

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.)	
)	
Petitioner,)	19 TT 130
)	20 TT 135
v.)	21 TT 125
)	
THE ILLINOIS DEPARTMENT OF REVENUE,)	Chief Judge James M. Conway
)	
Defendant.)	

NOTICE OF ELECTRONIC FILING

To:

Lori L. Jordan
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Sean P. Cullinan
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PLEASE TAKE NOTICE that on the 9th day of November 2022, I electronically filed with the Illinois Independent Tax Tribunal (ITT.TaxTribunal@illinois.gov) and Chief Administrative Law Judge, James M. Conway (James.Conway@illinois.gov) 160 N. LaSalle Street, Room N506, Chicago, IL 60601, **Notice of Motion and Motion to Compel**, copies of which accompany this notice and is served on you herewith.

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: /s/ Timothy J. McCaffrey
One of Petitioner's Attorneys

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THE ILLINOIS DEPARTMENT OF REVENUE,)	Chief Judge James M. Conway
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Defendant.)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 10, 2022, at 10 A.M., or as soon thereafter as counsel may be heard, we shall appear telephonically before the Honorable Chief Judge James M. Conway or any Judge sitting in his stead, and then and there present Petitioner CSX Transportation, Inc.'s Motion to Compel, a copy of which is attached and served upon you. Counsel for Defendant the Illinois Department of Revenue has not consented to the Motion.

Dated: November 9, 2022

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: /s/ Timothy J. McCaffrey
One of Petitioner's Attorneys

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MOTION TO COMPEL

Pursuant to 35 ILCS 1010/1-60 and Ill. Sup. Ct. R. 219, Petitioner CSX Transportation, Inc., (“Petitioner”), by and through its attorneys, Eversheds Sutherland (US) LLP, hereby moves this Tribunal for an order compelling Defendant The Illinois Department of Revenue (“Defendant”) to respond to Petitioner’s discovery requests and states as follows:

BACKGROUND

1. On or about October 19, 2020, Petitioner served a demand for discovery on Defendant requesting certain documents to be produced (the “Discovery Request”). A copy of the October 19, 2020, discovery request is attached hereto as **Exhibit A**.

2. On January 13, 2021, Petitioner and Defendant had a telephonic conference regarding the status of the demands in the Discovery Request. During the call, Defendant objected to Petitioner’s request for the audit narrative of the prior auditor, Bob Ciofalo, on the grounds that such request was outside the scope of discovery. Defendant claimed that Mr. Ciofalo opined only on matters that were not in dispute. In response, Petitioner agreed to provide specific citations to the audit file in which Mr. Ciofalo directly commented on the issues pending in this matter,

namely, the intercompany nature of the transactions between members of Petitioner's unitary transportation group.

3. In a letter to Defendant dated January 29, 2021, Petitioner provided the specific citations as indicated in the January 13, 2021 conference call. As noted in that letter, the Defendant has provided the following documents.

4. Bates Stamped Page IDOR006218 – 8/8/18 Email from Marsha Seitz to Robert Ciofalo, CC: Brian Fliflet, Carla Hawkins, and Joann Lariviere. The email states: “...*I am just trying to make sure we have all of our ducks in a row. It seemed when reading the prior agreement, the taxpayer was saying all the sales were intercompany so I want to get as much documentation as possible if we are going to pursue this...Please send what you have on intercompany as we certainly want to compare it to what Carla gets. Thank you for all of your input on this.*”

5. Bates Stamped Page IDOR006210 – 8/8/18 Email from Marsha Seitz to Robert Ciofalo, CC: Brian Fliflet, Carla Hawkins, and Joann Lariviere. The email states: “...*Bob, you are stating that the sales would not be intercompany, is that correct?... In the settlement agreement, it appears that the taxpayer stated that 98% of sales were between two members, however, Bob you are saying that is not the case and that you determined these sales were from 3rd parties. I did read your 2007-2009 audit narrative and if so would like to see what you have. ...Anyway Bob, if you have proof from an earlier audit showing that these were 3rd party receipts, it would help when we ask the taxpayer why are all receipts eliminated which I think they will do. We all know that special apportionment doesn't last forever.*”

6. Bates Stamped Page IDOR006053 – 8/7/18 Email from Robert Ciofalo to Carla Hawkins, CC: Marsha Seitz and Joann Lariviere. The email states: “...*I can't say for certain that B&OCT sales are not part of it, but from having conducting prior audits, it is my understanding*”

that none of the B&OCT line 1 sales are intercompany with CSXT or any other transportation company in the group. We determined that their sales were 100% from outside customers. It never came up that there were any intercompany sales with any companies in the consolidated return.”

7. Bates Stamped Page IDOR 006162 – 8/7/18 Email from Robert Ciofalo to Brian Fliflet; CC: Carla Hawkins, Marsha Seitz, and Joann Lariviere. The email states: *“...They are getting away with something they shouldn’t. The Illinois sales are not being reported in the numerator (or denominator). If we could include these sales in the numerator, somewhere, that would be fair. The question is which avenue is a stronger case to pursue. The decision would be which case would have a better chance for us to win, trying to show the services are transportation or non-transportation services.”*

8. Bates Stamped Page IDOR006244 – 8/13/18 Email from Robert Ciofalo to Carla Hawkins; CC: Joann Lariviere, Marsha Seitz. The email states: *“The possible intercompany sales between BOCT and CSXT is another issue, they will have to prove sales are strictly intercompany. It was NOT our understanding that BOCT was performing a service for CSXT, I’m not sure I buy that argument they are making about intercompany sales between these two companies. I think they wanted the numerator out of the non-insurance group in the past and would want it out of the transportation factor since its 100% Illinois.”*

9. Bates Stamped Page IDOR006219 – 8/8/18 Email from Robert Ciofalo to Marsha Seitz; CC: Brian Fliflet, Carla Hawkins, Joann Lariviere. The email states: *“If you are going to pursue the switching services as transportation services, then their federal line 1 amount is 100% Illinois sales. These sales were not eliminated on consolidation and I don’t see how the taxpayer could claim they are intercompany when the revenue originates from outside customers of*

B&OCT...There may be some administrative services that are intercompany but it was our understanding that line 1 sales was from outside customers to B&OCT.”

10. Bates Stamped Pages IDOR006222-006223 – 8/7/18 Email Exchange Between Brian Fliflet and Carla Hawkins, Joann Lariviere; CC: Marsha Seitz, Robert Ciofalo. One of the emails in the exchange states: “*Looks like we treated BOCT as a disregarded entity and flowed up its factors and income to CSX. Wouldn’t most/all of BOCT’s transactions be intercompany and be eliminated.*” Mr. Ciofalo responded: “*To answer your question, the answer would be no, it wouldn’t be eliminated. It was determined through research on the 12/05 – 12/07 audit which eventually was submitted together with the 01-02 and 03-04 audits (although the 01-02 audit was the one submitted at an earlier time and the one in court) that BOCT derived its income from outside customers. There were several contracts documented with outside customers. Therefore, its income and factors were not from payments from services from CSXT.*”

11. On February 11, 2021, a telephonic status conference was held with this Court, at which the Defendant asserted its sole issue was the “cherry-picking” of receipts by CSX and it represented that if found no separate line items for intercompany switching services that it would no longer pursue this matter.

12. Based on Defendant’s assertions and representations, Plaintiff subsequently produced 75,000 consecutive invoices to address Defendant’s concerns and the Plaintiff’s outstanding discovery requests were held in abeyance.

13. On May 4, 2022, a telephonic status conference was held with this Court, at which the Defendant seemingly acknowledged that it had not found any separate line items and that it was working to determine next steps.

14. On June 2, 2022, a telephonic status conference was held with this Court, at which the Defendant stated it would making a settlement offer to CSX.

15. On July 29, 2022, Defendant submitted a settlement proposal to Plaintiff.

16. By letter dated August 23, 2022, Plaintiff responded with a counter-offer to the Defendant's July 29, 2022, proposal.

17. Plaintiff has continued to hold its outstanding discovery requests in abeyance pending settlement discussions with the Defendant.

18. A telephonic conference with this Court was scheduled for September 8, 2022.

19. By that date, the Defendant had not yet evaluated Plaintiff's counteroffer. Instead, Defendant sought to adjourn the status conference originally scheduled for September 8 by another 45-60 days.

20. Plaintiff opposed Defendant's adjournment request. In its opposition, Plaintiff explained that the Defendant had been provided an inordinate amount of time to analyze the facts of this case, and that additional time to evaluate the counterproposal was therefore unwarranted.

21. A telephonic status conference with this Court was then scheduled for October 6, 2022.

22. At the October 6 conference, the Defendant informed the Court that it had not yet evaluated Plaintiff's counterproposal as it had yet to schedule an internal meeting to discuss Plaintiff's counterproposal. The Court requested specific details from Defendant regarding its internal meeting, and Defendant asserted a meeting was tentatively set for the week of October 17. The Court then set a conference for November 10 to report on the parties' progress, if any.

23. Since October 6, Defendant has failed to convene a meeting with Plaintiff to discuss the settlement proposals. By all appearances, it does not appear that Defendant has evaluated Plaintiff's counterproposal.

24. Due to Defendant's continued pattern and practice of delaying this matter, Plaintiff determined it could no longer hold its outstanding discovery demands in abeyance. On November 1, 2022, Plaintiff requested for immediate production the following items:

- a. The audit narrative of the prior auditor Bob Ciofalo;
- b. Complete correspondence from the e-mail string (see IDOR005416); and
- c. The Settlement Agreement or Agreements referenced at IDOR005792 and IDOR005411.

25. The November 1, 2022, requested that Defendant advise by 4:00 CST on November 3, 2022, whether it would produce the requested items. The November 1 request also informed Defendant that if Defendant failed to respond, Plaintiff would pursue relief from this Court.

26. On November 3, 2022, Defendant timely responded, and advised Plaintiff that it would locate and provide the requested documentation prior to the November 10, 2022, status conference.

27. The next day, on November 4, 2022, Defendant wrote that it was *still* preparing a response to Plaintiff's settlement counterproposal. Plaintiff further responded to Defendant's November 1, 2022, discovery request, reneging on its assurance that it would produce the requested documentation.

28. Instead of making good on its representation that it would produce the requested documents, and despite having been advised of the relevance of Mr. Ciofalo's audit comments were relevant in *January 2021*, the Defendant requested yet another explanation why the audit

comments could in any way lead to relevant information in this matter. The Defendant also advised as to the second item requested that “The email strings we provided to you are numbered on the bottom in sequential order. For example, IDOR bate stamp 5411 (page 1) is the first page of the string of emails which ends at IDOR bate stamp 5417 (page 7).” Finally, as to the third item requested in Plaintiff’s November 1, 2022, demand, Defendant responded “Please see bate stamps IDOR 5043-5051.”

ARGUMENT

29. Ill. Sup. Ct. R. 201(b)(1) allows for broad discovery “regarding any matter relevant to the subject matter involved in the pending action.”

30. Discovery “is intentionally broad in scope: it is intended to reveal not only facts admissible at trial, but also facts that may lead to admissible evidence.” *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 236, 730 N.E.2d 4 (2000) (citing *Monier v. Chamberlain*, 35 Ill. 2d 351, 357, 221 N.E.2d 410 (1966)).

31. Based on documents produced to date, it is evident that Defendant relied on Mr. Ciofalo’s opinion and historic knowledge gained through auditing Petitioner in tax periods prior to the one at issue in this matter. Further, based on documents produced to date, it is clear that Mr. Ciofalo played a direct role in the outcome of the audit from which the instant dispute arises. Specifically, Mr. Ciofalo concluded that Petitioner’s receipts were not intercompany receipts.

32. Defendant specifically relied on Mr. Ciofalo’s previous audit narrative in reaching its determination here that the receipts at issue were not from intercompany sales. ¶¶ 5-10, *supra*. For example, in an email dated August 7, 2018, from Mr. Ciofalo to Defendant, he explained that he conducted prior audits of the taxpayer and reached a conclusion that the receipts at issue in

those audits, which are the same as those at issue here, were not for intercompany sales. *See* ¶ 6, *supra*.

33. Further, in an email dated August 8, 2018, from Marsha Seitz to Robert Ciofalo, the Defendant specifically mentions that it relied on Mr. Ciofalo’s prior audit narrative – “*I did read your 2007-2009 audit narrative*” – and that if it was in fact true that Mr. Ciofalo concluded the receipts at issue were not from intercompany sales, then Defendant would like to seek additional information from Mr. Ciofalo supporting his conclusion. *See* ¶ 5, *supra*.

34. The above demonstrates that Defendant relied heavily on Mr. Ciofalo’s reasoning and analysis in prior audit cycles to support its faulty assessment for the years at issue in this case. That reliance makes Mr. Ciofalo’s prior audit narrative “relevant” to the issues in this case. Not only may the audit narrative lead to additional facts that could be relevant, but it goes to the heart of the matter here.

CONCLUSION

Petitioner respectfully requests that the Tribunal grant this motion and enter an order directing Defendant to provide Mr. Ciofalo’s audit narrative for tax years ending 2007 through 2009; awarding Petitioner its costs in connection with filing this motion, including attorneys’ fees; and awarding Petitioner such other relief as the Tribunal deems just and proper.

Dated: November 9, 2022

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: /s/ Timothy J. McCaffrey
One of Petitioner’s Attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of the foregoing Notice of Motion and Motion to Compel to be served by electronic mail before the hour of 5:00 p.m. on the 9th day of November, 2022 as follows:

Lori L. Jordan
Special Assistant Attorney General
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Lori.Jordan@illinois.gov

Sean P. Cullinan
Special Assistant Attorney General
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Jaime L. Lane
Paralegal

EXHIBIT A

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

CSX TRANSPORTATION, INC.)	
)	
Petitioner,)	
)	
v.)	No. 19 TT 130
)	
THE ILLINOIS DEPARTMENT OF REVENUE,)	
)	
Respondent.)	

PETITIONER’S SECOND REQUEST FOR PRODUCTION

Petitioner, CSX Transportation, Inc. (“Petitioner”), by and through its attorneys, EVERSHEDS SUTHERLAND (US) LLP, and pursuant to Illinois Supreme Court Rules 201 and 213, and Illinois Administrative Code Title 86, Section 200.125(e), requests that the Defendant, the Illinois Department of Revenue (“Department”), answer the following requests for production within twenty-eight (28) days from the date of this request (the “Request”).

DEFINITIONS

1. “Document” or “documents” shall mean every original (and every copy of any original or copy which differs in any way from the original) of every writing or recording of every kind or description.
2. “Refer,” “relate,” and “concern” mean, in addition to their customary and usual meanings and without limitation, discuss or discussing, reflect or reflecting, assess or assessing, record or recording, mentioning, summarizing and/or touching upon.
3. “Person” or “persons” shall mean each and every individual, corporation, partnership, franchisor/franchisee, joint venture, social or political organization or any other entity, whether real or juridical or incorporated or unincorporated, encompassed within the usual

or customary meaning of “person” or “persons” or otherwise encompassed within this definition.

4. The words “and” and “or” shall be construed conjunctively or disjunctively rather than exclusive. The word “including” shall be construed without limitation.
5. “Communication” means, in addition to its customary and usual meaning and without limitation, any oral or written exchange of words, thoughts or ideas to another person(s) whether person-to-person, in group, by telephone, telex or by any other process, electronic or electrical means, mechanical or otherwise. All such communication in writing shall include, without limitations, all such items defined as “Document” above.
6. “Department” means the Illinois Department of Revenue, its employees and any other person or persons acting on its behalf.
7. “Policy” means, in addition to its customary and usual meaning and without limitation, any position or approach of the Department or any related agency whether formally or informally adopted and communicated to those acting for the Department as to how the Department shall act, as to how a matter should be treated or resolved by the Department and as to any similar positions or approach.
8. “Authorities” means, without limitation, a decision from any federal or state trial or appellate court, an administrative agency decision or ruling from any state, a Department regulation, a Department private letter ruling or general information letter, a Department informational bulletin, a technical advice memoranda or any other written document that the Department relied on in making its audit determinations in this matter.

9. “CSX” refers to CSX Corporation, Petitioner’s parent company and a publicly held company that, during the Years in Issue, through its subsidiaries, engaged in four business segments: Rail, Intermodal, Domestic Container Shipping and International terminals.
10. “BOCT” refers to the Baltimore and Ohio Chicago Terminal Railroad Company, a switching company and wholly owned subsidiary of Petitioner.
11. “CSXIT” refers to CSX Intermodal Terminals, Inc., a standalone integrated intermodal company that links customers to railroads via trucks and terminals, providing coast-to-coast intermodal lift services.
12. “Non-Transportation Group” shall mean the Illinois unitary combined group composed of CSXIT and CSX’s non-transportation companies.
13. “Transportation Group” means the Illinois unitary combined filing group including Petitioner and its unitary transportation companies.
14. “Years at Issue” mean the tax years ending December 2014 and December 2015.
15. “Notices” means any Notices of Deficiency issued by the Department related to the Years at Issue.
16. “Audit File” refers to Petitioner’s Audit File as provided by the Department on November 4, 2019.
17. “Cross-Group Elimination” refers to the Department’s elimination items of income and deduction arising from transactions between members of CSX’s two separate Illinois unitary business groups during the Years at Issue.
18. “Attachments” refer to any and all documents, schedules, etc. that were attached to email correspondence included in the Department’s Audit File.

INSTRUCTIONS

1. This request for documents calls for production of all documents, as defined herein, in the possession, custody or control of the Department including documents in the possession, custody or control of its present and former auditors, agents, employees, attorneys, representatives and entities of whatever type which they own or control, wherever located, including all individual or Department premises and all individual residences as well as the residence of any Department officers, employees, agents or representatives.
2. This request calls for production of each requested document in its entirety. You shall produce the original copy of each document requested herein, as well as any drafts, revisions, or copies of the same which bear any mark or notation not present on the original, or which otherwise differ from the original.
3. You shall segregate documents produced in response hereto according to the paragraph or subparagraph to which they are responsive. You shall also identify in writing paragraph or subparagraphs of this request for which no responsive documents are produced.
4. If you believe that any given document is responsive to more than one paragraph or subparagraph of this request, you shall produce the document only in response to the first such paragraph or subparagraph. You shall also identify in writing paragraphs or subparagraphs of this request for which you believe that responsive documents have been produced in response to any other paragraphs or subparagraphs of this request.
5. If objection is taken to any of the following requests, or if a request is otherwise not responded to in full, state in writing the specific grounds therefore and respond to the request to the extent to which there is no objection.

6. If any requested documents are withheld under a claim of privilege or the “work production doctrine,” furnish a copy thereof which does not contain the information claimed to be privileged and fully describe or identify: (a) the author(s) of the document; (b) all persons to whom the documents were sent or has been shown; (c) the date of the document; (d) the identity of any person having possession, custody or control of copies of the document; (e) a description of the type of document (e.g., letter, memoranda, notes, report); (f) the subject matter of the document; and (g) state in detail the grounds upon which the document is withheld.
7. Whenever you are asked to produce a document and such document has ceased to exist, specify for each document: (a) the type of document; (b) the information contained therein; (c) the date of the document; (d) the circumstances under which such document ceased to exist; and (e) identify each person having knowledge of the circumstances under which the document ceased to exist and each person having knowledge of the document’s contents.
8. Whenever you are asked to produce a document and you do not possess or control such document, specify for each such document: (a) the type of document; (b) the contents of the document; and (c) identify each person and/or entity having possession or control of the document, and each person having knowledge of the document’s contents.
9. This request shall be deemed continuing in nature so as to require further and supplemental production if you receive, discover or create additional documents from the time of original production and the time of final judgment in this matter.
10. In each case where the Department finds there to be an ambiguity within a request, state the ambiguity including the alternative interpretations that the Department believes are

possible and then provide the response to each of the possible alternative interpretations of the request.

11. Petitioner hereby requests an affidavit attesting to the Department's complete compliance with this Second Request for Production of Documents pursuant to Illinois Supreme Court Rule 214 and signed by the Department's authorized representative with power and authority to fully and legally bind the Department under penalties of perjury pursuant to 735 ILCS 5/1-109 (735 ILCS 5/1-109).

DOCUMENTS TO BE PRODUCED

1. Any and all communications, including but not limited to e-mail or other correspondence, between or amongst members of the Department discussing, referring or regarding the short statute of limitations as referenced in Bate Stamped Page IDOR005411.

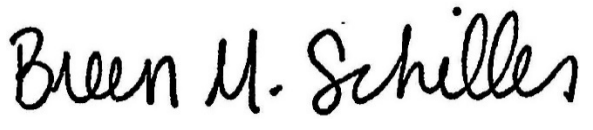
RESPONSE:

2. Any and all communications, including but not limited to e-mail or other correspondence, amongst or between members of the Department's audit staff and Brian Fliflet, not originally included in the Audit File, discussing, referring, regarding or the audit adjustments reflected in the Notices.

RESPONSE:

Respectfully submitted,

CSX Transportation, Inc.
Petitioner

By: 

One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **PETITIONER'S SECOND REQUEST FOR PRODUCTION** was served by electronic mail, before the hour of 5:00 pm on the 19th day of October, 2020, addressed as follows:

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