

Ohio Edison Co.,)	CASE NO. 97-K-322
)	
Appellant,)	(PUBLIC UTILITY
)	PROPERTY TAX)
vs.)	
)	ORDER
Roger W. Tracy, Tax)	
Commissioner of Ohio,)	(Granting Motion to Compel
)	Discovery in Part and
Appellee.)	Denying Motion to Deem
)	Request for Admission
)	Admitted)

APPEARANCES:

For the Appellant	-	Maryann B. Gall Todd S. Swatsler Jones, Day, Reavis and Pogue 1900 Huntington Center 41 South High Street Columbus, Ohio 43215
		Mitchell G. Blair James F. Lang Calfee, Halter & Griswold LLP 1400 McDonald Investment Center 800 Superior Avenue Cleveland, Ohio 44114-2688
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: James C. Sauer Barton A. Hubbard Assistant Attorneys General State Office Tower-16th Floor 30 East Broad Street Columbus, Ohio 43266-0410

Entered October 26, 1998

This matter is now before the Board of Tax Appeals following the filing of a "Motion to Compel Discovery and/or for Sanctions" by the Tax Commissioner and "Ohio Edison's Motion Directing that its Request for Admission No. 10 is Admitted." The parties have filed responses and replies to each of these requests.

We consider initially the Tax Commissioner's motion to compel in which he has identified eleven interrogatories and four requests for production of documents as those to which appellant's responses are considered by him to be inadequate and for which an order of this Board is sought. In addressing these interrogatories and document requests, the Tax Commissioner has addressed several collectively and, as appropriate, this Board will do likewise.

Interrogatory number 54 requests that appellant identify the accounts to which costs attributed to various claims have been capitalized. In its response appellant indicated that costs related to engineering drawings were capitalized to "account 101, Electric Plant in Service *** and account 106, Capitalized Construction Not Classified - Electric ***." With respect to both intangibles costs and non-value expenditures, appellant indicated that such costs were capitalized to account 101. Appellant indicated further, with respect to all three categories of costs that it had "not analyzed specifically how these costs were spread among sub-accounts 322 through 325 and 352 and 353 ***." However, it did indicate, for each of the three preceding claims, that it was able to state with certainty that these costs were not included within certain of these sub-accounts.

The Tax Commissioner objects to the response he was given, challenging appellant's use of the term "sub-account" as a hypertechnical interpretation of the interrogatory and that the answers set forth in an attached schedule reflect "a formulaic percentage allocation that has produced an unfounded estimate." Appellant represents that it has provided the Tax Commissioner "with the most accurate sub-account breakdown it is able to

provide." It appears that appellant has identified the accounts to which such costs were capitalized and, to the extent within its ability, has eliminated those sub-accounts in which such costs are clearly not included. The response given by appellant, while perhaps not the one anticipated by the Tax Commissioner, appears to be responsive to the interrogatory posed. Nevertheless, should appellant undertake to perform an analysis to more particularly attribute these costs to individual sub-accounts in order to support its claims before this Board, it is reminded of its continuing obligation to update its responses to discovery. Failure to do so could result in the continuation of a scheduled hearing date or the imposition of sanctions.

Interrogatories 58 through 62 are referenced collectively in the Tax Commissioner's motion as they all relate to appellant's calculation of the amount of its engineering drawings claim. Specifically, appellant was requested to: (1) identify when and from whom the drawings were obtained; (2) identify those entities to whom costs were paid to obtain the drawings and the amount such entities were paid; (3) indicate whether the amounts paid and the individuals receiving said payments were paid pursuant to a contract, purchase order or invoice number and, if so, to identify these documents by number and effective date; and (4) identify the accounts to which drawings payments were capitalized. Related to these interrogatories, in its requests for production numbers 2 and 3, the Tax Commissioner asked appellant to produce all contracts, purchase orders and invoices pursuant to which drawings were obtained and by virtue of which costs were calculated for the claimed deduction.

Appellant responded to these requests by indicating that the best available source for determining when the drawings were created and who created them were the drawings themselves which contained such information. Due to the voluminous number of these drawings, appellant has offered to make these drawings available for inspection by the Tax Commissioner at the locations where they are typically maintained. With respect to the remainder of the Tax Commissioner's inquiries, appellant's response was that it had not undertaken to calculate its claim on the basis of contracts, purchase orders and invoices because, in most instances, drawings costs were not specifically delineated in such documents. Further, appellant has indicated that it is its belief that it is impossible to accurately state its claim on the basis of these documents. Nevertheless, appellant has offered to make all such documents available for the Tax Commissioner's inspection and has indicated its willingness to provide an employee to assist the Tax Commissioner in locating the information which is requested.

Civ. R. 33(C) provides:

"Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies thereof or compilations, abstracts, or summaries therefrom."

As was the case in a similarly argued motion, i.e., Duquesne Light Co. v. Tracy (Nov. 9, 1995), B.T.A. Nos. 95-K-40, 95-K-71 and 95-K-72, unreported, this Board finds that the burden of examining the documentation requested by the Tax Commissioner is substantially the same for either appellant or the Tax Commissioner. Cf. Jaric, Inc. v. Chakroff (1989), 63 Ohio App.3d 506, 512-513. While the Tax Commissioner may object to the manner in which appellant has calculated certain of its claims, as he is entitled to do, it appears inappropriate to allow such arguments to provide the basis of an order compelling discovery. This Board will not issue an order which would require appellant to review, compile and identify information in a different fashion than that in which it has been maintained and utilized during the course of its business or for the presentation of its claims. Duquesne Light, supra. However, should the Tax Commissioner wish to undertake to make an inspection of such information, we consider it appropriate to allow him to do so. Accordingly, appellant, as it has already offered to do, shall make the requested information available for inspection by the Tax Commissioner's designated representatives.

In interrogatories 64 and 65 and request for production number 4, the Tax Commissioner sought information relating to appellant's intangibles and non-tangible personal property claims similar to the above-stated drawings requests, i.e., contracts, purchase orders, invoices, accounts to which costs were capitalized, etc. Appellant provided several schedules identifying claimed costs by commitment number, description, adjusted total

cost and Federal Energy Regulatory Commission ("FERC") account number. Appellant has also indicated that it is in the process of compiling yet another schedule that identifies by commitment number the records location of invoices and purchase orders and that it will make this schedule available as soon as it is completed. From this schedule, appellant represents that the Tax Commissioner's representative will be able to review the voluminous information requested at the site where it is located.

Within the time frame set forth within this Order, appellant shall provide to the Tax Commissioner the schedule to which reference has been made. As with the drawings-related requests discussed above, appellant shall make the various documents requested by the Tax Commissioner available for inspection by his designated representatives at the location where such documents are maintained.

In interrogatory number 69, the Tax Commissioner asked appellant to identify the data processing and communications equipment referenced in its notice of appeal, as well as the costs attributable to those items, their date of acquisition, a description of the items, and the true value determined by the Tax Commissioner and the true value claimed by appellant. Appellant indicates that "Exhibit A," provided as part of its initial discovery response, "reflects the original direct costs of data processing and communications equipment as reported on Ohio Edison's 1996 property tax return, and illustrates the difference in Ohio Edison's and the Tax Commissioner's taxable value computations for the equipment." We note that this exhibit identifies by "vintage year", the "net cost of taxable property,"

"percent good" and "true value of taxable property" for various classes of appellant's communications and data processing equipment.

Appellant has indicated that neither it nor the Tax Commissioner assign a true value to such property on an item-by-item basis and that its depreciation analyses were performed on an account basis rather than for each individual item. In addition, appellant indicated that it is unable to state the cost and date of acquisition of its communications and data processing equipment on an item-by-item basis. Appellant has provided the Tax Commissioner with additional information said to consist of "surviving asset reports, vintage schedules and property unit information information relating to the data processing and communications equipment." This "surviving" information apparently sets forth original costs, a general identification of the property in issue and the remaining costs attributable to such property. The Tax Commissioner indicates, however, that from the documents which have provided he is unable to derive the requested information. Appellant represents that it is capable of explaining the manner in which certain of the requested information can be ascertained. It appears that appellant has been generally responsive to the Tax Commissioner's request. However, given appellant's representation that it is capable of providing greater clarification, within the period set forth within this Order, it shall provide the Tax Commissioner with a written explanation regarding the manner in which a review of the documents previously provided can be performed in order to be responsive to the Tax Commissioner's interrogatory.

In interrogatory number 74, the Tax Commissioner requested that appellant identify other public utilities which had been granted a more favorable assessment rate than appellant had with respect to property and equipment leased to non-utilities. Specifically, the Tax Commissioner asked:

"With respect to the claim of a denial of equal protection that is set forth in numbered paragraph 7 of the notice of appeal, does the appellant contend that the Tax Commissioner has applied a 25% listing percentage in assessing property and equipment leased by other public utilities to non-utilities. If the answer is 'yes', identify the other utilities that the appellant believes are receiving such favorable treatment."

In its initial response, appellant answered as follows:

"Ohio Edison contends that non-utility property and property leased to non-utilities must be listed at 25% of its true value. Ohio Edison has requested that the Tax Commissioner produce information relating to the treatment of similarly situated taxpayers and will identify any taxpayers that are responsive to Interrogatory no. 74 when that information is available."

Appellant's subsequent response in an August 13, 1998 correspondence mirrored the preceding:

"[A]s you know, Ohio Edison has from the very outset of this case sought information from the Tax Commissioner regarding other similarly situated taxpayers. To date, the Tax Commissioner has refused to provide that information. We will likely be presenting that issue to the Board for a determination. Given the Tax Commissioner's decision to withhold this information, Ohio Edison is not now in a position to identify similarly situated taxpayers."

In its response to the Tax Commissioner's motion, appellant again indicates that due to the failure of the Tax Commissioner to provide "meaningful discovery responses" it is unable to answer this interrogatory. However, on the date for filing discovery-related motions, appellant did not challenge the Tax Commissioner's response to its discovery relating to this issue.

This aspect of appellant's claim has been previously considered by this Board when it ruled upon a motion by the Tax Commissioner to dismiss a portion of appellant's appeal. In an Order issued on July 11, 1997 denying this motion, the Board acknowledged that this forum may be the first opportunity for a taxpayer to not only raise claims of a constitutional nature but to undertake meaningful discovery in support of such claims:

"With respect to the Tax Commissioner's position that the specificity with which an appellant must identify claimed error is equally applicable to errors of a constitutional nature, we find persuasive appellant's argument that some latitude must be accorded a taxpayer asserting certain constitutional violations. The Department of Taxation is statutorily precluded from releasing taxpayer information except under limited circumstances. See R.C. 5703.21. See, also, R.C. 149.43(A)(1) (excepting from the definition of 'public record' those 'records the release of which is prohibited by state or federal law.') In those instances when a taxpayer asserts a claim of unequal treatment, it may be difficult, if not impossible, for that taxpayer to have within its knowledge or possession at the time of the filing of its notice of appeal the specific information which would necessarily support certain of its claims. It therefore appears reasonable to allow greater latitude under such circumstances." Id. at 8.

Nevertheless, we agree with the Tax Commissioner that appellant should be required, as this appeal moves toward the scheduling of a merit hearing, to either identify those entities receiving preferential treatment or indicate that it is not aware of any such entities. The information sought by the Tax Commissioner through this interrogatory appears not only to be reasonably related to the issues raised by appellant in its notice of appeal but necessary in order for him to prepare and present an adequate response to the equal protection claims which have been asserted by appellant. See Newcome Corporation v. Tracy (Jan. 16, 1998), B.T.A. No. 97-M-320, unreported, at 6-7. Accordingly, appellant shall, within the time frame set forth herein, identify those entities which are the subject of this interrogatory.

Interrogatory number 82 asks that appellant identify the constitutional language to which reference was made in paragraph 11 of appellant's notice of appeal. Appellant responded by citing the constitutional provision upon which it relies and references to and interpretations accorded said section by both the Ohio Supreme Court and this Board. Accordingly, appellant's response is considered sufficient.

Finally, the Tax Commissioner's request for production number 5 provides as follows:

"Produce all documents that you intend to introduce into evidence at the hearing before the Board of Tax Appeals and all other documents that you anticipate will be utilized by, referred to by, or relied on by your witnesses in testifying at the hearing before the Board of Tax Appeals."

It now appears through his motion to compel that the Tax Commissioner is attempting to improperly expand upon a previously served interrogatory in an effort to obtain a wide range of information that may be considered or relied upon by appellant's witnesses both during or outside of the hearing in this matter. Such amplification of his interrogatory is not only improper at this point but perhaps makes the inquiry overly broad.

To the extent of the Tax Commissioner's interrogatory, appellant has indicated that it has not yet determined what documents it will introduce at hearing or those documents to which its witnesses will refer. Clearly such information is discoverable. However, where the hearing of "non-OES Nuclear issues" has yet to be scheduled, it is reasonable that appellant has yet to determine precisely what exhibits will be introduced at hearing. Nevertheless, appellant remains under a continuing obligation to supplement its response in this regard as soon as it determines what documentary information will be relied upon. With respect to the OES Nuclear issues, where no specific deadline has been prescribed for the exchange of exhibits, appellant should provide said documents as soon as a determination is made that they will be used at hearing but in no event later than the period set forth in Ohio Adm. Code 5717-1-15(E).

As previously indicated, the Tax Commissioner has also requested that this Board sanction appellant for its "continuing refusal to answer basic interrogatories and produce requested documents." As discussed within the body of this Order, several of the Tax Commissioner's objections to the responses which appellant provided are directed not so much at the lack of information

received as at the nature of appellant's claims and the manner in which they have been calculated. It is certainly within the province of the Tax Commissioner to oppose said claims but such arguments are considered better reserved for that time when the parties present their arguments regarding the merits of this appeal. A period is established within the body of this Order for providing certain of the requested information. Despite the Tax Commissioner's arguments to the contrary, based upon the apparent willingness of appellant to make documents available for inspection and its continuing efforts to answer more fully or provide greater amplification of its earlier responses to the Tax Commissioner's discovery requests, this Board considers it unnecessary to impose sanctions at this time.

This Board now considers appellant's motion that the following request for admission submitted to the Tax Commissioner be deemed admitted:

"Admit that you have never adopted, promulgated, published or otherwise created, either formally or informally, any guideline, procedure, rule or any other advisory document or directive, for either you or a taxpayer to use, follow, implement, consult or otherwise review when evaluating, quantifying, or otherwise establishing a claim or claims relating to drawings pursuant to R.C. 5701.03(A)."

The Tax Commissioner's initial response was as follows:

"The position taken by the Tax Commissioner in this case, as set forth in the final determination, is the same as his position in other cases in which such claims have been raised, as set forth in the final determinations in those cases and as amplified in briefs filed on behalf of the Tax Commissioner in such cases. See, for example,

the Board of Tax Appeals brief filed by the Tax Commissioner in Duquesne Light Company v. Roger W. Tracy, BTA Case Nos. 95-K-40, 95-K-71, 95-K-72. A copy of that brief can be made available upon request."

Thereafter, in an August 27, 1998 correspondence, the Tax Commissioner stated:

"Admission Request No. 10 is extremely broad in the terms it uses and you have not defined many of those terms, including 'guideline,' 'procedure,' 'rule,' 'advisory' and 'directive.' For such reason, the Tax Commissioner has objected to the request for admission and, in the absence of further clarification, denies it. In this respect, the response noted that the Tax Commissioner's position respecting 'claims relating to drawings pursuant to R.C. 5701.03(A)' had, in fact, been set forth in various kinds of documents, such as final determinations and briefs filed in appeals.

"If you have a more specific request for admission, based on defined terms, do not hesitate to submit it and the Tax Commissioner will respond as accurately and precisely as possible."

Initially appellant attacks the timeliness of the foregoing response. However, this Board has considered the timeliness of both parties' responses to discovery, in particular that of appellant, in the context of an earlier sanctions request and acknowledged that a certain amount of delay in responding to discovery was understandable in this appeal. See Ohio Edison Co. v. Tracy (June 12, 1998), B.T.A. No. 97-K-322, unreported, at 8. Accordingly, we reject appellant's attempts to apparently hold the Tax Commissioner to a higher standard than that which was advocated on its own behalf when it responded to his earlier motion.

Further, the Tax Commissioner has indeed responded to appellant's request for admission and, in so doing, has specifically objected to the form of the admission posed as being overly broad and/or subject to questions of clarity and, as stated, denied it. Nevertheless, the Tax Commissioner referred to final determinations and briefs filed on his behalf as being generally responsive to appellant's request for admission.

We agree with the Tax Commissioner that this admission appears unduly broad. Admissions are in the nature of stipulations. Cf. Civ. R. 36, Staff Notes. In order to be in a position to admit or deny, in this case, a fact, the admission must be stated with clarity and be neither so broad or so vague as to be subject to multiple interpretations. Where an admission is overly broad, it appears entirely appropriate to object to it, as the Tax Commissioner did, and for the party upon whom the admission is served to seek further clarification from the requesting party. The Tax Commissioner has represented that appellant has not undertaken to restrict or clarify its request or define the terms used therein. Under these circumstances, appellant's request to have the admission deemed admitted is hereby denied.

Based upon the foregoing, the Tax Commissioner's motion to compel discovery is hereby granted in part and denied in part. It is the order of the Board of Tax Appeals that appellant, within twenty-one days of the issuance of this order, provide copies of or access to the documents as identified herein. Appellant shall also identify the location of documents related to those interrogatories for which inspection is to be allowed and, in coordination with the

Tax Commissioner, establish reasonable times for the inspection of such documents by his designated representatives.