IT 16-08
Tax Type: Income Tax
Tax Issues: Statute of Limitations Application and Federal Change (Corporation)

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

ABC BUSINESS,	)	Docket No.	XXXX
Taxpayer	)	Account ID	XXXX
v.	)	Tax Year Ending	1999
THE DEPARTMENT OF REVENUE	)	John E. White,	
OF THE STATE OF ILLINOIS	)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Fred Marcus and Jennifer Zimmerman, Horwood Marcus & Berk, Chartered, appeared for ABC Business Inc. & Subsidiaries; Rickey Walton, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves a Notice of Denial (Denial) the Illinois Department of Revenue (Department) issued to ABC Business Inc. & Subs. (ABC Business or Taxpayer), after reviewing the amended Illinois income tax return Taxpayer filed, in August 2008, to claim a credit or refund of tax claimed to been overpaid in error regarding tax year ending July 2, 1999 (TYE 1999). Taxpayer filed the 2008 Illinois amended return to report that a final federal change had been made to the amount of a capital loss Taxpayer incurred in TYE June 28, 2002 (TYE 2002), and which Taxpayer was able to carry back and use as a deduction to reduce its federal taxable income for TYE 1999.

In lieu of hearing, the parties filed cross-motions for summary judgment. Within their respective motions and briefs, the parties dispute whether Taxpayer's 2008 amended return was filed within the period set by § 911 of the Illinois Income Tax Act (IITA). After considering the

facts not in dispute and applicable Illinois law, I recommend that the Director grant the Department's Motion, and deny Taxpayer's Motion.

Facts Not In Dispute

Facts Regarding Taxpayer And Its Federal & Illinois Returns For The Periods At Issue

1. Taxpayer is a distributor of electronic components, computer products and embedded technology to customers located throughout the world. Taxpayer's Motion for Summary Judgment (TMSJ), Ex. 1 (affidavit of John Doe (John Doe), Taxpayer's senior tax analyst), ¶ 5.
2. On September 24, 2001, the IRS started an audit examination of Taxpayer's 1998-2000 tax years. TMSJ, Ex. 1, ¶ 8, 11-13; Stipulated Exhibit (Stip. Ex.) C (copy of Form 4549-A, titled, Department of the Treasury – [IRS] Income Tax Examination Changes, commonly referred to as a revenue auditor report (RAR), regarding Taxpayer's TYE 1998-2000, and dated February 22, 2005).
3. On October 1, 2002, Taxpayer filed a United States Form 1139, titled, Corporation Application for Tentative Refund (Form 1139), with the Internal Revenue Service (IRS), to apply to carry back to prior years a $XXX net operating loss, and a $XXX net capital loss (hereafter, capital loss), both of which were incurred in TYE 2002. Stip. Ex. B (copy of Taxpayer's 2002 Form 1139), p. 1, lines 1-2.
4. On its 2002 Form 1139, Taxpayer applied to carry back a TYE 2002 capital loss, in the amount of $XXX, to TYE 1999, to use as a deduction to reduce its previously reported federal taxable income (FTI) for TYE 1999 from $XXX to $XXX. Stip. Ex. B, pp. 1 (lines 1b, 11-13, 27 (columns (c)-(d)), 2 (attachment to Taxpayer's 2002 Form 1139 showing

Taxpayer's computation of tentative refund regarding TYE 1999). By using its TYE 2002 capital loss to reduce its previously reported FTI for TYE 1999, Taxpayer's 2002 Form 1139 claimed a tentative refund in the amount of $XXX for TYE 1999. Stip. Ex. B, pp. 1 (lines 11-13, 27 (columns (c)-(d)), 2.[1]

5. On November 11, 2002, the IRS paid Taxpayer the $XXX Taxpayer claimed as a tentative refund for TYE 1999 on its 2002 Form 1139. TMSJ, Ex. 1, ¶¶ 9-10; Stip. Ex. E (copy of pp. 3-4 of an IRS federal transcript regarding Taxpayer).
6. Taxpayer did not file an IL-1120-X (Illinois Amended Corporation Income and Replacement Tax Return) with the Department within 2 years and 120 days of the date the IRS paid Taxpayer the tentative refund, to notify the Department of that alteration, and to request a refund of Illinois income tax regarding TYE 1999. Stip. Ex. X (copy of Taxpayer's response to the Department's First Request to Admit), p. 2 (response to request number 4).
7. Upon the IRS's completion of its audit of Taxpayer's TYE 1998-2000, the audit examination changes were described in an RAR dated February 22, 2005. Stip. Ex. C; TMSJ, Ex. 1, ¶¶ 8, 11-13.
8. The IRS's audit examination of Taxpayer's TYE 1998-2000 did not include any review or consideration of the 2002 capital loss Taxpayer previously reported on its 2002 Form 1139, and used as a deduction on that Form to reduce its FTI for TYE 1999. TMSJ, Ex. 1, ¶ 12; Stip. Ex. C.
9. As a result of the IRS's audit examination of Taxpayer's TYE 1998-2000, the IRS reduced Taxpayer's TYE 1999 FTI from $XXX to $XXX. Stip. Ex. C; TMSJ, Ex. 1, ¶¶ 8, 11.

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[1] Taxpayer's 2002 Form 1139 also claimed a tentative refund for its TYE 1997, based on its application to carry back part of a net operating loss (NOL) incurred in TYE 2002 to reduce its TYE 1997 FTI. Stip. Ex. B, pp. 1 (lines 11-13, 27 (columns (a)-(b)), 2. That aspect of Taxpayer's 2002 Form 1139 is not at issue in this matter.

10. On or about April 11, 2005, Taxpayer filed a form IL-1120-X, titled, Amended Corporation Income and Replacement Tax Return, with the Department, regarding TYE 1999. Stip. Ex. D (copy of Taxpayer's form IL-1120-X for TYE 1999 (hereafter, 2005 IL amended return). On that 2005 IL amended return, Taxpayer reported the IRS's February 22, 2005 alteration of Taxpayer's FTI for TYE 1999 from $XXX to $XXX, and requested a refund of Illinois tax in the amount of $XXX. Stip. Ex. D, p. 1 (Parts I-II of return).
11. On August 4, 2004, the IRS started an audit examination of Taxpayer's TYE 2001-2003. TMSJ Brief, Ex. 1, ¶ 14; *see also* Stip. Ex. F (copy of RAR regarding Taxpayer's TYE 2001-2003).
12. Upon the IRS's completion of its audit of Taxpayer's TYE 2001-2003, the audit examination changes were described in an RAR dated December 12, 2007. Stip. Ex. F.
13. Pursuant to its audit of Taxpayer's TYE 2002, the IRS reduced the amount of the capital loss Taxpayer had previously reported on its 2002 Form 1139, and which Taxpayer had previously used on that Form to reduce its FTI for TYE 1999. Stip. Exs. B, F; TMSJ Brief, Ex. 1, ¶¶ 9-10, 16. Because the IRS reduced the amount of the capital loss Taxpayer incurred in TYE 2002, the IRS's 2008 audit examination for TYE 2002 also increased the amount of Taxpayer's FTI for TYE 1999 from the amount previously reported on Taxpayer's 2002 Form 1139. Stip. Exs. B, F; TMSJ Brief, Ex. 1, ¶¶ 9-10, 16.
14. On April 24, 2008, the IRS notified Taxpayer that the Joint Committee on Taxation took no exception to the IRS's audit determinations of such items for Taxpayer's TYE 2002. TMSJ Brief, Ex. 1, ¶ 16-17; Stip. Ex. G (copy of letter from IRS to Taxpayer, dated April 24, 2008).

15. On or about August 11, 2008, Taxpayer filed a form IL-1120-X with the Department regarding TYE 1999. Stip. Ex. H (copy of Taxpayer's form IL-1120-X for TYE 1999 (hereafter, 2008 IL amended return)).

16. On Taxpayer's 2008 IL amended return, Taxpayer reported a final federal change to the amount of Taxpayer's previously reported FTI for TYE 1999 from $XXX to $XXX. Stip. Ex. H. Based on that federal change, Taxpayer claimed a refund of $XXX on its 2008 IL amended return. *Id*.

17. After Taxpayer filed its 2008 IL amended return, the Department issued Taxpayer a form Ltr-353, titled, Notice of Claim Status, dated October 8, 2008 (October 2008 Notice), which included the following text:

> ***
>
> Dear Taxpayer:
>
> We have reviewed your Form IL-1120-X, Amended Corporation Income and Replacement Tax Return, which you signed and dated August 11, 2008, for the tax years indicated above. This review is not the result of an audit.
>
> Our records show total payments and credits of $XXX, minus corrected tax of $XXX, minus balance adjustment of $XXX, minus interest of $XXX[,] equals an overpayment of $XXX.
>
> If you have any questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4 p.m. Our address and telephone number are below. ***

Stip. Ex. I (copy of October 2008 Notice).

18. Thereafter, on ten separate occasions, the Department sent Taxpayer statements which communicated to Taxpayer that the Department's records showed that Taxpayer had an income tax credit balance in excess of $XXX that was attributable to Taxpayer's TYE 1999. Stip. Exs. J-S (copies of, respectively, documents titled, Taxpayer Statement, which the Department issued to Taxpayer and which are dated between June 10, 2009 through February 3, 2012).

19. On March 10, 2010, Betty Blue (Betty Blue), a tax analyst employed by Taxpayer, had a telephone conversation with Lori Oaks (Oaks), a Department employee assigned to the Department's Business Processing Division. TMSJ, Ex. 2 (Betty Blue affidavit), ¶¶ 5-8.

20. During that conversation, Oaks told Betty Blue that the Department did not have funds to pay refunds, and that the Department would not allow Taxpayer to apply any of its outstanding credits from its 1999 fiscal year to its future tax liabilities. TMSJ, Ex. 2, ¶¶ 6-7; *see also* Stip. Exs. T-V (copies of, respectively, Illinois Auditor General Report Digest of Financial Audit and Compliance Examinations of the Department, for fiscal years ending June 30, 2009, June 30, 2010, and June 30, 2011).

21. At or about the time the Department was issuing statements to Taxpayer notifying it that the Department's records showed that Taxpayer had an income tax credit balance in excess of $XXX that was attributable to Taxpayer's TYE 1999, a Department employee, George Smith (Smith), was assigned to conduct a second level review of Taxpayer's 2008 IL amended return, due to the amount of the refund sought on that return. Department's Motion for Summary Judgment (DMSJ), Ex. 1 (Smith affidavit), ¶¶ 8-9, 11-27.

22. As a result of Smith's second level review of Taxpayer's 2008 IL amended return, on February 22, 2012, the Department issued another form Ltr-353, titled, Notice of Claim Status, Notice of Denial (Denial), which included the following text:

***

Notice of Denial

> We have reviewed your Form IL-1120-X, Amended Corporation Income and Replacement Tax Return, which you signed and dated August 11, 2008, for the tax years indicated above. This review is not the result of an audit. We have denied your claim for refund.
>
> You must file a claim for refund of overpayment of tax resulting from a federal change within two years of the federal finalization notification from the Internal Revenue [S]ervice, stating that they accepted your change, either by refund, agreement, or judgment. The Federal Form 4549-A and 4549-B

> attached to your claim indicates that a Federal Form 1139 was filed previously to report capital loss carrybacks, however our records indicate no claim was filed to report this change to Illinois. We have allowed the amount of capital loss carryback show[n] on your Federal Forms 4549-A and 4549-B to offset any penalty and interest associated with your increased Illinois tax liability due to the increase of federal taxable income.
>
> ***

Stip. Ex. A (copy of Denial); *see also* DMSJ Ex. 1, ¶¶ 26-27.

Conclusions of Law:

The purpose of summary judgment proceedings is to decide questions of law after first deciding that no genuine issue of material fact exists, which is to be determined from the pleadings, depositions, affidavits, and exhibits. Makela v. State Farm Mutual Automobile Ins. Co., 147 Ill. App. 3d 38, 50, 497 N.E.2d 483, 491 (1st Dist. 1986). Entry of summary judgment has two requisites: the absence of any issue as to material fact and the unmistakable conclusion of law that the moving party is entitled to the judgment he seeks. Skipper Marine Electronics, Inc. v. United Parcel Service, Inc., 210 Ill. App. 3d 231, 235, 569 N.E.2d 55, 58-59 (1st Dist. 1991). Where both parties file motions for summary judgment, only a question of law is raised. Lake Co. Stormwater Management Comm. v. Fox Waterway Agency, 326 Ill. App. 3d 100, 104, 759 N.E.2d 970, 973 (2d Dist. 2001).

Here, the parties dispute whether Taxpayer's 2008 IL amended return was timely filed within the period set by IITA § 911(b). Department's Cross-Motion For Summary Judgment And Memorandum Of Law In Support (DMSJ Brief), pp. 8-16; Memorandum in Support of Taxpayer's Motion for Summary Judgment (TMSJ Brief), pp. 21-24. In this regard, the parties dispute whether Taxpayer's receipt of the $XXX refund, which the IRS paid to Taxpayer on November 11, 2002 after reviewing Taxpayer's 2002 Form 1139, was an alteration which triggered a notification required by IITA § 506(b). *See* DMSJ Brief, pp. 8-11; TMSJ Brief, p. 20. On this question, the facts are not in dispute, and the parties dispute only how the law applies to

such facts. I discuss each motion in turn.

The Department's Motion

The Department's Motion asserts that it is entitled to judgment, as a matter of law, because Taxpayer's 2008 IL amended return/claim for refund was not filed within the statutory period of limitations set by IITA § 911(b)(1). DMSJ, pp. 1-2. The expiration of a statute of limitations is an affirmative defense. Jenna R.P. v. Chicago School Dist., 2013 IL App (1st) 112247, ¶ 75, 3 N.E.3d 927, 943 (2013). A party who claims the benefit of a statute of limitations has the burden of proving that the action is barred by the limitations period set by a particular, and applicable, statute. In re Marriage of Stockton, 401 Ill. App. 3d 1064, 1074, 937 N.E.2d 657, 665 (2d Dist. 2010); 25 Ill. Law and Prac. *Limitations of Actions* § 136 (2012).

Section 911(b)(1) of the IITA sets the applicable statute of limitations for a taxpayer who, as a result of a federal alteration required to be reported to the Department by IITA § 506(b), seeks to claim a refund of Illinois income and/or replacement tax previously overpaid in error. 35 ILCS 5/911(b)(1). More broadly, § 911 includes a general statute of limitations, and several other exceptions to the general limitation period, for different, specified situations. The general rule and exception applicable here are included within paragraphs (a) and (b) of § 911, which provide, in pertinent part, as follows:

> Sec. 911. Limitations on Claims for Refund.
> (a) In general. Except as otherwise provided in this Act:
> (1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and
> (2) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.
> (b) Federal changes.

> (1) In general. In any case where notification of an alteration is required by Section 506(b), a claim for refund may be filed within 2 years after the date on which such notification was due (regardless of whether such notice was given), but the amount recoverable pursuant to a claim filed under this Section shall be limited to the amount of any overpayment resulting under this Act from recomputation of the taxpayer's net income, net loss, or Article 2 credits for the taxable year after giving effect to the item or items reflected in the alteration required to be reported.
>
> ***

35 ILCS 5/911(a)-(b)(1).

As the plain text reflects, the event that starts the statutory period set by § 911(b)(1) running is "any case where notification of an alteration is required by § 506(b)[.]" 35 ILCS 5/911(b)(1). The exception set forth in § 911(b)(1) extends the time provided by the general rule set by § 911(a) for a taxpayer to file claims for refund that are based on federal changes to items of the taxpayer's net income, net loss, or Article 2 credits for the taxable year. 35 ILCS 5/911(b)(1). This extension is provided because such federal changes often, if not always, occur well after the filing or payment dates referred to within § 911(a). Reading the extended statutory period set by § 911(b)(1) together with § 911(a)(2)'s general rule prohibiting credits or refunds for claims not filed within the particular statutory period, if a claim for refund based on a federal change is not filed "within 2 years after the date on which such notification was due[,]" then "[n]o credit or refund shall be allowed or made …." 35 ILCS 5/911(a)(2), (b)(1); Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 267, 586 N.E.2d 516, 519 (1st Dist. 1991) ("The plain meaning of section 911 is that the taxpayer has an affirmative duty to file for a tax refund within a prescribed period of time. … Since Dow filed its claim for refund … well beyond the … [time] allotted by the statute of limitations, and without an agreement for extension thereof, the Department maintains and we agree that such claim is now time-barred.").

Here, the parties dispute whether the IRS's payment of a tentative refund to Taxpayer on

November 11, 2002 was an alteration that § 506(b) required Taxpayer to report to the Department not later than 120 days after it was paid. 35 ILCS 5/911(b)(1). In November 2002, § 506(b) provided as follows:

> Sec. 506. Federal Returns.
>
> ***
>
> (b) Changes affecting federal income tax. A person shall notify the Department if:
>
> (1) the taxable income, any item of income or deduction, the income tax liability, or any tax credit reported in an original or amended federal income tax return of that person for any year or as determined by the Internal Revenue Service or the courts is altered by amendment of such return or as a result of any other recomputation or redetermination of federal taxable income or loss, and such alteration reflects a change or settlement with respect to any item or items, affecting the computation of such person's net income, net loss, or of any credit provided by Article 2 of this Act for any year under this Act, or in the number of personal exemptions allowable to such person under Section 151 of the Internal Revenue Code, or
>
> (2) the amount of tax required to be withheld by that person from compensation paid to employees and required to be reported by that person on a federal return is altered by amendment of the return or by any other recomputation or redetermination that is agreed to or finally determined on or after January 1, 2003, and the alteration affects the amount of compensation subject to withholding by that person under Section 701 of this Act.
>
> Such notification shall be in the form of an amended return or such other form as the Department may by regulations prescribe, shall contain the person's name and address and such other information as the Department may by regulations prescribe, shall be signed by such person or his duly authorized representative, and shall be filed not later than 120 days after such alteration has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund, tentative carryback adjustment, abatement or credit resulting therefrom has been assessed or paid, whichever shall first occur.

35 ILCS 5/506(b) (2002 through 2011); P.A. 92-846 (eff. August 23, 2002).

Subparagraphs (1) and (2) of § 506(b) describe the alterations for which persons are required to provide notice to the Department, and the final paragraph describes the form of the required notification, and when a notification must be made to the Department. When describing the timing of a required notification, the legislature repeatedly used the disjunctive, "or." 35

ILCS 5/506(b). "As used in its ordinary sense, the word 'or' marks an alternative indicating the various parts of the sentence which it connects are to be taken separately." Elementary School Dist. 159 v. Schiller, 221 Ill.2d 130, 145, 849 N.E.2d 130, 359 (2006). When used in the final paragraph of § 506(b), the legislature's repeated use of the disjunctive means that a required notice must be filed not later than 120 days after the date *any* of the alterations described in the sentence first occurs. 35 ILCS 5/506(b); Schiller, 221 Ill.2d at 145, 849 N.E.2d at 359. At a minimum, therefore, I construe the last sentence of the statutory text to mean that the required notice "shall be filed not later than 120 days after[: (1)] such alteration has been agreed to or finally determined for federal income tax purposes or [(2) not later than 120 days after] any federal income tax deficiency or refund, tentative carryback adjustment, abatement or credit resulting therefrom has been assessed or paid, whichever shall first occur." 35 ILCS 5/506(b). Put a different way, the statutory text mandates that:

> **the required notice shall be filed:**
> **not later than 120 days after:**
> - such alteration has been agreed to for federal income tax purposes, **or**
>
> **not later than 120 days after:**
> - such alteration has been finally determined for federal income tax purposes, **or**
>
> **not later than 120 days after:**
> - any federal income tax deficiency has been assessed or paid, **or**
>
> **not later than 120 days after:**
> - after any refund, tentative carryback adjustment, abatement **or** credit resulting therefrom has been paid,
>
> **whichever shall first occur**.

See 35 ILCS 5/506(b).

The plain text of § 506(b) reflects the Illinois General Assembly's recognition that there are procedures by which the IRS, the federal tax court system, and/or federal courts resolve and finalize federal tax disputes which arise between the IRS and taxpayers. By using the phrase, "whichever shall first occur," the Illinois General Assembly made clear that a taxpayer's duty

was to provide notice of certain alterations specified within § 506(b) within 120 days of the date such specifically identified alterations first occur, even though it might (or will) take much longer for any such alteration to be "agreed to or finally determined for federal income tax purposes[.]" *Id*. Simply put, the legislature's use of the phrase "whichever shall first occur" within § 506(b) means that not all of the alterations required to be reported by a taxpayer will have been agreed to or finally determined for federal income tax purposes by the date the statutory notification of the alteration is due.

That is why the Department's characterization of the November 11, 2002 refund paid to Taxpayer as being a "final federal change" is not accurate. *See, e.g.*, DMSJ Brief, p. 11 ("Pursuant to IITA §506(b), the payment of the federal refund based on the net capital loss carryback constitutes a final federal change. (35 ILCS 5/506(b))."); Department's Response to Taxpayer's [MSJ] (Department's Response), pp. 2-3, 7. Taxpayer has presented evidence and cited to authority which clearly demonstrates that ─ for federal income tax purposes ─ the IRS's November 11, 2002 tentative carryback adjustment to Taxpayer's TYE 1999 FTI did not become final until 2008, when the tentative alteration that first occurred on November 11, 2002 was, itself, altered as a result of the IRS's final determination of the amount of the capital loss Taxpayer incurred in TYE 2002. TMSJ, Ex. 1, ¶¶ 8-12, 14-17; Stip. ¶¶ 2, 5-7; Stip. Exs. B, E-G; TMSJ Brief, pp. 11-12, 24. As a matter of *federal* income tax law, the IRS's issuance of tentative refund to Taxpayer on November 11, 2002 did not effect a final change to either Taxpayer's capital loss for TYE 2002, or to Taxpayer's FTI for TYE 1999.

However, as a matter of *Illinois* law, the tentative carryback adjustment refund the IRS paid to Taxpayer on November 11, 2002 was an alteration that § 506(b) required Taxpayer to report to the Department not later than 120 days after the refund was paid. 35 ILCS 5/506(b).

So, while the Department incorrectly characterizes the tentative carryback adjustment refund as being a final federal change, the Department is correct in its determination of when § 506(b) required Taxpayer to notify the Department that that alteration had first occurred. DMSJ, p. 11 ("Inasmuch as the IRS paid the 'tentative carryback adjustment' the Taxpayer claimed on its Form 1139 on November 11, 2002, the Taxpayer was required to report that final [*sic*] federal change to the Department on or before March 11, 2003, the date 120 days after November 11, 2002 …."). The plain text of § 506(b) requires a person to notify the Department not later than 120 days after the date the person is paid a refund resulting from a tentative carryback adjustment not because such an alteration "has been agreed to or finally determined for federal income tax purposes," but because it is one of the specifically identified alterations that must be reported when it "first occur[s]." 35 ILCS 5/506(b).

The Illinois Income Tax regulation (IITR) adopted by the Department to administer and enforce § 909 is similarly clear that a taxpayer has a statutory duty to file an amended return to report its receipt of a tentative refund paid following the IRS's review of the taxpayer's filed federal form 1139. Specifically, 86 Ill. Admin. Code § 100.9400 provides, in pertinent part:

> 100.9400. Credits and Refunds (IITA Section 909)
>
> ***
>
> f) Refund claim.
>
> ***
>
> 4) Claim form; federal change. If, on the other hand, the due date for filing a return has passed and under the Act an overpayment based on a federal change has arisen, in addition to meeting the requirements of IITA Section 506 a claim for refund based on the federal change should be made by the filing (following the instructions thereon) of a notice of the change on Illinois Form IL-843, Form IL-1040-X, or Form IL-1120-X, as appropriate. To meet the requirements of IITA Section 909(d) for stating specific grounds, there should be within the form or on an attachment an explanation in detail sufficient to show the nature of the items of change or alteration. If helpful or otherwise appropriate to show the grounds and to compute the amount claimed as refundable, another return marked "AMENDED" may be attached or filed in connection with the Form IL-

> 843. Further, when a claim for refund is filed based on a federal change giving rise to an overpayment, documentation in form of the original federal documents or correspondence furnished the taxpayer or other satisfactory proof in connection with the change (or true and correct fully legible photocopies) shall be attached evidencing that the federal change represents an agreed to or final federal Internal Revenue Service (or court imposed) acceptance, recomputation, redetermination, change, tentative carryback adjustment or settlement, and it shall be stated or shown that no contest is pending. **In this connection, the payment received as the result of the filing of an application for a tentative carryback adjustment (on Form 1045 or Form 1139) pursuant to 26 USC 6411 is a change reportable under IITA Section 506.** A claim for refund of an overpayment of Illinois income tax occasioned by the payment of a tentative carryback adjustment may be filed on Form IL-1040-X and Form IL-1120-X. A premature or incomplete claim on Form IL-843, Form IL-1040-X, or Form IL-1120-X shall not constitute a claim for refund within the meaning of IITA Section 909(d), nor for purposes of commencing the 6-month period in subsection (g). Upon any claim being received and identified as premature, incomplete, or otherwise defective under the Act, the Department, as soon as practicable, shall notify the taxpayer in writing to enable, if possible, the timely submission of a mature and perfected claim.
>
> ***

86 Ill. Admin. Code § 100.9400(f) (emphasis added). The text highlighted within IITR § 100.9400(f)(4) has been part of the regulation since at least 1990, and it remains in effect currently. *Compare id. with* 14 Ill. Reg. 10082 (eff. June 7, 1990).

Taxpayer does not take issue with the plain text of the applicable regulation quoted above; instead, it ignores it. *See* TMSJ Brief, pp. 9-12 (text of IITR § 100.9400(f) not included within section of Taxpayer's Brief titled, Applicable Law). It ignores, too, the effect of § 506(b)'s last yet significant phrase, "whichever shall first occur." 35 ILCS 5/506(b). But when the Illinois General included that phrase within § 506(b), one must presume it intended the phrase to have meaning. People ex rel. Illinois Dept. of Corrections v. Hawkins, 2011 IL 110792, ¶ 23, 952 N.E.2d 624, 630 (2011) ("statute should be read as a whole and construed so as to give effect to every word, clause, and sentence; we must not read a statute so as to render any part superfluous or meaningless."); 3A Sutherland Statutory Construction § 66:3 & n.12 (7th ed.)

("Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.") (*citing* Hawkins, *supra*, in footnote). I cannot ignore the plain text of § 506(b), or its effect, and I recommend the Director not do so, either. In re County Collector of Kane Co., 132 Ill. 2d 64, 547 N.E.2d 107 (1989) ("In construing a statute or an ordinance, a court should not adopt a construction which renders words or phrases in a statute superfluous."). As a matter of Illinois law, the tentative carryback adjustment refund Taxpayer received on November 11, 2002 was an alteration § 506(b) required Taxpayer to report to the Department not later than 120 days after it was paid. 35 ILCS 5/506(b); 86 Ill. Admin. Code § 100.9400(f).

This contested case also shows that, in the event there is a federal alteration for which § 506(b) requires a taxpayer to provide notification to the Department when the alteration first occurs, § 506(b) also requires the taxpayer to provide additional notification(s) whenever the alteration which first occurs is, itself, changed as a result of some later agreement or other final determination for federal income tax purposes. 35 ILCS 5/506(b). Here, for example, the undisputed facts show that there were three separate federal alterations to the amount of Taxpayer's FTI for TYE 1999, and the plain text of § 506(b) required Taxpayer timely to notify the Department after each such alteration.

First, § 506(b) required Taxpayer timely to notify the Department of its initial receipt of the tentative carryback adjustment refund the IRS paid it on November 11, 2002 regarding TYE 1999. Stip. Exs. B, E; TMSJ Brief, Ex. 1, ¶¶ 9-10; 35 ILCS 5/506(b); 86 Ill. Admin. Code § 100.9400(f). Second, § 506(b) required Taxpayer timely to notify the Department after the IRS, on February 22, 2005, issued the February 22, 2005 RAR regarding its audit of Taxpayer's TYE 1998-2000, and reduced Taxpayer's FTI for TYE 1999. Stip. Exs. C-D; TMSJ Brief, Ex. 1, ¶¶ 8,

11-12; 35 ILCS 5/506(b). Third, and finally, § 506(b) required Taxpayer to notify the Department of the alterations that took place on April 24, 2008, when the IRS notified Taxpayer that its determination of the amount of Taxpayer's capital loss for TYE 2002, and which loss was available to carry back and use as a deduction to reduce Taxpayer's FTI for TYE 1999, had been finalized for federal income tax purposes. Stip. Exs. F-G; TMSJ Brief, Ex. 1, ¶¶ 13-17; 35 ILCS 5/506(b).

Each of those three events altered, by recomputation or determination, the amount of an item or items of income or deduction taken into account when computing Taxpayer's FTI for TYE 1999, and each such alteration reflected a change with respect to such item or items affecting the computation of Taxpayer's Illinois net income for TYE 1999. Stip. Exs. B-F; TMSJ Ex. 1, ¶¶ 8-17; 35 ILCS 5/506(b). The undisputed facts show that Taxpayer made the two later notifications (Stip. ¶¶ 4, 8; Stip. Exs. D, H; TMSJ Ex. 1, ¶¶ 13, 18), but not the one required regarding the alteration that first occurred on November 11, 2002. Stip. ¶ 24; Stip. Ex. X, p. 2 (response to request number 4).[2]

There is no dispute regarding the following facts, which are material to the Department's Motion. On November 11, 2002, after reviewing Taxpayer's 2002 Form 1139, the IRS issued a refund to Taxpayer in the amount of $115,251,241 for TYE 1999. Stip. ¶ 5; Stip. Ex. E; TMSJ Brief, Ex. 1, ¶¶ 9-10. By counting November 12 as the 1st day after November 11, the

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[2] And it must be noted that, as between the alteration that occurred on November 11, 2002, when the IRS paid Taxpayer a tentative refund for TYE 1999 following its review of Taxpayer's 2002 Form 1139, and the alterations that occurred on April 24, 2008, when the Joint Committee completed its review of the IRS's audit examination of Taxpayer's TYE 2000-2003, it was only the alteration that first occurred that would have produced an Illinois tax refund to Taxpayer regarding TYE 1999. 35 ILCS 5/506(b); 35 ILCS 5/911(b). That is because the IRS's audit examination alterations finalized in 2008 *decreased* the amount of Taxpayer's capital loss incurred in TYE 2002, and thereby *increased* the amount of Taxpayer's FTI for TYE 1999, from the amounts initially and tentatively determined when the IRS paid Taxpayer a refund for TYE 1999 on November 11, 2002. *Compare* Stip. Ex. B, pp. 1 (lines 11-13, 27 (columns (c)-(d)), 2 *and* DMSJ Ex. 1, ¶¶ 24-25 *with* Stip. Ex. F (bates stamp pages TP00035, TP00040, TP00054-55).

120th day after November 11, 2002 is March 11, 2003. *See* 5 ILCS 70/1.11. Between November 12, 2002 and March 11, 2003, Taxpayer did not file an Illinois amended return with the Department to notify it about the tentative carryback adjustment refund it received on November 11, 2002 regarding TYE 1999. Stip. Ex. X, p. 2 (response to request number 4); 35 ILCS 5/506(b); 86 Ill. Admin. Code § 100.9400(f). Nor did Taxpayer file an Illinois amended return for TYE 1999 on or before March 11, 2005, to claim a refund of Illinois income and replacement income tax based on the federal alteration of Taxpayer's FTI for TYE 1999, which first occurred on November 11, 2002. Stip. Ex. X, p. 2 (response to request number 4); 35 ILCS 5/911(b)(1).

The forgoing undisputed facts show that Taxpayer did not comply with the extended limitation period set by § 911(b)(1) for filing a claim for refund based on the federal alteration which first occurred on November 11, 2002. 35 ILCS 5/506(b); 35 ILCS 5/911(b)(1). "The obligation of a citizen to pay taxes is a purely statutory creation and, conversely, the right to a refund or credit can arise only from the acts of the legislature." Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (1st Dist. 1978). While the IITA grants taxpayers a statutory right to a claim a credit or refund for taxes overpaid in error (35 ILCS 5/909(d)), the General Assembly has also placed clearly stated time limits on a taxpayer's exercise of that statutory right. 35 ILCS 5/911(a)-(b); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519. Since there is no dispute that Taxpayer did not file a claim for refund within the extended limitation period set by IITA § 911(b)(1) for the federal alteration that occurred on November 11, 2002 (Stip. Ex. X, p. 2 (response to request number 4)), § 911(a)(2)'s general rule applies, and requires a determination, as a matter of law, that "[n]o credit or refund shall be allowed or made with respect to the year for which the claim was filed …." 35 ILCS 5/911(a)(2); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519.

Finally, in 2011, before the Department issued the Denial, the legislature amended § 909(a) to provide as follows:

> (a) In general. In the case of any overpayment, the Department, **within the applicable period of limitations for a claim for refund,** may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of the tax imposed by this Act, regardless of whether other collection remedies are closed to the Department on the part of the person who made the overpayment and shall refund any balance to such person or credit any balance to that person pursuant to an election under subsection (b) of this Section.
>
> ***

35 ILCS 5/909(a); P.A. 97-507, § 5 (effective August 23, 2011) (emphasis added).

What I infer from the amendment is the Illinois General Assembly's intent to limit the Department's authority to issue credits and/or refunds to those for which a taxpayer had filed a claim for refund within the applicable statute of limitations. In this regard, the legislature wanted to change Illinois law from the way the Dow court interpreted the prior statutory text. Dow Chemical Co., 224 Ill. App. 3d at 266-67, 586 N.E.2d at 519 ("When section 911 is read in conjunction with sections 904 and 909 it indicates, as determined by the trial judge, that although there is no limitation on the Department's authority to make a refund or a credit, there is a limit on the taxpayer's ability to file for one."). By the time the Department issued its Denial in this case, the Illinois General Assembly had not only imposed a time limit on a taxpayer's right to file a claim for credit or refund of tax overpaid in error, but it had also limited the Department's authority to issue credits or refunds to only those for which claims had been timely filed. Stip. ¶ 1; Stip. Ex. A; 35 ILCS 5/909(a); P.A. 97-507, § 5 (effective August 23, 2011).

Based on the undisputed facts and the plain text of IITA §§ 506(b) and 911(b)(1), I recommend that the Director grant the Department's Motion, and finalize the Department's Denial of Taxpayer's untimely filed 2008 IL amended return for TYE 1999.

Taxpayer's Motion

Taxpayer's Motion asserts that "[t]he sole issue … is whether the Department granted Taxpayer's refund claim for the Year at Issue by posting a credit in the amount of $XXX to Taxpayer's account, which the Department later improperly attempted to recover through the issuance of a Notice of Denial." TMSJ, ¶ 11. In its brief, Taxpayer asserts that it is entitled to judgment, as a matter of law, because the Department's issuance of the form Ltr-353, dated October 8, 2008, acted as "a notice of refund" of the amount claimed on Taxpayer's 2008 amended IL return, as that phrase is used in IITA § 909(e). TMSJ Brief, pp. 15 ("the issuance of the October 8, 2008 Notice constituted a notice of refund approving Taxpayer's claim."); *but see id*. p. 15 n.6 ("*** Thus, it [i.e., the October 8, 2008 Form Ltr-353] can only be characterized as a notice of credit under Section 909(e)."); 35 ILCS 5/909(e).

Taxpayer next reasons that, once the Department issues a notice of refund to a taxpayer, the only statutory procedure available to the Department to correct any purported error in its issuance is for the Department to issue a notice of deficiency (NOD) pursuant to IITA § 905(g). TMSJ Brief, p. 20. That statutory provision sets a time limit on the Department's authority to recover an erroneous refund. 35 ILCS 5/905(g). Taxpayer argues that, since the Department did not issue a notice of deficiency (NOD) within two years from October 8, 2008, the Department has no authority to recover the refund that notice represented. TMSJ Brief, p. 20.

Finally, Taxpayer asserts that, given the Department notices, the Department should be estopped from asserting that the October 8, 2008 Notice did not constitute a notice of refund, and that the Department should be precluded from denying the refund sought for TYE 1999. TMSJ Brief, pp. 16-19. Each of these arguments will be addressed in turn.

Taxpayer's Motion first asserts that, as a matter of law, the Department's October 8, 2008 Ltr 353 (October 8, 2008 Notice) constituted a notice of refund, as that phrase is used in § 909(e). TMSJ ¶ 11; TMSJ Brief, p. 15. Initially, I agree that this issue is one of law, not of fact. The parties do not dispute, for example, the text of the Department's October 8, 2008 Notice ─ or of any of the statements the Department issued to Taxpayer prior to the Denial. Nor do they dispute when such notices and statements were issued. Rather, they dispute the effect of them.

When Taxpayer filed its 2008 IL amended return, § 909(e) of the IITA provided, in pertinent part:

***

> (e) Notice of denial. As soon as practicable after a claim for refund is filed, the Department shall examine it and either issue a notice of refund, abatement or credit to the claimant or issue a notice of denial. ***

35 ILCS 5/909(e).

As an Illinois taxpayer and as an administrative law judge, I have never seen a Department form or letter titled, "notice of refund," but I have seen originals and copies of checks issued to taxpayers to refund overpayments of Illinois income tax. So, when I read the legislature's description of the different notices listed within § 909(e), I equate the phrase, notice of refund, with the actual issuance of a refund ─ that is, the issuance of a check drawn to the order of a taxpayer/claimant, or a direct deposit of funds to a taxpayer's account. This construction is consistent with the text of IITA § 905(g), which authorizes the Department to issue an NOD to recover an erroneous refund, and which provides that "a notice of deficiency may be issued at any time within 2 years from the making of such refund …." 35 ILCS 5/905(g). As that provision fairly implies, a refund is *made* when the Illinois comptroller issues a check drawn and made payable to a taxpayer/claimant, or when a direct deposit of such funds is made to the taxpayer's account. 35 ILCS 5/905(g).

Moreover, and notwithstanding Taxpayer's arguments here, a taxpayer is perfectly able to tell, and demonstrate, when it has received a tax refund. For example, Taxpayer does not dispute, and the evidence demonstrates, that it actually received a refund from the IRS on November 11, 2002, after the IRS reviewed the Form 1139 Taxpayer filed to apply to carry back a 2002 capital loss to reduce its 1999 FTI. TMSJ Brief, Ex. 1, ¶ 10; Stip. Ex. E. Even though Taxpayer correctly characterizes the November 11, 2002 refund as being "tentative," what was tentative about it was the finality of the alterations that gave rise to that refund, for federal income tax purposes. *See* TMSJ Brief, p. 24; 35 ILCS 5/506(b). The refund itself, however, objectively manifested the IRS's actual payment of a sum certain to Taxpayer on November 11, 2002, and the funds actually paid were, once the check was negotiated, immediately available for use by Taxpayer. Stip. Ex. E; TMSJ Brief, Ex. 1, ¶¶ 9-10; *see also* City of Chicago v. Michigan Beach Housing Co-op., 242 Ill. App. 3d 636, 648, 609 N.E.2d 877, 886 (1993) ("Surely, however, tax *refunds* are vastly different than tax *credits* as defined by *Randall.* Income tax refunds are quite obviously a property right because they constitute a present or future right to receive money which can be freely transferred after receipt. We reiterate, at the risk of appearing to be didactic, that unlike income tax refunds, tax credits do not constitute a right to a payment of money, have no independent value, and are not freely transferable upon receipt.") (emphasis original).

In contrast, the parties here do not dispute that Taxpayer has never received a check drawn and issued by the Illinois comptroller to pay Taxpayer a sum certain that was equal to the overpayment Taxpayer asked to be refunded to it on its 2008 IL amended return, and which overpayment was referred to on the Department's October 8, 2008 Notice. Again, the October 8, 2008 Notice provided, in substantive part:

***

> Dear Taxpayer:
>
> We have reviewed your Form IL-1120-X, Amended Corporation Income and Replacement Tax Return, which you signed and dated August 11, 2008, for the tax years indicated above. This review is not the result of an audit.
>
> Our records show total payments and credits of $XXX, minus corrected tax of $XXX, minus balance adjustment of $XXX, minus interest of $XXX[,] equals an overpayment of $XXX.
>
> If you have any questions, please write us or call our Springfield office weekdays between 8:00 a.m. and 4 p.m. Our address and telephone number are below.

***

Stip. Ex. I.

The text of the Notice does not contain the word "refund." *Id*. It clearly states that the Department had reviewed Taxpayer's 2008 IL amended return, and that its review was not the result of an audit. *Id*. While it also clearly reflects that the Department's "records show … an overpayment of $XXX[,]" it does not notify Taxpayer that the Department would immediately or at some future date direct the Illinois comptroller to draw and issue a check to Taxpayer to refund the amount of the overpayment that is identified in the notice. *Id*. The October 8, 2008 Notice provides no objective manifestation that the Department was issuing or making a tax refund to Taxpayer. *Id*. As a matter of law, of the four alternatives described in § 909(e), the Department's October 8, 2008 Notice did not constitute a refund, or a notice of refund. 35 ILCS 5/909(e); TMSJ Brief, p. 15 n.6.

Taxpayer also argues that, pursuant to IITA § 904, the Department's October 8, 2008 Notice must be considered prima facie correct. TMSJ Brief, p. 15. But if § 904's statutory presumption of correctness applies to the Department's October 8, 2008 Notice, that same presumption must also apply to the Department's subsequent Denial. 35 ILCS 5/904(a). As between the two, the October 8, 2008 Notice was issued following the Department's initial review of Taxpayer's 2008 IL amended return, and the Denial was issued after the Department's

second level review of that amended return. *Compare* Stip. Ex. A *and* DMSJ Ex. 1, ¶¶ 9-13 *with* Stip. Ex. I. Since the Denial takes a position that is inconsistent with the position implied by the October 8, 2008 Notice, the question begged is which of the two presumptively correct notices is more correct. *See* Byrd v. Hamer, 408 Ill. App. 3d 467, 480, 943 N.E.2d 115, 128 (2d Dist. 2011) (referring to Department's adjudicative determination that original Notices of Deficiency (NODs) to taxpayers should be upheld, and that amended NODs should be cancelled, because between them, the original NODs were more correct).

Prior to the time the Department issued its Denial in this case, the Department had begun a second level review of Taxpayer's 2008 IL amended return. Stip. Ex. A; DMSJ Ex. 1, ¶¶ 8-9. During that second level review, Smith determined that the Department had no record that Taxpayer had notified the Department that it had received a tentative carryback adjustment refund for TYE 1999 not later than 120 days from the date it received that refund. DMSJ Ex. 1, ¶¶ 26-27. Smith also determined that the Department had no record that Taxpayer had filed a claim for refund regarding the tentative carryback adjustment refund the IRS paid Taxpayer on November 11, 2002 within the time set by § 911(b)(1) — that is, by March 11, 2005. *Id*. Thereafter, and based on those determinations, the Department issued the Denial, which notified Taxpayer that the Department was denying its 2008 IL amended return/claim for refund. *Id*.; Stip. Ex. A. The undisputed facts show that both of Smith's determinations, and the Denial, are correct. Stip. Exs. A, X, p. 2 (response to request number 4); DMSJ Ex. 1, ¶¶ 26-27.

While Taxpayer cannot have appreciated the Department's about-face after its second review of the 2008 IL amended return, this is not the first time the Department has provided notice to a taxpayer that it was entitled to a claimed tax exemption, or to a claimed tax credit or refund, and then corrected its prior notice, by denying the claim. *E.g.*, Armenian Church of Lake

Bluff v. Department of Revenue, 2011 IL App. (1st) 1102249, ¶ 1 (2011) (Department issued applicant a notice granting a property tax exemption, which was later superseded by a second notice, denying the exemption); American Airlines, Inc. v. Department of Revenue, 402 Ill. App. 3d 579, 584-85, 931 N.E.2d 666, 672 (1st Dist. 2009) (Department auditor wrote letter to claimant stating that additional use tax refunds had been approved, but which additional refunds were later denied by Department). It will almost certainly not be the last time, either.

Further, and as Taxpayer's Motion acknowledges, the Illinois General Assembly has granted the Department the statutory authority to correct administrative errors that are worse (for the public fisc) than merely giving a taxpayer a mistaken notification that it is entitled to an exemption or refund, where applicable law does not warrant one. TMSJ Brief, p. 20. The Department is authorized to issue a notice of deficiency (NOD) or a notice of tax liability (NTL) to a taxpayer to whom the Department has actually issued a refund of tax, to recover a refund the Department subsequently determines was not lawfully due. *Id.*; *see also* 35 ILCS 5/905(g) (Department authorized to recover income tax refunds paid in error); 35 ILCS 105/22 (Department authorized to recover use tax refunds paid in error); 35 ILCS 110/20 (Department authorized to recover service use tax refunds paid in error); 35 ILCS 115/20 (Department authorized to recover service occupation tax refunds paid in error); 35 ILCS 120/6b (Department authorized to recover retailers' occupation tax refunds paid in error). While Taxpayer is certainly correct that the Department's authority to issue an NOD to recover such an erroneous refund is limited by IITA § 905(g), that provision's period of limitations does not apply to this matter, because, as a matter of law, the October 8, 2008 Notice did not make or issue any refund to Taxpayer, and because the Denial, as a matter of law, was not an NOD which proposed to recover an erroneous refund. Stip. Exs. A, I; TMSJ Brief, p. 15 n.6; 35 ILCS 5/905(g).

Taxpayer's focus on the Department's writings, moreover, is misguided because such statements do not entitle Taxpayer to a statutory refund. There is no statute which authorizes the payment of a tax refund — like some kind of qui tam award — to a taxpayer who, after filing a claim for refund, receives writings from the Department mistakenly stating or implying that the claim has been approved, when, as a matter of law, the claim was not timely filed. *See, e.g.*, American Airlines, Inc., 402 Ill. App. 3d at 584-85, 931 N.E.2d at 672. There are two essential elements required to obtain a statutory refund of Illinois income tax voluntarily overpaid in error. 35 ILCS 5/909; 35 ILCS 5/911.[3] The first element is satisfied by proof that tax was, in fact, overpaid in error — that is, proof that tax was paid but not due — and the second is satisfied by proof that the claim seeking a refund of such tax was timely filed. Dow Chemical Co., 224 Ill. App. 3d at 269, 586 N.E.2d at 520. Here, there is no dispute that Taxpayer has satisfied the first element, but cannot satisfy the second. Stip. Ex. X, p. 2 (response to request number 4). The Department's statements to Taxpayer, prior to its Denial, do not obviate Taxpayer's failure timely to file a claim for refund, not later than March 11, 2005, regarding the tentative carryback adjustment refund it was paid on November 11, 2002. *Id.*; 35 ILCS 5/506(b); 35 ILCS 5/911(b)(1).

Taxpayer's final argument in support of its claim for judgment as a matter of law is that the Department should be estopped from asserting that the October 8, 2008 Notice was not a notice of refund, based on its prior, numerous written statements to Taxpayer that the Department's account for Taxpayer showed an overpayment available regarding TYE 1999. TMSJ Brief, pp. 15-16.

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[3] Other tax acts may include other elements. For example, the Retailers' Occupation Tax Act requires a retailer claiming a statutory refund to prove that it bore the burden of the tax, and did not pass that burden on to someone else, like a customer. 35 ILCS 120/6.

Estoppel is an equitable remedy. Hickey v. Illinois Central RR Co., 35 Ill. 2d 427, 449, 220 N.E.2d 415, 427 (1966). The Department, however, is an administrative agency, and has no equitable powers. Parliament Insurance Co. v. Department of Revenue, 50 Ill. App. 3d 341, 347, 365 N.E.2d 667, 671 (1st Dist. 1977) ("The law is well established that an administrative agency has no inherent or common law powers, but is empowered to act only according to authority properly conferred upon the agency by law."). The Department, therefore, lacks the authority to grant the equitable remedy Taxpayer seeks. JMH Properties, Inc. v. Industrial Commission, 332 Ill. App. 3d 831, 773 N.E.2d 736 (4th Dist. 2002).

But even if the Department had the authority to grant equitable relief, I would not recommend that it be applied in this case. To begin, Illinois courts have generally been unwilling to apply estoppel against the State. Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 665 N.E.2d 795 (1996) ("against the State, estoppel is applied only to prevent fraud and injustice, and this is especially true when the public revenues are involved."). Dow Chemical Co., 224 Ill. App. 3d at 268-69, 586 N.E.2d at 520 ("Although it might seem reasonable to judicially toll the statute of limitations in order to fashion a remedy for Dow, such a decision is not supported by Illinois case law which holds that no exceptions which toll a statute of limitations or enlarge its scope will be implied.). And in the rare cases in which courts have invoked the remedy of estoppel against the State, it has been under circumstances where innocent parties have acted to their detriment in reliance on the State's actions. For example, in Hickey v. Illinois Central RR Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966), the Illinois supreme court noted as follows:

> *** The rule in this State, as repeatedly announced by this court, is stated in City of Quincy v. Sturhahn, 18 Ill.2d 604, 614, 165 N.E.2d 271, 277, 81 A.L.R.2d 1425; 'While situations may arise which justify invoking the doctrine of estoppel even against the State when acting in its governmental capacity, (citation) we have always adhered to the rule that mere nonaction of governmental officers is not sufficient to work an estoppel and that before the

> doctrine can be invoked against the State or a municipality there must have been some positive acts by the officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done. ….'

Hickey, 35 Ill. 2d at 448-49, 220 N.E.2d at 427.

Regarding the reliance aspect of its estoppel argument, Taxpayer asserts that:

> … the Department should be precluded from denying Taxpayer's refund for the Year at Issue because to do so would result in injustice in this case. For over three years, the Taxpayer reasonably relied upon the written Statements issued by the Department and the Taxpayer itself took affirmative steps to confirm the Department's Statements, first by contacting the Department itself and then by contacting one of its accounting advisors. [citations omitted] The Taxpayer should not be denied its refund claim that had been approved and credited to Taxpayer's' account due to the shortcomings and subjective decisions of the legislature and the Department. To do so would result in substantial injustice in this case, and would encourage the Department to engage in similar activities.

TMSJ Brief, p. 19.

As the quoted passage reflects, the acts Taxpayer undertook in reliance on the Department's statements consist of Taxpayer asking the Department, and directing one of its accountants to also ask the Department, if the Department meant what its writings implied. *Id*. Those acts are not like the acts that courts have previously held warranted the application of estoppel against the State. *Compare id. with* Hickey, 35 Ill. 2d at 449-50, 220 N.E.2d at 427 (granting estoppel because, "[f]or a period of more than fifty years, all governmental bodies, including numerous Attorneys General and various other agencies of the State of Illinois, together with representatives of the city of Chicago, have consistently disclaimed any interest in the lands, title to which is now asserted, and have continuously acted as if they were owned in fee by the Illinois Central. ***").

More importantly, estoppel should not apply in this case because the Department's October 8, 2008 Notice and later statements could not have negatively affected Taxpayer's

statutory right to claim a tax refund. *Compare* TMSJ, p. 19 *with* Stip. Ex. A *and* DMSJ Ex. 1, ¶ 24; Stip. Ex. X, p. 2 (response to request number 4). The Department statements Taxpayer complains of were made between 2008 and 2012 (Stip. Exs. I-S; TMSJ Brief, p. 19), whereas the only legal basis the Department raises for denying Taxpayer's refund is that Taxpayer failed to file, not later than March 11, 2005, a claim for refund to report the IRS's payment of a tentative carryback adjustment refund to it on November 11, 2002. Stip. Exs. A, X, p. 2 (response to request number 4); 35 ILCS 5/506(b); 35 ILCS 5/911(b)(1). As a simple function of time, no writings the Department issued to Taxpayer on and after October 8, 2008 could have caused or induced Taxpayer to forgo filing a claim for refund with the Department between November 11, 2002 and March 11, 2005. Given the undisputed facts, Taxpayer's failure to satisfy the condition set by IITA §§ 506(b) and 911(b)(1) cannot be blamed on any alleged shortcoming of the Illinois legislature or the Department.

Lastly, what Taxpayer characterizes as substantial injustice here is the Department's mere enforcement of a plainly stated statutory period of limitations for filing a claim for refund of taxes overpaid in error. Stip. Ex. A; 35 ILCS 5/911(b)(1). The legislature, however, intended taxpayers to have only a certain period of time within which to file a claim for refund. 35 ILCS 5/911; Dow Chemical Co., 224 Ill. App. 3d at 269, 586 N.E.2d at 520. The legislature similarly intended the Department to enforce the statutes of limitation included within Illinois' tax acts, as written. 35 ILCS 5/909(a) (2011); 35 ILCS 5/910(b); 35 ILCS 5/911; American Airlines, Inc., 402 Ill. App. 3d at 584-85, 931 N.E.2d at 672; Dow Chemical Co., 224 Ill. App. 3d at 269, 586 N.E.2d at 520.

The undisputed facts show that Taxpayer did not notify the Department of the tentative carryback adjustment refund it was paid on November 11, 2002 within the period required by

IITA § 506(b), and thereafter, did not file a claim for refund within the period set by IITA § 911(b)(1) regarding that alteration. Stip. Ex. X, p. 2 (response to request number 4). Denying Taxpayer a credit or refund in this case is not a substantially unjust agency decision; it is the decision Illinois law directs the Department to make. 35 ILCS 5/909(a) (2011); 35 ILCS 5/911(a)(2)-(b)(1). If there is an injustice done when an agency administers and enforces a statute of limitations as written, the remedy must lie with the Illinois General Assembly. Dow Chemical Co., 224 Ill. App. 3d at 269, 586 N.E.2d at 520.

Conclusion:

Based on the undisputed facts, I recommend that the Director grant the Department's Motion, deny Taxpayer's Motion, and finalize the Denial as issued.

January 7, 2016

John E. White
Administrative Law Judge