

ST 12-04

Tax Type: Income Tax

Issue: Claim Issues – Properly and Timely Filed

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

ABC COMPANY,)	Docket No.	XXXX
)	Tax Year	12/31/1991
)		
v.)		
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS)	Administrative Law Judge	

**RECOMMENDATION FOR DISPOSITION
PURSUANT TO CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Appearances: Jack Black and John Jones, Black and Blue, Chartered, appeared for ABC Company; Deborah Mayer, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves an amended return/claim for refund that ABC Company (Taxpayer) filed, in August 2004, to request a refund of Illinois income tax claimed to have been paid in error regarding tax year ending (TYE) December 31, 1991. Taxpayer's claim sought a refund in the amount of \$276,813. On November 18, 2009, the Department issued a Notice of Denial (Denial) to Taxpayer, which Taxpayer protested. The parties stipulate that the only issue is one of law, regarding whether Taxpayer's 2004 claim is barred by the statute of limitations.

In lieu of hearing, the parties submitted cross-motions for summary judgment, together with a stipulation of facts and exhibits. After considering the stipulated record and the parties' arguments, I am including in the recommendation a statement of facts not

in dispute, and conclusions of law. I recommend that the Director deny Taxpayer's Motion, grant the Department's Motion, and finalize the Denial as issued.

Facts Not In Dispute:

1. All of the parties' stipulations refer to Taxpayer's TYE December 31, 1991 (1991). Stipulation (Stip.) ¶ 1.
2. On October 7, 1992, Taxpayer filed an original Illinois combined unitary Corporate Income and Replacement Tax Return for 1991 (hereafter, Original Return). Stip. ¶ 2; Stip. Ex. 1 (copy of Original Return). On the Original Return's Schedule UB, Taxpayer listed 16 members of its unitary business group, with Taxpayer identified as the designated agent. Stip. ¶ 2; Stip. Ex. 1.
3. On October 15, 1993, Taxpayer filed an Illinois amended tax return for 1991 (hereafter, First Amended Return). Stip. ¶ 3; Stip. Ex. 2 (copy of First Amended Return).
4. Taxpayer was the designated agent for filing the First Amended Return. Stip. ¶ 4. The First Amended Return reported that Taxpayer's Illinois unitary business group had 15 members. *Id.*; Stip. Ex. 2 (First Amended Return, Schedule UB).
5. On April 10, 1995, Taxpayer signed an IL-872, pursuant to which it and the Department agreed, in writing, to extend the statute of limitations for filing claims for refund for 1991 until June 30, 1996. Stip. ¶ 5; Stip. Ex. 3 (copy of the IL-872).
6. In auditing the First Amended Return, the Department changed the composition of Taxpayer's unitary business group for 1991 by adding 123 Corporation and the following five surplus lines insurance companies: DEF Company, GHI Company,

JKLCompany, MNO Company, and PQR Company. Stip. ¶ 6; Stip. Ex. 9 (copy of audit schedule titled, Unitary Audit Result Input Form-Part II, AUB-2 Schedule); *see also, generally* 215 ILCS 5/445 (section of the Illinois Insurance Code pertaining to surplus lines insurance).

7. On April 12, 1996, after the audit was concluded, the Department issued a letter to Taxpayer (April 12, 1996 letter) notifying it to file a claim for refund for 1991 and TYE December 31, 1992. Stip. ¶ 7; Stip. Ex. 4 (copy of April 12, 1996 letter, without enclosures).
8. On June 25, 1996, Taxpayer filed a second Illinois amended tax return (hereafter, Second Amended Return) to claim a refund for 1991 (Stip. ¶ 8; Stip. Ex. 5 (copy of Second Amended Return)), as well as one for TYE 1992. *See* Stip. Exs. 6 (copy of audit workpapers dated January 5, 2004, including copy of Form IL-870, signed by Taxpayer on January 6, 2004, regarding TYE 1992)), 10 (copy of auditor comments).
9. In its Second Amended Return for 1991, Taxpayer added 123 Corporation to its unitary business group, and excluded the following five surplus lines companies from that group: DEFCompany, GHI Company, JKLCompany, MNO Company, and PQR Company. *Compare* Stip. Ex. 5 (Bates stamped pages nos. 59-60 of Second Amended Return) *with* Stip. Ex. 9 (copy of audit schedule titled, Unitary Audit Result Input Form-Part II, AUB-2 Schedule).
10. The Department did not act on the Second Amended Return within six months of its filing. Stip. ¶ 9. On August 25, 2003, Taxpayer filed a Protest (hereafter, August 25, 2003 Protest) to the Department's deemed denial of Taxpayer's Second Amended Return. Stip. ¶ 9; *see also* 35 ILCS 5/909(e) (a claim for refund filed with the

Department, but not acted upon within six months from the date filed, may be protested by the taxpayer/claimant as a deemed denial).

11. Taxpayer's counsel asked Judy Grintjes, a former supervisor in the Department's Audit Bureau, to assign the Second Amended Return to be audited. Stip. ¶ 10.
12. The Department's auditor reviewed the Second Amended Return and prepared audit workpapers based on that review. Stip. ¶ 11; Stip. Ex. 6. The Department's auditor determined that Taxpayer was due a refund of \$43,450. Stip. ¶ 11; Stip. Ex. 6.
13. At Taxpayer's counsel's request, on July 20, 2004, Greg Powers of the Department's Income Tax Technical Review Section faxed a copy of the audit workpapers dated January 5, 2004. Stip. ¶ 12; Stip. Ex. 6.
14. Among the audit workpapers dated January 5, 2004, the EDA-25 prepared for 1991 (Stip. Ex. 6) shows an amount of \$276,813, which incorporated a separate settlement agreement between the parties that was concluded in 2000, but limiting the total amount of the refund to \$43,450.00. Stip. Ex. 6. That separate settlement related to years other than 1991, namely 1988-1990 and 1993-1994. Stip. ¶ 13. Under that separate settlement agreement, STU Corporation was added to Taxpayer's Illinois unitary business group. *Id.* Also, under that separate settlement, a percentage of STU Corporation's income/loss was included in the unitary business group's income/loss. *Id.*
15. On August 5, 2004, Taxpayer filed a third amended return (hereafter, Third Amended Return) to a claim a refund for 1991, and requested a refund of \$276,813. Stip. ¶ 14; Stip. Ex. 7 (copy of Third Amended Return). In that Third Amended Return, Taxpayer sought to include within its unitary business group the same surplus lines

insurance companies it had previously sought to exclude from its unitary business group in its Second Amended Return (Stip. ¶ 14; Stip. Ex. 5) and it also sought to include STU Corporation into its unitary business group. Stip. ¶ 14; Stip. Ex. 7. As a result, a portion of STU Corporation's income/loss was also included in the combined return. Stip. ¶ 14; *see also* Stip. Ex. 10.

16. On May 20, 2005, the Department issued a check to Taxpayer for \$43,450.00, plus applicable interest, which Taxpayer cashed. Stip. ¶ 15.
17. On November 18, 2009, the Department issued a Notice of Denial (Denial) to Taxpayer's Third Amended Return. Stip. ¶ 16; Stip. Ex. 8 (copy of Denial). That Denial notified Taxpayer that the Department was denying part of the total refund sought in its Third Amended Return. Stip. ¶ 16; Stip. Ex. 8. Specifically, the Denial provided, in pertinent part, as follows:

Pursuant to Section 909(e) of the Illinois Income Tax Act, notice is hereby given that your claim for refund of income tax overpayment in the amount of \$276,813 for the above tax period [12/31/91], filed on or about August 12, 2004, is denied in part. The Department holds you filed your claim after the expiration of the time prescribed for the filing of a claim for refund, as set forth in Section 911(a) of the Act and, thus no refund can be made with respect to any overpayment of tax not covered by a timely filed claim. We did however allow a portion of your claim constituting the overpaid tax shown on the previous claim we received on June 25, 1996 in the amount of \$43,450, which was approved and subsequently refunded on May 20, 2005.

Stip. Ex. 8.

18. In response to the Denial, Taxpayer timely filed a Protest and Request for Hearing on January 6, 2010 (January 6, 2010 Protest).

Conclusions of Law:

Summary judgment is appropriate when resolution of the case hinges on a question of law. First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 651 N.E. 2d 1105 (1995); Kirk Corp. v. Village of Buffalo Grove, 248 Ill. App. 3d 1077, 618 N.E. 2d 789 (1st Dist. 1993). Summary judgment is also appropriate when the parties dispute the correct construction of an applicable statute. Bezan v. Chrysler Motors Corp., 263 Ill. App. 3d 858, 636 N.E. 2d 1079 (2nd Dist. 1994). When both parties file motions for summary judgment, as is the case here, only a question of law is raised. Lake Co. Stormwater Management Comm. v. Fox Waterway Agency, 326 Ill. App. 3d 100, 104, 759 N.E.2d 970, 973 (2d Dist. 2001). The last paragraph of the parties' stipulation of facts sets forth their agreement that "[t]he only issue to be determined by this Tribunal is whether the refund sought under the Third Amended Return is barred by the Statute of Limitations." Stip. ¶ 18.

Taxpayer's Motion

During oral argument, Taxpayer presented its motion as involving a two-step process. Tr. pp. 4-5. First, Taxpayer asserts that there is an initial, purely legal determination of whether, under Illinois law, Illinois taxpayers have a right to amend a timely filed claim for refund after the statute of limitations has run. Tr. p. 4. Since, Taxpayer argues, the text of the Illinois Income Tax Act (IITA) does not address this question directly (Tr. p. 5), Taxpayer invokes IITA § 102 to construe the term, claim for refund, to have the same meaning as when used in the Internal Revenue Code (IRC or the Code), and in federal cases Taxpayer cites in its brief. *Id.*; Taxpayer's Memorandum in Support of Its Cross Motion for Summary Judgment (Taxpayer's Brief), pp. 9-13 (*citing*

federal cases). The crux of Taxpayer's first position lies within the following sentence of its oral argument: "And really what is at stake is whether or not that term[,] Claim for Refund, includes subsequent amendments or whether each claim for refund stands alone by itself." Tr. p. 5.

Assuming that the answer to the first determination is yes — that is, that a timely filed claim for refund may be amended *after* the expiration of the statute of limitations — Taxpayer concludes that the next step is to determine whether its amendment should be treated as germane to Taxpayer's previously, and timely, filed claim for refund. Tr. p. 4; Taxpayer's Brief, pp. 9-13. Taxpayer argues that its Third Amended Return was germane to its Second Amended Return, since both concern the proper composition of Taxpayer's Illinois unitary business group. Taxpayer's Brief, pp. 14-18. Finally, Taxpayer claims that the Department's denial of its Third Amended Return violated its federal due process rights. *Id.*, pp. 22-24.

The first thing I note about Taxpayer's Motion is that it switched the terms the parties used in their stipulation of facts. Gone were the capitalized, First Amended Return, Second Amended Return, and Third Amended Return, as descriptors for Taxpayer's claims filed in, respectively, 1993, 1996 and 2004. *Compare* Taxpayer's Brief, p. 2 *with* Stip. ¶¶ 3, 8, 14 *and* Stip. Exs. 2, 5, 7. Instead, Taxpayer refers to its second amended return as its Refund Claim, and to its third amended return as its Amended Claim. Taxpayer's Brief, p. 2. This subtle change in language more closely dovetails with Taxpayer's argument that "the Amended Claim was, in form and substance, nothing more than an amendment to the Refund Claim and should therefore be considered timely because the Refund Claim was timely filed" (Taxpayer's Brief, p. 7),

but it ignores the IITA's plain text and procedures regarding the particular tax forms at issue. Also, because the arguments presented by Taxpayer's Motion are statutory construction arguments, they are best addressed by taking into account the texts of the different statutory provisions at issue. Kraft v. Edgar, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990) ("Legislative intent is best evidenced by the language used by the legislature").

To address Taxpayer's first issue, whether a claim for refund "includes subsequent amendments or whether each claim for refund stands alone by itself" (Tr. p. 5), I begin with the text of IITA § 909(d), which provides that "[e]very claim for refund shall be filed with the Department in writing in such form as the Department may by regulations prescribe, and shall state the specific grounds upon which it is founded." 35 ILCS 5/909(d); *see also*, 35 ILCS 5/1501(a)(19) ("The term 'regulations' includes rules promulgated and forms prescribed by the Department."). "Every" means "each without exception." The American Heritage Dictionary 293 (3d office ed. 1994). The Department has prescribed the forms to be used by different taxpayers when submitting a claim for refund pursuant to § 909(d), and those forms are called amended return forms. *See* Stip. Exs. 2, 5, 7; 2011 IL-1020-X (R-12/11) (copies of the Department's current and prior years' Illinois amended return forms prescribed for use by corporations, as well as those forms prescribed for use by individuals and other persons, are viewable at the Department's web site at <http://tax.illinois.gov/TaxForms/>) (last viewed on April 24, 2012). When filing each of its separate claims for refund that are described and included within this stipulated record, Taxpayer used the form the Department prescribed for use by corporations for filing claims for refund. Stip. Exs. 2, 5, 7. Thus, in this

recommendation, whenever I refer to a particular claim for refund, I am also referring to the particular amended return form that Taxpayer has filed to report that it is entitled to the specific refund claimed on that form. For the same reason, this recommendation uses the terms the parties used in their Stipulation to identify the three amended return forms/claims for refund Taxpayer filed regarding 1991. Stip. *passim*; Stip. Exs. 2, 5, 7.

Generally, the purpose for filing an Illinois amended return form is to report that an error was made on an original return that a taxpayer filed for a specific tax year, and to correct that error. Sometimes, an Illinois amended return form is used to report that the error caused an overpayment of the correct amount of Illinois income tax due (*see* Stip. Exs. 2, 5, 7), and other times they are used to report that the error caused an underpayment of tax due. *See, e.g.*, 35 ILCS 5/506(b). That is, while not every amended return will be filed to claim a refund, every claim for refund filed after an original return has been filed must be made by filing an amended return form. 35 ILCS 5/909(d).

While the purpose for filing an amended return is generally to report an error that was made on an original return for a specific tax year, it is also true that taxpayers may file an amended return form to report that, in addition to making an error on its original return for a given year, it also made an error on a previously filed claim for refund. That's right, a taxpayer can file an amended return form to amend a previously filed amended return form. This is made clear by statements the Department has repeatedly made in the instruction forms it publishes to notify taxpayers how to prepare the different Illinois amended return forms it has prescribed for use. For example, the instructions to the amended return form that Taxpayer used for its Third Amended Return provide, in pertinent part:

General Information
Who must file Form IL-1020-X?

You should file Form IL-1120-X if you are amending a previously filed, processable Form IL-1120, Illinois Corporation Income and Replacement Tax Return, or Form IL-1120-X, for a tax year ending **on or after** December 31, 1986. ***

Stip. Ex. 7; 2003 IL-1020-X Instructions (R-12/03), p. 1 (emphasis original) (a copy of the 2003 Instructions to form IL-1020-X is viewable at the Department's web site at <http://tax.illinois.gov/taxforms/Incm2003/bus/corp/IL-1120-X-Instr.pdf>) (last viewed on April 18, 2012). This same statement is repeated in instructions the Department has published for subsequent years. *E.g.*, 2011 IL-1020-X Instructions (R-12/11), p. 1 (the 2011 Instructions to form IL-1020-X may be viewed at the Department's web site at <http://tax.illinois.gov/taxforms/IncmCurrentYear/Business/Corporate/IL-1120-X-Instr.pdf>) (last viewed on April 19, 2012).

Of course, it goes without saying that an amended return form that is filed to amend a previously filed amended return form (or to use Taxpayer's preferred terminology, an amended claim), stills notifies the Department that the taxpayer had made an error on its original return for a certain year. In this case, for example, Taxpayer's Third Amended Return essentially repeated part of what it reported to the Department in its First and Second Amended Returns. Stip. Exs. 2, 5, 7. Specifically, its Third Amended Return repeated that the error made on its Original Return for 1991 was in its identification of the companies that should have been included within its Illinois unitary business group. *Compare* Stip. Ex. 5 *with* Stip. Ex. 7. The difference between its Second and Third Amended Returns was in how Taxpayer reported that its original 1991 error should be corrected. Stip. Exs. 5, 7. Each reported a different combination of

companies that should be included within its Illinois unitary business group. Stip. Exs. 5, 7.

Acknowledging that a taxpayer may amend a previously filed amended return/claim for refund form does not, however, mean that a taxpayer has a protectable right to do so *after* the statute of limitations set by § 911(a) has run. 35 ILCS 5/911. This point, too, is made clear within the Instructions to the 2003 form IL-1020-X:

How long do I have to amend my return?

The amount of time you have to amend your return depends on whether your Form IL-1120-X is being filed to report a state or federal change.

State change - ***

If your change decreases the tax due to Illinois and you are entitled to a refund, you must file Form IL-1120-X within

- three years after the due date of the return (including extensions),
- three years after the date your original return was filed, or
- one year after the date your Illinois tax was paid, whichever is latest.

IL-1020-X Instructions (R-12/03), p. 1 (emphasis original). Of course, the point is made even more clearly by the plain text of IITA § 911. 35 ILCS 5/911.

Section 911 of the IITA provides, in pertinent part:

Sec. 911. Limitations on Claims for Refund.

(a) In general. Except as otherwise provided in this Act:

(1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and

(2) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.

(c) Extension by agreement. Where, before the expiration of the time prescribed in this section for the filing of a claim for refund,

both the Department and the claimant shall have consented in writing to its filing after such time, such claim may be filed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. In the case of a taxpayer who is a partnership, Subchapter S corporation, or trust and who enters into an agreement with the Department pursuant to this subsection on or after January 1, 2003, a claim for refund may be filed by the partners, shareholders, or beneficiaries of the taxpayer at any time prior to the expiration of the period agreed upon. Any refund allowed pursuant to the claim, however, shall be limited to the amount of any overpayment of tax due under this Act that results from recomputation of items of income, deduction, credits, or other amounts of the taxpayer that are taken into account by the partner, shareholder, or beneficiary in computing its liability under this Act.

35 ILCS 5/911.¹

Section 911(a) sets an express limit on a taxpayer's right to obtain a refund of Illinois income tax overpaid in error, based on state changes. 35 ILCS 5/911(a); Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 586 N.E.2d 516 (1st Dist. 1991). When reading §§ 909(d) and 911 together, moreover, they make clear that *any* amendment of a timely filed claim for refund must, itself, be reported on a separate amended return form, and that each separate amended return form must be filed *before* the end of the limitations period. That is, § 909(d) provides that, “[e]very claim for refund shall be filed with the Department in writing in such form as the Department may by regulations prescribe, and shall state the specific grounds upon which it is founded.” 35 ILCS 5/909(d). Section 911(a)(1) begins with the phrase “[a] claim for refund shall be

¹ It should be noted that § 911 includes a separate statute of limitations that is applicable to amended returns/claims for refund taxpayers file to report that final, federal changes have been made to entries that it had previously reported on its original federal income tax return for a given year, and that those final federal changes correcting its original federal return also affect the person's Illinois income tax liabilities for that particular tax year. 35 ILCS 5/911(b); 35 ILCS 506(b)(2). This matter, however, involves only state changes that Taxpayer made to its original Illinois income tax return for 1991 (*see* Stip. Exs. 2, 5, 7), so that separate statute of limitations is not pertinent.

filed not later than” 35 ILCS 5/911(a). Generally, when “a” is used as an indefinite article, it means one, or any. The American Heritage Dictionary 1 (3d office ed. 1994). The definition section of the IITA provides that “[w]ords importing the singular include and apply to several persons, parties or things” 35 ILCS 5/1501(b)(1)(A). Thus, when the General Assembly used the phrase “a claim for refund” within § 911(a)(1), it meant *any* claim for refund. *Compare* 35 ILCS 5/911(a)(1) *with* 35 ILCS 5/909(d). Finally, § 911(a)(2) provides that “[n]o credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.” 35 ILCS 5/911(a)(2). Within that sentence, the words, “the claim” and “such claim” refer to a particular amended return form that a taxpayer has filed to claim a particular refund.

The text of these related provisions reflect that taxpayers have the right to file as many amended returns/claims for refund as they deem appropriate to notify the Department of whatever many different errors they determine were made on the original return filed for a given year. That is, the limitation set by § 911(a) is not on the number of claims for refund that a taxpayer may file for a given year, but on the last date by which *every* amended return/claim for refund form (35 ILCS 5/909(d); 35 ILCS 5/911(a)(1)) must be filed. 35 ILCS 5/911(a)(2). Thus, under the plain text of §§ 909(d) and 911(a), even if an amended return/claim for refund were filed to amend a previously filed amended return/claim for refund, the later amended return form, itself, must be filed within the period set by § 911(a), or within the extended period set by § 911(c), or any refund claimed in that later filed form is time barred. 35 ILCS 5/909(d); 35 ILCS 5/911(a), (c). Based strictly on the text of the related sections of the IITA, the answer to

Taxpayer's original question (*see* Tr. p. 5) is that every amended return/claim for refund stands on its own.

Taxpayer's implied argument here, however, is that, notwithstanding § 911's deadline for filing claims for refund, the Illinois General Assembly actually intended to provide a much greater period of time for taxpayers to obtain a refund of Illinois income tax overpaid in error. *See* Taxpayer's Brief, pp. 9-13. In this case, at least, the period Taxpayer suggests is appropriate is more than eight years after the date the parties agreed upon as the last date to file an amended return to claim such a refund. Stip. Exs. 3 (agreement to extend filing date to June 30, 1996), 7 (Third Amended Return filed on August 3, 2004). The legislative intent to create that much longer filing period, Taxpayer argues, should be inferred from the text of IITA § 102, because both the IITA and the IRC use the term "claim for refund," and because federal courts have allowed taxpayers to file — after the federal statute of limitations period set forth in Code § 6511 — amendments to timely filed federal claims for refund. Taxpayer's Brief, pp. 9-13 & n.2.

When analyzing Taxpayer's Motion, moreover, it is important to note the posture in which Taxpayer makes its request to use § 102 to construe the text of IITA § 911(a). Taxpayer is asserting that, as a matter of law, § 102 requires the Department to interpret § 911(a) to include the same extension of the statute of limitations that federal courts have allowed for taxpayers who file amendments to claims for refund under federal income tax law. Taxpayer's Brief, pp. 9-18. Whether Taxpayer is entitled to judgment as a matter of law, therefore, must depend on the text and effect of IITA § 102.

The full text of IITA § 102 provides:

Sec. 102. Construction.
Except as otherwise expressly provided or clearly
appearing from the context, any term used in this Act

shall have the same meaning as when used in a comparable context in the United States Internal Revenue Code of 1954 or any successor law or laws relating to federal income taxes and other provisions of the statutes of the United States relating to federal income taxes as such Code, laws and statutes are in effect for the taxable year.

35 ILCS 5/102. When considering the text and effect of § 102, the Illinois Supreme Court has said:

*** At the outset, we note our agreement with the appellate court that section 102 of the Act provides only that, as a rule of construction, the terms of the Act shall have the same meaning “as when used in a comparable context in the United States Internal Revenue Code ***.” (Ill. Rev. Stat. 1971, ch. 120, par. 1-102.) This section does not, by itself, incorporate substantive provisions of the Code such as section 172, so as to allow a State taxpayer to compute a net operating loss on a State tax return. ***

Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 509, 410 N.E.2d 828, 831 (1980). More recently, in Rockwood Holding Co. v. Department of Revenue, 312 Ill. App. 3d 1120, 1127, 728 N.E.2d 519, 526 (1st Dist. 2000), the Illinois appellate court construed § 102 similarly:

*** The language employed in this section makes clear that the terms used in the Act will have the same meaning as comparable terms in the IRC. This provision insures a certain level of uniformity, particularly since the Act utilizes federal taxable income as a starting point for calculating Illinois income tax liability. However, we will defer to the Illinois Supreme Court's judgment and find that section 102 "does not, by itself, incorporate substantive provisions of the [IRC]." *Bodine*, 81 Ill. 2d at 509, ... 410 N.E.2d at 831.

Rockwood Holding Co., 312 Ill. App. 3d at 1127, 728 N.E.2d at 526. Regarding one particular point made by the Rockwood court, it is also helpful to note that Article IX, § 3 of the Illinois Constitution provides:

SECTION 3. LIMITATIONS ON INCOME TAXATION

(b) Laws imposing taxes on or measured by income may adopt by reference provisions of the laws and regulations of the United States,

as they then exist or thereafter may be changed, for the purpose of arriving at the amount of income upon which the tax is imposed.

Ill. Const. 1970, Art. IX, § 3(b).

As the Rockwood court noted, the IITA “‘piggy-backs’ onto the federal calculation of income and uses federal taxable income as the premise for tax liability.” Rockwood Holding Co., 312 Ill. App. 3d at 1124, 728 N.E.2d at 524. Here, however, the identical terms used in both the IITA and the Code are not used for the purpose of arriving at the amount of income upon which tax is imposed. *Compare, e.g.*, 26 U.S.C. §§ 1-5 (Code sections under Subchapter A, Part I, pertaining to the determination of tax liability for individuals), 11-12 (Code sections under Subchapter A, Part II, pertaining to the determination of tax liability for corporations), 61-139 (Code sections under Subchapter B, Parts I-III, pertaining to Computation of Taxable Income), 801-848 (Code sections under Subchapter L, Parts I-II, pertaining to Insurance Companies) *and* 35 ILCS 5/202-203 (IITA sections defining net and base income) *with* 26 U.S.C. § 6511 (section using term, claim for refund) *and* 35 ILCS 5/909(d), 911 (sections using term, claim for refund).

Further, the first clause of § 102 (“Except as otherwise expressly provided or clearly appearing from the context, ...”) identifies the express exception to the IITA’s statutory rule of construction, and it would be wrong to ignore it. 35 ILCS 5/102; City Suburban Elec. Motors, Inc. v. Wagner, 278 Ill. App. 3d 564, 663 N.E.2d 77 (1st Dist. 1996) (“If possible, every word, clause or sentence of a statute must be applied in a way that no word, clause or sentence is rendered superfluous.”). This clause conveys the legislature’s manifest intent that the Code be referred to as a source to construe *only* those terms used in the IITA whose meaning is not otherwise expressly provided or

clearly apparent from the context. *Id.* Here, however, the context in which the Illinois General Assembly uses the term, claim for refund, in §§ 909-911 makes its meaning clear. *See* 35 ILCS 5/909-911. Since the IITA's context makes the term's meaning clear, § 102 directs that reference to the Code is unnecessary. 35 ILCS 5/102.

Finally, in its Motion, Taxpayer never once quotes a statutory definition or meaning of claim for refund that is set forth in the Code. *See* Taxpayer's Brief, *passim*. Indeed, the section of the Code that Taxpayer refers to, § 6511 (Taxpayer's Brief, p. 8), does not contain any definition for the term. 26 USC § 6511 (titled, Limitations on credit or refund). The absence of a definition for claim for refund in the Code further demonstrates why § 102 simply does not apply to this dispute. Taxpayer does not invoke § 102 because the meaning of claim for refund, when used in the IITA, is unclear or vague, whereas the Code's definition of the same term is plain. *See* Taxpayer's Brief, *passim*; 35 ILCS 5/909(d), 911. Neither party is unsure of what the Illinois General Assembly meant when it used the term, claim for refund, in the IITA. Rather, Taxpayer wants to use § 102 to read into the IITA's statute of limitations for filing claims for refund a filing extension that exists under federal income tax law, but which does not exist under § 911. *Compare* Taxpayer's Brief, pp. 9-18 *with* 35 ILCS 5/911(a).

On this point, however, Taxpayer has cited no case in which an Illinois court has construed IITA § 102 to require the Department to read into one of the IITA's filing deadlines a judicially created extension to a federal filing deadline. *See* Taxpayer's Brief, *passim*. None of the federal cases that Taxpayer cites held that a taxpayer's right to amend its claim for refund of federal income tax, under federal income tax law, is

applicable to a claim for refund of state income tax. Taxpayer, moreover, acknowledges that the federal cases it cites:

... have the origins of their analyses concerning supplemental, or amended, refund claims in a doctrine known as the “relation-back” doctrine. This doctrine, found in the rules governing amendments made to pleadings[footnote 2], dictates the circumstances under which “certain amendments correcting defects in pleadings shall relate back to the time of filing of the original pleading for the purpose of meeting the requirements of statutes of limitations.” *Amman Food & Liquor, Inc. v. Heritage Insurance Co.*, 65 Ill. App. 3d 140, 144, 382 N.E.2d 562 (1st Dist. 1978).

[footnote 2] See., e.g., section 2-616(b) of the Code of Civil Procedure, “The cause of action ... set up in any amended pleading shall not be barred by lapse of time under any statute ... if the time ... limited had not been expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted ... in the amended pleadings grew out of the same transaction or occurrence set up in the original pleading” 735 ILCS 5/2-616(b)).

Taxpayer’s Brief, pp. 12-13 & n.2.

While acknowledging that federal courts, in the cases it cites, fashioned the filing extension by using the relation back doctrine that is attributable to federal civil pleading rules, Taxpayer dismisses the recent Illinois case in which similar arguments were thoroughly examined by the Illinois appellate court. Taxpayer’s Brief, pp. 18-22. That recent decision is *American Airlines, Inc. v. Department of Revenue*, 402 Ill. App. 3d 579, 931 N.E.2d 666 (1st Dist. 2009).

The *American Airlines* court identified the issue in that case as being:

*** whether the relevant provisions of the UTA and the complementary ROTA, or alternatively the relation-back doctrine articulated in section 2–616(b) the Code of Civil Procedure (735 ILCS 5/2–616(b) (West 2006)), permit amendments of refund claims to be filed outside the UTA’s limitation period (35 ILCS 105/21 (West 2006)), and if so, under what circumstances. This is purely a question of statutory interpretation, which we review *de novo*.

American Airlines, Inc., 402 Ill. App. 3d at 589, 931 N.E.2d at 686.

As the issue makes clear, American Airlines did not involve the same tax Act or statutory provisions that are at issue here. The Act at issue in American Airlines was the Illinois Use Tax Act (UTA) and the related complementary Retailers' Occupation Tax Act (ROTA), and the applicable period of limitations was UTA § 21. *Id.* But in both cases, the statutory filing deadline at issue is one set forth within the tax Act for taxpayers to file claims for refund of the applicable state tax overpaid in error. *Compare* 35 ILCS 5/911 *with* 35 ILCS 105/21. In both cases, the limitations period is clearly stated, and each statute includes virtually the same, single method by which the limitations period may be extended. 35 ILCS 5/911; 35 ILCS 105/21. Both the UTA (35 ILCS 105/12b) and the IITA (35 ILCS 5/1408) contain an identical provision adopting the Illinois Administrative Procedures Act to “apply to all administrative rules and procedures of the Department of Revenue under [each] Act” American Airlines, Inc., 402 Ill. App. 3d at 601, 931 N.E.2d at 684-85.

Moreover, the arguments presented in American Airlines and here are very similar, with the only principle difference being the source of the pleading extension that each taxpayer wants to incorporate into the applicable Illinois Act's statute of limitations. In American Airlines, the taxpayer wanted the court to read into UTA § 21 the extension provided by § 2-616 of Illinois' Civil Practice Law. American Airlines, Inc., 402 Ill. App. 3d at 600-06, 931 N.E.2d at 684-89. Here, Taxpayer wants the Director to read into § 911(a) the extension that federal courts have granted to taxpayers to amend, after the

statute of limitations has expired, a previously and timely filed claim for refund of federal income tax. Taxpayer's Brief, pp. 9-18.

The American Airlines court held that the UTA's procedures specifically identify the time requirements for filing claims for refund authorized by that Illinois tax Act, and that the pleading procedure set forth in § 2-616(b) of Illinois' Civil Practice Law did not apply to the UTA's filing deadline. American Airlines, Inc., 402 Ill. App. 3d at 602, 931 N.E.2d at 685-86 ("we agree with the Department that the UTA does fully regulate the procedures for filing of refund claims, and more specifically the time requirements for filing of such claims, so as to preclude the late filing sanctioned under section 2-616(b) of the Civil Practice Law."). This holding is perfectly analogous to the facts and legal issue presented by this dispute. Nor do I consider the difference in the source of the extension in this case — i.e., the relation back doctrine that exists under federal civil procedure versus the relation back doctrine that exists under Illinois civil procedure — to warrant a result here that is different than the result in American Airlines.

This case involves Taxpayer's claimed right to a refund of Illinois income tax. Stip. ¶ 18. The only reason Taxpayer has a duty to file an Illinois income tax return, or to pay Illinois income tax, is because of the IITA. 35 ILCS 5/201(a); 35 ILCS 5/502(a)(2); Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (1st Dist. 1978) ("The obligation of a citizen to pay taxes is a purely statutory creation and, conversely, the right to a refund or credit can arise only from the acts of the legislature."). Similarly, the only reason Taxpayer has a right to a refund of Illinois income overpaid in error is because of the IITA. 35 ILCS 5/909(d); Jones, 60 Ill. App. 3d at 889, 377 N.E.2d at 204. Taxpayer's right to a refund depends on Illinois tax law, not federal tax law or

federal civil procedural rules. The same Illinois tax Act that grants Taxpayer the right to a refund also provides a plainly stated filing deadline that is applicable to “[e]very claim for refund” 35 ILCS 5/909(d); 35 ILCS 5/911(a). That taxpayers may have a right, under federal income tax law or federal rules of civil procedure, to amend a previously filed claim for refund of federal income tax has nothing to do with Taxpayer’s right to obtain a refund of Illinois income tax, based on a state change. *Compare* 35 ILCS 5/911(a) *with* 35 ILCS 5/911(b); *see also* Bodine Electric Co., 81 Ill. 2d at 509, 410 N.E.2d at 831.

Taxpayer’s biggest complaint about the American Airlines decision, however, is the way the court addressed American Airline’s argument that the UTA’s statute of limitations should be construed to include the right to amend a timely filed claim for refund, because taxpayers have the right to do so under federal income tax law. Taxpayer’s Brief, pp. 18-22 (arguments under heading, The American Airlines Decision Does Not Support the Department’s Position in this Case). Regarding this particular argument, the American Airlines court wrote:

American cites to no Illinois case applying the relation-back doctrine to toll the statute of limitations in the context of the refund claims brought under the UTA or the complementary ROTA, and our research has revealed none. Instead, American relies on the 50-year old decision of the federal district court in *Ryan v. Harrison*, 146 F.Supp. 671 (1956), which applied the relation-back doctrine in the context of an income tax refund sought under the federal income tax code.

We initially note that we are not bound by the decisions of lower federal courts. *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill.App.3d 828, 836, 283 Ill.Dec. 324, 807 N.E.2d 1165, 1171 (2004), quoting *People v. Spahr*, 56 Ill.App.3d 434, 438, 14 Ill.Dec. 208, 371 N.E.2d 1261, 1264 (1978) (“[D]ecisions of Federal courts, other than United States Supreme Court decisions[,] *** are not binding on Illinois courts”); *see also* *Prodromos v. Everen Securities, Inc.*, 389

Ill.App.3d 157, 175, 329 Ill.Dec. 401, 906 N.E.2d 599, 615 (2009), citing *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill.2d 278, 302, 258 Ill.Dec. 792, 757 N.E.2d 481 (2001) (“as a general rule, decisions of federal district or circuit courts are not binding on Illinois courts”); see also *S.I. Securities v. Bank of Edwardsville*, 362 Ill.App.3d 925, 932, 299 Ill.Dec. 263, 841 N.E.2d 995, 1001 (2005), citing *Ray Schools–Chicago, Inc. v. Cummins*, 12 Ill.2d 376, 381, 146 N.E.2d 42, 45 (1957), and *People v. Crawford Distributing Co.*, 53 Ill.2d 332, 338–39, 291 N.E.2d 648, 652 (1972) (“Illinois courts are generally not bound by federal court decisions construing Illinois statutes that do not involve federal questions”).

Moreover, the federal income tax statute, *i.e.*, the Internal Revenue Code (26 U.S.C. § 122 (2000)) involved in *Ryan* is different from the statute involved here. Unlike the UTA, which as already explained above, permits only one statutorily designated method for tolling the statute of limitations, the Internal Revenue Code apparently permits broader application of the relation-back doctrine. This is evident from subsequent federal regulations promulgated under the Internal Revenue Code (26 U.S.C. § 7422) which specifically adopt the relation-back doctrine and require the taxpayer to specify each ground for which a refund is claimed, or otherwise forfeit that refund. See 26 C.F.R. § 301.6402–2(b)(1) (West 2009) (“No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit”). There is no Illinois counterpart to this federal regulation, not in the UTA, ROTA, the Illinois Income Tax Act or in any regulation promulgated by the Department.

American Airlines, Inc., 402 Ill. App. 3d at 605-06, 931 N.E.2d at 688-89.

Taxpayer argues that the American Airlines “[c]ourt’s statements regarding amended income tax refund claims are more than simply *obiter dicta*. They are wrong as a matter of law.” Taxpayer’s Brief, p. 20. Taxpayer contends that the court “stated that the federal rule was based on a Treasury regulation, which adopts the ‘relation back’

doctrine.” *Id.* Taxpayer asserts that, to the contrary, the reason why federal courts allow taxpayers to amend timely filed claims for refund of federal income tax,

*** is because of the United States Supreme Court’s decision that the statute of limitations for filing a claim (now found at 26 U.S.C.A. § 6511) should be interpreted “like that of limitations generally ... to give protection against stale demands.” *Memphis Cotton Oil Co.*, 288 U.S. at 66, 71. The Supreme Court reasoned that, by analogy to the rules governing the amendment of a pleading, if the IRS Commissioner “holds [an original refund claim] without action until the form has been corrected ... what is before him is not a double claim about a single claim and indivisible” *Id.*, at 71.

Taxpayer’s Brief, p. 20.

I cannot agree with Taxpayer’s dismissal of the American Airlines court’s observations about the procedures allowed under federal income tax law. Nor do I agree with Taxpayer’s criticism of the American Airlines court’s comparison of those federal procedures with the filing deadlines set forth within Illinois’ tax Acts. First, what the court observed was that, “[u]nlike the UTA, ... which ... permits only one statutorily designated method for tolling the statute of limitations, the ... Code apparently permits broader application of the relation-back doctrine.” American Airlines, Inc., 402 Ill. App. 3d at 606, 931 N.E.2d at 688-89. That the Code permits broader application of the relation-back doctrine is at the heart of Taxpayer’s argument here, so this is not the part of American Airlines that Taxpayer objects to. Second, the American Airlines court did not “state[] that the federal rule was based on a Treasury regulation, which adopts the ‘relation back’ doctrine.” Taxpayer’s Brief, p. 20. Rather, what the court said was that “the ... Code[’s] ... broader application of the relation-back doctrine ... was evident from subsequent federal regulations promulgated under the ... Code” American Airlines, Inc., 402 Ill. App. 3d at 606, 931 N.E.2d at 688-89.

While I do not doubt Taxpayer's claim that federal courts allow the extension for taxpayers to amend a federal claim for refund because of the United State Supreme Court's decision in United States v. Memphis Cotton Oil, 288 U.S. 62 (1933), it only builds a straw man when it suggests that the American Airlines court decided that a taxpayer's right to do so originates from a Treasury regulation promulgated under the authority of Code § 7422. *See* Taxpayer's Brief, p. 20. The court did not do so. American Airlines, Inc., 402 Ill. App. 3d at 606, 931 N.E.2d at 688-89. Moreover, what I take from the American Airlines court's comparison of the extension that is allowed under federal law, with the UTA's filing deadline, is its acknowledgment that the UTA's statute of limitations contains no extension similar to the federal filing extension. American Airlines, Inc., 402 Ill. App. 3d at 606, 931 N.E.2d at 689. Just so under the IITA. 35 ILCS 5/911(a). Federal income tax filing deadlines, or extensions, simply do not apply to this state tax dispute. 35 ILCS 5/909(d), 35 ILCS 5/911(a); *see also* Bodine Electric Co., 81 Ill. 2d at 509, 410 N.E.2d at 831; American Airlines, Inc., 402 Ill. App. 3d at 606, 931 N.E.2d at 689. In any event, Taxpayer's argument that the American Airlines decision does not support the Department's Motion, does not constitute precedent that *it* is entitled to judgment as a matter of law.

In Bodine, the Illinois Supreme Court refused to read § 102 as though it "incorporate[d] substantive provisions of the Code" Bodine Electric Co., 81 Ill. 2d at 509, 410 N.E.2d at 831. Here, Taxpayer has not persuaded that § 102 must be read to incorporate one of the Code's procedural provisions to supplant IITA § 911(a)'s plainly stated deadline for filing claims for refund of Illinois income tax. Taxpayer has not shown, as a matter of law, that § 102 requires the Department to read § 911(a)'s statute of

limitations to include an extension that exists under federal income tax law. To the contrary, it is improper to read a statutory provision to include exceptions that are not set forth within the provision's text. *E.g.*, Kraft v. Edgar, 138 Ill. 2d at 189, 561 N.E.2d at 661 (“... where an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express.”). Again, the answer to Taxpayer's original question (*see* Tr. p. 5) is that, under the plain text of the related sections of the IITA, every amended return/claim for refund stands on its own. *Every* claim for refund (35 ILCS 5/909(d)), even one that amends a previously and timely filed claim for refund, must be filed within § 911's statute of limitations, or it is time-barred. 35 ILCS 5/911(a)(2), (c).

In addition to rejecting Taxpayer's first position, I also agree that the undisputed evidence shows that Taxpayer is not entitled to summary judgment regarding its second position. *See* Tr. pp. 4-5. That is because the stipulated evidence shows that Taxpayer's Third Amended Return was substantively different than its timely filed Second Amended Return. Stip. Exs. 5, 7. While Taxpayer has argued otherwise (*see* Taxpayer's Brief, pp. 2 (“Taxpayer's timely filed Refund Claim and its amendment to that claim were both based on the same legal predicate: proper composition of the Taxpayer's unitary business group.”) 14-18 (arguments under heading, “Taxpayer's Amended Claim was a Proper Amendment to its Refund Claim”)), the facts and documentary evidence that are relevant and material to Taxpayer's argument are not in dispute.

In its Brief, Taxpayer's own statement of undisputed facts shows that the factual bases set forth in its Second and Third Amended Returns were substantively distinct.

Taxpayer's Brief, pp. 4-5; *see also* Department's Motion, p. 11 (noting difference in facts reported in Stip. Exs. 5 and 7). Specifically, Taxpayer acknowledges:

On June 25, 1996, Taxpayer filed its [Second Amended Return]. (Stip. ¶ 8; Stip. Ex. 5). **In the [Second Amended Return], the Taxpayer added 123 Company to its unitary business group but did not include the surplus lines insurance companies.** (Stip. Ex. 5, Bates Label page no. 54, 55). The [Second Amended Return requested a refund of \$43,450 (St. Ex. 5).

On July 20, 2004, the Department sent to Taxpayer's counsel a copy of the audit workpapers [dated January 5, 2004]. (St. ¶ 12; Stip. Ex. 6, Bates Label page 62). Immediately thereafter, on August 5, 2004, Taxpayer filed its [Third Amended Return], requesting a refund of \$276,813. (Stip. ¶ 14; Stip. Ex. 7). **The [Third Amended Return] added to Taxpayer's unitary group the surplus lines insurance companies and STUCorporation.** (Stip. ¶ 14).

Taxpayer's Brief, pp. 4-5 (emphasis added).

At the outset, the significantly different amounts claimed on the two amended returns, alone, manifest that there had to be some significant difference in the facts that were reported in Taxpayer's Third Amend Return and those reported in its Second Amended Return. The same facts cannot reasonably explain how Taxpayer could claim to have overpaid about \$43,000 for 1991 in 1996, and in 2004, claim that it overpaid about \$276,000 for 1991.

But I do not need to draw reasonable inferences here. Taxpayer's Third Amended Return changed the composition of its unitary business group from the way it was reported in its Second Amended Return. Stip. Exs. 5, 7; Taxpayer's Brief, pp. 4-5. Notwithstanding Taxpayer's characterization, Taxpayer's Third Amended Return was based on different facts than its Second Amended Return, even though both reported changes to Taxpayer's Illinois unitary business group. Stip. Exs. 5, 7; Taxpayer's Brief,

pp. 4-5. As was the case in American Airlines, the stipulated record shows that Taxpayer's Third Amended Return was a new claim for refund, which was based on facts that were not finally determined until after the statute of limitations had run. American Airlines, Inc., 402 Ill. App. 3d at 609, 931 N.E.2d at 691 ("What American refuses to acknowledge ... is that all of these things occurred after the statute of limitations for timely filing refund claims expired.").

The stipulated record shows that the parties first agreed to the composition of the members of Taxpayer's Illinois unitary business group — which composition was later reported within Taxpayer's Third Amended Return (Stip. ¶¶ 13-14; Stip. Ex. 7) — in 2000, when the parties concluded a settlement agreement for tax years other than 1991. Stip. ¶ 13; Stip. Exs. 6, 10. The 2000 settlement agreement, therefore, was concluded *after* Taxpayer filed its Second Amended Return, and *after* the extended date the parties agreed upon as the last date for Taxpayer to file an amended return to claim a refund for 1991. Stip. ¶ 13; Stip. Exs. 3, 5-7, 10; *see also* Taxpayer's Brief, pp. 4-5. Taxpayer's Third Amended Return was a new claim for refund, and was not timely filed. Stip. Exs. 3, 7; 35 ILCS 5/911(a)(2). Taxpayer is not entitled to judgment, as a matter of law, that it has a right to the refund claimed in its untimely filed Third Amended Return. 35 ILCS 5/911(a)(2).

Finally, I address Taxpayer's due process claims. Taxpayer's claims are based on its allegation that the Department's Denial deprived it "of the clear, certain and meaningful remedy to which it is entitled" Taxpayer's Brief, p. 24. In support of this argument, Taxpayer cites a line of cases decided by the United State Supreme Court in circumstances where, after particular state taxes were held to violate the United States

Constitution, taxpayers sought repayment of the tax monies paid under such unconstitutional state tax schemes. Taxpayer's Brief, p. 23 (*citing* Newsweek, Inc. v. Florida Department of Revenue, 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998); Reich v. Collins, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990); and Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, 32 S.Ct. 216, 56 L.Ed. 436 (1912)). Taxpayer's arguments here repeat those addressed by the American Airlines court in a similar context. American Airlines, Inc., 402 Ill. App. 3d at 608-09, 931 N.E.2d at 690-91 ("American nevertheless contends that the Department's denial of its second refund claim deprived it of its right to due process of law guaranteed by the fourteenth amendment of the United States Constitution (U.S. Const. amend. XIV, § 1) [footnotes omitted] and the Constitution of the State of Illinois (Ill. Const., art. I, § 2, art. IX, § 2) because: (1) 'there is no statutory prohibition on amending a timely filed refund claim' and (2) because the Department 'changed their rules midstream.' Citing to Reich v. Collins, 513 U.S. 106, 111, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), American contends that 'due process requires a clear and certain remedy for taxes collected,' and that "what a State may not do *** is reconfigure its [tax refund procedure] unfairly in mid-course.' ").

The common thread within the cases cited by Taxpayer, but which is missing here, is a judicial determination that a state tax had been imposed in a discriminatory or otherwise unconstitutional manner. Newsweek, Inc., 522 U.S. at 442, 118 S.Ct. at 904 ("Effective January 1, 1988, Florida exempted newspapers, but not magazines, from its sales tax. ... In 1990, the Florida Supreme Court found this classification invalid under

the First Amendment of the Constitution of the United States.”); Collins, 513 U.S. at 108, 115 S.Ct. at 549 (“For many years, numerous States, including Georgia, exempted from state personal income tax retirement benefits paid by the State, but not retirement benefits paid by the Federal Government (or any other employer). In March 1989, this Court held that such a tax scheme violates the constitutional intergovernmental tax immunity doctrine, which dates back to McCulloch v. Maryland, ... and has been generally codified at 4 U.S.C. § 111.”); McKesson Corp., 496 U.S. at 31, 110 S.Ct. at 2247 (“It is undisputed that the Florida Supreme Court, after holding that the Liquor Tax unconstitutionally discriminated against interstate commerce because of its preferences for liquor made from " 'crops which Florida is adapted to growing,' " 524 So.2d, at 1008, acted correctly in awarding petitioner declaratory and injunctive relief against continued enforcement of the discriminatory provisions.”); Atchison, T. & S.F.R. Co., 223 U.S. at 285, 32 S.Ct. at 217 (“Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional”). Taxpayer identifies no decision holding that the IITA is being imposed in violation of the United States Constitution (Taxpayer’s Brief, *passim*), so the cases cited in this part of its brief have no bearing on this dispute.

Additionally, the Department, as a state actor, has not changed its position regarding the IITA’s statutory deadline for filing claims for refund, based on state changes. Section 909(d) has, from 1991 through today, required taxpayers to file an amended return every time they seek to claim a refund of Illinois income tax overpaid in error. 35 ILCS 5/909(d) (West) (Historical and Statutory Notes). Section 911 has also remained essentially the same from 1991 through today, and has placed a deadline on a taxpayer’s right to obtain any refund authorized by § 909(d), based on a state change. 35

ILCS 5/911(a), (c) (West) (Historical and Statutory Notes). As the court held in American Airlines when considering the UTA's virtually identical statute of limitations, such statutory provisions "afford taxpayers a 'clear and certain' statutory means by which they may request a refund." American Airlines, Inc., 402 Ill. App. 3d at 609, 931 N.E.2d at 691.

Taxpayer's only suggestion that the Department changed its position lies in its statement that "[w]hile [its Second Amended Return] was still pending, the Department informed the Taxpayer that its overpayment for ... [1991] was actually much larger than the Taxpayer anticipated." Taxpayer's Brief, p. 23. This argument too is like the one presented by the taxpayer in American Airlines. American Airlines, Inc., 402 Ill. App. 3d at 609, 931 N.E.2d at 691 ("We similarly disagree with American's contention that the Department's actions during the audit constituted 'changing the rules mid-stream.'"). The audit workpapers Taxpayer refers to in its brief do not reflect a change of position on whether Taxpayer is entitled to a refund that it first reported (Stip. Ex. 7), or that the Department first determined (Stip. Ex. 6), after § 911's statute of limitations had run. American Airlines, Inc., 402 Ill. App. 3d at 609, 931 N.E.2d at 691. The 2004 audit schedule that was prepared for 1991, after taking into account the parties' 2000 settlement agreement about the correct configuration of companies within Taxpayer's Illinois unitary business group (Stip. ¶ 13), expressly notes that "[r]efund is limited to \$43,450 since the claim is out of statute[.]" Stip. Ex. 6 (Bates stamp page no. 65). Moreover, § 911(a)'s statute of limitations begins on the date a taxpayer files an original return, the date it pays a tax, or the date the parties have agreed, in writing, to extend either such date. 35 ILCS 5/911(a), (c). The legislature did not create an extension of §

911(a)'s filing period that tolls the statute of limitations while the Department is reviewing an amended return/claim for refund that may, or may not, have been timely filed. *See* 35 ILCS 5/911(a), (c).

And again, Taxpayer is wrong, as a matter of law, when it argues that, “amendments to pending refund claims after the statute of limitations has already expired [are] not otherwise expressly prohibited by the [IITA].” Taxpayer’s Brief, pp. 23-24. Section 909(d) expressly provides that “[e]very claim for refund shall be filed with the Department in writing in such form as the Department may by regulations prescribe” 35 ILCS 5/909(d); 35 ILCS 5/1501(a)(19). “Every claim for refund” therefore, includes those amended return forms that are filed with the Department ostensibly to amend a previously filed amended return/claim for refund form. 35 ILCS 5/909(d). As to the filing deadline that is applicable to “[e]very claim for refund” (*id.*), § 911(a)(2) has always provided that “[n]o credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.” 35 ILCS 5/911(a)(2); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519 (“Since Dow filed its claim for refund ... 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.”).

Taxpayer’s Third Amended Return was the claim for refund that Taxpayer filed in 2004 to claim a refund for 1991. Stip. ¶ 14; Stip. Ex. 7. Taxpayer’s Second Amended Return was the claim for refund Taxpayer filed in 1996 to claim a refund for 1991. Stip. ¶ 8; Stip. Ex. 5. Taxpayer’s Second Amended Return and its Third Amended Returns were different claims for refund, and each amended return form stated different grounds upon

which each was founded. 35 ILCS 5/909(d); Stip. ¶¶ 8, 13-14; Stip. Exs. 5, 7. Taxpayer's Third Amended Return was filed after the date the parties agreed upon as the last date for Taxpayer to timely file a claim for refund for 1991. Stip. Exs. 3, 7. Since it was not timely filed, the plain text of § 911(a)(2) mandates that "[n]o credit or refund shall be allowed or made ... for such claim" 35 ILCS 5/911(a)(2); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519. Taxpayer's Second Amended Return, on the other hand, was timely filed (Stip. ¶ 8; Stip. Ex. 5), and the Department paid Taxpayer the amount of the refund it sought on that particular amended return/claim for refund. Stip. ¶ 15.

For all of the reasons stated above, I recommend that the Director deny Taxpayer's Motion.

Department's Motion

In support of its cross motion, the Department argues that, since Taxpayer's Third Amended Return was filed eight years after the parties' agreed-upon extension of the limitation period set by IITA § 911(a), it is time-barred as a matter of law. Department's Cross Motion for Summary Judgment (Department's Motion), pp. 1, 7, 20. It cites two Illinois cases, American Airlines, Inc., and Dow Chemical Co. to support its arguments that Taxpayer may not extend the period set by the plain text of § 911, other than as set forth in that section. The Department disputes Taxpayer's claim that a federal extension that exists under Code § 6511 must be read into § 911. Finally, the Department disputes Taxpayer's characterization of its Third Amended Return as being a mere correction of its timely filed Second Amended Return. Department's Motion, p. 11.

The Department's Motion argues that, as a matter of law, its Denial should be finalized as issued, because Taxpayer's Third Amended Return was filed after the statute of limitations set by IITA § 911(a), and after the date the parties agreed to, in writing, to extend the date by which Taxpayer was required to timely file a claim a refund for 1991. It argues that the decisions in Dow and American Airlines, Inc. support its argument that the statutory period set by § 911(a) creates an absolute bar to any untimely filed claim for refund. It also argues that the decision in American Airlines supports its argument that, in general, the statutory procedures to be followed regarding claims for tax refunds are the procedures that are set forth within the respective Illinois tax Act that allows for such refunds, and not the procedures set by Illinois' Civil Code of Procedure regarding claims filed in civil courts, or those procedures used by federal civil courts. I agree with each of these arguments.

Section 911(a) creates a plain and clear filing deadline that governs a taxpayer's right to obtain a refund of Illinois income tax, based on a state change. 35 ILCS 5/911(a), (c). Section 911 applies to each of the three amended returns/claims for refund that are described and included in the parties' stipulated record. Stip. Exs. 2, 5, 7. The Department correctly noted that two of Taxpayer's claims were filed within § 911's statute of limitations, and one was not. Department's Brief, p. 1; Stip. Exs. 2, 5, 7. The undisputed facts show that Taxpayer's Third Amended Return was filed years after the date the parties agreed to, to extend Taxpayer's right to file a claim for refund for 1991. Stip. Exs. 3, 7; 35 ILCS 5/911(a), (c). Based on these undisputed facts, Taxpayer's Third Amended Return was barred by § 911's statute of limitations for refund claims based on

state changes. 35 ILCS 5/911(a)(2), (c); Stip. Exs. 3, 7. The Department's Denial was, in all respects, correct.

Conclusion

I recommend that the Director deny Taxpayer's Motion, grant the Department's Motion, and finalize the Denial as issued, pursuant to statute.

Date: May 31, 2012

John E. White
Administrative Law Judge

