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IN THE INDIANA TAX COURT

CINCINNATI SMSA LIMITED PARTNERSHIP and NEW CINGULAR WIRELESS PCS, LLC, as successor to Indiana Cellular, LLC, Kentucky CGSA, LLC, Westel-Indianapolis, LLC, Indiana 8, LLC, and Westel-Milwaukee, LLC,	)	
Petitioners,	)	Cause No. 49T10-0409-TA-45
v.	)	
INDIANA DEPARTMENT OF STATE REVENUE,	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION TO STRIKE

NOT FOR PUBLICATION
August 21, 2009

FISHER, J.

On September 24, 2004, Cincinnati SMSA Limited Partnership and New Cingular Wireless PCS, LLC, as successor to Indiana Cellular, LLC, Kentucky CGSA, LLC, Westel-Indianapolis, LLC, Indiana 8, LLC, and Westel-Milwaukee, LLC (hereinafter,

"CSLP") initiated an original tax appeal seeking a refund of over $1.7 million in sales tax remitted to the Indiana Department of State Revenue (the Department) during the 2000 and 2001 calendar years (the years at issue). CSLP moved for summary judgment on October 30, 2007.

In their motion, CSLP claimed that they were entitled to judgment as a matter of law because their erroneous overpayment of Indiana sales tax ultimately resulted in the impermissible double taxation of certain roaming cellular telephone calls. In support of their motion, CSLP submitted: (1) the original and supplemental affidavits of Robert C. Landau, their Director of State and Local Taxation; (2) the original and supplemental affidavits of Mark Mercer, a Tax Managing Director with KPMG, LLP (KPMG); (3) a photocopy of an "Intercarrier Roamer Service Agreement" (roaming agreement); and (4) a photocopy of a "charm report."

The Department subsequently filed a motion to strike.[1] CSLP filed their response thereto on August 1, 2008. The Court held a hearing on the matter on September 22, 2008.

STANDARD OF REVIEW

This Court essentially acts as a trial court when it reviews a final determination of the Department denying a claim for refund. *See* IND. CODE ANN. § 6-8.1-9-1(d) (West 2009). Accordingly, it is afforded broad discretion in resolving motions to strike. *See, e.g., Vernon v. Kroger Co.*, 712 N.E.2d 976, 982 (Ind. 1999); *Bailey v. Indiana Dep't of State Revenue*, 641 N.E.2d 695, 696 n.1 (Ind. Tax Ct. 1994) (stating that this Court has

[1] More specifically, the Department filed a motion to strike on March 3, 2008. The Department subsequently moved, and received permission, to amend its motion. The Department filed its amended motion to strike on July 11, 2008. When this order uses the term "motion to strike," it refers to the Department's amended motion.

the same discretion[2] as trial courts when it carries out its trial functions) (footnote added) (citation omitted), *rev'd on other grounds*, 660 N.E.2d 322 (Ind. 1995).

ANALYSIS AND ORDER

Indiana Trial Rule 56(E), in relevant part, states that affidavits in support of, or in opposition to, a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ind. Trial Rule 56(E). When a party believes that an affidavit does not satisfy these requirements, it must object by directing this Court's attention to the affidavit's alleged defects.[3] *See Doe v. Shults-Lewis Child and Family Servs., Inc.*, 718 N.E.2d 738, 749 (Ind. 1999) (footnote added) (citations omitted).

Here, the Department has filed a motion to strike and a thirty-four page brief in which it argues that Landau and Mercer's original and supplemental affidavits, the roaming agreement, and the charm report should be stricken because that evidence does not comport with the requirements of Indiana Trial Rule 56(E). To the extent, the Department has presented a plethora of challenges to CSLP's designated evidence, the Court will, for ease of analysis, address each of the Department's claims as to each individual piece of designated evidence.

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[2] "'Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each case.'" *Vernon v. Kroger Co.*, 712 N.E.2d 976, 982 (Ind. 1999) (quoting *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993)).

[3] An affidavit's "'formal defects are waived in the absence of a motion to strike or other objection.'" *Doe v. Shults-Lewis Child and Family Servs., Inc.*, 718 N.E.2d 738, 749 (Ind. 1999) (quoting *Gallatin Group v. Central Life Assurance Co.*, 650 N.E.2d 70, 73 (Ind. Ct. App. 1995)).

1. Landau's Original and Supplemental Affidavits

Landau's original affidavit is comprised of eighteen paragraphs and three footnotes; his supplemental affidavit consists of nineteen paragraphs. The Department claims that all but paragraphs 1, 12, 17, and 18 of the original affidavit are inadmissible pursuant to Indiana Evidence Rules 402, 602, 701(a), 704(b), and 802. (*See* Resp't Am. Br. Mot. Strike (hereinafter, "Resp't Br.") at 11-18.) In addition, the Department contends that Evidence Rule 402 prohibits admission of the facts contained within Landau's entire supplemental affidavit. (*See* Resp't Am. Mot. Strike ¶ 4.)

a. Indiana Evidence Rule 402 Objections

Indiana Evidence Rule 402 prohibits the admission of irrelevant evidence. Ind. Evidence Rule 402.[4] The Department asserts that Landau's testimony on "the clearinghouse" and the "Mobile Telecommunications Sourcing Act" is irrelevant because neither subject has any bearing upon whether CSLP is entitled to a refund of sales tax. (*See* Resp't Br. at 11-12 (referring to Pet'rs Des'g Evid. Ex. 1 ¶ 4, n.3).) The Department also claims that all of Landau's testimony as contained in his supplemental affidavit should be stricken because it too is "irrelevant to the legal issue in this cause." (*See* Resp't Am. Mot. Strike ¶ 4.) For the following reasons, the Court must deny these claims.

First, CSLP's alleged overpayment of Indiana sales tax is directly linked to roaming cellular telephone calls. Landau's affidavit explains that the execution of roaming agreements ultimately makes roaming cellular telephone calls possible. (*See*

[4] Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401.

Pet'rs Des'g Evid. Ex. 1 ¶¶ 4, 16 n.3.) Moreover, Landau's affidavit explains that the roaming agreements actually led to the creation of "the clearinghouse."[5] (*See* Pet'rs Des'g Evid. Ex. 1 ¶ 4 (footnote added).) Landau's "clearinghouse" testimony is relevant to the issue at hand because it provides helpful background information with respect to roaming cellular telephone calls. *See, e.g., McFarland v. State*, 390 N.E.2d 989, 993 (Ind. 1979) (explaining that considerable leeway should be afforded for the admission of facts that simply provide "'details which fill in the background of the narrative and give it interest, color, and lifelikeness'") (citation omitted).

Second, to the extent CSLP alleges that the complexity of isolating roaming cellular telephone calls to one jurisdiction led to the double taxation of those calls, (*see, e.g.,* Pet'rs Resp. Opp'n [Resp't] Mot. Strike (hereinafter, "Pet'rs Br.") at 6), an alleged subsequent federal response to the problem – i.e., the "Mobile Telecommunications Sourcing Act" – is also relevant. *See, e.g., Houston v. State*, 730 N.E.2d 1247, 1250 (Ind. 2000) (stating that evidence that is only marginally relevant may still be deemed admissible).

Finally, while the Department has asserted that the majority of Landau's testimony in his original affidavit is not based on his personal knowledge, *see infra* Part 1(b), CSLP responded to that assertion by having him supplement his original affidavit. The supplemental affidavit provides additional facts as to Landau's tenure with CSLP,

[5] More specifically, the privately-operated clearinghouse acts as a reconciliation agent for several of the major cellular service providers in the United States: "cellular service providers participating in the clearinghouse provide [it] with call data details . . . for each roaming call made by [the] customers of other participating providers. The clearinghouse then offsets charges between [the] participating providers and calculates [the] net amounts [of] each" provider's liability, if any. (Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 13.)

his job responsibilities, and his overall experience in the wireless telecommunications industry as it relates to issues of taxation. (*See* Pet'rs Br. at 4 n.3; Pet'rs Des'g Evid. Landau Supp'l Aff.) As a result, the Court finds Landau's supplemental affidavit relevant.

b. Indiana Evidence Rule 602 Objections

According to the Department, the majority of Landau's testimony within his original affidavit fails to satisfy the personal knowledge requirement of Indiana Evidence Rule 602.[6] (*See* Resp't Br. at 12-15 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 2, 6-11, 14, 16) (footnote added).) Specifically, the Department explains that because Landau did not begin to work for CSLP until February 2001, he could not have possibly known what occurred at the companies prior to that time. (*See* Resp't Br. at 12-13.) Moreover, the Department asserts that nothing within Landau's original affidavit remotely suggests that he has firsthand knowledge of other jurisdiction's tax collection practices or whether third parties collected taxes pursuant to their state's laws. (*See* Resp't Br. at 13-14.)

The admissibility of Landau's testimony is initially governed by Indiana Evidence Rule 104(b).[7] 13 ROBERT L. MILLER JR., INDIANA PRACTICE: INDIANA EVIDENCE § 602.101 at 60 (3d ed. 2007) (stating "[t]he trial judge determines admissibility under Rule 104(b)") (footnote added). *See also, e.g., Clark v. State Bd. of Tax Comm'rs*, 694

[6] Indiana Evidence Rule 602 states that a witness may not testify to a matter unless "evidence [is] introduced sufficient to support a finding that [he] has personal knowledge of the matter." Ind. Evidence Rule 602. "Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness." Evid. R. 602.

[7] Indiana Evidence Rule 104(b) reads as follows: "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Evid. R. 104(b).

N.E.2d 1230, 1236 n.5 (Ind. Tax Ct. 1998) (relying upon Rule 104(b) when noting that the record in that case indicated that a tax consultant had personal knowledge of facts at issue). As such, the Court need not weigh the credibility of Landau's testimony; rather, it must determine whether "'a reasonable [trier of fact] could make the requisite factual determination based on the evidence before it.'" *See Cox v. State*, 696 N.E.2d 853, 861 (Ind. 1998) (citation omitted).

Here, Landau has averred that he has personal knowledge as to the facts contained within both of his affidavits. (Pet'rs Des'g Evid. Ex. 1 ¶ 1; Landau Supp'l Aff. ¶ 1.) Furthermore, Landau's 25 years of experience with CSLP, the wireless telecommunications industry in general, and his specific focus on state and local taxation issues leads the Court to conclude that his testimony is based upon his personal knowledge. *See, e.g., Cunningham v. Mid State Bank*, 544 N.E.2d 530, 533-34 (Ind. Ct. App. 1989) (explaining that an affiant's knowledge of a company's business practices may be inferred from his longstanding employment with the company), *trans. denied*. Therefore, the Department's Indiana Evidence Rule 602 objections are denied.

c. Indiana Evidence Rule 701(a) Objections

The Department claims that because Landau's original affidavit contains testimony that is not based on his actual observations, it must be stricken pursuant to Indiana Evidence Rule 701(a). (*See* Resp't Br. at 13-14 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 6-11 n.1, 14, 16 n.3).) More specifically, the Department asserts that Landau could not have observed the execution of the roaming agreements and calling plans relevant to the years at issue because he only worked for CSLP for "less th[a]n 50% of the years at issue." (*See* Resp't Br. at 13.) In addition, the Department asserts that

nothing within Landau's affidavit "puts him in a position to have actually perceived or observed" third parties collecting taxes pursuant to their jurisdictions' statutory requirements or "handling" roaming cellular telephone calls.[8] (*See* Resp't Br. at 13-14 (footnote added).)

A lay witness may provide testimony in the form of opinions or inferences if those opinions and inferences are rationally based on his perceptions. *See* Ind. Evidence Rule 701(a). The admissibility of such testimony depends upon whether the witness sets forth enough facts to allow the Court to find, pursuant to Indiana Evidence Rule 104(a), that the opinions are based on the witness's personal perceptions.[9] *See Ackles v. Hartford Underwriters Ins. Corp.*, 699 N.E.2d 740, 743 (Ind. Ct. App. 1998) (footnote added) (citation omitted), *trans. denied*. The extent of the requisite detail varies from case to case, and is therefore a matter within this Court's discretion. *See id.* (citation omitted); Ind. Evidence Rule 104(a) (stating that "[w]here a determination of admissibility . . . requires resolution of a question of fact, the question shall be resolved by the preponderance of the evidence"). "Perception," within the meaning of Rule 701,

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[8] The Department also claims that Landau's unsupported "categorical assertions and interpretations" are inadmissible. (*See* Resp't Br. at 14-15 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 4, 9, 13, 16 n.3).) More specifically, the Department claims that Landau frequently offers "inadmissible speculations, such as when he [avers] that 'cellular telephone users . . . generally desire service in many if not all states'" or when he states that KPMG's calculations and analyses were "refined" and "detailed," given that he could not have actually perceived or observed as much. (*See* Resp't Br. at 14-15 (citations omitted).) The Court, however, must disagree. While an affiant's use of words, such as "refined" or "detailed" could generally be construed as conjecture, the use of these words in this instance is proper because they are simply being used as adjectives. Moreover, Landau's other testimony is not speculative, as it supported by his 25 years of experience within the wireless telecommunications industry.

[9] Indiana Evidence Rule 104(a), in relevant part, provides that "[p]reliminary questions concerning the . . . admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b)." Evid. R. 104(a).

has been defined as "the process, act, or faculty of perceiving . . . insight, intuition, or knowledge gained by perceiving."[10] *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003) (quoting THE AMERICAN HERITAGE COLL. DICTIONARY 1014 (3d ed. 1993)) (footnote added). *See also* MILLER, *supra* § 701.102 at 399 ("perception" within the meaning of Rule 701 means "the facts on which the opinion is based must be within the witness's personal knowledge").

Landau's supplemental affidavit establishes that he has spent over 25 years in the wireless telecommunications industry focusing upon issues related to state and local taxation. (*See* Pet'rs Des'g Evid. Landau Supp'l Aff. ¶¶ 1-7, 10.) Landau explains that during that time frame, he read numerous roaming agreements and calling plans because those contracts have tax implications. (*See* Pet'rs Des'g Evid. Landau Supp'l Aff. ¶ 10.) The Court therefore concludes that Landau has set forth enough facts to demonstrate that his testimony on such subjects is based on his perceptions and actual observations.

d. Indiana Evidence Rule 704(b)

Indiana Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning . . . legal conclusions." Ind. Evidence Rule 704(b). The Department contends, however, that Landau offers inadmissible legal conclusions on: the existence and terms of roaming agreements; the existence and terms of calling plans; the existence of an agency relationship between CSLP and other cellular service providers; and the collection and payment of taxes. (*See* Resp't Br. at 15 (referring to

[10] In turn, to "perceive" means "to become aware of directly through any of the senses, esp[ecially] sight or hearing." *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003) (quoting THE AMERICAN HERITAGE COLL. DICTIONARY 1013 (3d ed. 1993)).

Pet'rs Des'g Evid. Ex. 1 ¶¶ 4-11 n.2, 14-16).) In addition, the Department asserts that Landau's testimony on the Federal Communications Commission's (FCC) licensing practices and whether the Mobile Telecommunications Sourcing Act "resolved" the alleged problems of double taxation of roaming cellular telephone calls is improper. (*See* Resp't Br. at 15 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 3, 7, 16 n.3).)

"The question of whether a certain or undisputed set of facts establishes a contract" is a question of law. *Wallem v. CLS Indus., Inc.*, 725 N.E.2d 880, 883 (Ind. Ct. App. 2000) (citation omitted). Likewise, the question of whether certain facts establish the existence of an agency relationship is a question of law. *See Kelly v. Levandoski*, 825 N.E.2d 850, 864 (Ind. Ct. App. 2005), *trans denied*. Accordingly, Landau's opinion testimony as to such issues generally would be inadmissible pursuant to Rule 704(b). *See id.* Those principles, however, are inapplicable in this case because neither the existence nor the terms of the contracts are actually in dispute. (*See, e.g.*, Resp't Am. Br. Opp'n Pet'rs Mot. Summ. J. at 1-2 (acknowledging that CSLP routinely executes calling plans and roaming agreements).) As such, Landau's averments merely explain how CSLP interpreted and complied with the provisions of the contracts. Those averments are undisputed statements of fact, not legal conclusions. Similarly, Landau's testimony as to the FCC's licensing practices and CSLP's payment and collection of taxes are undisputed statements of fact and not legal conclusions. (*See, e.g.,* Resp't Am. Br. Opp'n Pet'rs Mot. Summ. J. at 6-7 (where the Department, albeit with different evidence, also explains the FCC's licensing practices).) The remainder of Landau's original affidavit primarily explains why cellular service providers executed roaming agreements, why CSLP remitted tax to the Department, why CSLP remitted tax to other

cellular service providers, and why CSLP now claims that it is entitled to a refund of sales tax. Consequently, Rule 704(b) does not prohibit the admission of the aforementioned testimony.

Nevertheless, one of Landau's averments does appear to be an inadmissible legal conclusion because it is based upon his interpretation of the Mobile Telecommunications Sourcing Act. (*See* Pet'rs Des'g Evid. Ex. 1 ¶ 16 n.3 (stating that the Act resolved "[t]he problem of the duplicate taxation of roaming calls").) *See also, e.g., Porter Dev., LLC v. First Nat'l Bank of Valparaiso*, 866 N.E.2d 775, 778 (Ind. 2007) (explaining that questions of statutory interpretation are questions of law). Accordingly, the Court will strike footnote 3 of Landau's original affidavit.

e. Indiana Evidence Rule 802 Objections

Hearsay, "a statement, other than one made by the declarant while testifying at [] trial or hearing[and] offered in evidence to prove the truth of the matter asserted[,]" is generally not admissible. *See* Ind. Evidence Rules 801(c), 802. The Department asserts that Landau's testimony on the following must be stricken as hearsay: all statements regarding the roaming agreements and calling plans; all references to KPMG's actions; all statements concerning the provision of both in-state and out-of-state roaming cellular telephone services; and all statements purporting to establish that any party collected state or local tax in accordance with its state's laws. (*See* Resp't Br. at 16-18 (referring to Pet'rs Des'g Evid. Ex. 1 ¶¶ 4-5, 7-11 nn.1-2, 13-14, 16).)

Landau's testimony as to what "other people did" is permissible. Indeed, nothing within Landau's affidavit suggests that either Landau or the effectors of the actions (i.e., KPMG, CSLP's customers, and other cellular service providers) intended for their

actions to be assertions. *See* Evid. R. 801(a)(2) (providing that nonverbal acts are statements, for purposes of the hearsay rule, only if the person effectuating the action so intends). *See also, e.g., Wills v. State*, 318 N.E.2d 385, 387 (Ind. Ct. App. 1974) (police officers' testimony that a woman pointed to the defendant was not hearsay because it was offered "to show why the police were investigating whether [the] defendant had a pistol" rather than to prove that the man had a gun). Therefore, Landau's testimony on such matters does not constitute hearsay.

Furthermore, the majority of Landau's testimony with respect to the roaming agreement and the calling plans is not hearsay because Landau does not specifically describe the terms of these contracts. Rather, he primarily describes why roaming agreements must be executed and how cellular telephone calls are transmitted in light of those agreements.[11] Moreover, when Landau does restate the specific terms of the roaming agreement, his testimony is permissible because CSLP has laid the proper foundation for admission of the roaming agreement under the business records exception to the hearsay rule. *See infra* Part 2.

Some of Landau's other testimony, however, is problematic: Landau avers that CSLP's calling plans "specifically stated that the [c]ustomers were responsible for 'applicable taxes'" and that KPMG "advised" the Department that CSLP was seeking a total refund of $1,752,192.91. (*See* Pet'rs Des'g Evid. Ex. 1 ¶¶ 9, 13.) It is clear that though this testimony Landau seeks to establish that CSLP's calling plans placed the

[11] For example, Landau avers that the roaming agreements "generally define the carrier with the [c]ustomers registered with it as the 'Home Carrier,' and the carrier providing the service to that [c]ustomer . . . as the 'Foreign Carrier.' The nature of the [r]oaming [a]greement is that a carrier will be acting as the 'Home Carrier' with respect to some [c]ustomers, and as the 'Foreign Carrier' with respect to other [c]ustomers." (Pet'rs Des'g Evid. Ex. 1 ¶ 4.)

payment of all applicable taxes upon their customers and that KPMG told the Department that the companies sought a total refund of $1,752,192.91. (*See, e.g.,* Pet'rs Br. at 16.) Landau's testimony, therefore, is classic hearsay: two out-of court assertions, one written and the other oral, being offered to prove the truthfulness of the assertions. Consequently, the Court will disregard the inadmissible hearsay in paragraphs 9 and 13 of Landau's original affidavit.

2. Roaming Agreement

CSLP attached the roaming agreement to Landau's original affidavit. The Department now claims that the roaming agreement must be stricken because CSLP failed to show that it is admissible under Indiana Evidence Rule 803(6), the business records exception to the hearsay rule.[12] (Resp't Br. at 29-30 (footnote added).) The Department maintains that the roaming agreement is inadmissible because Landau has not testified that: (1) it was kept in the routine course of business; (2) he placed it in CSLP's business records pursuant to their authorization; (3) he has personal knowledge of its terms; (4) he placed it into CSLP's records either at or near the time it was

[12] Indiana Evidence Rule 803(6) allows for the admission of hearsay when:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Ind. Evidence Rule 803(6).

executed; and (5) he had a duty to retain it as a business record. (Resp't Br. at 29-30.)

The admissibility of the roaming agreement, pursuant to the business record exception to the hearsay rule, however, does not depend upon whether Landau personally executed the agreement, filed it, or had firsthand knowledge of the transaction that it represented. *See Rolland v. State*, 851 N.E.2d 1042, 1045 (Ind. Ct. App. 2006) (citations omitted). Rather, the admissibility of the document depends on whether it was "part of certain records kept in the routine course of [CSLP's] business and [whether it was] placed in the[ir] records by one who was authorized to do so and who had personal knowledge of the transaction represented at the time of entry." *See id.* (citation omitted). "Records kept in the ordinary course of business are presumed to have been placed there by those who have a duty to so record and have personal knowledge of the transaction represented by the entry, unless there is a showing to the contrary." *Id.* (citation omitted).

In this case, Landau's supplemental affidavit explains that since the 1980s, CSLP and their subsidiaries executed "thousands" of roaming agreements in order to provide nationwide cellular service to their customers. (Pet'rs Des'g Evid. Landau Supp'l Aff. ¶¶ 10, 14.) Landau avers that he routinely read and studied these agreements in order to better understand their tax ramifications. (*See* Pet'rs Des'g Evid. Landau Supp'l Aff. ¶¶ 9-10.) Finally, Landau avers that the roaming agreement attached to his affidavit was: a true and authentic copy of the original; executed by a subsidiary of CSLP; executed by individuals who had firsthand knowledge of its terms; executed, copied, and retained in the routine course of CSLP's business; and copied at or near the time of its original execution. (*See* Pet'rs Des'g Evid. Landau Supp'l Aff. ¶ 15.) Thus, Landau's testimony

clearly shows that CSLP and their subsidiaries executed the roaming agreement in the ordinary course of business, that CSLP and their subsidiaries routinely copied and placed the roaming agreements in their business records, and that the individuals who executed the roaming agreement at issue had personal knowledge of its terms. The Court, therefore, finds that CSLP laid the proper foundation for the admissibility of the roaming agreement under the business records exception to the hearsay rule. Accordingly, the Department's 802 objection as to the roaming agreement is denied.

3. Mercer's Original and Supplemental Affidavits

Mercer's original affidavit consists of six paragraphs; his supplemental affidavit is comprised of eighteen paragraphs. The Department maintains that half of Mercer's original affidavit and his entire supplemental affidavit must be stricken because Indiana Evidence Rules 402, 602, 701(b), 702(a), 704(b), and 802 prohibit admission of the facts contained therein. (*See* Resp't Br. at 18-27 (referring to Pet'rs Des'g Evid. Ex. 2 ¶¶ 3-6); Resp't Am. Mot. Strike ¶ 4.)

a. Indiana Evidence Rule 402 Objections

Paragraphs 3 through 6 of Mercer's original affidavit essentially describe how CSLP calculated their $1,752,192.91 claim for refund. Indeed, Mercer initially explains that CSLP used the Tax Credit Engine (TCE)[13] computer software to calculate their claims for refund, the results of which were subsequently summarized by KPMG. (*See* Pet'rs Des'g Evid. Ex. 2 ¶¶ 1, 3-4, 6 (footnote added).) Mercer then states that KPMG's summarized results showed that CSLP's alleged overpayment of sales tax was primarily

[13] "TCE is a software application developed for [CSLP] that accumulated roaming cellular telephone call data and performed calculations of creditable taxes for roaming activities." (Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 11.)

attributable to out-of-state roaming cellular telephone calls. (*See* Pet'rs Des'g Evid. Ex. 2 ¶¶ 4-5.) The Department maintains that this testimony should be stricken as irrelevant under Rule 402 because it does not indicate whether CSLP is entitled to an Indiana sales tax refund. (*See* Resp't Br. at 18-19.) The Department also claims that Mercer's supplemental affidavit is irrelevant for the same reasons. (*See* Resp't Am. Mot Strike ¶ 4.) The Court disagrees.

CSLP's calculation of their sales tax refund is based upon the TCE software. Consequently, Mercer's testimony concerning the software is not extraneous, as it goes to the mathematical accuracy of CSLP's claims. Furthermore, the Department's personal knowledge objections with respect to Mercer's original affidavit make his supplemental affidavit particularly relevant in that it provides additional facts as to Mercer's employment history. *See infra* Part 2(b). (*See also, generally,* Pet'rs Des'g Evid. Mercer Supp'l Aff.) The Court therefore denies each of the Department's Rule 402 objections.

b. Indiana Evidence Rule 602 Objections

Next, the Department asserts that Mercer's testimony regarding the calculation of CSLP's refund is inadmissible because it is not based on his personal knowledge: he never testifies that he used the TCE software; that he was employed by AMDOCS, the software's developer; or that KPMG possessed the software. (*See* Resp't Br. at 19 (referring to Pet'rs Des'g Evid. Ex. 2 ¶¶ 3-6).) In addition, the Department claims that to the extent Mercer's testimonial "breakdown" of CSLP's alleged overpayment of sales tax is conclusory in nature, it too indicates that the testimony is not based upon his personal knowledge. (*See* Resp't Br. at 20 (referring to Pet'rs Des'g Evid. Ex. 2 ¶ 5).)

Mercer has averred that he has personal knowledge as to the facts contained within both of his affidavits. (Pet'rs Des'g Evid. Ex. 2 ¶ 1; Mercer Supp'l Aff. ¶ 1.) Moreover, Mercer has worked "in the area of sales and use tax audits and defense in the telecommunications industry since 1997." (Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 2.) Both of Mercer's affidavits indicate that CSLP hired his previous and current employer to determine whether TCE functioned properly. (*See* Pet'rs Des'g Evid. Ex. 2 ¶ 6; Mercer Supp'l Aff. ¶¶ 7-8, 10-18.) Mercer explains that he used the charm reports to calculate CSLP's alleged overpayment of sales tax and compared those results to the TCE generated results. (Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 12.) That comparison led Mercer to conclude that the software functioned properly. (*See* Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 12.) The Court, therefore, finds that Mercer's testimony demonstrates that he has personal knowledge as to the TCE software and CSLP's sales tax refund calculations. Accordingly, the Department's 602 objections are denied.

c. Indiana Evidence Rule 701 Objections

According to the Department, Mercer's testimony regarding the TCE software is also inadmissible under Indiana Evidence Rule 701 because he has not testified that he either actually perceived or observed its development or use. (*See* Resp't Br. at 19-21 (referring to Pet'rs Des'g Evid. Ex. 2 ¶¶ 3-6).) As previously explained, the admissibility of lay opinion testimony under Rule 701 depends upon whether the witness sets forth enough facts to allow the Court to find that his testimony is based on his personal perceptions. *See supra* Part 1(c). Furthermore, the witness's opinions must help the adjudicator to either understand the witness's testimony or determine a fact in issue. *See* Evid. R. 701(b).

In this case, Mercer's supplemental affidavit demonstrates that he has focused on sales and use tax audit defense issues within the telecommunications industry for over ten years. (*See* Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 2.) As a result, Mercer was able to analyze the TCE calculations by performing his own independent calculations. (*See* Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 12.) Moreover, Mercer explains what factors were germane to those calculations. (*See* Pet'rs Des'g Evid. Ex. 2 ¶ 6.) Thus, the Court finds that Mercer's TCE testimony is not only based on his actual perceptions, but that it also helps establish whether CSLP's claims are mathematically accurate. As such, the Court denies the Department's 701 objections.

d. *Indiana Evidence Rule 702(a)*

Indiana Evidence Rule 702(a) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ind. Evidence Rule 702(a). The Department contends that Mercer's testimony concerning the TCE software is inadmissible under this Rule because he has not been qualified as "a software expert." (*See* Resp't Br. at 21-23 (referring to Pet'rs Des'g Evid. Ex. 2 ¶¶ 3-6).) Again, the Court disagrees.

Mercer (through some unspecified method/mechanism) calculated CSLP's alleged overpayment of sales tax and then compared his results to the TCE generated results. That comparison led Mercer to conclude that TCE's calculations were reliable. (*See* Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 12.) Consequently, Mercer did not need to be a software expert in order to conclude whether TCE functioned appropriately.

Hence, the Department's 702(a) objections are denied.

e. Indiana Evidence Rule 704(b) Objections

According to the Department, Mercer's testimony contains the same inadmissible legal conclusions as to the roaming agreements and calling plans as Landau's testimony. (*See* Resp't Br. at 23 (referring to Pet'rs Des'g Evid. Ex. 2 ¶¶ 4-6).) Having already determined that Landau's statements are not legal conclusions, *see supra* Part 1(d), the Court denies the Department's 704(b) objections with respect to Mercer.

f. Indiana Evidence Rule 802 Objections

The Department also maintains that Mercer's incorporation of terms, which were defined in Landau's original affidavit, and his testimony as to what CSLP, AMDOCS, KPMG, and other cellular service providers did, is inadmissible hearsay. (Resp't Br. at 23-27 (referring to Pet'rs Des'g Evid. Ex. 2 ¶¶ 2-6).) The Department cites to footnote three in *Schmidt v. State*, 816 N.E.2d 925, 938 (Ind. Ct. App. 2004), to support its contention. (Resp't Br. at 24.)

At the outset, the Department's reliance upon the *Schmidt* case is misplaced. The footnote upon which the Department relies explains that a defendant's statements to a doctor were inadmissible hearsay because they were not statements by a party-opponent under Indiana Evidence Rule 801(d)(2). *See Schmidt v. State*, 816 N.E.2d 925, 938 n.3 (Ind. Ct. App. 2004), *trans. denied*. In other words, the defendant sought to offer statements he made to the doctor through the doctor's testimony. *Id*. In this case, however, Landau's testimony is already before the Court via his affidavit. Consequently, Mercer's incorporation of the terms defined by Landau is nothing more than a permissible time-saving technique.

Second, nonverbal acts are statements, for purposes of the hearsay rule, only if the person effectuating the act so intends. *See supra* Part 1(e). Here, nothing within Mercer's affidavit suggests that either Mercer or the effectors of the actions intended for the actions to be assertions. Therefore, Mercer's testimony as to what others did does not constitute hearsay. Accordingly, the Department's Rule 802 objections are denied.

4. The Charm Report

Finally, the Department contends that the charm report, which was attached to Mercer's supplemental affidavit, must also be stricken because it too is "irrelevant to the legal issue in this cause." (*See* Resp't Am. Mot. Strike ¶¶ 3-4.) Again, the Department is incorrect. The charm report is relevant because it is directly linked to the source of CSLP's alleged overpayment of sales tax, i.e., roaming cellular telephone calls. (*See* Pet'rs Des'g Evid. Mercer Supp'l Aff. ¶ 13 (explaining that charm reports provide detailed breakdowns of roaming cellular telephone call data for the major cellular service providers in the United States).) Thus, the Department's motion to strike as to the charm report is denied.

CONCLUSION

For the above stated reasons, the Court GRANTS in part and DENIES in part the Department's motion to strike. Accordingly, the Court STRIKES the following: (1) footnote 3 of Landau's original affidavit; (2) the portion of paragraph 9 providing: "the agreements between Cingular Companies and Bundled Plan Customers specifically stated that the Customers were responsible for 'applicable taxes[;]'" and (3) the word "advised" from paragraph 13 of the affidavit. The remainder of CSLP's designated evidence, however, shall stand. The Court will address CSLP's summary judgment motion under separate cover.

SO ORDERED this 21st day of August, 2009.

Thomas G. Fisher, Judge
Indiana Tax Court

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