

**IT 11-07**  
**Tax Type: Income Tax**  
**Issue: Statute of Limitations Application**

**STATE OF ILLINOIS**  
**DEPARTMENT OF REVENUE**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE**  
**OF THE STATE OF ILLINOIS**

v.

**ABC BUSINESS,**  
**Taxpayer**

**No. XXXX**  
**Account ID XXXX**  
**Letter ID XXXX**  
**XXXX**  
**Tax Years 2006, 2007**

**Ted Sherrod**  
**Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**  
**REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**Appearances:** Special Assistant Attorney General Mehpara Suleman on behalf of the Illinois Department of Revenue; Jane Doe, *pro se*, on behalf of ABC Business

**Synopsis:**

This matter involves two Notices of Deficiency issued by the Illinois Department of Revenue (“Department”) to ABC Business (“ABC Business” or “taxpayer”) for Illinois income tax due for the taxable years ended December 31, 2006 and December 31, 2007. The parties have filed cross-motions for summary judgment on the question whether the Department's assessment for each of these tax years was barred by the statute of limitations governing notices of deficiency indicated in section 905 of the Illinois Income Tax Act, 35 ILCS 5/905. A hearing on this matter was held on June 3, 2011, during which the Department entered exhibits (“Hearing Exhibits”) into the record. In addition to the taxpayer's Motion for Summary Judgment, the

record in this case also includes a Brief Supporting Motion for Summary Judgment and the Department's Response to Taxpayer's Motion for Summary Judgment and Department's Cross Motion for Summary Judgment. I am including with this order and recommendation a brief statement of the material facts not at issue. I recommend that the Department's cross-motion for summary judgment be granted, that the taxpayer's motion for summary judgment be denied and that the Notices of Deficiency issued to the taxpayer be affirmed.

**Facts Not in Dispute:**

1. On March 13, 2007, the taxpayer filed an IL-1120-ST, Small-Business Corporation Replacement Income Tax Return for the tax year ended December 31, 2006, which claimed an Illinois net loss deduction ("NLD") of \$142,711. Department's Hearing Exhibit ("Ex.") 5.
2. Taxpayer's Schedule NLD for tax year 2006, filed with its IL-1120-ST for that year, identified accumulated net losses from prior years available to be carried forward to tax year 2006 and subsequent years of \$195,734. Department's Response to Taxpayer's Motion for Summary Judgment and Department's Cross- Motion for Summary Judgment, ("Department's Motion") Ex. 1.
3. On March 14, 2008, the taxpayer filed an IL-1120-ST, Small Business Corporation Replacement Income Tax Return for the tax year ended December 31, 2007 on which it claimed an Illinois NLD of \$53,023. Department Hearing Ex. 5.
4. Taxpayer's Schedule NLD for tax year 2007 filed with its IL-1120-ST for that year identified accumulated net losses from prior years to be carried forward to tax year 2007 of \$53,023. Department's Motion Ex. 5.

5. On audit, the Department determined that the NLD reflected on the taxpayer's 2006 and 2007 returns was incorrect. Department's Motion p. 2. It determined that a portion of these losses was attributable to the taxpayer's carry forward of its 1999 and 2000 net loss deductions to subsequent years. *Id.* The Department's auditor further determined that the taxpayer was not entitled to carry forward these net loss deductions because it failed to check the box to elect to forego the carry back of these net loss deductions as required by 35 ILCS 5/207(a)(2). *Id.* See also 86 Ill. Admin. Code, Ch. I, section 100.2330(d). As a consequence, the Department's auditor adjusted the taxpayer's NLD taken in 2006 and 2007 to reflect Illinois NLD available to the taxpayer based upon the taxpayer's failure to elect to forego a carryback of its 1999 and 2000 losses. Department's Motion p. 2.<sup>1</sup>
6. While the Department adjusted the taxpayer's NLD for 2006 and 2007 to reverse the erroneous carry forward of losses from 1999 and 2000, it did not adjust the losses the taxpayer reported on its 2004 return in this manner, and accepted the taxpayer's 2004 return reporting the carryforward of 1999 and 2000 losses as filed. Taxpayer's Brief Supporting Motion for Summary Judgment.<sup>2</sup>
7. The taxpayer timely filed its return for 2006 prior to the due date for this return (March 15, 2007) and did not request a federal or state tax extension of the due date for this return. *Id.*

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<sup>1</sup> As a result of the Department's audit, the taxpayer's NLD for tax year 1999 was carried back to 1997, and its NLD for 2000 was carried back to 1998. These adjustments were made pursuant to 35 ILCS 5/207(a-5)(B). See also 86 Ill. Admin. Code, ch. I, section 100.2330(d).

<sup>2</sup> The taxpayer's Motion for Summary Judgment and its Brief Supporting Motion for Summary Judgment each consist of 2 unnumbered pages.

8. The Department issued a Notice of Deficiency assessing a deficiency for the tax year ended December 31, 2006 on May 17, 2010. Department Hearing Ex. 1. On May 17, 2010, the Department also issued a Notice of Deficiency for the tax year ended December 31, 2007 assessing a deficiency for that tax year. Department Hearing Ex. 2.
9. On June 3, 2011, the taxpayer filed a Motion for Summary Judgment contesting the Department's Notice of Deficiency for tax year 2006 on the grounds that this notice was not issued within three years of the date on which the taxpayer's return for 2006 was timely filed and therefore was beyond of the statute of limitations prescribed by section 905 of the Illinois Income Tax Act. Taxpayer's Motion for Summary Judgment. This motion also avers that the taxpayer's loss reported in 2007 was originally reflected on its 2004 return, and that an assessment changing amounts reported on its 2004 return is barred by the statute of limitations applicable to that year which expired in 2008. *Id.*; Taxpayer's Brief Supporting Motion for Summary Judgment.

**Conclusion of Law:**

This matter involves a motion for summary judgment filed by the taxpayer and a cross-motion for summary judgment filed by the Department contesting the proper interpretation to be given section 905 of the Illinois Income Tax Act ("IITA") governing time limitations upon the issuance of Notices of Deficiency by the Department. Summary judgment is appropriate when resolution of a case hinges upon a question of law. First America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165 (1995); Kirk v. Village of Buffalo Grove, 248 Ill. App. 3d 1077 (1<sup>st</sup> Dist. 1993). Summary judgment is also appropriate when the parties dispute the correct construction of an applicable statute. Bezan v. Chrysler Motors Corp., 263 Ill. App. 3d 858 (2d Dist. 1994). Where both parties file motions for summary judgment, only a question of law is raised. Lake

Co. Stormwater Management Commission v. Fox Waterway Agency, 326 Ill. App. 3d 100, 104 (2d Dist. 2000). Because this matter involves the parties' cross-motions for summary judgment, and, as a consequence neither party has alleged that there is a genuine issue of material fact, summary judgment in this case is appropriate.

The principal issue in this case is whether the Department is barred from assessing tax for the tax years 2006 and 2007 by the statute of limitations governing assessments provided at section 905 of the IITA. With respect to the tax year 2006, the taxpayer alleges that the statute of limitations expired on March 15, 2010 (i.e. approximately 3 years from the date the return was filed) pursuant to section 905(a) of the IITA. Since the Department did not issue its assessment until May 17, 2010, the taxpayer argues that the Department's assessment was not timely. The Department argues that its assessment of tax for 2006 was timely because the statute of limitations did not expire until three years from the extended due date of the taxpayer's return which was October 15, 2010.

The record indicates that the taxpayer was assessed tax for 2007 on May 17, 2010 which was within 3 years from the date the taxpayer's return for 2007 was filed in March 2008. Department Hearing Ex. 5. The taxpayer nevertheless contends that the assessment of tax for 2007 was barred by the statute of limitations. With respect to the tax year 2007, the taxpayer contends that the Department is precluded from assessing tax because doing so would modify net income reported in 2004, a year that was closed by the three year statute of limitations indicated in section 905 of the IITA, when the Department's assessment was issued. Taxpayer's Brief Supporting Motion for Summary Judgment.

Resolution of the statute of limitations issues raised by the taxpayer turns upon the proper construction to be given section 905 of the IITA which enumerates the statute of limitations

applicable to income tax assessments in Illinois. Subdivisions (a) and (h) of section 905 provide as follows:

- (a) In general. Except as otherwise provided in this Act:
  - (1) A notice of deficiency shall be issued not later than 3 years after the return was filed, and
  - (2) No deficiency shall be assessed or collected with respect to the year for which the return was filed unless such notice is issued within such period.

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(h) Time return deemed filed. For purposes of this Section a tax return filed before the last day prescribed by law (including any extensions thereof) shall be deemed to have been filed on such last day.

The Department has adopted regulation 86 Ill. Admin. Code, chapter I, section 100.9320, a provision that interprets and applies sections 905(a) and (h). This regulation states, in part, as follows:

- (a) In general.

With respect to a taxable year for which a taxpayer filed a return, no deficiency shall be assessed or collected except as otherwise provided in this Act unless the Department issues a notice of deficiency not later than 3 years after the later of the last day prescribed for filing or the date the return was filed. See subsection (h) regarding when a return is deemed filed.

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(h) Time return deemed filed. For purposes of this Section, a return filed before the last day prescribed by law (including any extensions of time for filing) shall be deemed to have been filed on such last day. The last day prescribed for filing shall include any automatic extension of time for filing.

As noted above, regulation 100.9320 indicates that a notice of deficiency is timely if made no later than three years from the “last day prescribed for filing” a return, and pursuant to

subdivision (h) of this regulation, states that the “last day prescribed for filing” includes “any automatic extension of time for filing.” The Department (at pages 6 and 7 of Department’s Motion) contends that, pursuant to regulation 100.9320, the statute of limitations for 2006 did not expire until three years from the extended due date of the taxpayer’s return which, for 2006, was seven months from the original due date of the taxpayer’s return, or October 15, 2010. See 86 Ill. Admin. Code, ch. I, section 100.5020(b).

The taxpayer disagrees with the Department’s interpretation of regulation 100.9320. It contends that this regulation extends the limitation period for assessments to three years from the extended due date only where the taxpayer has requested an extension and has filed its return after the original due date, but on or before the extended due date for the taxpayer’s return. Taxpayer’s Brief in Support of Motion for Summary Judgment.

The taxpayer's interpretation of regulation 100.9320 is of doubtful validity. Under Illinois law, administrative regulations have the force and effect of law. Union Electric Co. v. Department of Revenue, 136 Ill. 2d 385 (1990); Subway Restaurants of Bloomington Normal Inc. v. Department of Revenue, 322 Ill. App. 3d 376 (4<sup>th</sup> Dist. 2001). Because administrative regulations have the force and effect of law, the familiar rules that govern the construction of statutes also apply to the construction of administrative regulations. Tivoli Enterprises, Inc. v. Zehnder, 297 Ill. App. 3d 125, 132 (1998); M.A.K. v. Rush Presbyterian-St. Luke’s Medical Center, 198 Ill. 2d 249, 257 (2001). One such familiar rule is that a statute should be construed, if possible, so that no word is rendered meaningless or superfluous. M.A.K., *supra* at 257. As noted above, regulation 100.9320(a), governing limitations upon notices of deficiency, states that a notice of deficiency is timely if made no later than three years from the “last day prescribed for filing” a return. It further directs, in the last sentence of 100.9320(a): “See subsection (h)

regarding when a return is deemed filed.” Subdivision (h) of regulation 100.9320 states that the “last day prescribed for filing” includes “any automatic extension of time for filing.”

The taxpayer’s construction of subsection (a) of regulation 100.9320 reads it to mean that the statute of limitations expires no later than three years from “the date the return was filed.” Such a construction of regulation 100.9320(a) might have merit if this regulation did not state that the statute of limitations expires either three years from that date or three years from “the last day prescribed for filing” and did not precisely define what is meant by the “last day prescribed for filing” in subsection (h) of this regulation. However, the taxpayer’s construction of regulation 100.9320 discounts entirely, and gives absolutely no effect to language in regulation 100.9320 extending the statute of limitations to three years from the “last day prescribed for filing” and stating that the “last day prescribed for filing” includes the automatic extension due date of the return. Consequently, the taxpayer’s construction of regulation 100.9320 renders the reference in this regulation to three years from “the last date prescribed for filing” and to subdivision (h), and the provisions contained therein, entirely superfluous.

Under the familiar rules of statutory construction noted above, this reading of the regulation violates the principle of statutory construction that a regulation be read so that no word contained therein is rendered meaningless or superfluous. M.A.K., *supra*. Accordingly, applying the aforementioned rule of statutory construction, this regulation must be construed to mean that the statute of limitations expires three years from the "last day prescribed for filing" and that the “last day prescribed for filing” includes the automatic extension due date for filing under the IITA. Pursuant to 86 Ill. Admin. Code, chapter I, section 100.5020(b), this date is seven months from the original due date of the return, or, in the instant case, October 15, 2010

for the taxpayer's 2006 return and October 15, 2011 for the taxpayer's 2007 return.<sup>3</sup> Giving effect to subsection (h) defining the outside limit of the period for assessment with reference to the extended due date of the taxpayer's return, the clear import of regulation 100.9320 is that the Department has three years from the extended due date of a return, which is the "last day prescribed for filing" a return, to render its assessment .

Moreover, the Department has interpreted regulation 100.9320 in a manner that flatly contradicts the taxpayer's contentions. In letter ruling IT 02-0044-GIL the Department expressly construes regulation 100.9320 as providing a basis for its conclusion that "even if a tax return was timely filed ..., the applicable three-year statute of limitations would not expire until October 15 [i.e. the extended due date] of the third year following the year in which the return was filed." Department's General Information Letter No. IT 02-0044-GIL, 10/17/2002.

While not precedent, and not binding upon any court, interpretations by an agency charged with administering a statute are entitled to respect and deference from a reviewing court. Craftmasters, Inc. v. Department of Revenue, 269 Ill. App. 3d 934, 940-41 (4<sup>th</sup> Dist. 1995). Moreover, as noted in Kronemeyer v. U.S. Bank National Association, 368 Ill. App. 3d 224, 229 (5<sup>th</sup> Dist. 2006), "[T]his principle of deference to agency interpretations is even stronger when the agency is interpreting its own regulation." Accordingly in Kronemeyer, *supra*, the court states that when an agency interprets its own regulation, the agency's interpretation is controlling unless "clearly erroneous or inconsistent with the regulation." *Id.*

The Illinois Appellate Court's pronouncement in Kronemeyer regarding the level of deference to be given an agency's interpretation of its own regulation is consistent with United States Supreme Court decisions that have addressed the level of deference to which an agency's

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<sup>3</sup> The original due date of the taxpayer's 2006 return was March 15, 2006, and the original due date of the taxpayer's 2007 return was March 15, 2007. See Taxpayer's Brief in Support of Motion for Summary Judgment; Department Motion Hearing Ex. 5.

interpretation of its own regulations is entitled. Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock and Sand Co., 325 U.S. 410 (1945). Indeed, with respect to the deference to be accorded an agency's interpretation of its own regulation, the U.S. Supreme Court, in Seminole Rock & Sand Co., *supra*, offers the following:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention [of the legislature] or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.  
Seminole Rock & Sand Co., *supra* at 413-14.

Accordingly, applying principles enumerated by both the Illinois and federal courts in the instant case, the Department's interpretation of regulation 100.9320 contained in IT-02-0044-GIL, while not binding legal precedent or binding upon a court of law, is entitled to "controlling weight" unless it is "plainly erroneous" or "inconsistent with" this regulation and the statutory provision this regulation construes.

As noted above, the Department's interpretation of regulation 100.9320 that is contained in IT-02-0044-GIL construes the regulation to mean that the statute of limitations for the issuance of assessments is three years from the extended due date of the taxpayer's original return. It also construes this limitation period to apply regardless of whether the taxpayer has filed its return on the original due date or the extended due date for this return.

The taxpayer has provided no evidence or argument that this Department's interpretation of regulation 100.9320 indicated in IT-02-0044-GIL is inconsistent with this regulation or with section 905 of the IITA. Indeed, such an argument by the taxpayer would be problematic, since both regulation 100.9320 and section 905 provide that a notice of deficiency must be issued not later than three years after the date a return was filed, and subsection (h) of both of these

provisions states that and that a return is deemed filed on “the last day prescribed by law” for filing a return including any extension thereof. This language is certainly not inconsistent with the Department’s interpretation of the statute of limitations provisions of section 905 and regulation 100.9320.

The taxpayer's principal contention is that the Department's construction of regulation 100.9320 is clearly erroneous because it conflicts with regulations and case law construing the statute of limitations upon the Internal Revenue Service's authority to issue notices of assessment contained in section 6501 of the Internal Revenue Code (“IRC”). Section 6501 of the IRC (26 U.S.C.A. §6501) provides, in pertinent part, as follows:

(a) General rule.

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed ... [.]

With respect to the statute of limitations provision contained in section 6501, the taxpayer, in its brief, avers the following:

The taxpayer’s position is supported at IRS Code sec. 301.6501(b)(1)[.] Time limit without regard to extension[.]  
This position is further supported by the cases:  
Davenport Bank & Trust Co., DC Iowa, 93-1 USTC P50193  
D. Purcella, DC Colo., 92-1 USTC P50083

The taxpayer’s citations stand for the proposition that, for federal tax purposes, the statute of limitations contained in section 6501 of the IRC expires three years after the taxpayer’s return is filed irrespective of any extended due date for filing the return.

A comparison of section 6501 of the IRC and section 905 of the IITA indicates that these provisions are indeed comparable, both providing that the statute of limitations expires “3 years after the return was filed.” With respect to the effect of federal interpretations of provisions of

the IRC that are comparable to provisions contained in the IITA, section 102 of the IITA provides as follows:

Construction. Except as otherwise expressly provided or clearly appearing from the context, any term used in this Act shall have the same meaning as when used in a comparable context in the United States Internal Revenue Code of 1954 or any successor laws or laws relating to federal income taxes and other provisions of the statutes of the United States relating to federal income taxes as such Code, laws and statutes are in effect for the taxable year.

35 ILCS 5/102

In essence, the taxpayer contends that the construction given the term “3 years after the return was filed” contained in IRC section 6501, in the cases and other authority construing the federal income tax statute of limitations it has offered, controls the proper interpretation to be given the virtually identical term in section 905(a) of the IITA by virtue of IITA section 102. This argument fails, however, because section 102, by its own terms, is applicable only to the extent that the provisions of the IITA, and the construction given these provisions by the Department, do not expressly conflict with the applicable federal construction of comparable statutory terminology. In the instant case, the federal interpretation of the term “3 years after the return was filed” used in section 6501 cited by the taxpayer is expressly contradicted by the construction of section 905 of the IITA contained in regulation 100.9320 which states that the statute of limitations contained in section 905 does not expire three years from the date that the original return was filed (the federal rule) but, rather three years from the “last date prescribed for filing a return” if this date is later than 3 years from the date the taxpayer’s return was filed. Accordingly, while the precedents cited by the taxpayer construe a provision of federal law that is comparable to section 905, these precedents are not controlling because they conflict with an “expressly provided” provision of Illinois law, namely regulation 100.9320.

With respect to the tax year 2007, the taxpayer also contends that the Department is precluded from assessing tax because doing so would modify net income reported in 2004, a year that was closed by the three year statute of limitations indicated in section 905 of the IITA at the time the Department's assessment for 2007 was issued. While the taxpayer has cited federal case law it contends supports this claim, I find that none of these cases are in point. Moreover, since the taxpayer was assessed on May 17, 2010, which is within 3 years of the date on which it filed its return for 2007, the taxpayer cannot argue that the Department's assessment for 2007 was barred by section 905(a) since such an argument would not be supported by the record in this case.

The statute of limitations provision the taxpayer has presumably asked the administrative law judge to construe in its Motion for Summary Judgment is section 903(b) of the IITA which provides as follows:

Limitations on assessment. No deficiency shall be assessed with respect to a taxable year for which a return was filed unless a notice of deficiency for such year was issued not later than the date prescribed in section 905.

While this section bars any change to a prior year return changing the amount of taxes due for a prior year for which a notice of deficiency has not been timely issued, the language of this provision, on its face, only bars the issuance of a notice of deficiency pertaining to such a prior year return. It does not prohibit a change to a prior year's reported net income that does not result in the assessment of a deficiency for that year even though the change affects the liability that has been determined for that year. While the Department's *de facto* modification of income reported for 2004 to disallow the amount of net operating loss reported in that year has affected the amount of net income attributable to that year, the Department has not issued a notice of deficiency that pertains to 2004. Rather, it has issued a timely notice of deficiency for the tax

year 2007 that is not barred by the statute of limitations on assessments prescribed by section 905 of the IITA. Consequently it has not violated the limitations on assessments prescribed by section 903(b).

**Conclusion**

For the reasons enumerated herein, I find that the Department's Notices of Deficiency issued to the taxpayer for the tax years 2006 and 2007 were not barred by the 3 year statute of limitations prescribed by section 905 of the IITA. I recommend, therefore, that the Director grant the Department's Cross-Motion for Summary Judgment, that it deny the taxpayer's Motion for Summary Judgment, and that he finalize, as issued, the Notices of Deficiency in controversy.

**Ted Sherrod  
Administrative Law Judge**

**Date: August 8, 2011**