

CT 04-2

Tax Type: Cigarette Tax

Issue: Statute of Limitations Application

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

**ABC COMPANIES, INC.
Taxpayer**

v.

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

Docket #

02-ST-0000

Notice of Tentative Denial of Claims

**Barbara S. Rowe
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. B. Kip Shelby, Elias, Meginnes, Riffle & Seghetti, P.C. for ABC Companies; Mr. John T. Robinson, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

The Illinois Department of Revenue (hereinafter referred to as the "Department" or "IDOR") issued seven Notices of Tentative Denial of Claim for Cigarette Use Tax (hereinafter referred to as the "Notices") to ABC Companies, Inc. (hereinafter referred to as "ABC" or the "Taxpayer") in the amount of \$369,261.06. Taxpayer timely protested the notices and asked for a hearing. The parties requested that the matter be heard on the stipulation of facts, with attached exhibits and briefs submitted. Taxpayer argues that it is entitled to a credit or refund of the \$369,261.06, or in the alternative, to replacement cigarette tax stamps. Following a careful

review of the record in this matter, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT¹:

A. ABC and IDOR Licensure

1. ABC is composed of multiple, separately licensed and located divisions, including the Kansas City Division and the Chicago Division. The Kansas City Division is the focus of this matter. [Joint Ex. No. 1 Stip. A-1]

2. For the licensure year 2002-2003, ABC's Kansas City Division possessed a Cigarette Distributor's License issued by IDOR in accordance with the provisions of the Cigarette Tax Act or the Cigarette Use Tax Act. [Joint Ex. No. 1 Stip. A-2; Ex. No. 9]

3. At all relevant times prior to licensure year 2002-2003, ABC's Kansas City Division possessed a Cigarette Distributor's License issued by IDOR in accordance with the provisions of the Cigarette Tax Act or the Cigarette Use Tax Act. [Joint Ex. No. 1 Stip. A-3]

4. The last shipment of cigarettes into Illinois from the Kansas City Division was on or about the 1st quarter of 2000. Thereafter, the Kansas City Division terminated its cigarette sales and distributing activities in the State of Illinois. [Joint Ex. No. 1 Stip. A-4]

5. At all relevant times, ABC's Chicago Division (formerly the Romeoville Division) possessed a Cigarette Distributor's License issued by IDOR in accordance with the provisions of the Cigarette Tax Act or the Cigarette Use Tax Act. [Joint Ex. No. 1 Stip. A-5; Ex. No. 10]

B. The Purchases

¹ Findings of Fact numbers A-1 through E-1 are verbatim recitations from the stipulations submitted except for items contained in [] brackets.

1. On December 10, 1997, ABC Co., Inc. (ABC) submitted to the Illinois Department of Revenue (IDOR) a Form RC-1-A “Cigarette Stamp Order-Invoice”, together with ABC’s check for \$205,146.00 for prepayment of Illinois Cigarette taxes. On or about that same date, IDOR issued ABC 360,000 Illinois cigarette tax stamps (Series numbers 10 through 20 & 25 L) as proof of payment of the taxes. [Joint Ex. No. 1 Stip. B-1; Ex. No. 1]

2. Prior to December 19, 1997, ABC submitted to IDOR a Form RC-1-A “Cigarette Stamp Order-Invoice”, together with ABC’s check for \$10,257.30 for prepayment of Illinois Cigarette taxes. On December 19, 1997, IDOR issued ABC 14,400 Illinois cigarette tax stamps (Series numbers 1126 through 1133 & 1135) as proof of payment of the taxes. [Joint Ex. No. 1 Stip. B-2; Ex. No. 1]

3. Prior to May 13, 1998, ABC submitted to IDOR a Form RC-1-A “Cigarette Stamp Order-Invoice”, together with ABC’s check for \$107,105.48 for prepayment of Illinois Cigarette taxes. On May 13, 1998, IDOR issued ABC 14 rolls of Illinois cigarette tax stamps (Series numbers 0000-0 through 0000-0 & 0000-0 through 0000-0) as proof of payment of the taxes. [Joint Ex. No. 1 Stip. B-3; Ex. No. 1]

4. On October 27, 1998, ABC submitted to IDOR a Form RC-1-A “Cigarette Stamp Order-Invoice”, together with ABC’s check for \$151,747.07 for prepayment of Illinois Cigarette taxes. On October 27, 1998, IDOR issued ABC 10 rolls of Illinois cigarette tax stamps (Series numbers 0183-J, 0186-J through 0188-J, & 0174-J through 0179-J) as proof of payment of the taxes. [Joint Ex. No. 1 Stip. B-4; Ex. No. 1]

C. The Transfer Inquiry

1. Prior to May 21, 2002, ABC, through its employees, Joni Doe and Jane Doe, contacted Bobbi Houston, an IDOR employee, by telephone and inquired as to whether IDOR

would allow ABC to transfer 634,582 cigarette stamps that were issued to ABC's Kansas City Division, to another ABC Division holding an IDOR Cigarette Distributor's License. ABC was informed that IDOR would not allow the cigarette stamps to be transferred at that time. [Joint Ex. No. 1 Stip. C-1]

2. IDOR acknowledges that ABC could produce witnesses who could competently testify to such facts, and asserts that if called to testify, Bobbi [sic] Houston would state that she can neither confirm nor deny that a conversation occurred wherein the transfer of stamps was discussed and would further affirmatively state that she is certain that any such conversation included her statement to ABC's representative that all requests for credit, refund or transfer must be placed in writing to be considered. [Joint Ex. No. 1 Stip. C-2]

D. The Claims for Credit.

1. On May 21, 2002, ABC filed claims for the refund of 634,582 cigarette stamps totaling \$369,261.06 as follows: [Joint Ex. No. 1 Stip D-1]

2. On May 21, 2002, ABC filed Form RC-16 "Cigarette Tax Claim for Credit", seeking \$69,600.00 credit for 120,000 returned stamps, including those in the following series: 0000, 0000, 00000, 0000. [Joint Ex. No. 1 Stip. D-2; Ex. No. 2]

3. On May 23, 2002, IDOR denied ABC's claim for the credit described in paragraph 2 above, and issued form MTC-29 "Notice of Tentative Denial of Claim for Cigarette Use Tax". [Joint Ex. No. 1 Stip. D-3; Ex. No. 2]

4. On May 21, 2002, ABC filed a Form RC-16 "Cigarette Tax Claim for Credit", seeking \$69,600.00 credit for 120,000 returned stamps, including those in the following series: 0000, 0000,000000,00000. [Joint Ex. No. 1 Stip. D-4; Ex. No. 3]

5. On May 23, 2002, IDOR denied ABC's claim for the credit described in paragraph 4 above, and issued form MTC-29 "Notice of Tentative Denial of Claim for Cigarette Use Tax". [Joint Ex. No. 1 Stip. D-5; Ex. No. 3]

6. On May 21, 2002, ABC filed a Form RC-16 "Cigarette Tax Claim for Credit", seeking \$69,600.00 credit for 120,000 returned stamps, including those in the following series: 0000, 0000, 00000, 0000. [Joint Ex. No. 1 Stip. D-6; Ex. No. 4]

7. On May 23, 2002, IDOR denied ABC's claim for the credit described in paragraph 6 above, and issued form MTC-29 "Notice of Tentative Denial of Claim for Cigarette Use Tax". [Joint Ex. No. 1 Stip. D-7; Ex. No. 4]

8. On May 21, 2002, ABC filed Form RC-16 "Cigarette Tax Claim for Credit", seeking \$69,600.00 credit for 120,000 returned stamps, including those in the following series: 0000, 0000, 00000, 0000. [Joint Ex. No. 1 Stip. D-8; Ex. No. 5]

9. On May 23, 2002, IDOR denied ABC's claim for the credit described in paragraph 8 above, and issued form MTC-29 "Notice of Tentative Denial of Claim for Cigarette Use Tax". [Joint Ex. No. 1 Stip. D-9; Ex. No. 5]

10. On May 21, 2002, ABC filed a Form RC-16 "Cigarette Tax Claim for Credit", seeking \$67,517.80 credit for 116,410 returned stamps, including those in the following series: 0000, 00000, 00000. [Joint Ex. No. 1 Stip. D-10; Ex. No. 6]

11. On May 23, 2002, IDOR denied ABC's claim for the credit described in paragraph 10 above, and issued form MTC-29 "Notice of Tentative Denial of Claim for Cigarette Use Tax". [Joint Ex. No. 1 Stip. D-11; Ex. No. 6]

12. On May 21, 2002, ABC filed a Form RC-16 “Cigarette Tax Claim for Credit”, seeking \$23,111.26 credit for 37,772 returned stamps, including those in the following series: 1126. [Joint Ex. No. 1 Stip. D-12; Ex. No. 7]

13. On May 23, 2002, IDOR denied ABC’s claim for the credit described in paragraph 12 above, and issued form MTC-29 “Notice of Tentative Denial of Claim for Cigarette Use Tax”. [Joint Ex. No. 1 Stip. D-13; Ex. No. 7]

14. On May 21, 2002, ABC filed a Form RC-16 “Cigarette Tax Claim for Credit”, seeking \$232.00 credit for 400 returned stamps. [Joint Ex. No. 1 Stip. D-14; Ex. No. 8]

15. On May 23, 2002, IDOR denied ABC’s claim for the credit described in paragraph 14 above, and issued form MTC-29 “Notice of Tentative Denial of Claim for Cigarette Use Tax”. [Joint Ex. No. 1 Stip. D-15; Ex. No. 8]

16. The seven claims for credit described in paragraphs 2, 4, 6, 8, 10, 12, and 14 above (attached [to Joint Ex. No. 1] as Exhibits 2 through 8) are hereafter collectively referred to as the “Claims for Credit”. [Joint Ex. No. 1 Stip. D-16]

17. ABC’s claims for credit were filed with IDOR after January 1, 2002 for taxes paid prior to January 1, 1999. [Joint Ex. No. 1 Stip. D-17]

18. As of May 22, 2002, IDOR possessed the 634,582 stamps returned by ABC to IDOR with the Claims for Credit (the “Stamps”). IDOR has continued to maintain possession of the Stamps to the present date. [Joint Ex. No. 1 Stip. D-18]

E. 2002 Tax Rate Increase

1. On July 1, 2002, the Illinois cigarette tax rate increased from 29 mills per cigarette to 49 mills per cigarette. [citing to] The IDOR Bulletin, captioned FY2002-36, Cigarette Tax Rate Increase, Informational Bulletin, To: Cigarette Distributors, . . . [Joint Ex.

No. 1 Stip. E-1; Ex. No. 11]

Additional Findings

1. For the licensure years 1999 through 2003 neither ABC nor its Kansas City division terminated its business as an Illinois distributor. [Joint Ex. No. 1 Stip. A-2; Ex. No. 9; Joint Ex. No. 1 Stip. A-3; Joint Ex. No. 1 Stip. A-5; Ex. No. 10]

2. The Kansas City Division of ABC has IBT No. 0000-0000 and IDOR Cigarette Distributor's License No. 0-00000 for the period of January 14, 2002 through January 13, 2003. [Ex. No. 9]

3. The Chicago Division of ABC has IBT No. 0000-0000 and IDOR Cigarette Distributor's License No. 0-00000 for the period of June 27, 2002 through June 26, 2003. [Ex. No. 10]

4. The basis of the denials of the claims was that the claims were made beyond the statutory limitations period. [Ex. No. 2 p. 2; Ex. No. 3 p. 2; Ex. No. 4 p. 2; Ex. No. 5 p. 2; Ex. No. 6 p. 2; Ex. No. 7 p. 2; Ex. No. 8 p. 2]

CONCLUSIONS OF LAW:

The Cigarette Tax Act, 35 **ILCS** 130/1 *et seq.* (hereinafter referred to as the "Act") imposes a tax on the occupation of selling cigarettes at retail within the State of Illinois. The impact of the tax levied by the "[A]ct is imposed upon the retailer and shall be prepaid or pre-collected by the distributor for the purpose of convenience and facility only, and the amount of the tax shall be added to the price of the cigarettes sold by such distributor. Collection of the tax shall be evidenced by a stamp or stamps affixed to each original package of cigarettes, . . ." 35 **ILCS** 130/2. Further, section 3 of the Act provides, in pertinent part:

§ 3. Payment of the taxes imposed by Section 2 of this Act shall (except as hereinafter provided) be evidenced by revenue tax stamps affixed to each original package of cigarettes. Each distributor of cigarettes, before delivering or causing to be delivered any original package of cigarettes in this State to a purchaser, shall firmly affix a proper stamp or stamps to each such package... .

The Department, or any person authorized by the Department, shall sell such stamps only to persons holding valid licenses as distributors under this Act. 35 ILCS 130/3

In conformance with this statute, Department regulation, 86 Ill. Admin. Code ch. I, Sec. 440.20, provides that “payment of the tax imposed by the Act shall be evidenced by a stamp affixed to each ‘original package’ of cigarettes, Stamps are sold only to distributors by the Department”

Taxpayer filed a number of claims for the refund of monies paid for cigarette tax stamps it had purchased from the Department on December 10, 1997, prior to December 19, 1997, prior to May 13, 1998, and on October 27, 1998. The claims filed on May 21, 2002, and denied on May 23, 2002, totaled \$369,261.06. The Department denied the claims asserting that the Taxpayer failed to file them within the statutory limitations period.

Taxpayer’s “Brief and Memorandum of Law” in support of its protest of the Department’s denial of its claims for credit or refund raises six arguments to support its contention that the Department, by law, is required to either issue a credit or refund Taxpayer’s money or issue it new tax stamps. Those arguments, as stated by Taxpayer,² are:

- I. ABC is entitled to a credit for the Tax Stamps as a result of the cigarette tax rate increase effective July 1, 2002.
- II. Pursuant to 35 ILCS 130/28, ABC had the absolute right to transfer the ABC Tax Stamps upon termination of ABC’s cigarette sales and distribution business in Illinois.
 - A. The Department wrongfully denied ABC’s request to transfer the Tax Stamps and misled ABC improperly.

² Verbatim recitation from Taxpayer’s Brief pp. 3, 5, 7, 8, 10, 12, 15, 16, 19, 21

- B. The Regulation Exceeds the Department's Statutory Authority.
- III. ABC's Claims for refund or credit are not barred by the statute of limitations set forth in Section 130/9d.
- A. Section 130/9d of the Act provides that a distributor is entitled to a refund or credit for a tax paid which was not due under the Act.
- B. The amounts paid by ABC to purchase the Tax Stamps were not erroneously paid taxes.
- C. ABC's Claims are not barred by Section 130/9d because the three-year statute of limitations could not begin to run, if at all, until such time as the purchase of ABC's Tax Stamps, and the Illinois cigarette taxes thereby prepaid, could be considered an erroneously paid tax under the Act.
- D. Even if the three year statute of limitations in Section 130/9d began to accrue when the Tax Stamps were purchased (which ABC denies), Section 130/9d does not bar ABC's Claims because of the credit for "old" tax stamps available on July 1, 2002 as a result of the tax rate increase that went into effect on that date.
- IV. Pursuant to 87 Ill. Admin Code 440.130, ABC is entitled to replacement stamps because ABC's Tax Stamps have become unfit for use.
- V. The Department's retention of the \$369,261.06 paid by ABC to purchase the Tax Stamps is an unconstitutional taking of ABC's property without just compensation.
- VI. The denial of ABC's Claims, and the Department's failure to either (a) issue a refund or credit to ABC or (b) replace the Tax Stamps with stamps currently usable by ABC, constitutes an inequitable windfall to the State of Illinois

Statutes of Limitation

The statutory language found at 35 ILCS 130/9d entitled "Credit memoranda or refunds"

states:

§ 9d. If it appears, after claim therefore filed with the Department, that an amount of tax or penalty has been paid which was not due under the Cigarette Tax Act, whether as the result of a mistake of fact or an

error of law, except as hereinafter provided, then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment, or if that person has died or become incompetent, to his legal representative, . . .

As to any claim filed hereunder with the Department on and after each January 1 and July 1, no amount of tax or penalty erroneously paid (either in total or partial liquidation of a tax or penalty under the Act) more than 3 years prior to such January 1 and July 1, respectively, shall be credited or refunded. . . .

Therefore, for any taxpayer to obtain a refund from the Department for taxes paid, a taxpayer must: 1) file a claim with the Department; 2) have paid that tax either as a mistake of fact or error of law; and, 3) file the claim within 3 years prior to January 1st or July 1st of that third year.

There is a significant distinction between statutes of limitation and statutes that confer both jurisdiction on a court and fix a time within that jurisdiction when the remedy requested may be sought. Section 9(d) of the Cigarette Tax Act is not a true statute of limitation. This section, insofar as it provides for the filing of claims for credit or refund of taxes paid, is an exclusive³ statutorily created means by which taxpayers can retrieve from the State monies remitted under a mistake of fact or error of law. Since the obligation to pay taxes in the first instance is established solely by statute, any right that may exist to retrieval of those taxes, once paid, must also arise by statute. In the absence of such a created provision, taxes voluntarily paid cannot be recovered, as the right to a refund can only exist as it may be afforded by legislation.

Jones v. Department of Revenue, 60 Ill.App.3d 886 (1st Dist. 1987)

Therefore, because the right to a refund is not accorded by common law but is strictly a creature of statute, any time element which is applied to the right is not a “statute of limitation”

³ 35 ILCS 120/6c (incorporated into the Cigarette Tax Act by 35 ICS 130/9d) makes the legislative intent of this clear by its own terms, stating: “Claims for credit or refund hereunder must be filed with and initially determined by the Department, the remedy herein provided being exclusive; and no court shall have jurisdiction to determine the

in the common understanding of the term. It is, instead, a jurisdictional requisite to the right created. In other words, the limitation period contained in Section 9(d) is not just procedural, but is, rather, substantive in nature. Time, therefore, becomes an integral and inseparable element of the right. Smith v. Toman, 368 Ill. 414 (1938). Not acting within the time frame given does not just bar you from access to the right, it eliminates the right itself. North Side Sash & Door v. Hect, 295 Ill. 515 (1920)

Regarding the statute of limitations issue, Taxpayer initially argues both that the tax was not due and that it was not erroneously paid and therefore the denial of its refund is not precluded by the statutes of limitation. Taxpayer's arguments, however, are without factual or legal support.

“If it appears, after claim therefore filed with the Department, that an amount of tax or penalty has been paid which was not due under the Cigarette Tax Act, whether as the result of a mistake of fact or an error of law, . . . then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment, . . .” (emphasis added) 35 ILCS 130/9(d). Thus, in order for a taxpayer to have a valid claim for credit, the taxes must have been paid “as a result of a mistake of fact or an error of law.” By the very language of the statute itself, it is only through that mistake of fact or error of law that the mechanism for retrieval of taxes paid can be triggered. Taxpayer simply cannot argue, as it obviously has, for a credit or refund if there has been no erroneous payment or overpayment.

The facts, of course, support the position that ABC paid the tax. The parties stipulated that Taxpayer paid for the stamps. The stamps reflect the payment of the tax. 35 ILCS 130/2 In fact, by statute, in order for the Taxpayer, as a distributor, to get the required stamps, it had to pay the tax. *Id.*; 35 ILCS 130/3 (“The Department or any person authorized by the Department,

merits of any claim except upon review as provided herein.” (emphasis added)

shall sell such stamps only to persons holding valid licenses as distributors under this Act.”) Under Sundance Homes, Inc. v. County of DuPage, 195 Ill.2d 257, 267 (2001), the time when the tax is paid is when the statute of limitations begins to run. This court cited the Supreme Court case of United States v. Dalm, 494 U.S. 596 (1990), as follows:

The most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment is erroneous. The very purpose of statutes of limitations in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.” U.S. v. Dalm at 610.

Therefore, the date on which ABC paid the tax for the stamps begins the running of the statute of limitations for purposes of any claim for credit or refund by ABC.

In Illinois, the only entities that are entitled to claims for tax refund or credit are those that bear the burden of the tax. Snyderman v. Isaacs, 31 Ill.2d 192 (1964), Central Illinois Light Company v. Department of Revenue, 117 Ill.App.3d 911 (3rd Dist. 1983). ABC argues that the timing of the statute of limitations occurs when the distributor collects the price of the stamp from its customer. However, once ABC sells the stamped cigarettes and, thereby recoups the cost of the stamp, it is no longer the entity bearing the burden of the tax and can not, at that time, apply for a refund of the tax from the Department. Thus, a distributor’s right to a refund of monies it paid for tax, as represented by the stamps it purchased, is at the time that it alone bears the burden of the tax, that is, before it sells the cigarettes, with the stamps affixed, to a retailer.

Statutes of limitations are not unique to tax. Timing requirements limit opportunities and are set by legislative or judicial enactment. Even if not deemed to be jurisdictional in nature, statutes of limitations are affirmative defenses that nullify rights. If a party does not act

responsibly within the statutory time period, privileges may be removed. Limitation actions not only “discourage the presentation of stale claims,” but also “encourage diligence in the bringing of actions.” Sundance Homes, Inc. v. County of DuPage, *supra* at 265-66 “Undoubtedly, statutes of limitation are valid procedural restrictions which may be invoked to bar an otherwise meritorious claim for refund . . .” *Id.* at 270. Clearly if a party fails to act within the generous time parameters granted by the legislature, that party has forfeited any legal rights it might otherwise be entitled.

Taxpayer purchased the tax stamps on the following dates: December 10, 1997, prior to December 19, 1997, prior to May 13, 1998, and on October 27, 1998. A statute of limitations action begins to run when the tax is paid. Sundance Homes, Inc. v. County of DuPage, *supra*. Taxpayer states the Kansas City division ceased its operations in Illinois on or about the first quarter of 2000. Finding of Fact A-4 Taxpayer finally filed the appropriate written claims for refund on May 21, 2002. That date is well after December 31, 2001, the last date that Taxpayer could have timely filed a claim for credit for any of the taxes at issue and almost two years after it asserts it stopped shipping cigarettes into Illinois. At that time, claims for refunds for these taxes would not have been time barred. On May 21, 2002, when Taxpayer finally filed its claims, it had no legal right to a refund or a credit for these taxes. As painful as it may be to the Taxpayer, the legislature provided rights, and the Taxpayer failed to avail itself of those generous rights because it failed to act in a timely manner.

Taxpayer’s arguments imply that equitable principles apply in this case. In discussing the application of equitable principles to revenue cases, the court in Sundance Homes, Inc. v. County of DuPage, *supra* at 271-72, states:

[W]e *do* note the inclination of courts to circumscribe the reach of equity in revenue cases and the apparent intent of our legislature to impose

shorter limitation periods, and thus greater certainty, in the area of tax refund litigation. The federal government, like Illinois, imposes detailed statutes of limitation on tax refund claims. Section 6511(a) of the Internal Revenue Code of 1986 requires an aggrieved taxpayer to file any claim for refund within three years from the time the tax return was filed or two years from the time the tax was paid, whichever period expires later. 26 U.S.C. § 6511(a) (1994). We have previously referred to the application of that statute in our discussion of Dalm. We note that the same statute of limitation was at issue in United States v. Brockamp, 519 U.S. 347 (1997), wherein the taxpayers seeking a refund argued that the statute was subject to equitable tolling for nonstatutory equitable reasons. The Supreme Court concluded that Congress did not intend the equitable tolling doctrine to apply beyond the provisions of the statute. Writing for a unanimous Court, Justice Breyer stated:

“Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

The nature of the underlying subject matter—tax collection—underscores the linguistic point. *** To read an ‘equitable tolling’ exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for ‘equitable tolling’ which, upon close inspection, might turn out to lack sufficient equitable justification. [Citation.] The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute’s limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.” Brockamp, 519 U.S. at 352-53.

Therefore, Taxpayer’s equitable arguments made in this matter fail.

The Right to Transfer

The Taxpayer is also incorrect when it asserts that, by statute, a distributor has an absolute right to transfer or sell unused stamps upon termination of his business. The statutory provision addressing this specific matter reads:

Where at the time of terminating his business as distributor in this State any distributor has on hand unused stamps, he or his legal representative may transfer or sell said unused stamps to some other distributor licensed

under this act; provided that at least twenty-four (24) hours prior to such transfer or sale such distributor or his legal representative shall report to the Department in writing an intention to so sell or transfer said stamps and the name and address of the distributor to whom such sale or transfer is to be made, together with the total of the face amount of each denomination of stamps to be sold or transferred. 35 ILCS 130/28

In complete conformance with the statute, the Department has promulgated rules regarding the transfer of stamps. 86 Admin. Code ch. I, Sec. 440.120 addresses unused stamps and the notice required by the Department. The rule states:

- a) Sales and transfers of Illinois cigarette revenue stamps...by one licensed cigarette distributor to another licensed cigarette distributor are not permitted unless authorization is given in writing by the Department to make such sale and transfer. . . .

- c) Where, at the time of terminating his business as a licensed distributor in this State, a licensed distributor has on hand unaffixed Illinois cigarette revenue stamps..., he may transfer or sell said unaffixed stamps...to some other licensed distributor, provided that, prior to such sale or transfer, such licensee shall request and receive from the Department, in writing, authority to sell and transfer stamps or meter units to some other distributor licensed under the Illinois Cigarette Tax Act, the distributor making such request must submit the name and address of the distributor to whom he intends to sell said stamps or meter units, together with the exact number of stamps in each series or the exact number of meter units to be sold or transferred. (emphasis added)

Since the language of the rule is well within the mandates of the statute, Taxpayer's assertion that the regulation exceeds the Department's statutory authority has no basis.

Both the regulation and the statute mandate that a taxpayer must: 1) be a licensed distributor; 2) terminate its business as a distributor; 3) have on hand unused cigarette tax stamps; 4) report to the Department in writing an intention to so sell or transfer said stamps; with 5) the name and address of the distributor to whom the sale or transfer of the stamps is made and the face amount of the stamps.

The statute and rule both require that a taxpayer notify the Department in writing that it intends to transfer the stamps to another distributor that is licensed in the State of Illinois. Taxpayer relies on the fact that its employees, Joni Doe and Jane Doe, telephoned Bobbi Houston, a Department employee, and were informed that the Department would not allow the cigarette stamps to be transferred at that time. Taxpayer's reliance on this telephone conversation to establish that the Department is estopped from denying its requests for relief is without legal basis.

Initially, it is well established that public policy generally opposes the application of an estoppel against the State where public revenues are involved. Claire v. Bell, 378 Ill. 128 (1941), Department of Revenue v. Barding, 33 Ill.2d 235 (1965). This is true even where detrimental reliance is present. People v. Brown, 67 Ill. 435 (1873). In Austin Liquor Mart, Inc. v. Department of Revenue, 51 Ill.2d 1 (1972), the court cited with approval the language from State ex rel. Williams v. Adams, 90 Idaho 195 (1965): "The government is not estopped by previous acts or conduct of its agents with reference to the determination of tax liabilities or by failure to collect the tax, nor will the mistakes or misinformation of its officers stop it from collecting the tax." Austin Liquor Mart, Inc. v. Department of Revenue, at 5. Therefore, advice given over the telephone by a Department employee is not binding on the Department.

A remedy for incorrect information given by the Department is found in the Taxpayers' Bill of Rights Act, 20 **ILCS/2520/1** *et seq.* The relevant part of that statute, found at 20 **ILCS 2520/4**, is entitled "Department responsibilities" and states: "The Department of Revenue shall have the following powers and duties to protect the rights of taxpayers. . . . (c) To abate taxes and penalties assessed based upon erroneous written information or advice given by the Department." (emphasis added) Taxpayer concedes that the advice given by the Department

was verbal. Thus, it also cannot prevail in its estoppel argument under any statutory authority because the information given was not in writing.

Further, in this case, it is far from fact that the telephone conversation even occurred, because the parties stipulated that Ms. Houston would testify that she could “neither confirm nor deny that a conversation occurred wherein the transfer of stamps was discussed”. Joint Ex. No. 1 Stip. C-2 Assuming, for the sake of argument, that the conversation occurred, the Taxpayer concedes that Ms. Houston’s testimony would be that she would have advised Taxpayer that all requests must be in writing for there to be a valid transfer of stamps. *Id.* As agreed in the stipulations in this case, the Taxpayer orally requested that it be allowed to transfer the stamps and the Department’s employee stated that all requests must be in writing. The parties have, therefore, stipulated that if such a conversation occurred, the Department correctly advised Taxpayer of the law on this issue. Consequently, not only have the courts and legislature determined that oral advise from a Department employee affords no grounds for an estoppel argument against the State, but, in this case, the parties agree that the advise was correct, thereby precluding, without question, any equitable remedy as this Taxpayer suggests. It is evident that it is the Taxpayer who failed to timely act despite correct information from the Department and despite a statute and regulation that are plainly and clearly written.

In addition, there is nothing in this matter that negates the statutory mandate that the right of transfer only occurs when there is a termination of the business of a licensed distributor. There is no evidence in the record that either the Kansas City division or the Taxpayer terminated its business as a licensed distributor in the state of Illinois during the time period at issue. The Kansas City division still had its license in the period of January 14, 2002 through January 13, 2003. Ex. No. 9. The Chicago division of ABC maintained its license from June

27, 2002 through June 26, 2003 and there is no indication it was ever cancelled. At the times Taxpayer filed its claims for credit or made an oral request to transfer its stamps, neither entity had terminated its business as a distributor in Illinois. Therefore this section of the statutes does not apply to either the Kansas City division or the Taxpayer.

Mutilated Stamps

Taxpayer also asserts that 86 Admin. Code ch. I, Sec. 440.130 is applicable to this situation. That rule states:

Mutilated Stamps. Where stamps have become mutilated or otherwise unfit for use, distributors shall notify the Department, and if an investigation discloses that said stamps have not evidenced a taxable transaction, replacement stamps will be supplied.

There is no evidence in the record that, at the time of the filing of the claims, the Taxpayer had mutilated stamps or stamps that were unfit for use. Taxpayer simply had stamps that it no longer wanted.

Taxpayer is clearly unhappy that its failure to timely act to receive a credit or refund for its stamps leaves it without a remedy. However, the Department can only act within the parameters of the pertinent statutes. There is no legal mandate for a taxpayer to be made whole in tax law, especially if a taxpayer does not follow the requirements of a clear, specific statute. In tax law, the legislature creates jurisdictional and time parameters because of the need to allocate funds for state programs and benefits. If there were no parameters, financial chaos would occur.

When Taxpayer filed the claims for credit, the stamps were perfectly fit for use and they remained fit for use until July 1, 2002. Even if they were not, the unfit for use rule cannot be read outside the statute of limitations period. In fact, the statutory claims for refund and credit provision addresses replacement stamps by providing, in pertinent part:

If the Department approves a claim for stamps affixed to a product

returned to a manufacturer or for replacement of stamps, the credit memorandum shall not exceed the face value of stamps originally affixed, and replacement stamps shall be issued only in an amount equal to the value of the stamps previously affixed. 35 ILCS 130/9d

There is nothing in this provision that permits the replacement of stamps outside of the statutory limitations period otherwise set therein. Nor is there any provision elsewhere that would allow a credit of any type for mutilated stamps outside of the statutory limitations period for stamp replacement. Since, “[e]ach part of a statute should be interpreted in light of every other provision and the entire statute should be construed to produce a harmonious whole” (Dow Chemical Company v. Department of Revenue, 224 Ill. App.3d 263, 266 (1st Dist. 1991))

Taxpayer’s arguments in this instance are without merit.

Tax Rate Increase and “Old” Stamps

Taxpayer also asserts that it is entitled to a credit for the tax stamps because a cigarette tax rate increase took effect on July 1, 2002. P.A. 92-536, § 5. Taxpayer cites no authority for this proposition except that the bulletin issued by the Department refers to “old” stamps and the Taxpayer had old stamps. Based upon a plain reading of the entire bulletin, the “old” stamps referred to are without question tax stamps issued at the prior rate of 29 mills per cigarette versus the new tax rate, which took place on July 1, 2002, of 49 mills per cigarette. The tax rate increase was addressed in the “Cigarette Tax Rate Increase Informational Bulletin” dated June 2002, that was issued to cigarette distributors.

Taxpayer’s reliance on the statutory rate change and the ensuing Department bulletin is also misplaced. There is nothing in the rate increase or the bulletin that negates the statute of limitations at issue in this matter. There is also nothing in the bulletin that negates the obligation of the Taxpayer to timely file a written claim for credit. In fact, the bulletin specifically states:

You may return unaffixed stamps for credit to us starting July 1, 2002.

Please return all stamps to us by July 31, 2003. To receive credit for **unaffixed** stamps, you must send us the following items in the same package:

- Any unaffixed stamps, and
- A completed Form RC-16, Cigarette Tax Claim for Credit. . . .

If we approve your claim for credit, we will issue you a credit memorandum based on the color and face value of each stamp returned. (Exhibit 11) (emphasis in the original)

It is clear that there is no absolute right to or blanket credit established by the bulletin because the word “if” precedes the words “we approve your claim for credit.” Therefore, the guarantee of the credit is not automatic. In fact, the language on the bulletin supports the Department’s application of the statutory statute of limitations in the Act.

Clay v. Kuhl, 189 Ill.2d 603 (2000), a case referenced in Sundance Homes Inc. v. County of DuPage, *supra*, states that even if a legislative change occurs, statutes of limitations are not changed. “[P]laintiff correctly concedes that if her action was already barred under the common law discovery rule⁴ prior to the enactment of section 13-202.2, then the new statute could not have revived it; under Illinois law, the barring of an action by a statute of limitations creates a vested right in favor of the defendant, and the action cannot later be revived. See M.E.H. v. L.H., 177 Ill.2d 207, 215 (1977).” Clay v. Kuhl, *supra* at 609.

In Dow Chemical Company v. Department of Revenue, *supra*, a specific provision in the Illinois Income Tax Act (35 ILCS 5/101 *et seq.*) allowed the limitations on claims for refund to be extended by agreement of the parties⁵. There is no such language in the Cigarette Tax Act. When Taxpayer filed its claim for credit in May, 2002, the stamps were still perfectly valid stamps to be used by a retailer or distributor. However, when the bulletin was issued and prior to

⁴ Another type of limitation action where a party’s cause of action accrues when the party knows or reasonable should have known of an injury and that the injury was wrongfully. Clay v. Kuhl, *supra* at 608.

⁵ 35 ILCS 5/911(c).

the effective date of the tax rate increase, there was a jurisdictional, or at the least, a procedural time bar that prevented the Taxpayer from negotiating with the Department for a claim for credit.

There is absolutely nothing about the tax rate increase to suggest that it in any way alters the pre-existing statute of limitations. A review of legal authority, in fact, establishes the contrary. The general rule is that retroactive legislation is not favored and statutes will not be construed retroactively unless it clearly appears that such was the legislative intent. Mather v. Parkhurst, 302 Ill. 236 (1922). In Sundance Homes, Inc. v. County of DuPage, *supra*, the court discussed the retroactive application of court decisions and made it “clear that the court decisions cannot be applied retroactively to civil cases already barred by statutes of limitation or *res judicata*.” *Id.* at 269 As stated therein, “[f]ederal decisions appear to sanction strict application of statutes of limitation in the area of tax litigation, even where the law has been altered by judicial decision. ‘Legal principles, even when applied retroactively, do not apply to cases already closed.’ Hernandez-Rodregues v. Pasquarell, 118 F.3d 1034, 1042 (5th Circ.1997), citing Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995).” Sundance Homes, Inc. v. County of DuPage, *supra* at 268. See also, Commonwealth Edison v. Will County Collector, 196 Ill.2d 27 (2001) (in the absence of clear language to the contrary, new statutes or amendments are presumed to apply only prospectively and not to pre-statute cases or causes of action)

Although the bulletin creates a right of exchange and credit on July 1, 2002, this right is not without legislatively established limitations, which the legislature did not see fit to change in either the rate-changing amendment or the claim for credit or refund statutory provision. Taxpayer attempts to bootstrap a legislative tax increase whereby distributors received rights of credit and exchange into its own perceived absolute right to pursue a statutorily time-barred remedy. However, the Taxpayer has cited no authority to negate the fact that the first

consideration must be whether the Department has, in the first instance, any jurisdiction to address the claims, or whether it has any right to grant stale claims. And, in fact, there is none. This argument can only be used by this Taxpayer to deflect from the fact that it recognized it had paid taxes for which it had a right of refund, credit or exchange, but, because of its own inattention and inaction, it failed to timely pursue its rights. As discussed above, because the law is specific and clear, the Taxpayer cannot use an after-the-fact change in the law to establish rights it once had but neglected to pursue.

As an Illinois agency, the Department has only that authority given to it by the legislature. Davis v. Chicago Police Board, 268 Ill.App.3d 851, 856 (1st Dist. 1994). Thus, the Department cannot confer a right on this Taxpayer when the Taxpayer, through its own negligence, lost that right.

Constitutional Arguments

Taxpayer also argues that the Department's retention of Taxpayer's \$369,261.06 is an unconstitutional taking of property without just compensation under the fifth and fourteenth amendments of the United States Constitution and Article I, §15 of the Constitution of the State of Illinois. The essence of those sections is that private property shall not be taken by a state for public purposes without just compensation and due process of law. Taxpayer asserts that the Department will receive an inequitable windfall with the retention of the \$369,261.06 and that the Department's actions are an unconstitutional taking without just reimbursement.

It is difficult to assess Taxpayer's arguments against existing caselaw and legal interpretation of these constitutional provisions especially when the only case Taxpayer cites for its proposition does not address what is at issue here. Heyman v. Mahin, 49 Ill.2d 284 (1971), concerned a constitutional argument raised by Heyman that graduated discounts allowed

distributors under the Cigarette Tax Act for taxes paid were unconstitutional as a denial of the equal protection clause of the fourteenth amendment of the Federal constitution and a violation the uniformity provision of §1 of Article IX of the Illinois Constitution. Heyman discovered that the cost of collecting cigarette tax per revenue stamps affixed did not decrease with the increased collections of taxes. Of the four discount rates, Heyman received the smallest discount because of the large volume of his business. The court found this insufficient to overcome the presumption of constitutionality of the Cigarette Tax Act provision for graduated discount rates applicable to distributors' purchases of cigarette tax stamps. The court found the discount rates did not constitute an arbitrary or capricious classification or a denial of equal protection.

The Heyman v. Mahin court does discuss the history of the Cigarette Tax Act and the 1963 amendment which “declared that the impact or incidence of the tax is on the retailer; however, under the amended Act the distributor continues to have the responsibility of affixing the tax stamps to the cigarette packages and is required to add the tax to the price of the cigarettes sold. Under the amendment any distributor who fails to properly collect and pay the tax imposed is liable for the tax.” *Id.* at 285-286. Taxpayer reiterates its argument regarding when the tax is due and paid. Taxpayer is correct that the tax is imposed on the retailer as an occupation tax. However, the burden of the tax is initially on the distributor who recoups its payments by collecting the amount of the tax from the retailer, who, in turn, collects the tax from the customer. As discussed above, the claim for credit statutory provision in the Act would be meaningless if distributors did not bear the burden of the tax, as represented by the stamps that they must purchase before they can sell the stamped cigarettes to their retail customer. If the Taxpayer prevails in this argument that it did not pay the tax because tax was not due until it collected it from its own customer, then Taxpayer never had a remedy, either statutorily or in

common law, to recover monies it paid for the tax stamps. Therefore, the protest it made would properly have been dismissed for failing to state any cause of action against the Department.

Taxpayer's "constitutional taking" argument fails for a number of reasons. The Department issued the requested cigarette tax stamps to the Taxpayer for the money tendered. Taxpayer was, therefore, compensated for its tax payment with the stamps it received. As stated previously, there are statutory and regulatory remedies afforded to taxpayers, such as ABC, who wish to transfer their stamps as a means of recouping the money paid or to receive a refund from the Department for the stamps. In this case, ABC did not follow the statutory or regulatory mandates to successfully accomplish its goals. Thus, ABC's failure to accomplish its goals is not a result of the Department's action, but rather, of ABC's own flawed and untimely action.

Dow Chemical Company v. Department of Revenue, *supra*, has facts that are different from those herein, but the reasoning used by the court mandates a similar outcome. Dow overpaid its income tax by \$401,237. The overpayment first came to light following a reaudit of its tax returns. The Department issued a notice of deficiency to Dow on December 4, 1979, in the amount of \$241,153 for 1975 through 1978 after an audit. Dow timely protested the notice on January 17, 1980. Both Dow and the Department employed the separate entity method in computing Dow's income liability in the audit. After several meetings between the parties, the Department agreed it would correct certain errors and in March 1982, a reaudit and determination whether Dow and its subsidiaries were a unitary group for purposes of tax computations was begun. The reaudit was completed on December 7, 1983, wherein it was determined that Dow and its other members were a unitary group that had overpaid liabilities in the amount of \$401,237.

On December 20, 1983 Dow filed an amended and restated protest requesting the return

of the overpayment. The Department notified Dow that the overpayment could not be allowed because the statute of limitations had expired.⁶ Dow filed its return for 1984 claiming \$76,243 of the \$401,237 overpayment as a credit against that year's tax liability. A hearing was held in 1986 to resolve the issues about the overpayment and Dow raised the same windfall argument that Taxpayer herein raises. The decision determined that the original notice of deficiency was void, but Dow was not entitled to a refund or any set off because the statute of limitations had expired. The circuit and appellate courts upheld the decision.

In its reasoning the appellate court stated:

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. Furthermore, this time may be extended by agreement with the Department. When section 911 is read in conjunction with sections 904⁷ and 909⁸ 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. Since Dow filed its claim for refund on December 12, 1983, well beyond the three years 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. . . .

* * *

Although Dow is correct in maintaining that if this court affirms the decision rendered below that the Department will receive a windfall at its expense, this fact alone does not provide justification for rendering a contrary judgment. 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. (See *Severe v. Miller* (1983), 120 Ill.App.3d 550, 555. See also *Morgan v. People* (1959), 16 Ill.2d 374.) However, we note that Dow fails to explain why it did not file a claim for refund as a protective device before the statute of limitations expired on filing such a claim or at the very least, obtain an extension for filing a claim as provided in section 911 of the statute. While Dow is doubtlessly in a most unenviable position, its legal arguments are weak. Its sole really viable

⁶ Income tax refunds must be filed no later than three years after the date the return was filed. 35 ILCS 5/911(1).

⁷ Entitled "Deficiencies and Overpayments." 35 ILCS 5/904.

⁸ Entitled "Credits and Refunds." 35 ILCS 5/909

argument is the Nebraska decision in the *Kellogg*⁹ case which nevertheless must be balanced against our own case law which favors a strict construction of statutes of limitations. This seems to be a case which calls for a legislative remedy rather than a judicial one. Dow Chemical Company v. Department of Revenue, *supra*, at 267, 268-69.

Just as Dow did, ABC argues that the denial of the claims and failure to issue a refund or credit or replace the stamps constitutes an inequitable windfall for the state and the retention of the \$369,261.06 is an unconstitutional taking without just compensation. However, just as in Dow Chemical Company v. Department of Revenue, *supra*, and as addressed previously, the pertinent statute, the Act, has provisions in its claim for credit section that control the returns of and reimbursement for unused stamps that the Taxpayer did not follow. The result herein can, legally, be no different than it was for the Dow Chemical Company v. Department of Revenue taxpayer.

For the foregoing reasons, it is recommended that the tentative denials of claims issued to the Taxpayer be finalized as issued.

Respectfully Submitted,

Barbara S. Rowe
Administrative Law Judge
Date: April 30, 2004

⁹ An unpublished Nebraska state trial court decision, *Kellogg v. Donna Darnes, Nebraska State Tax Commissioner*.