

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

COMPUTER ASSOCIATES, INC.)	
AND SUBSIDIARIES,)	
Petitioner,)	
)	
v.)	16 TT 52
)	Chief Judge James M. Conway
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

**ORDER ON PETITIONER’S MOTION FOR SUMMARY JUDGMENT AND
DEPARTMENT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Computer Associates, Inc. and Subsidiaries, a company that provides enterprise information technology management solutions, is challenging income tax Notices of Deficiency issued by the Department relating to tax years 2009 and 2011 following an audit.^{1 2} According to the Notices, the Department claimed that Computer Associates’ sales factor formula used in determining its business income should be adjusted to exclude certain royalties pursuant to 35 ILCS 5/304(a)(3)(B-2) and should include certain factorable receipts pursuant to 35 ILCS 5/304(a)(3)(C-5)(iii)(a).

In Count I of its Petition, Computer Associates argues that the Department’s Notices of Deficiency did not satisfy the requirements of the Illinois Taxpayers’ Bill of Rights, 20 ILCS 2320/4, because the statute of limitations had run on the Department’s ability to issue the Notices of Deficiency in this case.

¹ The audit included tax year 2010, but the auditor concluded the taxpayer was due a refund after all audit adjustments were considered. As a result, no notice of deficiency was issued for 2010.

² Computer Associates is on a fiscal year end of March 31 for each tax year.

In Count II of its Petition, Computer Associates contends that the Department's Notices of Deficiency did not satisfy the requirements of the Illinois Taxpayer's Bill of Rights because the Explanation of Audit Results attached to the Notices of Deficiency had "\$0.00" entered for the two items of income changes and for the resulting tax impact.

In Count III of the Petition, Computer Associates argues that the Department lacked statutory authority to exclude receipts from its sales factor formula.

In Count IV of the Petition, Computer Associates claims that the Department's exclusion of certain receipts from the sales factor formula violates the Commerce Clause and is therefore unconstitutional.

In Count V of the Petition, Computer Associates argues that it is not a "dealer" under I.R.C. § 475 and it is not subject to Illinois apportionment rules under 35 ILCS 5/304(a)(3)(C-5)(iii)(a).

In Count VI of the Petition, Computer Associates argues that its failure to pay the additional tax arising from the audit was due to reasonable cause and no late-payment penalty should be assessed.

In Count VII, the final count of the Petition, Computer Associates further argues that the imposition of amnesty interest on the additional tax arising from the audit is improper and violates the Due Process Clause of the Constitution.

Simultaneous to filing its current Motion for Summary Judgment, Computer Associates filed a Motion to Voluntarily Dismiss Count I of the Petition which is granted. In its Summary Judgment Motion, Computer Associates only addresses Count II of its Petition, leaving Counts III through VI for another day unless it prevails on its present motion.

In its Summary Judgment Motion, Computer Associates argues that the Department violated the Taxpayers' Bill of Rights by failing to include sufficient information regarding the proposed assessments in the relevant Notices of Deficiency by omitting specific dollar figures on the Explanation of Audit Adjustments pages which were enclosed with the Notices, and that any additional detailed explanation of the audit adjustments provided by the Department after the issuance of the Notices did not cure the violation. Computer Associates further argues that the auditor caused the Notices to be issued after failing to follow guidance from the Department's Informal Conference Board, which adds to

Computer Associate's overall confusion of what the Notices actually covered. Computer Associates' final contention is that the Notices should be considered void or, alternatively, so erroneous that the Notices should not be considered to be *prima facie* correct as they would be in a routine case before the Tax Tribunal.

The Department counters that Notices of Deficiency contain detailed information about the proposed audit adjustments and their attached statements list out the exact dollar amounts used in the auditor's calculations despite the fact that on the Audit Adjustment pages that were part of the Notices had \$0.00 listed in the columns for audit changes and for the resulting tax impact. The Department claims that the Taxpayers' Bill of Rights was not violated as there was no cognizable harm to the taxpayer.

As explained below, Computer Associates' summary judgment motion is denied and the Department's cross-summary judgment motion is granted.

1. Background

Illinois Taxpayers' Bill of Rights

Illinois' Taxpayers' Bill of Rights Act, found at 20 ILCS 2520/1 *et seq.*, reads, in part:

Sec. 2. Legislative Declaration. The General Assembly finds and declares that taxes are the most sensitive point of contact between citizens and their government, and that there is a delicate balance between revenue collection and freedom from government oppression. It is the intent of the General Assembly to place guarantees in Illinois law to ensure that the rights, privacy, and property of Illinois taxpayers are adequately protected during the process of the assessment and collection of taxes.

The General Assembly further finds that the Illinois tax system is based largely on self-assessment, and the development of understandable tax laws and taxpayers informed of those laws will both improve self-assessment and the relationship between taxpayers and government. It is the further intent of the General Assembly to promote improved taxpayer self-assessment by improving the clarity of tax laws and efforts to inform the public of the proper application of those laws.

(Source: P.A. 86-176; 86-189.)

Sec. 4. Department responsibilities. The Department of Revenue shall have the following powers and duties to protect the rights of taxpayers:

(a) To furnish each taxpayer with a written statement of rights whenever such taxpayer receives a protestable notice, a bill, a claim denial or reduction regarding any tax. Such statement shall explain the rights of such person and the obligations of the Department during the audit, appeals, refund and collections processes.

(b) To include on all tax notices an explanation of tax liabilities and penalties.

(c) To abate taxes and penalties assessed based upon erroneous written information or advice given by the Department.

Sec. 5. Taxpayer's suits. Taxpayers have the right to sue the Department of Revenue if such Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. The maximum recovery for damages in such a suit shall be \$100,000. If a taxpayer's suit is determined by the court to be frivolous the court may impose a penalty on the taxpayer not to exceed \$10,000 to be collected as a tax.

2. Analysis

Summary judgment is proper when “the pleadings, depositions and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Performance Marketing Assoc., Inc. v Hamer*, 2013 IL 11496, ¶12 (2013) (quoting 735 ILCS 5/2-1005(c) (2010)). In the present case, Computer Associates filed a Motion for Summary Judgment on Count II of the Petition, the Department filed a Cross-Motion for Summary Judgment and Response to the Taxpayer's Motion for Summary Judgment, and Computer Associates filed a Response to Respondent's Cross-Motion for Summary Judgment.³ When both parties file motions for summary judgment, they agree that no material facts are in dispute and invite a decision as a matter of law. *Irwin Indus. Tool Co. v. Ill. Dep't. of Revenue*, 238 Ill. 2d 332, 340 (2010).

³ As noted above, Computer Associates voluntarily moved to dismiss Count I of the Petition.

At this juncture, the findings contained in the notices issued by the Department are considered to *prima facie* correct and are *prima facie* evidence that the notices are correct. 35 ILCS 5/904(a). See *Copilevitz v. Dep't of Revenue*, 41 Ill. 2d. 154, 156-157 (1968).

A. The Tax Tribunal Does Not Have Jurisdiction to Rule on an Alleged Violation of the Taxpayers' Bill of Rights

Both parties failed to address whether or not the Tax Tribunal is authorized to review any claim for relief under the Taxpayers' Bill of Rights. It is not. The Tax Tribunal is a court of limited subject matter jurisdiction. Section 1-45 of the Illinois Independent Tax Tribunal Act of 2012 provides that "[t]he Tax Tribunal shall have original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency, Notice of Tax Liability, Notice of Claim Denial, or Notice of Penalty Liability issued [under 22 various taxing statutes]." The Taxpayers' Bill of Rights is not a taxing statute and it is not referenced in the Tax Tribunal's enabling statute.

The Taxpayers' Bill of Rights is a remedial statute that authorizes a taxpayer to seek redress for damages when the Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. Furthermore, nowhere in the Taxpayers' Bill of Rights does it provide the relief sought by the Petitioner, that is, the outright dismissal of a pending case based on an alleged deficiency in the procedures used to assess a tax.

B. The Department Did Not Violate the Taxpayers' Bill of Rights

Assuming *arguendo*, that the Tax Tribunal could hear Computer Associates' claim that the relevant Notices violated the Taxpayers' Bill of Rights, that claim would be rejected for failing to reveal erroneous written information or advice provided by the Department on which the taxpayer relied.

Computer Associates sole complaint about the information contained in the Notices is that the Notices, when issued, were confusing due to the lack of numerical entries on the Explanation of Audit Adjustments page. Pet'r Mem. in Supp. of Mot. for Summ. J. at 2.

The Notices in this case, which are attached to Computer Associates' Memorandum as Exhibit 2, each include of a "cover page" titled "Notice of Deficiency." On that page, 1) the audit period is listed, 2) the "Total Deficiency," calculated on the overall tax, interest and penalties due and owing based on the two substantive audit adjustments, is listed down to the penny, and 3) an amount, again

listed down to the penny, is provided for the “Balance Due.” Generally, Balance Due figures can be identical to the Total Deficiency figures, but in this case those numbers are slightly different due to presumed offsetting debits/credits in the taxpayer’s account with the Department. At the bottom of the Notice of Deficiency page, a phone number for the Department is provided if the taxpayer has any questions along with references to the Taxpayers’ Bill of Rights, including its statutory citation.⁴

Accompanying the Notices of Deficiency are “Statements.” Each Statement breaks down numerous line items on the relevant tax return and provides a computation of the overall deficiency, interest and penalty. For example, the Statement provided for tax year 2009 states a tax deficiency of \$215,334.00, a penalty of \$86,133.60, and interest of 77,702.70 for a total amount due of \$379,170.30. That amount is the same amount specified as the Total Deficiency on the Notice of Deficiency cover page.

Along with the Notices of Deficiency and the Statements were Forms EDA-27-Explanation of Audit Adjustments. As an example, for tax year 2009, that form stated the following for the two proposed audit adjustments:

<u>Explanation of adjustments for tax period ending 03/31/2009</u>	<u>Income change</u>	<u>Tax impact</u>
We adjusted your sales factor to exclude royalties since the gross receipts from license, sales, etc., from patents did not exceed 50% of total receipts. [35 ILCS 5/304(a)(3)(B-2)]	\$0.00	\$0.00
We adjusted the sales factor to include all factorable receipts on your Federal 1120 lines 1 through 10. [35 ILCS 5/304(a)(3)(C-5(iii)(a))]	\$0.00	\$0.00

Because figures were omitted on the Explanation of Audit Adjustment pages, Computer Associates knew that adjustments were being proposed for the two specific sales factor adjustments enumerated on those pages in the aggregate amount provided on the Statements, but Computer Associates didn’t know the dollar break down for each of the two proposed audit adjustments.

The Notices of Deficiency and the above-described attachments that Computer Associates was provided for each tax year complied with the requirements of the Taxpayers’ Bill of Rights. It was the duty of the Department to provide Computer Associates an explanation of tax liabilities and penalties

⁴ No evidence has been provided by Computer Associates that it availed itself of the invitation to simply pick up the telephone in an attempt to get further clarification from the Department despite the exhortation to do so in the event it had any questions about the Notices.

pursuant to section 4(b) of the Taxpayers' Bill of Rights. Computer Associates was provided an explanation for each of the two proposed audit adjustments along with an overall proposed tax liability for each year.

The obvious omissions of actual figures on the Explanation of Audit Adjustments pages are unfortunate, but are also nothing more than patently clerical errors.

C. Dismissal of Notices of Deficiency is not a Remedy Under the Taxpayers' Bill of Rights

Computer Associates is demanding that this court dismiss the Notices of Deficiency as the measure of relief necessary for the perceived violation of the Taxpayers' Bill of Rights. In support of its position, Computer Associates cites to two cases.

In the first case, *McLean v. Dep't of Revenue of State of Illinois*, 184 Ill. 2d 341 (1998), the Illinois Supreme Court reviewed two Department officially-issued written Information Bulletins which provided advice to auctioneers relating to their responsibility for collecting sales tax on consigned goods. The Illinois Supreme Court affirmed the circuit court's finding that one Bulletin contained contradictory tax advice to the underlying tax regulation. The Illinois Supreme Court held that the taxpayer relied on the contradictory advice and upheld the reversal of the assessment of taxes, penalties, and interest which was caused by and which was directly related to that reliance. *Id.* at 363. That type of remedy is specifically provided for under the Taxpayers' Bill of Rights under 20 ILCS 2520/4(c). The Illinois Supreme Court, however, rejected the taxpayer's additional arguments that the "bond or lien" requirements at issue in that case conflicted with the Taxpayers' Bill of Rights and, more importantly to the present case, that the declaratory language in the Taxpayers' Bill of Rights provided a remedy for the taxpayer:

We find nothing in the declaratory section or the substantive provisions of the Taxpayers' Bill of Rights that conflicts with the "bond or lien" requirements in question. In our view, the declaratory language cited by plaintiff merely expresses the legislature's intent and philosophy behind the Taxpayers' Bill of Rights and does not serve as a sound basis for invalidating the statutory provisions at issue in this case.

Id. at 358.

In the second case, *Hartney Fuel Oil v. Hamer*, 2013 IL 115130, the Illinois Supreme Court cited to *McLean* and allowed the abatement of taxes and penalties

under the Taxpayers' Bill of Rights section 4(c). The taxpayer in *Hartney*, like the taxpayer in *McLean*, demonstrated that the contested tax and penalties in that case were a result of flawed written advice in the form of a Department regulation that provided wrong guidance which was relied upon by the taxpayer. *Id.* at ¶67.

Neither case helps Computer Associates. It did not receive erroneous written information or advice from the Department on which it relied upon to conduct and report its tax affairs. The clerical errors in this cases resulted in certain information, the breakdown of the tax adjustment and overall tax due and owing allocated to the two audit adjustments, to be missing from the Notices that were issued. 20 ILCS 2520/4(c) is simply inapplicable to this case.

Under 20 ILCS 2520/4(b), one enumerated duty of the Department is “[t]o include on all tax notices an explanation of tax liabilities and penalties.” Even with the omitted figures on the Notices at issue, the Department technically complied with that directive as it provided the explanation as to why it made the two substantive audit adjustments. It also provided a narrative for the imposition of the penalty in this case. Moreover, even if the Notices were so lacking in information to run afoul of 20 ILCS 2520/4(b), there is no remedial corrective action authorized under 20 ILCS 2520.

Computer Associates further argues, contrary to the language in *McCLean* provided above, that both *Hartney* and *McCLean* lend support that the draconian remedy of “abatement of tax and penalty assessed” is appropriate in this case. Pet'r Mem. in Supp. of Mot. for Summ. J. at 3-6. While Computer Associates recognizes those cases dealt with the collection of tax as opposed to its assessment, *id.* at 3, it attempts to extend penalties for violations of the declaratory section of the Taxpayer's Bill of Rights even though that section does not provide for any penalties as the Supreme Court stated in *McCLean*. The quoted language from *McLean* doesn't provide any support for Computer Associates' argument, but actually forecloses it.

D. The Conduct of the Auditor in this Matter Does Not Provide Any Support for the Claimed Taxpayers' Bill of Rights Violation

The Notices in this matter were not issued in a vacuum, but were issued following an audit and an informal conference process at the Department's Informal Conference Board (ICB). Computer Associates claims that the auditor, in finalizing the audit after the informal conference process concluded, ignored a directive from the ICB to ascertain whether Computer Associates was a “Dealer” under Internal Revenue Code Section 475. Pursuant to 35 ILCS 5/304(a)(3)(C-5)(iii)(a), for taxable

years after December 31, 2008, sales of intangible property by Dealers are generally sourced to our State when “[t]he income or gain is received from a customer in this State.”

Computer Associates’ conclusion that the auditor ignored the mandate from the ICB was drawn from the Notices which reference 35 ILCS 5/304(a)(3)(C-5)(iii)(a) (the Dealer subsection) as a basis for the adjustment involving factorable receipts. For example, the Notice for the 2009 tax year reads, in part:

We adjusted the sales factor to include all factorable receipts on your Federal 1120 lines 1 through 10. [35 ILCS 5/304(a)(3)(C-5)(iii)(a)] \$0.00 \$0.00

The Tax Tribunal requested that the Department provide an affidavit of the auditor to determine his actions concerning the instructions from the ICB. In that affidavit, the auditor stated that he received the ICB Action Decision and requested information from the taxpayer to whether Dealer status should be applied to Computer Associates. According to the auditor, he received no response on this issue from Computer Associates. He determined, based on the information that was available, that Computer Associates was entitled to calculate its sales factor formula pursuant to 35 ILCS 5/304(a)(3)(C-5)(iii)(a) and the auditor made no adjustment with respect to that subsection in his audit report.⁵ Accordingly, the auditor complied with the ICB directive, as he “determined” Computer Associates properly sourced its sales as a Dealer pursuant to 35 ILCS 5/304(a)(3)(C-5)(iii)(a), and made no adjustment to the Computer Associates sales factor formula for that issue.⁶

Computer Associates was advised as much prior to the conclusion of the audit, as the auditor stated the following in a Form EDA 70-Information Document Request directed to Computer Associates and dated June 1, 2015:

The ICB has rendered their decision on the income tax audit for the period 4/1/08 thru 3/31/11. Based on the recommendation I need to verify that CA Inc is a dealer of intangible property

⁵ At oral argument on the summary judgment motions, the Department stated that the affidavit provided by the auditor can be read that the auditor ultimately determined that no audit adjustment for the Dealer issue was required after the auditor received the ICB action decision, when, in fact, he made the determination prior to receipt of the ICB action decision. In either event, no Dealer adjustment was made, but the Department is admonished that the Tax Tribunal expects affidavits to be more carefully prepared and reviewed before submission. It is particularly galling that an affidavit provided to explain mistakes on Notices of Deficiency also contained a mistake.

⁶ The auditor’s ultimate determination appears to be an acceptance of Computer Associates’ accounting methodology as presented on its tax return without any further meaningful analysis.

(computer programs). It is my understanding that CA Inc. is in fact a dealer of intangible property and should be reporting their sales per 35 ILCS 5/304(a)(3)(C-5)(iii)(a). It is also my understanding that the sales apportionment data that you presented to me in the audit properly allocates the Illinois sales using this approach. If this is incorrect please provide me with sales data showing the correct sourcing of sales into Illinois. I will need this information by July 1, 2015⁷

The audit of Computer Associates resulted in two adjustments being proposed, both of which were enumerated on the EDA 27s provided to Computer Associates, those being the “royalty” issue and the “factorable receipts” issue. According to the auditor, when he prepared his listing of adjustments that later appeared on the EDA-27s, he mistakenly referenced 35 ILCS 5/304(a)(3)(C-5)(iii)(a)(the Dealer subsection) as the statutory basis for the factorable receipts adjustment when the appropriate authority should have been listed as 35 ILCS 5/304(a)(3) which precedes 35 ILCS 5/304(a)(3)(C-5)(iii) in statute section 304 (determination of non-resident business income) and which simply provides the general heading “Sales factor.” Clearly, had the correct citation been used, Computer Associates might have been further alerted as to the nature of the audit adjustment. Despite the Department’s additional mistake of providing the wrong citation for the factorable receipts adjustment, which compounded its error in failing to provide a breakdown of overall tax liability for each of the two adjustments, Computer Associates was on notice that the adjustment was made to adjust its “sales factor to include all factorable receipts,” based on the explicit language provided in the Notices.⁸

In an additional effort to rectify any confusion on the Petitioner’s part, the Department attorney assigned to this case met with opposing counsel shortly after the petition was filed and provided additional documentation as to the nature of the adjustments. Dept’s Resp. to Pet. M. for Summ. J. at 3-4.

⁷ Counsel for Petitioner proffered at oral argument that the Petitioner does not recall receiving the document request.

⁸ Because this court finds that the Department did not violate any statute or regulation and that it provided a sufficient explanation of the audit adjustments on the Notices, Petitioner’s alternative argument (Pet’r Motion for Summ. J. at 10-12) that the Notices should not be afforded the presumption that they are *prima facie* correct is also rejected.

