ST 07-5
Tax Type: Sales Tax
Issue: Statute of Limitations Application

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

***ABC* AIRLINES**, Taxpayer v. **THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,**	No. 05-ST-0000 IBT: 0000-0000 Claim Periods 7/00 — 12/00 John E. White, Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Michael Koenigsknecht, Michael Koenigsknecht & Associates, appeared for *ABC* Airlines; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

The matter involves two sets of amended returns *ABC* Airlines (*ABC* or taxpayer) filed to claim a refund of use tax it paid during the months of July through December 2000. The Illinois Department of Revenue (Department) granted a refund in the amount *ABC* sought on amended returns *ABC* filed on October 3, 2003, and it denied *ABC* a refund of additional amounts of tax sought, regarding the same months, on amended returns *ABC* filed on May 9, 2005. *ABC* protested the Department's denial and requested a hearing.

In a pre-hearing order, the parties agreed that the issue to be resolved is whether an amendment to a timely filed claim for credit is deemed filed within the statute of limitations under § 21 of the Use Tax Act (UTA), 35 **ILCS** 105/21. I am including in the recommendation findings of fact and conclusions of law. I recommend the issue be resolved in favor of the Department.

Findings of Fact:

1. *ABC* purchases fuel that it loads onto aircraft in Illinois for use and consumption. *See* Taxpayer Ex. 1 (copies of *ABC*'s amended return forms filed on October 3, 2003).

2. *ABC* does not pay use tax to the person(s) from whom it purchases such fuel. *See* 35 **ILCS** 105/3-45, 105/3a. Instead, it self-assesses use tax and pays the Department directly on the twentieth day after the month in which it loads such fuel onto aircraft in Illinois. 35 **ILCS** 105/10; Taxpayer Ex. 1.

3. On October 3, 2003, *ABC* filed separate forms ST-1-X, Amended Sales and Use Tax Returns (hereinafter, the 10/3/03 amended returns), to seek a refund of Illinois use tax that it had previously paid when it filed original Illinois Sales and Use Tax Returns regarding the months of June 2000 through November 2000. Taxpayer Ex. 1 (copies of cover letter and 10/3/03 amended returns).

4. On each of *ABC*'s six 10/3/03 amended returns, in the part of the form on which a filer is asked to identify the reason why the filer is correcting its return, *ABC* wrote:

> According to IRS Ruling 2002-50, the IRS has a new interpretation of flights that qualify for international or foreign trade. Based on this new interpretation, we have more international flights. Therefore, we are requesting a refund of jet fuel paid on these additional flights.

Taxpayer Ex. 1.

5. *ABC*'s 10/3/03 amended returns sought the following refunds:

Month	Refund Sought
June 2000	$ 26,935
July 2000	$ 27,209
August 2000	$ 31,740
September 2000	$ 27,798

October 2000	$ 36,366
November 2000	$ 33,825
Total Refund Sought	$ **183,873**

Taxpayer Ex. 1.

6. On November 4, 2003, *ABC* received a letter from the Department notifying *ABC* that the Department had received *ABC*'s 10/3/03 amended returns. Taxpayer Ex. 2 (copy of letter from Department to *ABC*, dated October 30, 2003).

7. The Department assigned Phyllis Mondy (Mondy) to audit *ABC*'s amended returns. Taxpayer Ex. 7 (copy of audit history worksheet kept by Mondy regarding audit). Mondy prepared an audit history worksheet to document her activities regarding the audit of *ABC*'s 10/3/03 amended returns. Taxpayer Ex. 7.

8. Mondy received actual physical possession of *ABC*'s 10/3/03 amended return forms on May 14, 2004. Taxpayer Ex. 7, p. 1.

9. *ABC*'s employee, *Jane Doe* (*Jane*), was the person Mondy contacted for information regarding the audit of *ABC*'s 10/3/03 amended returns. Taxpayer Ex. 7.

10. An entry in Mondy's audit history worksheet, dated September 20, 2004, provides,

> Met with *Jane*; she gave me airport codes and IRS ruling; **she also gave me schedule of additional gallons for international flights that weren't included in the claims filed; she asked if I could include with review**
> Prepared schedule of what was filed and revised figures for claim
> Emailed Angie in Technical review to find out if this ruling has any bearing on how dept interprets international flights
> Reviewed schedule used to calculate gallons for international flights; the schedule reflect[s] day of flight, flight number, aircraft number and cities aircraft flew into;

the taxpayer calculated gallon[s] based on flight from Illinois to outside of Illinois

Taxpayer Ex. 7, pp. 1-2 (emphasis added).

11. The entry on Mondy's audit history worksheet for January 19, 2005, provides:

> 1/19/05 Discussed audit with supervisor; explained that taxpayer had additional info they wanted included with ST-1X filed; prepared schedule to reflect add'l refund request; supervisor said have taxpayer revise[ ] ST-1X and include add'l figures on them;
> Spoke with *Jane* and explained that she has to include add'l figures on ST-1X; I told her to revise[ ] ST-1X's and I will pick them up; she may have these ready by end of February

Taxpayer Ex. 7, p. 3.

12. On the same date, Mondy sent an email to *Jane* that provided, in pertinent part:

> ***
> The claims filed for 7/00-12/00 have been returned to me for corrections. The additional information submitted to me for review has to be filed on ST-1X's. Please amend the ST-1X's filed requesting a refund of $183873 and include the total amount you are requesting. Please contact me when the ST-1X's are done. I will pick up and mail them to Springfield for processing.
> ***

Taxpayer Ex. 3 (copy of 1/19/05 email from Mondy to *Jane*).

13. The entries on Mondy's audit history worksheet for May 9 and 11, 2005, provide:

> 5/9/05 Met with *Jane*; she gave me revised ST-1X's; she had me sign[ ] letter stating the returns were picked up by me
> Examined schedules; ***Jane* explained original exempt fuel did not include fuel used on flights that carried passengers and/or cargo that didn't go all the way through (i.e. passenger didn't continue to destination outside the [U]nited [S]tates, however, flight arrived at destination outside the [U]nited [S]tates)**
> Examined schedules reflecting additional fuel used on international flights; report consist[s] of month/year, destination airport, flight number, flight date, aircraft tail no., city pair which gallons taken from, all airports flight flew to; examined flight operations report which contained

> fuel gallons of city pair; example of how to read report: dfworddfwgru-flight 2347 left dfw to ord to dfw and then to gru which is Sao Paulo, Brazil; gallons used to determine exempt fuel is for fuel used from ord to dfw
>
> ***
>
> 5/11/05 Completed examination; discussed audit with *Jane*; refund for request approved; gave *Jane* EDA-125

Taxpayer Ex. 7, pp. 3-4 (emphasis added).

14. On May 9, 2005, *Jane* gave to Mondy ST-1-X forms, dated April 20, 2005 (hereinafter, 5/9/05 amended returns), that *ABC* prepared, consistent with Mondy's instructions, to request a refund of additional amounts of use tax regarding its withdrawal of fuel for use during the months of July 2000 through December 2000. Taxpayer Ex. 4 (copies of 5/9/05 amended returns, and cover letter also dated April 20, 2005), Taxpayer Ex. 7, p. 3.

15. When Mondy picked up the 5/9/05 amended returns from *Jane* on May 9, 2005, Mondy signed a cover letter *Jane* prepared, and which letter was also dated April 20, 2005. Taxpayer Ex. 4, p. 1; Taxpayer Ex. 7, p. 3.

16. *ABC*'s 5/9/05 amended returns sought the following refunds:

Month	**Refund Sought**
June 2000	$ 97,693
July 2000	$ 114,893
August 2000	$ 113,874
September 2000	$ 125,985
October 2000	$ 143,008
November 2000	$ 106,479
Total Refund Sought	$ **701,932**

Taxpayer Ex. 4.

17. Each of *ABC*'s 5/9/05 amended return forms contained a statement in Part 2 that is identical to the statement set forth in the same section of the 10/3/03 amended

returns, explaining the reason why *ABC* was correcting its 7/00 through 12/00 returns. *Compare* Taxpayer Ex. 1 *with* Taxpayer Ex. 4.

18. The amounts of tax *ABC* sought to have refunded to it in the 5/9/05 amended returns include the amounts of tax previously sought in *ABC*'s 10/3/03 amended returns. Taxpayer Ex. 4; Taxpayer Ex. 7, pp. 3-4.

19. On May 11, 2005, Mondy sent a letter to *Jane* that provided, in pertinent part:

> The claim for refund request for tax overpaid in the amount of $701932 has been approved. The claim was filed 10/3/03 for the tax period 7/00 through 12/00.

Taxpayer Ex. 5 (copy of May 11, 2005 letter from *Jane* to Mondy).

20. Mondy sent the May 11, 2005 letter to *Jane* before Department audit supervisory personnel approved her audit determinations. Taxpayer Ex. 7, p. 4.

21. The entry on Mondy's audit history worksheet for May 13, 2005, provides:

> 5/13/05 Spoke with new supervisor (Roger Koss); he asked if I got waiver from taxpayer; I said no because I didn't think waiver was necessary on claim; explained that add'l refund requested was for same issue (use tax paid in error on exempt fuel); I told Roger, supervisor at time (Tony Gonerka) instructed me to have taxpayer revise[ ] ST-1X's and include add'l refund request; Roger said taxpayer can't increase claim because it was not in statute; Springfield will return audit to me for corrections

Taxpayer Ex. 7, p. 4.

22. Mondy corrected her initial audit determination that *ABC* was entitled to a refund of use tax in the amount of $701,932 by reducing the amount of the refund to the amount requested in *ABC*'s 10/3/03 amended returns. Department Ex. 1; Taxpayer Ex. 6 (same).

23. The Department issued a Notice of Proposed Claim Denial (Denial) on August 19, 2005, in which it notified *ABC* that the refund sought within *ABC*'s 10/3/03 amended returns was approved, and that the additional refund sought within *ABC*'s 5/9/05 amended returns was denied. Department Ex. 1; Taxpayer Ex. 6.

Conclusions of Law:

The Department introduced its *prima facie* case when it introduced its denial of *ABC*'s amended returns/requests for refund. Department Ex. 1; 35 **ILCS** 105/20. The Department's *prima facie* case is a rebuttable presumption. Branson v. Department of Revenue, 68 Ill. 2d 247, 262, 659 N.E.2d 961, 968 (1995). The Department's *prima facie* case is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department's determinations are wrong. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156-57, 242 N.E.2d 205, 206-07 (1968); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832, 527 N.E.2d 1048, 1052 (1st Dist. 1988).

Before addressing the parties' arguments, I first identify the particular Illinois exemption pursuant to which the refund sought in *ABC*'s 10/3/03 amended returns was granted. Section 2-5(22) of the Retailers' Occupation Tax Act (ROTA) and § 3-5(12) of the UTA each exempt from taxation "[f]uel and petroleum products sold to or used by an air carrier, certified by the carrier to be used for consumption, shipment, or storage in the conduct of its business as an air common carrier, for a flight destined for or returning from a location or locations outside the United States without regard to previous or subsequent domestic stopovers." 35 **ILCS** 120/2-5(22); 35 **ILCS** 105/3-5(12). Retailers'

Occupation Tax Regulation (ROTR) § 130.321 interprets the exemption described in ROTA § 2-5(22), and it provides:

> Section 130.321. Fuel Used By Air Common Carriers in International Flights
>
> a) Notwithstanding the fact that sales may be at retail, fuel and petroleum products sold to or used by an air common carrier, certified by the carrier to be used for consumption, shipment or storage in the conduct of its business as an air common carrier, for a flight destined for or returning from a location or locations outside the United States without regard to previous or subsequent domestic stopovers is exempt from tax. (Section 2-5 of the Act)
>
> b) An air common carrier means a commercial air common carrier certified and authorized to conduct international flights involving passengers or cargo for hire, on a regularly-scheduled basis.
>
> c) Flights destined for a destination outside the United States include flights which originate in Illinois or have a stopover in Illinois and which may have intermediate stops at other locations in the United States prior to arriving at the destination outside the United States. In such situations, all fuel loaded for such a flight shall be considered to be exempt, notwithstanding the fact that a portion of the fuel will be consumed within the United States. If a flight is loaded with exempt fuel for an intended international flight, but for some reason the flight stops at an intermediate location in the United States and does not continue to the foreign destination, the fuel will be taxable.
>
> d) In general, exempt international fuel shall be treated in the same manner as bonded fuel with respect to the sale, accountability and eligibility of tax exemption.
>
> e) Exempt international fuel may be commingled with other jet fuel within the hydrant systems at qualifying airports. However, accurate records must be maintained with respect to the purchaser, gallonage of fuel loaded, flight number, aircraft tail number, ultimate foreign destination and intermediate stops.

86 Ill. Admin. Code § 130.321.

The Department denied the *ABC*'s claim for refund in the amount of the difference between its 5/9/05 amended returns and its 10/3/03 amended returns because *ABC*'s 5/9/05 amended returns were filed after the statute of limitations, set forth in UTA § 21, had run. Department Ex. 1; Taxpayer Ex. 6. Section 21 of the UTA provides:

> As to any claim for credit or refund filed with the Department on and after January 1 but on or before June 30 of any given year, no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or interest under this Act) more than 3 years prior to such January 1 shall be credited or refunded, and as to any such claim filed on and after July 1 but on or before December 31 of any given year, no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or interest under this Act) more than 3 years prior to such July 1 shall be credited or refunded. No claim shall be allowed for any amount paid to the Department, whether paid voluntarily or involuntarily, if paid in total or partial liquidation of an assessment which had become final before the claim for credit or refund to recover the amount so paid is filed with the Department, or if paid in total or partial liquidation of a judgment or order of court.

35 **ILCS** 105/21.

An applicable regulation, adopted pursuant to the complementary ROTA, provides examples of how the identical statutes of limitations operate, for claims filed under either the ROTA or the UTA. *Compare* 35 **ILCS** 105/21 *with* 35 **ILCS** 120/6. That regulation provides, in pertinent part:

> *** [T]he normal statute of limitations will vary from 3 to 3 ½ years as shown in the following examples:
>
> A) On June 29, 1999 a taxpayer files a claim with the Department. The credit may be allowed for amounts paid on or after January 1, 1996. The credit will not be allowed for amounts paid on or before December 31, 1995.
>
> ***

C) A taxpayer files a claim on November 30, 1999 for the months of October through December 1996. The claim will be processed by the Department because the time period that is open under the statute of limitations extends back through July 1, 1996.

D) A taxpayer files a claim on January 5, 2000 for the month of October 1996 that was paid on November 20, 1996. The claim will not be approved by the Department because it is barred by the statute of limitations. A claim filed on January 5, 2000 only has open periods back through January 1, 1997.

E) During the course of an audit of the periods July 1, 1996 through June 30, 1999, the taxpayer and the Department agree in writing to extend the statute of limitations through December 31, 2000 for the purpose of issuing a notice of tax liability for the audit period. (See Section 4 of the Act.) This extension of the time for issuing a notice of tax liability also extends the period under which the taxpayer may file a claim. (See Section 6 of the Act.) Therefore a claim filed by the taxpayer on November 27, 2000 to recover a payment that was filed and paid on July 20, 1996 will be processed because the open time limit for filing claims extends back to July 1, 1996 pursuant to the agreement. This is true even if the payment was for the June 1996 monthly return (due date of July 20, 1996) and June 1996 is outside the statute of limitations period for issuing a notice of tax liability.

***

86 Ill. Admin. Code § 130.1501(a)(4).

Thus, *ABC*'s 10/3/03 amended returns seeking a refund of tax paid during the months of July through December 2000 were timely filed. 35 **ILCS** 105/21; 86 Ill. Admin. Code § 130.1501(a)(4)(C). In contrast, *ABC*'s 5/9/05 amended returns were not timely filed because they sought refunds of additional amounts of tax *ABC* claimed it erroneously overpaid during the months of July through December 2000. 35 **ILCS** 105/21; 86 Ill. Admin. Code § 130.1501(a)(4)(D).

ABC posits four general arguments why the Department's denial of the refunds sought in its 4/10/05 amended returns was improper. *ABC*'s Brief, p. 3. First, it argues that its 10/3/03 amended returns were filed timely, and that those returns gave the Department all of the necessary information regarding *ABC*'s claim. *ABC* claims that since its 5/9/05 amended returns relate back to the date its 10/3/03 amended returns were filed, the full refund should be approved. *ABC*'s Brief, pp. 3, 6-7. Second, *ABC* asserts that it preserved its right to amend the dollar amount of its refund claim consistent with the instructions set forth in Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 586 N.E.2d 516 (1st Dist. 1991). *ABC*'s Brief, pp. 3, 9-10. *ABC* contends that since its 10/3/03 amended returns were a protective claim, its subsequent amendment of that timely-filed claim was proper. *Id*. Third, *ABC* claims that denying its 5/9/05 amended returns is bad public policy. *ABC*'s Brief, pp. 3, 10-11. Finally, *ABC* argues that if the Department's denial is upheld, the Department will have denied *ABC* of its due process rights, by not affording it a clear and certain means of seeking redress for its payment of self-assessed, estimated taxes. *ABC*'s Brief, pp. 3, 11-13.

The Department confronts *ABC*'s primary argument directly, asserting that the relation back doctrine does not exist under Illinois tax law. The Department cites Sundance Homes, Inc. v. County of DuPage, 195 Ill. 2d 257, 746 N.E.2d 254 (2001) to support that proposition, as well as the absence of any statutory provision within the UTA, or any case law holding that a taxpayer may, after the statute of limitations has run, amend a timely filed refund claim. Department's Response Brief (Department's Brief), pp. 4-5. In its reply, *ABC* responds to the Department's reliance on Sundance Homes by asserting that the statute of limitations is not an issue, and that *ABC* " 'stopped the

[statute of limitations] clock' when it filed a timely claim for refund in October 2003." Taxpayer's Reply to the Department's Response Brief (*ABC*'s Reply), p. 4. *ABC* then mirrors the Department's argument, by pointing out that the Department has cited to no statute or regulation that states that a taxpayer cannot amend a timely-filed claim for refund. *ABC*'s Reply, p. 4.

The threshold issue is whether the relation back doctrine applies to claims for refund authorized under the UTA. This is a purely legal issue, and is best addressed by comparing the applicable statutes and case law governing refunds and/or credits authorized by the UTA and analogous Illinois tax law, with § 2-616(b) of the Illinois Code of Civil Procedure (the Code), which authorizes amendments to claims asserted in cases initiated in Illinois trial courts. The follow-up issue, if necessary, is whether, under the circumstances, *ABC*'s 5/9/05 amended returns relate back to its 10/3/03 amended returns.

Section 2-616 of the Code governs amendments to pleadings and the relation back of those amendments to the date of the filing of the original pleading to avoid the statute of limitations. Zeh v. Wheeler, 111 Ill. 2d 266, 270, 489 N.E.2d 1342, 1344 (1986). Section 2-616(b), which is the particular subsection that *ABC* asserts is relevant here (*ABC*'s Brief, pp. 8-9), provides:

> § 2-616. Amendments.
>
> ***
>
> (b) The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in

> the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.
>
> ***

725 **ILCS** 5/2-616(b).

This section of the Code permits the relation back of an amended pleading to avoid the impact of an otherwise applicable statute of limitations if two requirements are met: (1) the original pleading was timely filed; and (2) the original and amended pleadings indicate that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading. Zeh, 111 Ill. 2d at 270-71, 489 N.E.2d at 1344.

ABC asserts that its

> original refund request contained all of the necessary information required by IDOR regulations and thus, put the Department on notice of the time period, the tax, and the subject matter of the refund claim. The timely filed claim for refund concerned the definition of "international flights" for purposes of the exemption from Illinois Use Tax. In September 2004, additional flights were discovered that fit within the definition of "international flight," and *ABC* … calculated its overpayment to be $701,932, a $518,119 increase from the original amount of the claim. IDOR's auditor instructed *ABC* … to file an amended refund claim in the amount of $701,932.
>
> ***
>
> *ABC* … is entitled to the full amount of its overpayment, $701,932, because its refund claim was filed within the prescribed statutory time limit. The revised ST-1X's filed by *ABC* … on May 9, 2005 is for the same tax,

> the same transaction and the same time period as the original filing made by *ABC* in October of 2003. The only difference between the original ST-1X's filed in October 2003 and the amended ST-1X's filed in May 2005 was the dollar amount of the taxpayer's overpayment. The statute of limitations does not prohibit amendments to timely filed claims. If *ABC*['s] … refund claim of $701,932 is denied, the result would be unjust and leave the Department with a substantial windfall.

ABC's Brief, pp. 6-7.

In this way, *ABC*'s argument likens an amended return a taxpayer files to request a refund of use tax to a complaint that a plaintiff would file in an Illinois circuit court to initiate a justifiable cause of action (s*ee* Illinois Constitution of 1970, art. VI, § 9 (jurisdiction of Illinois circuit courts)), and *ABC* wants me to treat its 10/3/03 amended returns like they were a timely-filed complaint in circuit court. Since Code § 2-616(b) is applicable to complaints filed to initiate a cause of action in an Illinois circuit court, and since a claim for refund is like such a complaint, *ABC* would have Code § 2-616(b) also deemed applicable to the statutory procedures the UTA and the complementary ROTA make applicable to taxpayers seeking a refund of tax. *ABC* wants me to treat its 5/9/05 amended returns as a mere amendment to its original claim, which amendment is authorized by Code § 2-616(b).

But the statutory procedures applicable to pleadings filed to initiate causes of action in Illinois circuit courts, and the statutory procedures applicable to tax refund requests under the UTA, arise under separate and distinct legislative enactments. The Code itself is comprised of different articles. 735 **ILCS** 5/1-101. Article II of the Code is the Civil Practice Act. 735 **ILCS** 5/1-101(b). Article II of the Code and the Illinois Supreme Courts Rules govern litigation conducted under the jurisdiction of a circuit or

other Illinois court. 735 **ILCS** 5/1-104(a) ("The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to, but not inconsistent with the provisions of this Act …."); Ill. Sup. Ct. R. § 1 ("General rules apply to both civil and criminal proceedings. The rules on proceedings in the trial court, together with the Civil Practice Law and the Code of Criminal Procedure, shall govern all proceedings in the trial court, except to the extent that the procedure in a particular kind of action is regulated by a statute other than the Civil Practice Law. The rules on appeals shall govern all appeals."); *see also* Illinois Constitution of 1970, art. VI, § 9. Article III of the Code is the Administrative Review Law, and it applies to and governs every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of Article III of this Act or its predecessor, the Administrative Review Act. 735 **ILCS** 5/3-102.

There can be no doubt that by incorporating § 12 of the ROTA, the legislature has expressly adopted Article III of the Code within the UTA. 35 **ILCS** 120/12; 35 **ILCS** 105/12. But the question here is whether the relation back doctrine, which is found within Article II, § 2-616(b) of the Code, applies to a timely filed amended return/claim for refund that is authorized by the UTA. The Department is correct that nothing within the UTA expressly provides that the pleading provisions found within Article II, Part 6, of the Code are applicable to tax refunds authorized by the UTA. But even more important than the absence of a provision incorporating any part of Article II of the Code into the UTA or the ROTA is the legislature's choice of a different set of statutory procedures to govern claims filed under the those tax acts. The Illinois legislature

expressly adopted the Illinois Administrative Procedure Act (IAPA) to govern hearings requested and held to resolve disputes arising out of the Department's administration and enforcement of the UTA's provisions. 35 **ILCS** 105/12b. Given the legislature's express choice of the IAPA as the act that would provide the statutory, procedural rules that shall apply to contested cases arising under the UTA, I conclude that the legislature did not intend the procedures set forth in Article II, Part 6 of the Code, to apply to amended returns/claims for refund authorized by the UTA.

Further, the express provisions of the UTA, and those within the complementary ROTA that are applicable to a tax refund sought pursuant to the UTA, establish that there is only one statutorily authorized means of extending the identical statutes of limitations set forth in the UTA and in the ROTA. 35 **ILCS** 105/19, 105/21; 35 **ILCS** 120/6; 86 Ill. Admin. Code §§ 150.1501(a)(4), 150.1401(c). The record also establishes that *ABC* did not exercise that single, statutory extension to UTA § 21's statute of limitations in this case. Taxpayer Ex. 7, pp. 3-4.

The UTA's provisions governing refunds and/or credits authorized by the UTA are found within §§ 19-22. 35 **ILCS** 105/19-22. The portion of UTA § 19 that is applicable here provides:

> § 19. If it shall appear that an amount of tax or penalty or interest has been paid in error hereunder to the Department by a purchaser, as distinguished from the retailer, whether such amount be paid through a mistake of fact or an error of law, such purchaser may file a claim for credit or refund with the Department in accordance with Sections 6, 6a, 6b, and 6c of the Retailers' Occupation Tax Act. ***
>
> ***

35 **ILCS** 105/19.

Next, the pertinent portions of UTA § 20 provide:

> § 20. As soon as practicable after a claim for credit or refund is filed, the Department shall examine the same and determine the amount of credit or refund to which the claimant or the claimant's legal representative, in the event that the claimant shall have died or become a person under legal disability, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his or her legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. ***
>
> ***
>
> *** Claims for credit or refund hereunder must be filed with and initially determined by the Department, the remedy herein provided being exclusive; and no court shall have jurisdiction to determine the merits of any claim except upon review as provided in this Act.

35 **ILCS** 105/20.

Section 6 of the ROTA, which UTA § 19 provides is one of the ROTA's sections that a refund claim will be filed "in accordance with" (35 **ILCS** 105/19), sets forth the only express statutory extension for the limitations period for a tax refund described within UTA § 21. 35 **ILCS** 120/6; 86 Ill. Admin. Code § 150.1401(c). That section provides, in pertinent part:

> *** However, as to any claim for credit or refund filed with the Department on and after each January 1 and July 1 no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or amount of interest under this Act) more than 3 years prior to such January 1 and July 1, respectively, shall be credited or refunded, **except that if both the Department and the taxpayer have agreed to an extension of time to issue a notice of tax liability as provided in Section 4 of this**

> **Act, such claim may be filed at any time prior to the expiration of the period agreed upon.**
> ***

35 **ILCS** 120/6; 86 Ill. Admin. Code §§ 130.1501(a)(4), 150.1401(c).

The record is clear that *ABC* had not entered into an agreement with the Department to extend the statutory limitations period for the Department to issue a Notice of Tax Liability (NTL) regarding *ABC*'s taxable purchases and/or uses of tangible personal property reported on returns filed in July through December 2000. Taxpayer Ex. 7, pp. 3-4. Since, under the procedures expressed and adopted by the Illinois legislature, there is only one statutorily authorized means of extending UTA § 21's statute of limitations for filing a claim for refund of use tax, and since there is no dispute that *ABC* did not enter into an agreement with the Department to extend the period for the Department to issue an NTL regarding the months of July through December 2000 (35 **ILCS** 105/12, 105/21; 35 **ILCS** 120/4, 120/6), then § 21's express text must be heeded. Thus, "no amount of tax or penalty or interest erroneously paid … shall be credited or refunded …" for *ABC*'s 5/9/05 requests for additional refunds of tax claimed to have been erroneously paid during July through December 2000. 35 **ILCS** 105/21.

I further conclude that § 6a of the ROTA, which UTA § 19 also makes applicable to claims for refund of use tax, belies two of *ABC*'s arguments why its 5/9/05 amended returns should be considered a mere amendment to its prior 10/3/03 amended returns. Section 6a describes the nature of the claim form that a taxpayer seeking a refund under either the ROTA or the UTA is required to file (35 **ILCS** 105/20), and it provides, in pertinent part:

> § 6a. Claims for credit or refund shall be prepared and filed upon forms provided by the Department. Each claim

> shall state: (1) The name and principal business address of the claimant; (2) the period covered by the claim; (3) the total amount of credit or refund claimed, giving in detail the net amount of taxable receipts reported each month or other return period used by the claimant as the basis for filing returns in the period covered by the claim; (4) the total amount of tax paid for each return period; (5) receipts upon which tax liability is admitted for each return period; (6) the amount of receipts on which credit or refund is claimed for each return period; (7) the tax due for each return period as corrected; (8) the amount of credit or refund claimed for each return period; (9) reason or reasons why the amount, for which the claim is filed, is alleged to have been paid in error; (10) a list of the evidence (documentary or otherwise) which the claimant has available to establish his compliance with Section 6 as to bearing the burden of the tax for which he seeks credit or refund; (11) payments or parts thereof (if any) included in the claim and paid by the claimant under protest; (12) sufficient information to identify any suit which involves this Act, and to which the claimant is a party, and (13) such other information as the Department may reasonably require. ***
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35 **ILCS** 120/6a.

Section 6a makes clear that a taxpayer seeking a refund of use tax erroneously paid is required to specifically identify, on the face of the amended return, "the total amount of credit or refund claimed, giving in detail the net amount of taxable receipts reported each month or other return period used by the claimant as the basis for filing returns in the period covered by the claim; … receipts upon which tax liability is admitted for each return period; … the amount of receipts on which credit or refund is claimed for each return period; … the tax due for each return period as corrected; … the amount of credit or refund claimed for each return period; [and the] … reason or reasons why the amount, for which the claim is filed, is alleged to have been paid in error …." 35 **ILCS** 120/6a. In other words, a taxpayer's identification of each such amount constitutes

a material part of the taxpayer's claim for refund. The amounts are material because they are intended to specifically identify to the Department the particular purchases of tangible personal property that the taxpayer claims to have used, in Illinois, in an exempt manner.

There is a presumption that *ABC* owes use tax on every gallon of fuel that it uses in Illinois, unless it can establish that such fuel was subject to a specific exemption, like the one authorized by 35 **ILCS** 105/3-5(12). 35 **ILCS** 105/12 (incorporating, *inter alia*, 35 **ILCS** 120/7). *ABC*'s 10/3/03 amended returns sought a refund of $183,873 in use tax that *ABC* claimed it had erroneously paid regarding transactions in which it loaded fuel onto international flights. Taxpayer Ex. 1. On its 5/9/05 amended returns, *ABC* sought an additional $518,059 of tax that it claimed it had erroneously paid regarding its use of fuel that it loaded onto other international flights during the same months. Taxpayer Ex. 4. *ABC*'s claim that the 5/9/05 claim relates back to its 10/3/03 claim thus suggests that all of the fuel it loaded onto different aircraft in Illinois during, for example, June 2000 (which is the month regarding which it paid use tax in July 2000; *see* 35 **ILCS** 105/10), collectively comprised a single transaction.

But *ABC*'s act of loading fuel onto one particular aircraft for a flight that is "destined for or returning from a location or locations outside the United States" is not the same transaction as *ABC*'s loading of fuel onto another aircraft for another such flight. 35 **ILCS** 105/3-5(12). For example, let us say that *ABC* had, on June 1st, 2000, scheduled flight number 1, which originated in Berlin, Germany at noon, with its final destination being Los Angeles, California, and one stopover in Chicago, Illinois, where it refueled. Let us say that *ABC* has scheduled another flight, also designated flight number 1, to leave Berlin, Germany at noon every other day of June 2000, with an identical

itinerary. There is no rational reason to treat the flight number 1 that flew on June 1, 2000, as the same transaction or occurrence as the flight number 1 that flew on June 3, 2000. Rather, each and every time *ABC* loads fuel onto an aircraft in Illinois, it is engaging in a separate transaction, and a separate use of distinct tangible personal property. *See* 35 **ILCS** 105/1 (definition of use), 3-5(12), 105/12, 105/19; 35 **ILCS** 120/7.

Just as clearly, *ABC*'s identification, on its 10/3/03 amended returns, of the specific amounts of use tax claimed to have been erroneously paid, and based on its purchase price of fuel that it loaded onto certain international flights, most certainly did not notify the Department that *ABC* was, in actuality, seeking a refund for *all* amounts of use tax that might have been erroneously paid during that one particular month. After all, *ABC* was required to identify on its 10/3/03 amended returns the amount of the "… tax liability [which] is admitted for each return period …." 35 **ILCS** 120/6a. Thus, § 6a belies *ABC*'s argument that the "only difference between the original ST-1X's filed in October 2003 and the amended ST-1X's filed in May 2005 was the dollar amount of the taxpayer's overpayment." *ABC*'s Brief, pp. 6-7. The significant increase in the amount of the refund sought by *ABC* on its 5/9/05 amended returns means that *ABC* was also identifying within those 5/9/05 amended returns many more purchases and uses — that is, many more transactions — than those it had previously claimed were exempt on its 10/3/03 amended returns.

ABC's argument shows why the pleading procedures included within Article II, Part 6 of the Code are inconsistent with the procedures that govern the filing of requests for refund under the UTA and the complementary ROTA. The amounts *ABC* actually

reported as being refundable on each of its 10/3/03 amended returns were not immaterial, or inconsequential, to its request for refund of tax paid during the periods at issue. I do not view *ABC*'s 10/3/03 amended returns broadly, as a circuit court might view a complaint, as giving notice to the Department that *ABC* was seeking a refund for *all* amounts of use tax that *ABC* had erroneously overpaid on returns filed regarding its use of fuel on "international flights" during June through November 2000, regardless of the amounts *ABC* said were properly refundable on those 10/3/03 amended returns. Indeed, *ABC*'s 10/3/03 amended returns did nothing of the sort. The first time the Department was actually confronted with notice that *ABC* may have paid use tax erroneously regarding its loading of fuel onto aircraft for flights other than the flights that formed the bases for *ABC*'s 10/3/03 amended returns was in September 2004, when *ABC*'s employee asked the Department's auditor to see whether such additional flights might also come within the scope of UTA § 3-5(12). Taxpayer Ex. 7, pp. 1-2 (entry for 9/20/04). By that time, however, the statute of limitations had already run on *ABC*'s right to file any further amended return to seek additional amounts of use tax claimed to have been erroneously paid by *ABC* during the months of July through December 2000. 35 **ILCS** 105/21.

I agree with *ABC*'s general stance that a taxpayer may amend a timely filed amended return/claim for refund. *See ABC*'s Brief, p. 7 ("The statute of limitations does not prohibit amendments to timely filed claims"). But *ABC* is not correct when it asserts that a taxpayer may do so by following the procedures set forth in Code § 2-616(b), instead of the ones set forth within the UTA. That is, a taxpayer may seek a refund of additional amounts of use tax erroneously paid by filing a subsequent amended return that identifies other transactions that are also exempt from tax, so long as that subsequent

amended return is also filed within the limitations period set by UTA § 21. 35 **ILCS** 105/19, 105/21; 35 **ILCS** 120/6, 120/6a.

As a final point on the threshold issue, I must reject *ABC*'s interpretation of Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 586 N.E.2d 516 (1st Dist. 1991). *ABC*'s Brief, pp. 3, 9-10. The Dow court noted "that Dow fails to explain why it did not file a claim for refund as a protective device before the statute of limitations expired on filing such a claim, or at the very least, obtain an extension for filing a claim as provided in section 911 of the statute." Dow, 224 Ill. App. 3d at 269, 586 N.E.2d at 520. *ABC* seems to read this part of the Dow decision to mean that, so long as a taxpayer does, in fact, timely file an amended return for a tax refund, the taxpayer is then free to seek a refund of any additional amounts of tax that arose out of the same type of transactions or occurrences as those that form the bases of its timely filed amended return, for the same tax period. I do not read Dow to mean what *ABC* suggests. What Dow would have protected by timely filing an amended return was its right to the amount of the refund that it actually identified in the timely filed amended return. It would not have been entitled, however, to seek a refund of any additional amounts of tax that it might discover, after the statutory period had run, to have been also erroneously overpaid for the same tax periods. Thus, I reject *ABC*'s invitation to read Dow as though it held that the act of timely filing an amended return has the same legal effect as the act of entering into an agreement between a taxpayer and the Department to extend the statute of limitations for the Department to issue a Notice of Tax Liability, or a Notice of Deficiency. *See, e.g.* W.L. Miller Co. v. Zehnder, 315 Ill. App. 3d 799, 806, 734 N.E.2d 502, 507 (4th Dist 2000).

In this respect, I agree with the Department that Sundance Homes reflects the Illinois supreme court's strict construction of statutes of limitations in tax codes. Sundance Homes, Inc., 195 Ill. 2d at 267-70, 746 N.E.2d at 260-62. Other Illinois courts agree, generally, that statutes of limitations should be extended only when authorized by an applicable statute. IPF Recovery Co. v. Illinois Insurance Guaranty Fund, 356 Ill. App. 3d 658, 665, 826 N.E.2d 943, 949 (1st Dist. 2005) ("Illinois law is clear that, as a general rule, the statute of limitations continues to run unless tolling is authorized by a statute"); Dow Chemical Co., 224 Ill. App. 3d at 268-69, 586 N.E.2d at 520 ("Although it might seem reasonable to judicially toll the statute of limitations in order to fashion a remedy for Dow, such a decision is not supported by Illinois case law which holds that no exceptions which toll a statute of limitations or enlarge its scope will be implied.").

In sum, as to the threshold issue, I agree with the Department that Code § 2-616(b) does not apply to claims for refunds of use tax authorized by the UTA, so as to allow a subsequent amended return/claim for refund, filed out of statute, to relate back to a prior, timely-filed amended return/claim for refund. To treat Code § 2-616(b) as though it applied to requests for tax refunds under the UTA and/or the ROTA would be to extend the specific tax statutes of limitations in a way not intended by the Illinois General Assembly. Sundance Homes, Inc., 195 Ill. 2d at 267-70, 746 N.E.2d at 260-62; W.L. Miller Co., 315 Ill. App. 3d at 806, 734 N.E.2d at 507; Dow Chemical Co., 224 Ill. App. 3d at 268-69, 586 N.E.2d at 520.

Under the applicable tax provisions, the only way an amendment to a timely filed claim for credit will be deemed filed within the statute of limitations is if the amendment itself is filed within the statute of limitations. 35 **ILCS** 105/19, 35 **ILCS** 120/6a. The

only one way to extend UTA § 21's statute of limitations is to enter into an agreement with the Department to do so. 35 **ILCS** 105/19; 35 **ILCS** 120/6; 86 Ill. Admin. Code § 150.1501(a)(4). *ABC*'s 5/9/05 amended returns were not timely filed because *ABC* did not enter into such an agreement with the Department. Taxpayer Ex. 7, pp. 3-4. I recognize, however, that these conclusions are conclusions of law, to which a reviewing court owes no deference. *E.g.*, Home Interiors and Gifts, Inc. v. Department of Revenue, 318 Ill. App. 3d 205, 210, 741 N.E.2d 998, 1003 (1st Dist. 2000). Thus, I now address the follow-up issue, which is whether, under the circumstances, *ABC*'s 5/9/05 amended returns relate back to its 10/3/03 amended returns.

ABC has always asserted that both its 10/3/03 and its subsequent 5/9/05 amended returns were initiated as a result of the IRS's Revenue Ruling 2002-50. Taxpayer Exs. 1, 4; *ABC*'s Brief, pp. 4, 6. That ruling provides:

TAX-FREE SALE OF ARTICLES FOR USE BY THE PURCHASER AS SUPPLIES FOR VESSELS OR AIRCRAFT
Released: July 19, 2002

Section 4041.--Imposition of Tax, *26 CFR 48.4041-10: Exemption for use as supplies for vessels or aircraft.*

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 4081.--Imposition of Tax

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 4091.--Imposition of Tax

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 4092.--Exemptions

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 6416.--Certain Taxes on Sales and Services, *26 CFR 48.6416(b)(2)-2: Exportations, uses, sales, and resales included.*

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 6421.--Gasoline Used for Certain Nonhighway Purposes, Used by Local Transit Systems, or Sold for Certain Exempt Purposes

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 6427.--Fuels Not Used for Taxable Purposes

When is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

Section 7805.--Rules and Regulations, *26 CFR 301.7805-1: Rules and regulations.*

When is an aircraft "actually engaged in

foreign trade" within the meaning of § 4221(d)(3)?

Section 4221.--Certain Tax-Free Sales, *26 CFR 48.4221-4: Tax-free sale of articles for use by the purchaser as supplies for vessels or aircraft.*

Tax-free sale of articles for use by the purchaser as supplies for vessels or aircraft. For purposes of section 4092, an aircraft that flies a person for hire between the United States and a foreign country is actually engaged in foreign trade within the meaning of section 4221(d)(3). That aircraft is also actually engaged in foreign trade when flying that person from a city in the United States to another city in the United States as part of the transportation between the United States and the foreign country. Rev. Rul. 69-259 modified and superseded.

Tax-free sale of articles for use by the purchaser as supplies for vessels or aircraft. For purposes of section 4092 of the Code, an aircraft that flies a person for hire between the United States and a foreign country is actually engaged in foreign trade within the meaning of section 4221(d)(3) of the Code. That aircraft is also actually engaged in foreign trade when flying that person from a city in the United States to another city in the United States as part of the transportation between the United States and the foreign country.

ISSUE

For purposes of § 4092 of the Internal Revenue Code, when is an aircraft "actually engaged in foreign trade" within the meaning of § 4221(d)(3)?

FACTS

Aircraft *A*, Aircraft *B*, and Aircraft *C* are operated by a domestic airline in the business of transporting persons by air for hire. The aviation fuel purchased for use in the aircraft is purchased in the United States.

Situation 1. Aircraft *A* flies from city # 1 in the United States to city # 3 in a foreign country. En route to city # 3 Aircraft *A* stops in city # 2 in the United States. The flight from city # 1 to city # 2 is designated Flight No. 111 and the flight from city # 2 to city # 3 is designated Flight No. 333. Aircraft *A* transports at least one person for hire from city # 1 to city # 3.

Situation 2. Aircraft *B* flies from city # 4 in a foreign country to city # 6 in the United States. En route to city # 6 Aircraft *B* stops in city # 5 in the United States. The flight from city # 4 to city # 5 is designated Flight No. 555 and the flight from city # 5 to city # 6 is designated Flight No. 777. Aircraft *B* transports at least one person for hire from city # 4 to city # 6.

Situation 3. Aircraft *C* flies only within the United States. Aircraft *C* transports persons for hire from city # 1 to city # 2, some of whom will transfer to Aircraft *A* for its flight from city # 2 to city # 3 in a foreign country.

LAW AND ANALYSIS

Section 4092 provides that no tax is imposed under § 4091 on aviation fuel sold by a producer for use by the purchaser in a nontaxable use (as defined in § 6427(l)(2)(B)).

Section 6427(l)(2)(B) provides that the term "nontaxable use" means, in the case of aviation fuel, any use that is exempt from the tax imposed by § 4041(c)(1) other than by reason of a prior imposition of tax.

Section 4041(g)(1) provides that no tax is imposed under § 4041(c)(1) on any liquid sold for use or used as supplies for vessels or aircraft (within the meaning of § 4221(d)(3)).

Section 4221(d)(3) provides that the term "supplies for vessels or aircraft" includes fuel supplies, ships' stores, sea stores, or legitimate

equipment on vessels actually engaged in foreign trade or trade between the United States and any of its possessions. For purposes of the preceding sentence, the term "vessels" includes civil aircraft employed in foreign trade or trade between the United States and any of its possessions.

Section 48.4221-4(b)(2) of the Manufacturers and Retailers Excise Tax Regulations provides that the terms "fuel supplies" and "legitimate equipment" include all articles, materials, supplies, and equipment necessary for the navigation, propulsion, and upkeep of vessels actually engaged in foreign trade, even though such vessels may make intermediate stops in the United States.

Section 48.4221-4(b)(7) provides that the exemption relating to supplies for vessels or aircraft, with respect to aircraft not constituting equipment of the armed forces, extends to aircraft only when employed in foreign trade.

Section 48.4221-4(b)(8) provides that the term "trade" includes the transportation of persons or property for hire and the making of the necessary preparations for the transportation.

Rev. Rul. 69-259, 1969-1 C.B. 287, addresses the question of whether Plane No. 1 and Plane No. 2 are engaged in foreign trade within the meaning of § 4221(d)(3). Plane No. 1 flies from a city in the United States to a city in a foreign country with intermediate stops in the United States. The ruling holds that Plane No. 1 is engaged in foreign trade within the meaning of the statute and regulations even though it makes intermediate stops in the United States. Plane No. 2 flies only within the United States and carries passengers whose ultimate destinations are cities within the United States and other passengers with tickets to a city in a foreign country. The foreign bound passengers are transferred from Plane No. 2 to another airplane for completion of their flights. The ruling holds that Plane No. 2 cannot be considered engaged in foreign trade because, to be so engaged, the plane itself must travel to a foreign destination.

Section 4221(d)(3) defines the term supplies for vessels or aircraft as including fuel supplies on vessels actually engaged in foreign trade. Under § 48.4221-4(b)(8), the term trade includes the transportation of persons or property for hire. Thus, an aircraft is "actually engaged in foreign trade" when it is transporting any person for hire between the United States and a foreign country. Under § 48.4221-4(b)(2), once an aircraft is actually engaged in foreign trade the aircraft remains so engaged even though it makes intermediate stops in the United States.

Situation 1. When flying from city # 1 to city # 3, Aircraft *A* is actually engaged in foreign trade within the meaning of § 4221(d)(3) because at least one person is transported for hire on that aircraft from city # 1 to city # 3. The stop in city # 2 is an intermediate stop in the United States and thus Aircraft *A* is actually engaged in foreign trade on the flight from city # 1 to city # 2. Accordingly, the aviation fuel used in the aircraft on the flight from city # 1 to city # 2 is used in a nontaxable use for purposes of § 4092. The change in the flight number from Flight No. 111 to Flight No. 333 does not affect the determination of whether the aircraft is actually engaged in foreign trade.

Situation 2. When flying from city # 4 to city # 6, Aircraft *B* is actually engaged in foreign trade within the meaning of § 4221(d)(3) because at least one person is transported for hire on that aircraft from city # 4 to city # 6. The stop in city # 5 is an intermediate stop in the United States and thus Aircraft *B* is actually engaged in foreign trade on the flight from city # 5 to city # 6. Accordingly, the aviation fuel used in the

aircraft on the flight from city # 5 to city # 6 is used in a nontaxable use for purposes of § 4092. The change in the flight number from Flight No. 555 to Flight No. 777 does not affect the determination of whether the aircraft is actually engaged in foreign trade.

Situation 3. Aircraft *C* is not engaged in foreign trade even though some of its passengers transfer to Aircraft *A* for transport to a foreign country because Aircraft *C* flies only within the United States.

HOLDING

For purposes of § 4092, an aircraft that flies a person for hire between the United States and a foreign country is actually engaged in foreign trade within the meaning of § 4221(d)(3). That aircraft is also actually engaged in foreign trade when flying that person from a city in the United States to another city in the United States as part of the transportation between the United States and the foreign country.

This holding applies equally with respect to: fuel used in foreign aircraft that meet the requirements of § 4221(e)(1); aviation fuel not used for a taxable purpose within the meaning of § 6427(1); gasoline sold for specified uses and resales within the meaning of § 6416(b)(2); and gasoline sold for certain exempt purposes within the meaning of § 6421(c). This ruling does not consider the application of §§ 4092 and 4221(d)(3) to charter flights and no inferences should be drawn from this ruling regarding such flights.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 69-259 is modified and superseded.

PROSPECTIVE APPLICATION

Pursuant to the authority provided by § 7805(b)(8), this revenue ruling will not apply before January 1, 2003.

DRAFTING INFORMATION

The principal author of this revenue ruling is Susan Athy of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Susan Athy at (202) 622-3130 (not a toll-free call).

Rev. Rul. 2002-50 (July 19, 2000).

The evidence suggests that *ABC*, on October 3, 2003, made a mistake of fact or a mistake of law as to which of its flights were subject to the Illinois exemption from use tax for fuel loaded onto international flights. From the record, it appears that *ABC*'s 10/3/03 amended returns were based on *ABC*'s determination, as of that date, that the only flights properly deemed international flights under the Illinois exemption would be the same flights properly deemed to be "actually engaged in foreign trade within the meaning of § 4221(d)(3)", pursuant to Revenue Ruling 2002-05. *See* Rev. Rul. 2002-50 (July 19, 2000) quoted *supra*, p. 28 ("Holding"). Specifically, Mondy's audit history

worksheet recounts *ABC*'s employee's explanation that *ABC*'s 10/3/03 amended returns did not include a request for a refund of tax paid regarding "fuel used on flights that carried passengers and/or cargo that didn't go all the way through (i.e. passenger didn't continue to [a] destination outside the [U]nited [S]tates, however, [the] flight arrived at [a] destination outside the [U]nited [S]tates)." Taxpayer Ex. 7, p. 3; Rev. Rul. 2002-50 (July 19, 2000).

But the scope of the Illinois exemption from use tax for fuel loaded onto international flights is not identical to the federal exemption described in Revenue Ruling 2002-05. That federal exemption requires that at least one passenger be transported on a flight from a domestic location to a foreign location, or vice-versa. Rev. Rul. 2002-50 (July 19, 2000). The Illinois exemption, however, says nothing about whether at least one passenger is actually being transported on a "a flight destined for or returning from a location or locations outside the United States without regard to previous or subsequent domestic stopovers …." 35 **ILCS** 105/3-5(12); 86 Ill. Admin. Code § 130.321(a). Rather, Illinois' exemption is contingent upon the origin and/or destination of a particular flight, and not whether at least one passenger and/or one piece of cargo might remain on such a flight throughout all intermediate stops. 35 **ILCS** 105/3-5(12); 86 Ill. Admin. Code § 130.321(a). Here, moreover, the Department does not argue that the scope of the Illinois exemption is coterminous with the scope of the exemption for federal taxes, described in Revenue Ruling 2002-05. Thus, and contrary to *ABC*'s assertions here, I do not conclude that the additional amounts of tax *ABC* identified as having been paid in error on its 5/9/05 amended returns were discovered to be exempt because of the IRS's new interpretation of international flights. Taxpayer Ex. 4; *ABC*'s Brief, pp. 6-7. Rather,

the record supports the conclusion that *ABC*'s 5/9/05 amended returns were based on *ABC*'s subsequent determination that the Illinois use tax exemption for fuel loaded onto international flights might be broader than the federal exemption described in Revenue Ruling 2002-05. Taxpayer Ex. 7, p. 1. *ABC*'s first communication to the Department of that determination occurred on May 20, 2004. *Id*.

This record establishes that *ABC*'s 10/3/03 amended returns did not include a request for a refund of the use tax *ABC* previously paid regarding fuel that it loaded onto aircraft, in Illinois, for *all* flights that were destined for or returning from a location or locations outside the United States without regard to previous or subsequent domestic stopovers. Taxpayer Exs. 1, 4, 7. As the difference between the original and subsequent amended returns reflects, *ABC* loaded fuel, in Illinois, onto considerably more aircraft for flights that continued on to foreign destinations after passengers deplaned, and/or after cargo had been removed, at a domestic stop, than it loaded onto other aircraft for flights on which passengers and/or cargo remained on the flight to such foreign destinations. *Compare* Taxpayer Ex. 1 *with* Taxpayer Ex. 4. *ABC* had not identified, on its 10/3/03 amended returns, the tax that it had paid regarding its use, in Illinois, of fuel that it had loaded onto aircraft for flights that continued on to foreign destinations after passengers deplaned, and/or after cargo had been removed, at domestic stopovers. Taxpayer Ex. 7, pp. 1, 3.

As stated earlier, loading fuel onto a particular aircraft at a particular time is a use that is separate and distinct from the use of fuel that is loaded onto a different aircraft, or that is loaded onto the same aircraft at a different time. Thus, *ABC*'s uses of fuel detailed within *ABC*'s 5/9/05 amended returns did not arise out of the same transaction or

occurrence as did the uses of fuel detailed on *ABC*'s 10/3/03 amended returns. Even if a court were to conclude that § 2-616(b) might arguably apply, in some circumstances, to requests for refunds authorized pursuant to the UTA, the distinct and additional transactions detailed on *ABC*'s 5/9/05 amended returns do not relate back to the transactions detailed on its 10/3/03 amended returns. Zeh, 111 Ill. 2d at 270-71, 489 N.E.2d at 1344.

Finally, I reject *ABC*'s arguments that not treating its 5/9/05 amended returns as relating back to its timely filed 10/3/03 amended returns is bad public policy, or would deny it due process. The Illinois General Assembly created the identical statutes of limitations within the UTA and the complementary ROTA as an adjunct to its creation of the statutory means by which a taxpayer might seek refund of taxes erroneously overpaid. The right to a refund of taxes voluntarily paid to the state does not exist at common law, and that right — like the corresponding obligation to pay taxes in the first place — exists only pursuant to statute. People ex rel. Eitel v. Lindheimer, 371 Ill. 367, 371, 21 N.E.2d 318, 320 (1939); Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (1st Dist. 1978). Obviously, a taxpayer might prefer a statutory scheme that would grant a right to request a refund of taxes erroneously overpaid without setting a time limit within which such requests might be filed, but that is not the scheme the Illinois General Assembly created. 35 **ILCS** 105/19, 105/21; W.L. Miller Co., 315 Ill. App. 3d at 806, 734 N.E.2d at 507 ("the merits of a claim [for tax refund] are irrelevant when the claim is not filed within the statute of limitations."). If *ABC* believes that the UTA's tax refund provisions constitute bad public policy, its argument must be directed to the Illinois General Assembly. *See* Dow Chemical Co., 224 Ill. App. 3d at 268-69, 586

N.E.2d at 520 ("This seems to be a case which calls for a legislative remedy rather than a judicial one.").

For the same reason, denying the additional refund sought in *ABC*'s 5/9/05 amended returns does not deny *ABC* due process. *ABC* quotes Reich v. Collins, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), for the proposition that "'Due process requires a clear and certain remedy for taxes collected in violation of federal law.'" *ABC*'s Brief, pp. 12-13. But *ABC* fails to identify which federal law was violated by the Department's straightforward application of a longstanding state statute of limitations to deny *ABC*'s untimely request for a refund of Illinois use tax.

Further, the Department's Denial was not based on its determination that no statute authorized a refund of tax erroneously paid, as did the state of Georgia in Reich. Reich, 513 U.S. at 108, 115 S.Ct. at 549, 130 L.Ed.2d 454. Notwithstanding *ABC*'s due process argument, the UTA affords taxpayers a clear and certain statutory means by which they may request a refund of tax mistakenly overpaid (35 **ILCS** 105/19-22), but it also requires that any such request be filed within the statutory period set forth in § 21. 35 **ILCS** 105/21.

Indeed, in this case, the Department's Denial gives meaning and effect to each of the applicable sections of the UTA's provisions governing requests for refund. The Denial notified *ABC* that the Department had granted the amount of the refund *ABC* sought in its timely filed 10/3/03 amended returns, thus making clear that the UTA provides a right to such refunds, in accordance with §§ 19-20, and 22 of the UTA. The Denial also notified *ABC* that it would not grant a refund of the additional amounts of tax that *ABC* identified and sought in its 5/9/05 amended returns, thus making clear that

Illinois' grant to taxpayers of a statutory right to a tax refund is conditioned upon the taxpayer's timely filing of an amended return on which it specifically identifies the tax claimed to have been erroneously paid regarding specific transactions. 35 **ILCS** 105/19, 105/21; 35 **ILCS** 120/6, 120/6a; W.L. Miller Co., 315 Ill. App. 3d at 806, 734 N.E.2d at 507; *see also* Dow Chemical Co., 224 Ill. App. 3d at 268-69, 586 N.E.2d at 520.

ABC's 5/9/05 amended returns were filed beyond UTA § 21's statute of limitations, and those 5/9/05 amended returns sought an additional refund of tax that *ABC* paid regarding transactions that were other than the transactions that formed the bases of its 10/3/03 amended returns. Taxpayer Ex. 7, pp. 1, 3. *ABC* cites to no decision holding that it is a violation of federal due process for a state to impose or to apply such a statutory limitation on a taxpayer's request for a state tax refund, and I know of no such case.

Conclusion:

I recommend the Director finalize the Department's denial as issued.

Date: 1/5/2007

John E. White
Administrative Law Judge