**IT 07-3**
**Tax Type: Income Tax**
**Issue: Math Error in Calculation of Return(s) Filed**

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

| | | | |
|---|---|---|---|
| **ABC , INC.,** | ) | No. | 00-IT-0000 |
| **formerly XYZ , INC.,** | ) | FEIN | 00-0000000 |
| **formerly XXX CORPORATION,** | ) | Tax Year: | 10/08/1999 |
| Taxpayer | ) | | |
| v. | ) | | |
| **THE DEPARTMENT OF REVENUE** | ) | John E. White, | |
| **OF THE STATE OF ILLINOIS** | ) | Administrative Law Judge | |

## RECOMMENDATION FOR DISPOSITION

**Appearances:** Thomas Donohoe, Theodore Bots, and Keith Staats, McDermott Will & Emery LLP, appeared for ABC , Inc.; Ralph Bassett and Rickey Walton, Special Assistant Attorneys General, appeared for the Illinois Department of Revenue.

**Synopsis:**

This matter involves amended returns/claims for refund that ABC , Inc., formerly XYZ , Inc., formerly XXX Corporation (XXX), filed with the Illinois Department of Revenue (Department), and which claims the Department denied. The issues pertain to the Department's determination that XXX made a math error on the face of an Illinois return it filed for tax year ending October 8, 1999.

In lieu of hearing, the parties submitted a stipulated record, which includes a written stipulation of facts and documents the parties agree would be admissible at hearing. I am including in this recommendation findings of fact and conclusions of law. I recommend that the denial be finalized as issued.

**Findings of Fact:**

1. On or about October 8, 1999, XXX merged with XYZ Inc. (XYZ). Stip. ¶ 1.
2. Upon merger, XXX became a member of XYZ's federal consolidated return group. Stip. ¶ 2.
3. XXX has nexus with the State of Illinois and files Illinois Corporation Income and Replacement Tax Returns, Form IL-1120s (Illinois returns). Stip. ¶ 3.
4. XXX's federal tax liability for the 1999 calendar year was reported on two separate federal consolidated returns. Stip. ¶ 4.
5. XXX filed its own federal consolidated return for the period covering January 1, 1999 through October 8, 1999. Stip. ¶ 5. On the face of that federal consolidated return, XXX stated that it was for "tax year beginning 01/01, 1999, ending 10/08/1999[.]" Stip. Ex. 3 (copy of XXX's federal consolidated return for tax year ending 10/8/99).
6. XXX was included in XYZ's federal consolidated return for the period covering October 9, 1999 through December 31, 1999. Stip. ¶ 6.
7. On the two federal returns, XXX made a ratable allocation election for the 1999 calendar year pursuant to Treasury Regulation (Treas. Reg.) § 1.1502-76. Stip. ¶ 7; Stip Exs. 4 (copy of the ratable allocation elections for each member of XXX's federal consolidated return group for the period covering January 1, 1999 through October 8, 1999), 5 (copy of the ratable allocation elections that were included in the XYZ consolidated federal return for the period covering October 9, 1999 through December 31, 1999).

8. For the 1999 calendar year, XXX filed two Illinois returns, one covering the period from January 1, 1999 through October 8, 1999 and another covering the period from October 9, 1999 through December 31, 1999. Stip. ¶ 8.
9. On the face of the original Illinois return covering the period from January 1, 1999 through October 8, 1999, XXX stated that it was for "fiscal year beginning 01/01/1999, ending 10/08/1999." Stip. Ex. 1 (copy of XXX's Illinois return for tax year ending (hereinafter, TYE) 10/8/99). On the face of the original Illinois return covering the period from October 9, 1999 through December 31, 1999, XXX stated that it was for "fiscal year beginning 10/09/1999, ending 12/31/1999." Stip. Ex. 2 (copy of XXX's Illinois return for TYE 12/31/99).
10. Pursuant to the ratable allocation election on the federal returns, XXX's originally filed Illinois returns computed its taxable income based on its operations from January 1, 1999 through December 31, 1999. Stip. ¶ 9. XXX allocated the taxable income to TYE 10/8/99 based on the number of days in the tax year (281) except for extraordinary items that were fully recognized in the period in which they occurred. Stip. ¶ 9. XXX allocated the taxable income to TYE 12/31/99 based on the number of days in the tax year (84) except for extraordinary items that were fully recognized in the period in which they occurred. Stip. ¶ 9.
11. XXX did not include as attachments to its original Illinois returns filed for TYE 10/8/99 and for TYE 12/31/99, the ratable allocations that it attached to its federal returns for the same periods. Stip. ¶ 7.
12. On its originally filed Illinois returns for TYE 10/8/99 and 12/31/99, XXX computed its Illinois apportionment factor numerators and denominators based upon a single

taxable period covering January 1, 1999 through December 31, 1999, except for extraordinary items which were included in the period in which they occurred. Stip. ¶ 10.

13. XXX used the apportionment factor percentages set forth in 35 **ILCS** 5/304(h)(2) when calculating its Illinois income and replacement tax liabilities on each return. Stip. Exs. 1-2 (p. 2, Part III of each return).

14. XXX's original Illinois returns for TYE 10/8/99 and 12/31/99 were delivered to the Department on October 13, 2000 in one package. Stip. ¶ 11. The package contained no cover letter. *Id*.

15. When processing XXX's original Illinois return for TYE 10/8/99, the Department treated XXX's use of the apportionment factor percentages set forth in 35 **ILCS** 5/304(h)(2) as a math error, as that term is defined in 35 **ILCS** 5/1501(a)(12). Stip. ¶ 12; Stip Ex. 6 (copies of the first two pages of XXX's original Illinois return for TYE 10/8/99, which reflect handwritten changes a Department employee made when processing that return).

16. The Department corrected XXX's putative math error by calculating the tax due on XXX's Illinois base income using the apportionment factor percentages set forth in 35 **ILCS** 5/304(h)(1). Stip. ¶ 12; Stip. Ex. 6, p. 2 (Part III); *see also* 35 **ILCS** 5/304(h)(1)-(2).

17. XXX made estimated tax payments during 1999 that were in excess of its Illinois tax liability for TYE 10/8/99. Stip. Ex. 1, pp. 1-2 (Parts II, V of the return).

18. As part of the Department's treatment of XXX's use of the apportionment factor percentages set forth in 35 **ILCS** 5/304(h)(2) on its Illinois return for TYE 10/8/99 as

a math error, the Department collected the amount of tax that it determined was understated on that return from the additional tax monies XXX had previously paid. *See* Stip. ¶ 12; Stip. Ex. 10 (copy of LTR-355 Business Income Tax Letter, dated May 13, 2002 (5/13/02 Letter), pp. 1-2); *see also* 35 **ILCS** 5/902(a), 903(a)(1).

19. The Department issued to XXX, and XXX received, a document titled, BTR-76 Taxpayer Notification, dated March 3, 2001 (3/3/01 Notice). Stip. ¶ 13; Stip. Ex. 8 (copy of 3/3/01 Notice).

20. XXX replied to the 3/3/01 Notice with a letter dated March 27, 2001, which the Department received. Stip. ¶ 14; Stip. Ex. 9 (copy of XXX's response to the Department's 3/3/01 Notice).

21. The Department issued to XXX, and XXX received, the 5/13/02 Letter. Stip. ¶ 15; Stip. Ex. 10.

22. The Department's 5/13/02 Letter provided, in part:

> ***
>
> Please note that the income tax liability shown for the tax year ended October 8, 1999 was increased from the amount of tax as originally filed due to the use of incorrect weighted apportionment factors. The correct weighted factors for tax years ending on or after December 31, 1998 and prior to December 31, 1999 are .166667 for property and payroll, and .666666 for sales. Also, the amount of overpayment originally shown on the IL-1120 for the tax year ended October 08, 1999 was requested to be refunded and was not available for carryforward.
>
> ***

Stip. Ex. 10, p. 1.

23. The Department issued its 5/13/02 Letter to XXX within three years from the date XXX filed its Illinois return for TYE 10/8/99. Stip. ¶¶ 11, 15; *see also* 35 **ILCS** 5/903(a)(1).

24. One of the schedules attached to the Department's 5/13/02 Letter stated the reduced amount of tax that the Department determined XXX overpaid ("due to the use of incorrect weighted apportionment factors"), and which was subsequently carried over to XXX's TYE 12/31/99. Stip. Ex. 10, pp. 1-2.

25. The Department audited XXX's original Illinois returns for TYE 10/8/99 and 12/31/99 after processing them. Stip. ¶ 16. As a result of that audit, the Department adjusted the apportionment factor numerators and denominators as reported by XXX by prorating the year end amounts between the two short periods based upon the number of days in each period, i.e., from January 1, 1999 to October 8, 1999, and from October 9, 1999 to December 31, 1999, respectively. Stip. ¶ 16. The audit did not make any adjustment to the Department's original determination, when processing XXX's original returns for 1999, that XXX committed a math error when it used the apportionment factor percentages set forth in 35 **ILCS** 5/304(h)(2) on its original Illinois return for TYE 10/8/99. *See id.*; Stip. ¶ 12; Stip. Ex. 11 (copies of audit adjustments and auditor's work-papers).

26. The Department did not issue XXX a Notice of Deficiency (NOD) that stated the amount by which the Illinois net income and replacement tax reported on XXX's original Illinois return filed for the period ending October 8, 1999 was understated as a result of the Department's determination that XXX mistakenly used the wrong apportionment factor percentages. Stip. ¶ 17; *see also* 35 **ILCS** 5/902(a), 903(a).

27. On or about June 20, 2003, XXX filed an amended Illinois tax return, IL-1120-X, for the period October 9, 1999 through December 31, 1999. Stip. ¶ 18; Stip. Ex. 15 (copy of first amended Illinois return for TYE 12/31/99).

28. On or about October 14, 2003, XXX filed another amended Illinois return for the period October 9, 1999 through December 31, 1999. Stip. ¶ 18; Stip. Ex. 16 (copy of second amended Illinois return for TYE 12/31/99).
29. On or about October 14, 2003, XXX filed an amended Illinois tax return, IL-1120-X, for the period January 1, 1999 through October 8, 1999. Stip. ¶ 18; Stip. Ex. 12 (copy of amended Illinois return for TYE 10/8/99).
30. Among other things, XXX's amended Illinois return for TYE 10/8/99 used the apportionment factor weighting set forth on its return as originally filed, and requested a refund of the additional Illinois income and replacement tax resulting from the Department's adjustment to XXX's apportionment factor weighting. Stip. ¶ 19.
31. The Department denied the refund claimed on XXX's amended Illinois return for TYE 10/8/99 as it related to the apportionment factor weighting. Stip. ¶ 20; Stip. Ex. 13 (copy of Department's Notice of Denial (Denial)).
32. XXX filed a timely protest of the Department's Denial. Stip. ¶ 21; Stip. Ex. 14 (copy of XXX's protest).

**Conclusions of Law:**

When a taxpayer seeks to take advantage of deductions or credits allowed by statute, the burden of proof is on the taxpayer. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981). Here, XXX claims entitlement to a refund of tax paid to the Department, therefore, it has the burden of proof.

Because the parties could not agree how to phrase the issues, each made separate statements within a pre-hearing order. *See* Pre-Hearing Order. In essence, the questions

raised by the parties' separate issue statements are: (1) whether the Department properly determined that XXX made a math error on its Illinois return for TYE 10/8/99 by using the apportionment factor percentages set forth in § 304(h)(2) instead of those set forth in § 304(h)(1); and if so (2) whether the Department properly notified XXX of that math error. Each of those questions, in turn, requires a review of interrelated sections of the Illinois Income Tax Act (IITA), 35 **ILCS** 5/101 *et seq*. For convenience, all subsequent section citations in this recommendation will refer to the IITA, unless otherwise noted.

Before discussing the two issues specifically, I will briefly review the statutory distinction between a math error notice and a notice of deficiency, and the procedural effects that follow from those distinct determinations. The procedural differences are due to the interplay between §§ 902 and 903. Section 902 provides, in pertinent part:

> § 902. Notice and Demand.
> (a) In general. Except as provided in subsection (b) the Director shall, as soon as practicable after an amount payable under this Act is deemed assessed (as provided in Section 903), give notice to each person liable for any unpaid portion of such assessment, stating the amount unpaid and demanding payment thereof. In the case of tax deemed assessed with the filing of a return, the Director shall give notice no later than 3 years after the date the return was filed. Upon receipt of any notice and demand there shall be paid at the place and time stated in such notice the amount stated in such notice. Such notice shall be left at the dwelling or usual place of business of such person or shall be sent by mail to the person's last known address.
> (b) Judicial review. In the case of a deficiency deemed assessed under Section 903(a)(2) after the filing of a protest, notice and demand shall not be made with respect to such assessment until all proceedings in court for the review of such assessment have terminated or the time for the taking thereof has expired without such proceedings being instituted.
> ***

35 **ILCS** 5/902.

Section 903 provides, in pertinent part:

> § 903. Assessment.
> (a) In general.
> (1) Returns. The amount of tax which is shown to be due on the return shall be deemed assessed on the date of filing of the return (including any amended returns showing an increase of tax). In the event that the amount of tax is understated on the taxpayer's return due to a mathematical error, the Department shall notify the taxpayer that the amount of tax in excess of that shown on the return is due and has been assessed. Such notice of additional tax due shall be issued no later than 3 years after the date the return was filed. Such notice of additional tax due shall not be considered a notice of deficiency nor shall the taxpayer have any right of protest. In the case of a return properly filed without the computation of the tax, the tax computed by the Department shall be deemed to be assessed on the date when payment is due.
> (2) Notice of deficiency. If a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in section 904(d) if no protest is filed; or, if a protest is filed, then upon the date when the decision of the Department becomes final.
> ***
> (b) Limitations on assessment. No deficiency shall be assessed with respect to a taxable year for which a return was filed unless a notice of deficiency for such year was issued not later than the date prescribed in section 905.
> ***

35 **ILCS** 5/903.

In essence, § 902 identifies when the Department may seek to collect payment for the unpaid amount of a final income tax assessment, and § 903 identifies how an income tax assessment is initiated. Section 903 distinguishes between the procedures to be followed when the Department makes a correction of a taxpayer's return for a math error, and the procedures to be followed when the Department makes a correction of a taxpayer's return for an error that requires the issuance of an NOD. 35 ILCS 5/903(a)(1)-

(2). The Department need not issue an NOD when it makes a math error correction to a taxpayer's return. 35 **ILCS** 5/903(a)(1). Nor is the Department required to forego collection activities until a person determined to have made a math error has been granted a hearing, in the event he disagrees with the Department's determination. 35 **ILCS** 5/902(a)-(b); 86 Ill. Admin. Code § 100.9200(a)(2)(B)-(C).

Instead, when the Department determines that a taxpayer has made a math error on the face of a return, it need only notify the taxpayer that the amount of tax in excess of that shown on the return is due and has been assessed. 35 **ILCS** 5/903(a)(1). Such notice must be issued within three years from the date the taxpayer filed the return. *Id*. Section 903's reference to, and distinction between, the Department's correction of a taxpayer's return for a math error, and the Department's correction of a taxpayer's return for an error that requires the issuance of an NOD, has been within that section since the IITA's enactment in 1969. Ill.Rev.Stat. ch. 120, ¶ 9-903 (1969). The fundamental difference between a taxpayer notified of a math error and a taxpayer who has been issued an NOD, therefore, is that the former does not have the same right to a pre-deprivation hearing (i.e., a hearing before it must pay the tax) that the latter enjoys, if he disagrees with the Department's determination. Department of Revenue v. Walsh, 196 Ill. App. 3d 772, 779, 554 N.E.2d 433, 437 (1st Dist. 1990).

**Issues and Analysis**
**Issue 1**

The first issue is whether the Department correctly determined that XXX made a math error on the return it filed for TYE 10/8/99 by calculating its average Illinois apportionment factor using the percentages set forth in § 304(h)(2) rather than those set forth in § 304(h)(1). Before addressing how subparagraph (h) fits within the rest of that

section, let us recall that the general purpose of § 304 is to describe how non-residents shall either allocate or apportion business income. 35 **ILCS** 5/304. Where a non-resident earns business income from both inside and outside Illinois, the purpose of the apportionment formula is to confine the taxation of business income to that portion which is attributable to the non-resident's business activities in Illinois. Caterpillar Tractor Co. v. Lenkos, 84 Ill. 2d 102, 123, 417 N.E.2d 1343, 1354 (1981); Caterpillar Financial Services Corp. v. Whitley, 288 Ill. App. 3d 389, 392-93, 680 N.E.2d 1082, 1083-84 (3d Dist. 1997).

Subparagraph (h) of § 304 was enacted in 1998, as part of the Illinois General Assembly's decision to fundamentally change Illinois' method of apportioning a non-resident's business income for income tax purposes. *See* P.A. 90-613 (effective July 8, 1998). By amending the text of § 304 and by adding subparagraph (h) to that section, the Illinois legislature gradually transformed Illinois' statutory formula from three-factor apportionment to single-factor apportionment. The three factor method had taken into account the relative amounts of a non-resident's payroll, property and sales in Illinois, versus its payroll, property and sales everywhere within the United States. *E.g.*, General Telephone Co. of Illinois v. Johnson, 103 Ill. 2d 363, 371-72, 469 N.E.2d 1067, 1071 (1984). Illinois' current scheme uses a single factor, which takes into account a non-resident's sales in Illinois and compares it to the person's sales everywhere within the United States. 35 **ILCS** 5/304(h).

Regardless of the number of factors taken into account within Illinois' former or current statutory apportionment scheme, the calculation of a non-resident's apportionment factor was and remains a calculation that the non-resident is required to

make on the face of its Illinois return. As XXX's Illinois return for TYE 10/8/99 reflects, the apportionment factor calculation is made on page 2, Part III of the return. Stip. Ex. 1, p. 2 (Part III). The average factor is then multiplied by the non-resident's total base income. *Id*. The product of this calculation, again, is the portion of the non-resident's business income derived from its business activities within the water's edge of the United States that Illinois is constitutionally permitted to tax. Caterpillar Financial Services Corp., 288 Ill. App. 3d at 392-93, 680 N.E.2d at 1083-84.

After the enactment of Public Act 90-613, the pertinent parts of § 304 provided:

> § 304. Business income of persons other than residents.
> (a) In general. The business income of a person other than a resident shall be allocated to this State if such person's business income is derived solely from this State. If a person other than a resident derives business income from this State and one or more other states, then, for tax years ending on or before December 30, 1998, and except as otherwise provided by this Section, such person's business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the sum of the property factor (if any), the payroll factor (if any) and 200% of the sales factor (if any), and the denominator of which is 4 reduced by the number of factors other than the sales factor which have a denominator of zero and by an additional 2 if the sales factor has a denominator of zero. For tax years ending on or after December 31, 1998, and except as otherwise provided by this Section, persons other than residents who derive business income from this State and one or more other states shall compute their apportionment factor by weighting their property, payroll, and sales factors as provided in subsection (h) of this Section.
> ***
> (h) For tax years ending on or after December 31, 1998, the apportionment factor of persons who apportion their business income to this State under subsection (a) shall be equal to:
> (1) for tax years ending on or after December 31, 1998 and before December 31, 1999, 16 2/3% of the

> property factor plus 16 2/3% of the payroll factor plus 66 2/3% of the sales factor;
>
> (2) for tax years ending on or after December 31, 1999 and before December 31, 2000, 8 1/3% of the property factor plus 8 1/3% of the payroll factor plus 83 1/3% of the sales factor;
>
> (3) for tax years ending on or after December 31, 2000, the sales factor.
>
> If, in any tax year ending on or after December 31, 1998 and before December 31, 2000, the denominator of the payroll, property, or sales factor is zero, the apportionment factor computed in paragraph (1) or (2) of this subsection for that year shall be divided by an amount equal to 100% minus the percentage weight given to each factor whose denominator is equal to zero.

35 **ILCS** 5/304(h).

The legislature, certainly knowing that Illinois' transition from a three-factor state into a single-factor state might increase or decrease the income relative tax burden of different non-residents, sought to ease taxpayers though that transition over the course of three years. 35 **ILCS** 5/304(h)(1)-(3). To provide certainty and ease of administration, the legislature used the dates on which a taxpayer's year ended as the trigger for determining the apportionment factor percentages to be used during each of the years of the transition period. 35 **ILCS** 5/304(h).

This brings us to § 401, which provides:

> § 401. Taxable Year.
>
> (a) In general. For purposes of the tax imposed by this Act, the taxable year of a person shall be the same as the taxable year of such person for federal income tax purposes. The taxable year of any person required to file a return under this Act but not under the Internal Revenue Code shall be his annual accounting period if it is a fiscal or calendar year, and in all other cases shall be the calendar year.
>
> (b) Change in taxable year. If the taxable year of a person is changed for federal income tax purposes, the taxable year of such person for purposes of the tax imposed

> by this Act shall be similarly changed. In the case of a taxable year for a period of less than 12 months, the standard exemption allowed under section 204 shall be prorated on the basis of the number of days in such year to 365.

35 **ILCS** 5/401.

The legislature defined the term "taxable year" in the definitions section of the IITA:

> § 1501. Definitions.
>
> ***
>
> (23) Taxable year. The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the base income is computed under this Act. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of this Act, the period for which such return is made.

35 **ILCS** 5/1501(a)(23).

Here, there is no dispute that XXX filed two federal returns ─ one with a TYE on 10/8/99 and one with a TYE on 12/31/99. Stip. ¶¶ 4-6. There is also no dispute that XXX filed two Illinois returns ─ one with a TYE on 10/8/99 and one with a TYE on 12/31/99. Stip. ¶ 8; Stip. Exs. 1-2. A tax year that ends on 10/8/99 is not one that ends "on or after December 31, 1999 and before December 31, 2000 …." 35 **ILCS** 5/304(h)(2). Rather, it is one that ends "on or after December 31, 1998 and before December 31, 1999 …." 35 **ILCS** 5/304(h)(1). Pursuant to the plain text of § 304(h) then, it is clear that XXX erred when calculating its Illinois apportionment factor using the percentages set forth in § 304(h)(2), instead of those set forth in § 304(h)(1). The Department, therefore, correctly determined that XXX erred when using the apportionment factor percentages set forth in 35 **ILCS** 5/304(h)(2) to calculate its average Illinois apportionment factor, and thereafter,

to use that incorrect average apportionment factor to calculate its Illinois income and replacement tax liability for TYE 10/8/99. Stip. Ex. 1, p. 2 (Part III); 35 **ILCS** 5/304(h)(1)-(2). The question remains, however, whether XXX's error was a math error, as that term is defined in 35 **ILCS** 5/1501(a)(12).

The Illinois General Assembly defined the term mathematical error within the IITA. Section 1501(a)(12) provides:

> § 1501. Definitions.
>
> ***
>
> (12) Mathematical error. The term "mathematical error" includes the following types of errors, omissions, or defects in a return filed by a taxpayer which prevents acceptance of the return as filed for processing:
>
> (A) arithmetic errors or incorrect computations on the return or supporting schedules;
>
> (B) entries on the wrong lines;
>
> (C) omission of required supporting forms or schedules or the omission of the information in whole or in part called for thereon; and
>
> (D) an attempt to claim, exclude, deduct, or improperly report, in a manner directly contrary to the provisions of the Act and regulations thereunder any item of income, exemption, deduction, or credit.
>
> ***

35 **ILCS** 5/1501(a)(12).

The parties stipulate that the Department treated XXX's use of § 304(h)(2)'s apportionment factor percentages as a math error (Stip. ¶ 12), and the Department argues that XXX's use of the wrong apportionment factor percentages was the type of math error described within § 1501(a)(12)(D). Department of Revenue's Post-Hearing Brief (Department's Brief), pp. 13-14. XXX, however, contends that its use of § 304(h)(2)'s percentages was not a math error because it did not use those percentages unintentionally,

by mistake, or in error, and because its use of those percentages was not directly contrary to an Illinois statute or regulation. Taxpayer's Opening Brief (XXX's Brief), p. 29.

I agree that XXX's use of § 304(h)(2)'s apportionment factor percentages was a math error, but I disagree with the Department's contention that it was a math error as described in § 1501(a)(12)(D). The computation of one's average apportionment factor is not a calculation involving items of income, exemption, deduction or credit. *Compare* 35 **ILCS** 5/1501(a)(12)(D) *with* Stip. Ex. 1, p. 2 (Part III). Rather, the math error XXX made is described within § 1501(a)(12)(A) as an "incorrect computation[] on the return or supporting schedules …." 35 **ILCS** 5/1501(a)(12)(A). What makes the particular computation at issue here ─ basically, a multiplication problem ─ incorrect is that it did not include numbers that the Illinois General Assembly required to be included within the equation. When XXX calculated its average apportionment factor on Part III of its Illinois return filed for TYE 10/8/99 (Stip. Ex. 1, p. 2), it did not use the apportionment factor percentages that the legislature directed non-residents to use on returns filed for tax years ending "on or after December 31, 1998 and before December 31, 1999 …." 35 **ILCS** 5/304(h)(1).

In this way, the incorrect computation XXX made on its Illinois return was akin to its use of an incorrect tax rate when calculating the amount of tax due. For example, had the Illinois General Assembly amended the IITA so as to increase Illinois's corporate income tax rate, and the amending act provided that the new rate would be effective for tax years ending on or after December 31, 1998, then XXX's use of the old rate on its Illinois return filed for its TYE 10/8/99 would similarly be an "incorrect computation[ ] on the return or supporting schedules …." 35 **ILCS** 5/1501(a)(12)(A). The Department's

math error determination here was entirely ministerial, rather than the product of some intensive or extensive comparison of XXX's returns with its books and records. *See* Stip. ¶¶ 12, 16.

XXX contends that its use of § 304(h)(2)'s factor percentages cannot be treated as a math error because it intended to use those percentages, and because, under the circumstances, its use of those percentages was correct. XXX's Brief, pp. 4 ("There is a legitimate legal dispute; the taxpayer's use of the factor weighting for tax years ended on or after December 31, 1999 was not a mathematical error"), 29 ("XXX's position [that its use § 304(h)(2)'s percentages on its Illinois return for TYE 10/8/99 was correct] is certainly not an unintentional mistake or an arithmetic error"). But nothing within Illinois' statutory definition of math error suggests that intent is relevant to the question of whether a particular computation required to be made on a return is correct. 35 **ILCS** 5/1501(a)(12). The taxpayer in Walsh certainly intended to compute his taxable income by claiming a deduction that was not authorized by § 203, yet the court agreed that his intentional act was a math error. Walsh, 196 Ill. App. 3d at 775-77, 554 N.E.2d at 435. Nor did the fact that Walsh considered the propriety of his claimed but unauthorized deduction to be a substantive issue, as XXX does here (XXX's Brief, p. 4), persuade the court that the Department was powerless to correct it as a math error. Walsh, 196 Ill. App. 3d at 777, 554 N.E.2d at 435. It would frustrate the legislative intent underlying § 903(a)(1) if a taxpayer could render any math error determination void merely by claiming that it purposefully made the particular computation that the Department determined was a math error. Here, therefore, XXX cannot bootstrap its argument that its use of § 304(h)(2)'s percentages should not be considered a math error merely by

asserting that that incorrect calculation was purposefully made.

Further, XXX's election to make a ratable allocation pursuant to Treas. Reg. § 1.1502-76 does not make its use of § 304(h)(2)'s factor percentages on its Illinois return for TYE 10/8/99 correct. Notwithstanding XXX's arguments, the plain text of Treas. Reg. § 1.1502(b) repeatedly confirms that ─ regardless whether a taxpayer makes a ratable allocation election pursuant to part of that regulation ─ the short-year periods created when a member enters or leaves a federal consolidated group constitute separate tax years "for all Federal income tax purposes." 26 C.F.R. § 1.1502-76(b)(1)(ii)(A)(1), (b)(2)(i); *see also id.*, § 1.1502-76(b)(2)(ii)(A). Specifically, Treas. Reg. § 1.1502-76 provides, in pertinent part:

§ 1.1502-76 Taxable year of members of group.

(a) Taxable year of members of group –

(1) Change to parent's taxable year. The consolidated return of a group must be filed on the basis of the common parent's taxable year, and each subsidiary must adopt the common parent's annual accounting period for the first consolidated return year for which the subsidiary's income is includible in the consolidated return. If any member is on a 52-53-week taxable year, the rule of the preceding sentence shall, with the advance consent of the Commissioner, be deemed satisfied if the taxable years of all members of the group end within the same 7-day period. Any request for such consent shall be filed with the Commissioner of Internal Revenue, Washington, DC 20224, not later than the 30th day before the due date (not including extensions of time) for the filing of the consolidated return.

***

(b) Items included in the consolidated return –

(1) General rules--

(i) In general. A consolidated return must include the common parent's items of income, gain, deduction, loss, and credit for the entire consolidated return year, and each subsidiary's items for the portion of the year for which it is a member. If the consolidated return includes the items of a corporation for only a portion of its tax year determined without taking this section into account, items for the portion of the year not included in the consolidated return must be included in a separate return (including the consolidated return of another group). The rules of this paragraph (b) must be applied to prevent the duplication or elimination of the corporation's items.

(ii) The day a corporation becomes or ceases to be a member –

(A) End of the day rule.

(1) In general. **If a corporation (S), other than one described in paragraph (b)(1)(ii)(A)(2) of this section, becomes or ceases to be a member during a consolidated return year, it becomes or ceases to be a member at the end of the day on which its status as a member changes, and its tax year ends for all Federal income tax purposes at the end of that day.** Appropriate adjustments must be made if another provision of the

Internal Revenue Code or the regulations thereunder contemplates the event occurring before or after S's change in status. For example, S's items restored under Sec. 1.1502-13 immediately before it becomes a nonmember are taken into account in determining the basis of S's stock under Sec. 1.1502-32. On the other hand, if a section 338(g) election is made in connection with S becoming a member, the deemed asset sale under that section takes place before S becomes a member. See Sec. 1.338-10(a)(5) (deemed sale excluded from purchasing corporation's consolidated return.)

(2) Special rule for former S corporations. If S becomes a member in a transaction other than in a qualified stock purchase for which an election under section 338(g) is made, and immediately before becoming a member an election under section 1362(a) was in effect, then S will become a member at the beginning of the day the termination of its S corporation election is effective. S's tax year ends for all Federal income tax purposes at the end of the preceding day. This paragraph (b)(1)(ii)(A)(2) applies to transactions occurring after November 10, 1999.

(B) Next day rule. If, on the day of S's change in status as a member, a transaction occurs that is properly allocable to the portion of S's day after the event resulting in the change, S and all persons related to S under section 267(b) immediately after the event must treat the transaction for all Federal income tax purposes as occurring at the beginning of the following day. A determination as to whether a transaction is properly allocable to the portion of S's day after the event will be respected if it is reasonable and consistently applied by all affected persons. In determining whether an allocation is reasonable, the following factors are among those to be considered--

(1) Whether income, gain, deduction, loss, and credit are allocated inconsistently (e.g., to maximize a seller's stock basis adjustments under Sec. 1.1502-32);

(2) If the item is from a transaction with respect to S stock, whether it reflects ownership of the stock before or after the event (e.g., if a member transfers encumbered land to nonmember S in exchange for additional S stock in a transaction to which section 351 applies and the exchange results in S becoming a member of the consolidated group, the applicability of section 357(c) to the exchange must be determined under Sec. 1.1502-80(d) by treating the exchange as occurring after the event; on the other hand, if S is a member but has a minority shareholder and becomes a nonmember as a result of its redemption of stock with appreciated property, S's gain under section 311 is treated as from a transaction occurring before the event);

(3) Whether the allocation is inconsistent with other requirements under the Internal Revenue Code (e.g., if a section 338(g) election is made in connection with a group's acquisition of S, the deemed asset sale must take place before S becomes a member and S's gain or loss with respect to its assets must be taken into account by S as a nonmember) (but see Sec. 1.338-1(d)); and

(4) Whether other facts exist, such as a prearranged transaction or multiple changes in S's status, indicating that the transaction is not properly allocable to the portion of S's day after the event resulting in S's change.

(C) Successor corporations. For purposes of this paragraph (b)(1)(ii), any reference to a corporation includes a reference to a successor or predecessor as the context may require. A corporation is a successor if the basis of its assets is determined, directly or indirectly, in whole

or in part, by reference to the basis of the assets of another corporation (the predecessor). For example, if a member forms S, S is treated as a member from the beginning of its existence.

(iii) Group structure changes. If the common parent ceases to be the common parent but the group remains in existence, adjustments must be made in accordance with the principles of Sec. 1.1502-75(d)(2) and (3).

(2) Determination of items included in separate and consolidated returns--

(i) In general. **The returns for the years that end and begin with S becoming (or ceasing to be) a member are separate tax years for all Federal income tax purposes.** The returns are subject to the rules of the Internal Revenue Code applicable to short periods, as if S ceased to exist on becoming a member (or first existed on becoming a nonmember). For example, cost recovery deductions under section 168 must be allocated for short periods. On the other hand, annualization under section 443 is not required of S solely because it has a short year as a result of becoming a member. (Similarly, section 443 applies with respect to a consolidated return only to the extent that the group's return is for a short period and section 443 applies without taking this paragraph (b) into account.)

(ii) Ratable allocation of a year's items—

(A) Application. **Although the periods ending and beginning with S's change in status are different tax years, items (other than extraordinary items) may be ratably allocated between the periods if--**

**(1) S is not required to change its annual accounting period or its method of accounting as a result of its change in status (e.g., because its stock is sold between consolidated groups that have the same annual accounting periods); and**

**(2) An irrevocable ratable allocation election is made under paragraph (b)(2)(ii)(D) of this section.**

(B) General rule--

(1) Allocation within original year. Under a ratable allocation election, paragraph (b)(2) of this section applies by allocating to each day of S's original year (S's tax year determined without taking this section into account) an equal portion of S's items taken into account in the original year, except that extraordinary items must be allocated to the day that they are taken into account. All persons affected by the election must take into account S's extraordinary items and the ratable allocation of S's remaining items in a manner consistent with the election.

(2) Items to be allocated. Under ratable allocation, the items to be allocated and their timing, location, character, and source are generally determined by treating the original year as a single tax year, and the items are not subject to the rules of the Internal Revenue Code applicable to short periods (unless the original year is a short period). **However, the years ending and beginning with S's change in status are treated as different tax years (and as short periods) with respect to any item carried to or from these years (e.g., a net operating loss carried under section 172) and with respect to the application of section 481.**

(3) Multiple applications. If this paragraph (b) applies more than once with respect to an original year, adjustments must be made in accordance with the principles of this paragraph (b). For example, if S becomes a member of two different consolidated groups during the same original year and ratable allocation is elected with respect to both groups, ratable allocation is generally determined for both groups by treating the original year as a single tax year; however, if ratable

> allocation is elected only with respect to the first group, the ratable allocation is determined by treating the original year as a short period that does not include the period that S is a member of the second group. Ratable allocation is not a method of accounting, and ratable allocation with respect to one application of this paragraph (b) to S does not require ratable allocation to be subsequently applied with respect to S.

26 C.F.R. § 1.1502-76 (emphases added).

Considering the clear text of Treas. Reg. § 1.1502-76, and of § 401, I do not understand XXX's argument that "[t]here was no substantive reason for filing two Illinois returns." *See* XXX's Brief, p. 10 (argument heading). Whether XXX made the ratable election or not, its change of ownership required it to file separate, short-year federal returns. 26 C.F.R. § 1.1502-76(b)(1)(ii)(A)(1), (b)(2)(i); *see also id*., § 1.1502-76(b)(2)(ii)(A). Under the plain text of the federal regulation, XXX's return for TYE 10/8/99 would not be considered a return filed for TYE 12/31/99. 26 C.F.R. § 1.1502-76(b)(1)(ii)(A)(1), (b)(2)(i); *see also id*., § 1.1502-76(b)(2)(ii)(A).

The same is true for purposes of Illinois law. 35 **ILCS** 5/401. Under the plain text of § 401, XXX was required to file Illinois returns using the same tax years that it used for federal income tax purposes, including any changes to such years. 35 **ILCS** 5/401. Indeed, it did so, but when computing its average Illinois apportionment factor on its Illinois return for TYE 10/8/99, it ignored the clear direction of § 304(h). That XXX made a ratable allocation election simply has nothing to with the facts regarding, or the statutory basis for, the Department's determination that XXX made a math error by using the wrong apportionment factor percentages when calculating its average apportionment factor on the face of the Illinois return XXX filed for TYE 10/8/99. 35 **ILCS** 5/304(h), 401, 903(a)(1). Sections 304(h) and 401 provide all of the authority ─ and the reason ─ necessary to support the Department's math error determination.

Moreover, since the Illinois General Assembly fundamentally changed Illinois law when it passed Public Act 90-613, XXX's citation to letter rulings previously issued by the Department to persons who sought permission to file a single Illinois return, after being required to file separate, short-year federal returns due to changes in ownership, are not persuasive here. Union Electric Co. v. Department of Revenue, 136 Ill. 2d 385, 400, 556 N.E.2d 236, 243 (1980) (normally private letter rulings have no precedential effect). First, and as the Department points out (Department's Brief, p. 12), XXX had not sought permission from the Department to file a single Illinois tax return during the separate periods for which it filed two, short-year federal returns. Instead, XXX filed two, separate Illinois returns, and it stated on the face of those returns that they were being filed regarding tax years ending, respectively, 10/8/99 and 12/31/99. Stip. Exs. 1-2. XXX, therefore, is not in same position as the taxpayers in the letter rulings it cites. XXX's Brief, p. 17, & nn. 2-4.

More importantly, the Department's prior letter rulings are neither binding nor persuasive here because of another amendment that the Illinois General Assembly made to § 304 with Public Act 90-613. That Act also amended § 304(f), by added the following language to that subsection, which is underlined below:

> (f) Alternative allocation. If the allocation and apportionment provisions of subsections (a) through (e) and of subsection (h) do not fairly represent the extent of a person's business activity in this State, the person may petition for, or the Director may require, in respect of all or any part of the person's business activity, if reasonable:
>
> (1) Separate accounting;
> (2) The exclusion of any one or more factors;
> (3) The inclusion of one or more additional factors which will fairly represent the person's business activities in this State; or

> (4) The employment of any other method to effectuate an equitable allocation and apportionment of the person's business income.

35 **ILCS** 5/304(f); P.A. 90-613.

The income tax regulation adopted to administer and implement § 304(f) provides, in pertinent part:

> ***
>
> (b) The petition procedures provided in this Section are [the] exclusive means by which a taxpayer may petition for an alternative apportionment formula. Any attempt to invoke an alternative apportionment formula by a method or procedure other than as specified in this Section shall not be considered a valid petition under IITA Section 304(f). Pursuant to Section 304(f), the Director has sole and exclusive authority to grant a petition for an alternative apportionment formula.
>
> (c) Burden of Proof. A departure from the required apportionment method is allowed only where such methods do not accurately and fairly reflect business activity in Illinois. An alternative apportionment method may not be invoked, either by the Director or by a taxpayer, merely because it reaches a different apportionment percentage than the required statutory formula. However, if the application of the statutory formula will lead to a grossly distorted result in a particular case, a fair and accurate alternative method is appropriate. The party (the Director or the taxpayer) seeking to utilize an alternative apportionment method has the burden or going forward with the evidence and proving by clear and cogent evidence that the statutory formula results in the taxation of extraterritorial values and operates unreasonably and arbitrarily in attributing to Illinois a percentage of income which is out of all proportion to the business transacted in this State. In addition, the party seeking to use an alternative apportionment formula must go forward with the evidence and prove that the proposed alternative apportionment method fairly and accurately apportions income to Illinois based upon business activity in this State.
>
> ***

86 Ill. Admin. Code § 100.3390(b)-(c).

This stipulated record does not include any evidence that XXX sought to petition the Director for alternative allocation or apportionment pursuant to amended § 304(f). And since filing such a petition is the exclusive statutory means by which XXX could seek to avoid the effect of § 304(h), it is wholly improper to allow XXX to do so here. 86 Ill. Admin. Code § 100.3390(b).

**Issue 2**

The second issue is whether the Department properly notified XXX that it made a math error on its Illinois return for TYE 10/8/99. XXX argues that neither of the documents the Department issued to it, that is, the 3/3/01 Notice and the 5/13/02 Letter, conform to the type of notice described within § 903(a)(1). XXX's Brief, pp. 30-33. XXX contends that the math error notice requirements of § 903(a)(1) must be given a mandatory interpretation. XXX's Brief, p. 33. XXX asserts that the Department's collection of the additional amount of tax that it determined was understated on XXX's return for TYE 10/8/99 was invalid, since the Department did not issue a proper math error notice to it as required by § 903(a)(1), or an NOD as required by § 903(a)(2). *See* XXX's Brief, pp. 3-4, 30-33.

But what XXX seems to want me to construe as being mandatory about § 903(a)(1) is that a math error notice must, in all circumstances, include some language — which XXX never specifically identifies — lest the Department's initial math error determination be deemed void. The closest XXX comes to identifying such language is on page 31 of its brief, when, in discussing the text of § 903(a)(1) and of the regulation the Department adopted to administer that statutory provision, it argues that:

> There is no ambiguity here. If the Department asserts that there has been a mathematical error, it "shall"

> issue a "notice of additional tax due." Given that a determination that an additional amount has been assessed gives the Department the power to commence collection efforts, the requirement that the taxpayer be informed of the Department's belief that an additional amount should be assessed is entirely appropriate.

XXX's Brief, p. 31.

If, in fact, XXX's argument is that no math error notice is valid unless it contains the words "notice of additional tax due", or some other combination of words that precisely trace some of the relevant text of § 903(a)(1), I reject it. Indeed, XXX's own reading of the applicable Illinois income tax regulation provides the best explanation why a writing from the Department might well conform to the math error notice requirements of § 903(a)(1), yet not include the words "notice of additional tax due." XXX contends that:

> The regulation suggests another reason for requiring notice. The regulation states that the conclusion that there has been a mathematical error calls for an "informal inquiry to the taxpayer …." 86 Ill. Admin. Code § 100.9200(a)(2)(B). The regulation continues to state that the taxpayer's appropriate response to the notice of additional tax due is to pay the amount unless the defect specified by the Department can be remedied. 86 Ill. Admin. Code § 100.9200(a)(2)(C). The regulation thus suggests that the mathematical error determination is a fluid one and that it can be adjusted upon response to the informal inquiry." If the taxpayer satisfactorily responds to the notice, the regulation prescribes that the Department shall "cancel the previously issued notice of additional tax due."

XXX's Brief, p. 31. At a minimum, it seems inconsistent for XXX to both concede that the applicable regulation interprets a math error determination as involving the Department's "informal inquiry" to a taxpayer about a return, yet simultaneously argue

that the Department's "informal inquiry" must later be deemed to be invalid if it did not contain some express language that XXX suggests is required by statute.

The Department provides two responses to XXX's argument that § 903(a)(1) should be given a mandatory construction. First, it argues that a math error notice described in § 903(a)(1) has to be issued "only … when [a] taxpayer has not paid in sufficient funds to cover the increased amount of tax." Department's Brief, p. 14. It also asserts that, even though it was not required to issue a math error notice "[u]nder these circumstances" (Department's Brief, p. 14), it "did send sufficient notice of [XXX's] mathematical error" (*id*., p. 15) to XXX by issuing the 3/31/02 Notice and the 5/13/02 Letter. *Id*., pp. 15-16.

The Illinois General Assembly used the word "shall" twice within § 903(a)(1), when describing the Department's duty upon determining that a taxpayer has made a math error. 35 **ILCS** 5/903(a)(1). Generally, the legislature's use of the word "shall" indicates a mandatory intent. Andrews v. Foxworthy, 71 Ill. 2d 13, 21, 373 N.E.2d 1332, 1335 (1978). "However, the term 'shall' does not have a fixed or inflexible meaning. It can, in fact, be construed as meaning 'may,' depending on the legislative intent. However, '(w)here the word is employed with reference to any right or benefit to anyone, and the right or benefit depends upon giving a mandatory meaning to the word, it cannot be given a permissive meaning ***.' " Foxworthy, 71 Ill. 2d at 21, 373 N.E.2d at 1335 (*quoting* Clark v. Patterson, 214 Ill. 533, 539, 73 N.E. 806, 808 (1905)); *see also* Emerald Casino, Inc. v. Illinois Gaming Board, 346 Ill. App. 3d 18, 803 N.E.2d 914 (1st Dist. 2004) (and cases cited within the court's extensive compilation and discussion of cases involving the mandatory and directory construction of statutes using the term "shall").

The Department's first response seeks to have the legislature's repeated use of the word "shall" within § 903(a)(1) construed to mean "may," at least in a case such as this. That is, it wants me to read § 903(a)(1) to mean that the Department may notify a taxpayer of a math error that results in an understatement of tax on its return, but not if the taxpayer has overpaid the tax that should have been shown due on the return. Under those circumstances, the Department's argument implies, the state can summarily take the taxpayer's money, and not tell him about it *at all*. The Department thus asks that § 903(a)(1) be read as though the legislature intended to create two classes of taxpayers, only one of which is entitled to a math error notice.

Under the Department's interpretation of § 903(a)(1), taxpayers that underpaid their Illinois tax liabilities because of math error would be better protected than those that overpaid them. That is, the former, being entitled to notice of a math error, would be provided information sufficient to allow them timely to file an amended return and obtain the post-deprivation hearing the legislature intended such taxpayers to enjoy, if they disagreed with the Department's math error determination. On the other hand, taxpayers that overpaid their Illinois liabilities, and who — at least under the Department's construction — would not be entitled to notice of a math error, might never receive information that the Department has collected some of the tax overpaid, which was deemed assessed at the time the return was filed. As a consequence, such taxpayers would be much more likely to forfeit their opportunity to timely challenge the Department's math error determination, in a post-deprivation hearing, should they disagree with the Department's determination. *See* 35 **ILCS** 5/911(a)(1) (statute of limitations for filing amended returns/claims for refund).

It is difficult to believe that the Illinois General Assembly intended § 903(a)(1) to apply in the way the Department asserts here. Antunes v. Sookhakitch, 146 Ill. 2d 477, 486, 588 N.E.2d 1111, 1115 (1982) ("Statutes should be construed as to give them a reasonable meaning and in the most beneficial way to prevent absurdity or hardship"). The Department cites no authority for its argument that § 903(a)(1) should be read to require that notice be given to some taxpayers, but not to others, and the plain text of that section militates against such a construction. Village of Chatham v. County of Sangamon, 216 Ill. 2d 402, 429, 837 N.E.2d 29, 45 (2005) ("It is never proper for a court to depart from plain language by reading into the statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent.").

And while I agree that the Illinois General Assembly intended that the Department timely notify any taxpayer of a math error that results in an understatement of tax due, regardless whether it overpaid or underpaid its Illinois tax liability, I do not conclude that the legislature intended § 903(a)(1) to mean that the Department lacks the authority to correct a math error unless the notice it provides to the taxpayer includes some particular text or content. As the United States Supreme Court and Illinois courts have held, the guiding rule when considering whether a particular notice is valid is one of reasonableness under the circumstances. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-14, 70 S.Ct. 652, 657, 94 L.Ed.2d 865 (1950) ("The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected …."); People ex rel. Harris v. Parrish Oil Production, Inc., 249 Ill. App. 3d 664, 668, 622 N.E.2d 810, 814 (5th

Dist. 1993) ("The timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved.").

The facts here are that XXX filed its Illinois return for TYE 10/8/99 on October 13, 2000. Stip. ¶ 11. XXX also paid more in estimated tax payments than its Illinois tax liability (Stip. Ex. 1, pp. 1-2), even when taking into account the amount of tax understated on XXX's Illinois return for TYE 10/8/99 due to its use of the wrong apportionment factor percentages. Stip. Exs. 1, 6. Since the Department determined that XXX's use of the wrong apportionment factor percentages was a math error (Stip. ¶ 12), and since the Department properly deemed the amount of tax that should have been shown due on that return assessed on the date XXX's return was filed (35 **ILCS** 5/903(a)(1)), the Department collected the understated amount of tax due to XXX's math error from the additional tax XXX had previously paid. Stip. ¶ 12; 35 **ILCS** 5/902(a), 903(a)(1).

Thereafter, in its 5/13/02 Letter to XXX, the Department expressly communicated to XXX that "the income tax liability shown for the tax year ended October 8, 1999 was increased from the amount of tax as originally filed due to the use of incorrect weighted apportionment factors. ***" Stip. Ex. 10.[1] There is no dispute that the Department issued its 5/13/02 Letter to XXX within the period required by § 903(a)(1) for math error notices. 35 **ILCS** 5/903(a)(1). When XXX actually received a writing from the Department that stated that "the income tax liability shown for the tax year ended October 8, 1999 was increased from the amount tax as originally filed …", I do not

[1] I agree with XXX that the Department's 3/31/02 Notice (Stip. Ex. 8) should not be considered a math error notice as described in § 903(a)(1). That notice, XXX correctly notes, "has nothing to do with the mathematical error asserted with respect to the apportionment factor weighting." XXX's Brief, p. 32.

understand how XXX can argue that that writing "is not a notice of additional tax due." XXX's Brief, p. 32. XXX's argument here exalts form over substance. While XXX's overpayment of its Illinois tax liability does not allow the Department to avoid its statutory duty to notify XXX of its math error, it provides a perfectly understandable reason why the Department's written communication to XXX did not contain the words "notice of additional tax due." Again, there *was* no additional tax due, since the Department had already collected the understated amount of tax from XXX's excess tax payments. Stip. ¶ 12; 35 **ILCS** 5/902(a), 903(a)(1).

Further, the Department's 5/13/02 Letter notifies XXX that the amount of tax that XXX reported that it overpaid on the face of its Illinois return for TYE 10/8/99 was not correct, and an attachment states the reduced amount of tax that the Department determined XXX overpaid based on XXX's use of the wrong apportionment factor percentages. Stip. Ex. 10, pp. 1-2; Department's Brief, p. 16. In this way, the Department's 5/13/02 Letter communicated to XXX that that difference was the amount of tax the Department determined was understated, and which it assessed and collected from XXX, based on XXX's use of § 304(h)(2)'s apportionment percentages. Stip. Ex. 10, pp. 1-2; 35 **ILCS** 5/903(a)(1).

Given the substance of the written communication that the Department actually gave to XXX (Stip. ¶ 15; Stip. Ex. 10), it is difficult for me to conclude ─ and XXX has never even asserted (*see* XXX's Brief, pp. 30-33; Taxpayer's Reply Brief, pp. 8-9) ─ that, after receiving the Department 5/13/02 Letter, XXX lacked actual knowledge that the Department had deemed the amount of the understatement assessed, based on XXX's use of § 304(h)(2)'s percentages, on the date the return for TYE 10/8/99 was filed.

Instead, it asserts that the Department's 5/13/02 Letter, which it concedes it actually received from the Department (Stip. ¶ 15), "was not a *proper* math error notice." Taxpayer's Reply Brief, p. 9 (emphasis added). Even though the Department's 5/13/02 Letter does not bear a heading of "notice of additional tax due", or otherwise track the exact language included within § 903(a)(1), the notice it did provide gave XXX information that substantially conformed to the requirements of that provision. 35 **ILCS** 5/903(a)(1); Mullane, 339 U.S. at 313, 70 S.Ct. at 657, 94 L.Ed.2d 865 ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding."); *id*. at 314-15, 70 S.Ct. at 657 ("The notice must be of such nature as reasonably to convey the required information … and it must afford a reasonable time for those interested to make their appearance …." [I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.").

Perhaps the best evidence of the reasonableness of the Department's notice to XXX under the circumstances ─ and therefore, the validity of that notice ─ lies in the fact that XXX is making its arguments within the setting the Illinois General Assembly intended to make available to persons that have received a math error notice. 35 **ILCS** 5/903(a)(1); 86 Ill. Admin. Code § 100.9200(a)(2)(C). That is, if the Department wholly failed to satisfy XXX's statutory right to notice that the Department had assessed the amount of tax that was understated on XXX's Illinois return filed for TYE 10/8/99 due to a math error, how is it that XXX was able timely to contest the determinations XXX now suggests the Department never communicated to it?

**Conclusion:**

I recommend that the Director finalize the Department's prior denial.

Date: 7/9/2007

John E. White
Administrative Law Judge