NO. CV 03 0519851S

INTERNATIONAL BUSINESS MACHINES CORPORATION	:	SUPERIOR COURT
	:	TAX SESSION
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN :
COMMISSIONER OF REVENUE SERVICES	:	JULY 23, 2004

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION TO COMPEL AND DEFENDANT'S OBJECTION

This action involves a five year audit of the plaintiff, International Business Machines Corporation (IBM), performed by the commissioner of the department of revenue services (Commissioner). The purpose of this audit, which lasted from August 1, 1993 to June 30, 1998, was to determine if sales and use taxes were paid on taxable recurring expenses. The Commissioner, with the consent of IBM, selected a test month of October 1996 to make such a determination and applied its findings to the remaining 59 month period. As a result of this audit, the Commissioner issued a bill to IBM for $1,174,199.81, consisting of $612,921.87 in taxes, $132,270.63 in penalties and $429,007.31 in interest.

IBM claims that the Commissioner failed to give IBM credit for sales and use taxes that were inadvertently paid by IBM during the audit period.

On January 30, 2004, IBM propounded requests for admission on the Commissioner. IBM claims that the Commissioner refused to provide responsive answers to requests 5(e), 22 through 28, and 39 through 41. IBM now seeks to compel the Commissioner to respond to these requests. The Commissioner initially objects to the form of the motion now before the court. The Commissioner argues that a motion to compel is inappropriate because all of IBM's requests have been answered or objected to, in accordance with the Practice Book. The Commissioner claims that IBM's motion should instead be treated as a motion to determine the sufficiency of answers or objections to requests for admissions. See Practice Book § 13-23 (b).[1]

We agree with the Commissioner that the plaintiff's motion should be treated as one to determine the sufficiency of the answers or objections since plaintiff's counsel filed an affidavit to the effect that the parties were unable to resolve their differences, as is required by Practice Book § 13-23 (b). In addition, IBM itself relies on Practice Book § 13-23 (b) as the basis for its motion. (Plaintiff's Motion to Compel, dated May 27, 2004, p. 1.)

IBM's request for admission 5(e) asks the Commissioner to admit: "(e) Defendant made no examination to determine if tax had been erroneously paid or erroneously self-assessed by IBM with respect to Recurring Expenses incurred during the Test Month."

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[1]Practice Book § 13-23 (b) recites: "The party who has requested the admission may move to determine the sufficiency of the answer or objection. . . . If the judicial authority determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The judicial authority may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial."

(Plaintiff's Memorandum of Law in Support of Motion to Compel, dated May 27, 2004, Exhibit 1, p. 5.)

The Commissioner responded: "The Defendant admits that in reviewing the download of the Plaintiff's recurring expenses, which were comprised of all tangible personal property and services purchased by the Plaintiff during the month of October 1996 that were not capitalized by the Plaintiff, the Plaintiff identified through a series of codes whether or not it had paid sales tax or accrued use tax on the tangible personal property and services listed therein . The Defendant admits that her representatives verified and accepted the accuracy of the codes that were used by the Plaintiff. As such, the Defendant admits that she would not have assessed the Plaintiff tax on any item of tangible personal property or on any service listed therein where the Plaintiff indicated through a code that it had paid or accrued sales or use tax." (Plaintiff's Memorandum of Law, dated May 27, 2004, Exhibit 1, p. 5-6.)

Although IBM appears to request that the Commissioner admit a negative, the response by the Commissioner is sufficiently adequate to meet the request for admission. We note that in this regard, the purpose of Practice Book § 13-23 is not to obtain information but rather to facilitate proof which reduces trial time as well as reducing time and expense for litigants in presenting evidence. 8A C. Wright, A. Miller and R. Marcus, Federal Practice and Procedure (2nd Ed. 1994) § 2252, p. 522.

IBM's requests 22 through 28 recite:

> "22. The development and distribution of customer satisfaction surveys is not a service subject to Connecticut Sales and Use Tax. . . .
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> "23. The preparation of a speech to be delivered by an IBM business executive at a presentation outside of Connecticut is not subject to Connecticut Sales and Use Tax. . . .

"24. The provision of computer system support by a third-party vendor unrelated to IBM to a United States government customer of IBM located outside of Connecticut is not subject to Connecticut Sales and Use Tax. . . .

"25. The provision of electricity cost modeling services and electric rate negotiation services to a commercial end-user of electricity that is not in the electric utility industry is not subject to Connecticut Sales and Use Tax. . . .

"26. The provision of electric cost modeling services and electric rate negotiation services to a commercial end-end user of electricity that is not in the electric utility industry with respect to the consumption of electricity at facilities that are located outside of Connecticut is not subject to Connecticut Sales and Use Tax. . . .

"27. The preparation of construction cost estimates related to facilities located outside of Connecticut is not subject to Connecticut Sales and Use Tax. . . .

"28. The audit of construction costs on completed projects located outside of Connecticut, and the review of costs for pending projects located outside of Connecticut, are not subject to Connecticut Sales and Use Tax." (Plaintiff's Memorandum of Law, dated May 27, 2004, Exhibit 1, p. 15-17.)

To all of the above requests, the Commissioner responded: "Objection. This request for admission is not a statement of fact but rather a legal conclusion." (Plaintiff's Memorandum of Law, dated May 27, 2004, Exhibit 1, p. 15-17.) We agree. Connecticut Practice Book § 13-2 recites: "In any civil action . . . where the judicial authority finds it reasonably probable that evidence outside the record will be required, a party may obtain in accordance with the provisions of this chapter discovery of information or disclosure, production and inspection of papers, books or documents . . . not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially

greater facility than it could otherwise be obtained by the party seeking disclosure." In this instance, IBM is seeking an opinion from the Commissioner related to the taxability or nontaxability of certain transactions. The issue of taxability is a matter of statutory construction subject to the interpretation by the parties and ultimately the courts. In addition, the plaintiff's requests for admission will not, in our view, aid in reducing trial time or limit the factual issues in the case.

In construing our rules of practice, it is appropriate to look to federal authorities since basic sections of the federal rules of practice have been incorporated into the Connecticut rules of practice. See W. Horton & K. Knox, Connecticut Practice Series, Superior Court Civil Rules (2004 Ed.) Ch. 13, p. 544 (Author's comments). See also, Marr v. WMX Technologies, Inc., 244 Conn. 676, 680-681, 711 A.2d 700 (1998). We note that Practice Book § 13-23 (b) is modeled after Rule 36 of the Federal Rules of Civil Procedure. Although East Haven Builders Supply, Inc. v. Fanton, 80 Conn. App. 734, 744, 837 A.2d 866 (2004), states in passing that requests for admissions are an "instrument of discovery," federal authority construing Rule 36 holds to the contrary. "Requests for admissions are not a general discovery device." Misco, Inc. v. United States Steel Corp., 784 F.2d 198 (6th Cir. 1986). "Discovery pleadings are expected to elicit and expound upon the facts of the matters, whereas, the [r]equests for [a]dmission essentially and hopefully, limit the factual issues in the case. . . . These [r]equests and corresponding answers are expeditious, efficient resolutions of factual issues and may, to a considerable degree, when propounded early in the litigation, control the cost of discovery as well." Henry v. Champlain Enterprises, United States District Court, Docket No. 1681 (N.D.N.Y. January 10, 2003) (212 F.R.D.73, 77). "Rule 36 allows parties to narrow the issues to be resolved at trial by effectively identifying and eliminating those matters on which the parties agree." United States v. Kasuboski, 834

F.2d 1345, 1350 (7th Cir. 1987). With this purpose in mind, "requests for admissions as to

central facts in dispute are beyond the proper scope of the rule." Pickens v. Equitable Life Assurance Society of U.S., 413 F.2d 1390, 1393 (5th Cir. 1969). See also Perez v. Miami-Dade County, 297 F.3d 1255 (11th Cir. 2002), cert. denied, 537 U.S. 1193, 123 S. Ct. 1291, 154 L.Ed. 2d 1028 (2003); Lakehead Pipe Line Co. v. American Home Assurance Co., United States District Court, Docket No. 5-95-42 (D. Minn. December 5, 1997); 8A C. Wright, A. Miller & R. Marcus, supra, § 2252, p. 522. The admissions sought in requests 22 through 28 are obviously matters that are in dispute, therefore, the request for admission is not the proper vehicle for settling such disputes.

IBM's requests 39 through 41 recite:

"39. There is no statutory basis that would preclude a taxpayer from amending a timely filed petition for reassessment prior to the hearing date. . . .

"40. There [is] no case law that would preclude a taxpayer from amending a timely filed petition for reassessment prior to the hearing date. . . .

"41. There are no regulations nor rulings that would preclude a taxpayer from amending a timely filed petition for reassessment prior to the hearing date. . . ." (Plaintiff's Memorandum of Law, dated May 27, 2004, Exhibit 1, p. 23.)

To these requests, the Commissioner responded: "Objection. This request for admission is not a statement of fact but rather a legal conclusion." (Plaintiff's Memorandum of Law, dated May 27, 2004, Exhibit 1, p. 23.)

For the reasons cited above, the response to these requests for admissions will neither aid in reducing the time for trial nor limit the factual issues in the case.

For the above stated reasons, the Commissioner's objections are sustained.

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Arnold W. Aronson
Judge Trial Referee