

TC 15-01

Tax Type: Telecommunications Tax

Tax Issue: Amnesty Eligibility and Statute of Limitations Application

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

ABC BUSINESS,)	Docket No.	XXXX
Taxpayer)	Account Nos.	XXXX
v.)		XXXX
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Thomas Donohoe, McDermott Will & Emery, LLP, appeared for ABC BUSINESS; Paula Hunter, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves amended returns that ABC BUSINESS (Taxpayer) filed to request credits for Telecommunications Excise Tax (TET) and Telecommunications Infrastructure Maintenance Fees (IMF), which Taxpayer claimed it paid to the Illinois Department of Revenue (Department) in error. The Department denied Taxpayer's amended returns, after determining that they were filed after the applicable statutes of limitation had expired.

In lieu of hearing, the parties submitted a stipulated record, which included stipulations of fact and certain documents, which relate to whether Taxpayer is entitled to the credits sought. I have reviewed the stipulated record, and I am including in this recommendation findings of facts and conclusions of law. I recommend that the issue be resolved in favor of the Department.

Stipulations & Findings of Fact:

1. Taxpayer is a corporation organized under Illinois law, and at all relevant times, it was authorized to do business in Illinois. TET Stip. ¶ 1; IMF Stip. ¶ 1.¹
2. During the periods at issue, Taxpayer was registered with the Department and with the City of Anywhere Department of Finance (Anywhere) as a retailer of telecommunications operating in Illinois and Anywhere. TET Stip. ¶ 6; IMF Stip. ¶ 6.
3. Taxpayer was obligated to and did collect the TET imposed under 35 ILCS 630/3 and 35 ILCS 630/4, and the Anywhere Telecommunications Tax (Anywhere TET) imposed under § 3-70-030 of the Municipal Code of Anywhere (MCC). TET Stip. ¶ 7.
4. Taxpayer was also obligated to and did collect the IMF imposed under 35 ILCS 635/15, and the Anywhere Infrastructure Maintenance Fee (Anywhere IMF) imposed under MCC § 3-75-030. IMF Stip. ¶ 7.

Facts Regarding the Department's TET Audit of Taxpayer for 1/1997-12/2002, & Its IMF Audit of Taxpayer for 1/1998-12/2002

5. Beginning in 2002, the Department conducted an audit of Taxpayer's TET returns (the Illinois TET Audit) for the months from November 1997 through December 2002 (the Illinois TET Audit Period). TET Stip. ¶ 8. At or about the same time, the Department also conducted an audit of Taxpayer's IMF reports (the Illinois IMF Audit) for the months from January 1998 through December 2002 (the Illinois IMF Audit Period). IMF Stip. ¶ 8.

¹ Taxpayer's protests of the Department's separate denials were opened under separate docket numbers, with the IMF denial being docketed under 12-ST-0385 and the TET denial docketed under 12-ST-0386. Prior to agreeing that the matters should be consolidated under number 12-ST-0386, the parties submitted separate stipulation agreements for each case. As a result, in this recommendation, when citing to one of the parties' stipulations, I will refer to the particular stipulation agreement by reference to the type of credit sought (i.e., IMF or TET), as well as to the appropriate stipulation paragraph or exhibit.

6. The Department conducted the Illinois TET and IMF Audits of Taxpayer (collectively, the Illinois Audits) at the same time (*see* TET Stip. ¶¶ 8-12; IMF Stip. ¶¶ 8-12), and the same auditor conducted both audits. *See* TET Stip. Ex. 1; IMF Stip. Ex. 1.
7. During the course of the Illinois Audits, the Department requested and Taxpayer agreed to extend the statutes of limitation for issuing a notice of tax liability (NTL) under 35 ILCS 120/4, which is incorporated into the Illinois Telecommunications Excise Tax Act (TETA) by 35 ILCS 630/9, and which is incorporated into the Illinois Telecommunications Infrastructure Maintenance Fee Act (TIMFA) by 35 ILCS 635/27.55, until and including December 31, 2003. TET Stip. ¶ 9; IMF Stip. ¶ 9.
8. Both of the Illinois Audits were conducted using the same method. *See* TET Stip. ¶¶ 10-11; IMF Stip. ¶¶ 10-11. In each, the auditor examined a sample of all customer bills from the Illinois IMF Audit Period, and from the Illinois TET Audit Period. TET Stip. ¶ 10; IMF Stip. ¶ 10. The auditor discovered that certain bills in the sample disclosed gross charges that had not been subjected to the Illinois IMF or to the Illinois TET. *Id.* On the sampled bills, the auditor calculated the ratio of untaxed gross charges to the total gross charges. *Id.* The resulting percentage was the sampled bills' error rate. *Id.* The auditor applied the sample error rate to the entire gross charges reported for the Illinois Audit Periods to determine the total amount of gross charges that had not been taxed. *Id.* The auditor multiplied the total amount of gross charges that had not been taxed by the Illinois IMF rate, and by the Illinois TET rate, to determine the amount of Illinois IMF and TET that had not been paid. *Id.*
9. The Department determination that Taxpayer had failed to collect Illinois IMF or Illinois TET on certain gross charges was based on Taxpayer's inability to provide documentation

that would have justified reductions in the amount of taxable gross charges. IMF Stip. ¶ 11; TET Stip. ¶ 11.

10. In November 2003, the Department's auditor prepared and delivered to Taxpayer three documents titled, [Form] RT-10-A Telecommunications Infrastructure Maintenance Fees Audit Reports (IMF Audit Reports). IMF Stip. ¶ 12; IMF Stip. Ex. 1 (copies of IMF Audit Reports). At or about the same time, the Department's auditor also prepared and delivered to Taxpayer four documents titled, [Form] RT-2-A Telecommunications Excise Tax Audit Reports (the TET Audit Reports). TET Stip. ¶ 12; TET Stip. Ex. 1 (copies of the TET Audit Reports).
11. The IMF Audit Reports stated the amount of Illinois IMF Taxpayer owed for the Illinois IMF Audit Period was \$XXXX (the Illinois IMF Audit Liability). IMF Stip. ¶ 12; IMF Stip. Ex. 1, lines 14, 20 of each IMF Report (XXXX + XXXX + XXXX = XXXX). The TET Audit Reports stated the amount of Illinois TET Taxpayer owed for the Illinois TET Audit Period was \$XXXX (the Illinois TET Audit Liability). TET Stip. ¶ 12; TET Stip. Ex. 1, lines 17, 22 of each TET Report (XXXX + XXXX + XXXX + XXXX = XXXX).
12. There were no legal issues involved in the determination of either the Illinois IMF or TET Audit Liabilities. IMF Stip. ¶ 12; TET Stip. ¶ 12.
13. On November 17, 2003, Taxpayer paid the Illinois IMF Audit Liability, together with applicable interest. IMF Stip. ¶ 13. The amount paid was \$XXXX (the Illinois IMF Audit Payment). *Id.* On November 13, 2003, Taxpayer paid the Illinois TET Audit Liability, together with applicable interest. TET Stip. ¶ 13. The amount paid was \$XXXX (the Illinois TET Audit Payment). *Id.*

14. Taxpayer paid its Illinois Audit Liabilities pursuant to Illinois' 2003 Tax Delinquency Amnesty Act (Amnesty Program). TET Stip. ¶¶ 31, 40; IMF Stip. ¶¶ 31, 40; TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4.

Facts Regarding Anywhere's TET & IMF Audits of Taxpayer for 7/2000-12/2002

15. During 2005, Anywhere conducted an audit of Taxpayer's Anywhere TET returns for a period that included the months from July 2000 through December 2002 (the Anywhere TET Audit). TET Stip. ¶ 14. At the same time, Anywhere conducted an audit of Taxpayer's Anywhere IMF returns for a period that included the months from July 2000 through December 2002 (the Anywhere IMF Audit). IMF Stip. ¶ 14.

16. The Anywhere TET and IMF Audits (collectively, the Anywhere Audits) disclosed that Taxpayer had collected but had not remitted the Anywhere TET and Anywhere IMF (collectively, the Anywhere Taxes) to Anywhere for the months from July 2000 through December 2002. TET Stip. ¶ 15; IMF Stip. ¶ 15; TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4.

17. Specifically, the Anywhere Audits disclosed that, beginning with its returns for the month of July 2000 through its returns for the month of December 2002, Taxpayer collected the correct amount of Anywhere Taxes due from its Anywhere customers. TET Stip. ¶ 15; IMF Stip. ¶ 15. However, Taxpayer mistakenly remitted the amounts of the Anywhere Taxes it had collected to the Department and not to Anywhere. TET Stip. ¶ 15; IMF Stip. ¶ 15; TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4.

18. The amount of the Anywhere TET Taxpayer collected and remitted to the Department, rather than to Anywhere, was \$XXXX (the Anywhere TET Liability). TET Stip. ¶ 15. The amount of the Anywhere IMF Taxpayer collected and remitted to the Department, rather than to Anywhere, was \$XXXX. IMF Stip. ¶ 15.

19. Taxpayer agreed with the findings of the Anywhere Audits. TET Stip. ¶ 16; IMF Stip. ¶ 16; TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4. It paid the Anywhere Taxes to Anywhere in June 2006. TET Stip. ¶ 16; IMF Stip. ¶ 16.
20. Because the amounts of Anywhere TET and IMF that Taxpayer had collected from its customers were remitted to the Department in error, Taxpayer has not been reimbursed for its payment of the Anywhere Taxes to Anywhere. TET Stip. ¶ 17; IMF Stip. ¶ 17. Taxpayer thus bore the burden of the Anywhere Taxes it paid to Anywhere in June 2006, and which it had previously paid to the Department during July 2000 through December 2002. TET Stip. ¶¶ 15-17; IMF Stip. ¶¶ 15-17.
21. During the Illinois TET and IMF Audits, Taxpayer's mistake of remitting the amounts of the Anywhere Taxes to the Department and not to Anywhere was not discovered. TET Stip. ¶ 18; IMF Stip. ¶ 18. Had the overpayments been discovered during the Illinois Audits, the Department would have credited the entire Anywhere Taxes to Taxpayer. TET Stip. ¶ 18; IMF Stip. ¶ 18.

Facts Regarding Taxpayer's Claims for Credit of IMF and TET

22. On June 13, 2006, Taxpayer filed an amended TET return (TET Claim) seeking a credit of TET, which it claimed to have paid to the Department, in error, in November 2003. TET Stip. ¶ 2; TET Stip. Ex. 2 (copy of TET Claim). On that TET Claim, Taxpayer asked for a TET credit in the amount of \$ XXXX. TET Stip. Ex. 2; *but see* TET Stip. ¶ 15. Taxpayer has since revised the amount of its TET Claim as requesting only \$XXXX. TET Stip. ¶ 37; TET Stip. Ex. 6, p. 4. The Department received Taxpayer's TET Claim on June 13, 2006. TET Stip. ¶ 2.

23. On June 13, 2006, Taxpayer also filed an amended IMF return (IMF Claim) seeking a credit of IMF, which it claimed to have paid to the Department, in error, in November 2003. IMF Stip. Ex. 2 (copy of IMF Claim). Taxpayer asked for credit of IMF in the amount of \$ XXX. IMF Stip. ¶ 2; IMF Stip. Ex. 2.
24. The Department's Audit Division has examined Taxpayer's TET and IMF Claims and concluded that Taxpayer mistakenly paid the amounts of the Anywhere TET and IMF Taxes to the Department. TET Stip. ¶ 20; IMF Stip. ¶ 20.
25. On October 29, 2010, the Department issued a Notice of Proposed Claim Denial for Taxpayer's IMF Claim, and a separate Proposed Denial for its TET Claim (collectively, the Proposed Denials). TET Stip. ¶ 21; TET Stip. Ex. 3 (copy of TET Proposed Denial); IMF Stip. ¶ 21; IMF Stip. Ex. 3 (copy of IMF Proposed Denial).
26. Taxpayer sought Informal Conference Board (ICB) review of the Proposed Denials. TET Stip. ¶ 22; IMF Stip. ¶ 22. Following a hearing, the ICB denied Taxpayer's request for relief. TET Stip. ¶ 22; IMF Stip. ¶ 22. The ICB denied Taxpayer's requests because "[t]he Taxpayer did not file the amended ... returns within the statutory period." TET Stip. ¶ 22; TET Stip. Ex. 4 (copy of the ICB's Action Decision denying Taxpayer's TET request); IMF Stip. ¶ 22; IMF Stip. Ex. 4 (copy of the ICB's Action Decision denying Taxpayer's IMF request).
27. On August 29, 2012, the Department issued a Notice of Tentative Audit Denial of [Taxpayer's TET] Claim (TET Denial), and a Notice of Tentative Audit Denial of [Taxpayer's IMF] Claim (IMF Denial) (collectively, Denials) to Taxpayer. TET Stip. ¶ 23; TET Stip. Ex. 5 (copy of TET Denial); IMF Stip. ¶ 23; IMF Stip. Ex. 5 (copy of IMF Denial).

28. On October 18, 2012, Taxpayer filed a Protest and Request for Administrative Hearing regarding both the IMF and the TET Claims. TET Stip. ¶ 4; IMF Stip. ¶ 4.
29. The parties' stipulations do not specify the amounts of Anywhere Taxes Taxpayer actually remitted to the Department, instead of to Anywhere, for each of the months of July 2000 through December 2002, or the dates on which each such discrete payments were mistakenly paid to the Department, instead of to Anywhere. TET Stip. ¶¶ 15-16; IMF Stip. ¶¶ 15-16; TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4.

Facts Regarding Certain Entries in the Department's Audit Manual

30. The Department's audit manual is a compilation of Department instructions and explanations used to guide auditors in making audit investigations. TET Stip. ¶ 24; IMF Stip. ¶ 24.
31. Beginning no later than May 1999 and continuing through the present time, the Department's audit manual contained language stating in substance as follows:

A taxpayer has three years to file a claim for credit against both ST-1 and audit payments. This means that the taxpayer can file a claim for credit against ST-1 even if the three years from the payment date has expired. The claim for credit is being filed based on the audit statute date.

For example, ABC Company has been audited for January 1994 through December 1996. A waiver has been obtained to hold open the audit period through December 31, 1997. They agree to the use tax and interest by paying \$10,000 on November 25, 1997. On February 2, 1998, they file a claim for credit against the March 1994 ST-1. It had been discovered that an exempt sale had tax collected on it. The total claim for credit is \$2,500. The taxpayer can still file a claim for credit even though the March 1994 ST-1 is out of statute. The claim for credit will be against the audit payment because the audit holds open this period. The audit payment statute date expires December 31, 2000. We are looking at dollars not issues. Therefore, the taxpayer will receive tax credit of \$2,500 plus applicable interest paid in the audit. Interest on the overpayment will begin accruing from the date the audit has been paid. For this example, interest through date on the EDA-105 will be November 25, 1997. If the March 1994 claim for credit had been filed December 29, 1997, it would have been processed against the original ST-1. It would still be in statute through December 31, 1997.

TET Stip. ¶ 25; IMF Stip. ¶ 25; *but see* 35 ILCS 120/6; 35 ILCS 630/10.

Conclusions of Law:

Section 10 of the TETA authorizes a statutory credit or refund of tax paid in error by a retailer, under certain circumstances. 35 ILCS 630/10. In a different way of providing the same statutory remedy, § 27.55 of the TIMFA incorporates the credit and refund provisions (that is, §§ 6 through 6c) of the Retailers' Occupation Tax Act (ROTA). 35 ILCS 635/27.55; 35 ILCS 120/6; 35 ILCS 120/6a; 35 ILCS 120/6b; 35 ILCS 120/6c. As a result, both the TETA and the TIMFA include the same statutory limitation period for a person who seeks to obtain a credit or refund of tax or fees paid in error. Specifically, § 10 of the TETA provides, in pertinent part:

As to any claim for credit or refund filed with the Department on or after each January 1 and July 1, no amounts erroneously paid more than three 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 under this Act, the claim may be filed at any time prior to the expiration of the period agreed upon.

35 ILCS 630/10. Section 6 of the ROTA, as incorporated by § 27.55 of the TIMFA, similarly 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; 35 ILCS 635/27.55.

The statutory periods that limit the time in which a taxpayer may file a claim for credit or refund under the TETA and TIMFA mirror the period in which the Department has to file a notice of tax liability under each act. Each incorporates § 4 of the ROTA (35 ILCS 630/9; 35 ILCS 635/27.55), which provides, in pertinent part:

*** No such notice of additional tax due shall be issued on and after each July 1 and January 1 covering gross receipts received during any month or period of time more than 3 years prior to such July 1 and January 1, respectively.

35 ILCS 120/4.

Here, after Taxpayer filed its Credit Claims, the Department examined them, and determined that Taxpayer was not entitled to any credit, because the Credit Claims were filed beyond the statutes of limitation set by TETA § 10 and ROTA § 6. TET Stip. ¶ 23; TET Stip. Ex. 5; IMF Stip. ¶ 23; IMF Stip. Ex. 5. Pursuant to those respective statutes, the Department's Denials are prima facie correct. 35 ILCS 630/10; 35 ILCS 635/27.55 (incorporating ROTA § 6).

When a taxpayer seeks to take advantage of deductions, credits or other tax benefits allowed by statute, the burden of proof is on the taxpayer. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981). Here, Taxpayer has the burden to show that it entitled to a credit or refund of the TET and IMF it overpaid to the Department, in error. *Id.* Further, the parties proceeded via a stipulated record, in lieu of hearing. As a result, to the extent that the stipulations do not set forth facts, or provide evidence, sufficient to rebut the Department's presumptively correct determination that Taxpayer did not timely file its amended TET and IMF returns, the absence of proof of such facts will be construed against Taxpayer, who has the burden of production and persuasion. Branson v. Department of Revenue, 168 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995) ("... by operation of the statute, proof of the correctness of such

penalty, including the willfulness element, is established by the Department's penalty assessment and certified record relating thereto. If the taxpayer offers no countervailing evidence, the Department's prima facie case stands un rebutted and becomes conclusive."); Arts Club of Anywhere v. Department of Revenue, 334 Ill. App. 3d 235, 246, 777 N.E.2d 700, 709 (1st Dist. 2002) ("We ... consider the absence of evidence in the record regarding reasonable salaries to weigh in the Department's favor because the taxpayer claiming the exemption has the burden of proof.").

Issues and Arguments

The parties first dispute which of Taxpayer's payments were erroneous. Taxpayer characterizes the erroneous payments as being its TET and IMF Audit payments to the Department on November 13 and 17, 2003. TET Stip. ¶¶ 13, 38; IMF Stip. ¶¶ 13, 33-36, 38; Taxpayer's Opening Brief (Taxpayer's Brief), pp. 8, 11-12. Taxpayer contends that the Department's Illinois TET and IMF Audit Reports, and the resulting Illinois Audit Liabilities, were erroneous, because neither gave Taxpayer any credit for its prior overpayments of the Anywhere Taxes that it mistakenly paid to the Department, instead of to Anywhere. TET Stip. ¶¶ 18, 20, 38; IMF Stip. ¶¶ 18, 20, 38. Taxpayer asserts that, when it and the Department agreed upon extensions of the statutes of limitation for purposes of the Illinois TET and IMF Audits, those agreements held open the audit payment statute until December 31, 2006. TET Stip. ¶ 39; IMF Stip. ¶ 39. When making this last argument, Taxpayer relies on entries contained within the Department's audit manual. Taxpayer's Brief, pp. 8, 11-12; *but see* 35 ILCS 120/6; 35 ILCS 630/10.

The Department responds that it based its Denials on its factual determination that Taxpayer's erroneous payments were its payments of Anywhere Taxes to the Department,

instead of to Anywhere, during the months of July of 2000 through December of 2002. TET Stip. ¶¶ 15, 27; IMF Stip. ¶¶ 15, 27; Department's Brief in Response (Department's Brief), pp. 2, 5-6. More specifically, it argues that the "last erroneous payments of TET and []IMF were made by the taxpayer in December 2002." Department's Brief, p. 4; *see also* TET Stip. ¶ 15; TET Stip. Ex. 6, p. 4 ("During th[e Anywhere Audits] Illinois Bell learned that from July 2000 through December of 2002, Illinois Bell had misdirected payments to the State of Illinois that should have been sent to the City of Anywhere or other municipalities in the amount of approximately \$1,800,000."); IMF Stip. ¶ 15; IMF Stip. Ex. 6, p. 4.

Based on its factual determination of when the erroneous overpayments occurred, the Department contends that Taxpayer's Credit Claims are time barred. TET Stip. ¶ 28; IMF Stip. ¶ 28; Department's Brief, pp. 3-6. The Department asserts that Taxpayer may not rely on statements contained in the Department's audit manual, and that its audit manual provides no legal authority for reversing the Department's Denials. Department's Brief, p. 5.

Analysis

A statute of limitations is an affirmative defense. Hood v. Commonwealth Trust & Savings Bank, 376 Ill. 413, 420, 34 N.E.2d 414, 419 (1941). A party who claims the benefit of a statute of limitations has the burden of proving that the action is barred by the limitations period set by statute. *Id.*; 25 Ill. Law and Prac. *Limitations of Actions* § 136 (2012). In this case, it is the Department who is asserting that the statute of limitations set by ROTA § 6, and TETA § 10 bars Taxpayer's Credit Claims, based on the following two factual determinations: (1) Taxpayer made the last of its erroneous payments of Anywhere Taxes to the Department in December 2002; and (2) Taxpayer filed its Credit Claims on June 13, 2006. TET Stip. ¶¶ 15, 27; IMF Stip. ¶¶ 15, 27; Department's Brief in Response (Department's Brief), pp. 2, 5-6.

The Department's determinations, on this point, are presumptively correct, and Taxpayer has the burden to show that its Credit Claims were timely filed within the appropriate period. 35 ILCS 120/6; 35 ILCS 630/10; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295, 421 N.E.2d 236, 238 (1st Dist. 1981) ("The Illinois legislature, in order to aid the Department in meeting its burden of proof in this respect, has provided that the findings of the Department concerning the correct amount of tax due are prima facie correct."). The question of when Taxpayer made each of its erroneous payments of Anywhere Taxes to the Department for the months of July 2000 through December 2002 is a question of fact. See Novicki v. Department of Finance, 373 Ill. 342, 345, 26 N.E.2d 130, 131 (1940) ("The amount of such receipts is purely a question of fact which is susceptible of accurate computation, and on a hearing the amount found due must be sustained by competent evidence."). The question of which law sets forth the appropriate statutory period is one of law. In re Marriage of Stockton, 401 Ill. App. 3d 1064, 1074, 937 N.E.2d 657, 665 (2d Dist. 2010) ("We review *de novo* the application of a statute of limitations, as it is a question of law."). I address the fact question first.

Issue 1: Did Taxpayer Rebut the Department's Determination that Taxpayer's Last Erroneous Payments of Anywhere Taxes to the Department Occurred in December 2002

Most statute of limitations challenges involve a process of counting the number of days (or years) from one critical event to another. The period set by TETA § 10 and ROTA § 6 requires one to count backward, from the date on which a taxpayer files a claim for credit or refund to recover its erroneous payment(s) of tax, to determine whether those erroneous payment(s) occurred within 3 to 3½ years of the date it filed its claim. 35 ILCS 120/6; 35 ILCS 630/10. Here, under the general periods stated in TETA § 10 and ROTA § 6, since Taxpayer filed its Credit Claims on June 13, 2006, Taxpayer had to establish that it made its erroneous

payments of Anywhere Taxes to the Department, instead of to Anywhere, after December 2002.

In a footnote to its brief, Taxpayer writes that “[t]he June 2006 Credit Claims would have been timely made against the December 2002 returns, as payment was due January 2002. 35 ILCS 630/6, 635/27.” Taxpayer’s Brief, p. 11 n.5. It is certainly possible that Taxpayer may have paid its Anywhere Taxes to the Department, in error, in January 2003, regarding the month of December 2002, but the parties did not stipulate that Taxpayer did so. And contrary to its footnoted argument, Taxpayer has stated, in writing, that “[d]uring th[e Anywhere Audits Taxpayer] learned that from July 2000 through December of 2002, [it] had misdirected payments [of Anywhere Taxes] to the State of Illinois that should have been sent to the City of Anywhere” TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4. These written statements constitute at least a tacit admission by Taxpayer that it made its erroneous payments of Anywhere Taxes to the Department, for December 2002, in December 2002. TET Stip. Ex. 6, p. 4; IMF Stip. Ex. 6, p. 4; In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1st Dist. 1988) (“Generally, any statement made by a party or on his behalf which is inconsistent with his position in litigation may be introduced into evidence against him.”).

Taxpayer offered no evidence to show, as a matter of fact, the respective amounts of Anywhere TET and IMF it suggests may have been paid, in January 2003, when the returns for December 2002 were due to be filed. Taxpayer’s burden was to show that the Department erred when determining that Taxpayer’s last erroneous payments of Anywhere Taxes to the Department were made in December 2002. If Taxpayer had evidence to show that it remitted a specific amount of Anywhere TET or IMF to the Department, in January 2003, regarding the month of December 2002, Taxpayer had the burden to produce such evidence. 35 ILCS 120/6;

35 ILCS 630/10. Taxpayer, however, produced no such evidence, and instead, presented only argument.

This is not to dispute that, in hindsight, the Department's Illinois Audit Reports were erroneous (*see* Taxpayer's Reply Brief, pp. 2-3, 12), but it does make clear why they were erroneous. The Illinois Audit Reports were erroneous because neither the Department nor Taxpayer had noticed that Taxpayer had previously paid its Anywhere Taxes to the Department from July 2000 through December 2002. TET Stip. ¶¶ 15-16, 18; IMF Stip. ¶¶ 15-16, 18. But the parties have stipulated to the bases for the Illinois Audit Reports, and for the Anywhere Audits. TET Stip. ¶¶ 10-13 (Illinois TET Audit), 14-16 (Anywhere TET Audit); IMF Stip. ¶¶ 10-13 (Illinois IMF Audit), 14-16 (Anywhere IMF Audit). The parties' failure to notice Taxpayer's prior payments of Anywhere TET and IMF to the Department, regarding the months of July 2000 through December 2002, does not mean that Taxpayer made its erroneous payments of Anywhere Taxes to the Department — either again or for the first time — in November 2003. The parties' stipulations make clear that Taxpayer did not make any erroneous payments of Anywhere Taxes to the Department in November 2003. TET Stip. ¶¶ 15-16; IMF Stip. ¶¶ 15-16; Taxpayer's Brief, pp. 11-14.

In a nutshell, Taxpayer's argument that its November 2003 payments were the erroneous payments demand that the fact-finder treat the right that Taxpayer had, in November 2003, to claim credits for the Anywhere taxes paid to the Department in error from July 2000 through December 2002, as though Taxpayer actually acted on that right in November 2003. But that did not happen; Taxpayer never filed any amended returns to claim credits for its misdirected payments of Anywhere Taxes to the Department until June 2006. TET Stip. ¶ 2; TET Stip. Ex. 2; IMF Stip. ¶ 2; IMF Stip. Ex. 2. Tax credits, like refunds, or other authorized deductions, are

matters of legislative grace, and the legislature has the authority to place limits on how and when such credits, refunds, or deductions may be applied. Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 512-13, 410 N.E.2d 828, 833 (1980); *see also* Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (5th 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.”).

Taxpayer’s prior misdirected payments do not make any or every subsequent tax payment that Taxpayer made to the Department after December 2002 another, or a new, erroneous payment, simply because, when such payments were made, Taxpayer had the right to file an amended return to claim a credit to use against, or to offset, such taxes. Rights never asserted, or asserted too late, may be lost. *See* American Airlines, Inc., 402 Ill. App. 3d 579, 582-85, 931 N.E.2d 666, 670-72; Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, 266-69, 586 N.E.2d 516, 519-20 (1st Dist. 1991). The legislature has placed limitations on a taxpayer’s right to obtain a credit or refund of tax paid in error, just as it has placed limitations on the Department’s power to issue notices of tax liabilities. 35 ILCS 120/4; 35 ILCS 120/6; 35 ILCS 530/10. Because of those former limitations, the legislature intended the Department to properly deny amended returns which claim credits for taxes actually overpaid in error, if such returns are not filed within the period set by the applicable statute of limitations. 35 ILCS 120/6; 35 ILCS 630/10; American Airlines, Inc., 402 Ill. App. 3d 579, 582-85, 931 N.E.2d 666, 670-72.

Taxpayer has not rebutted the Department’s presumptively correct determination that Taxpayer’s last erroneous payments of Anywhere Taxes were remitted to the Department, instead of Anywhere, in December 2002. TET Stip. ¶¶ 15, 27; TET Stip. Ex. 6, p. 4; IMF Stip. ¶¶ 15, 27; IMF Stip. Ex. 6, p. 4. Since Taxpayer filed its Credit Claims in June 2006, the statutes of

limitation set forth in ROTA § 6 and TETA § 10 both provide that no refund may be paid to Taxpayer for any amounts paid in error prior to January 1, 2003. 35 ILCS 120/6; 35 ILCS 630/10; American Airlines, Inc., 402 Ill. App. 3d 579, 582-85, 931 N.E.2d 666, 670-72.

Issue 2: Which Period Applies To Taxpayer’s Credit Claims, The Period Set By ROTA § 6 and TETA § 10, or the Period Referred To in the Department’s Audit Manual

Here, the parties agree that Taxpayer filed its Credit Claims on June 13, 2006. TET Stip. ¶ 2; TET Stip. Ex. 2; IMF Stip. 2; IMF Stip. Ex. 2. Had there been no written extension of the time for the Department to issue a notice of tax liability under the TETA or TIMFA, since Taxpayer filed its Claims after January 1, 2006, the Department would be precluded from issuing a credit or refund for any amounts Taxpayer erroneously paid prior to January 1, 2003. 35 ILCS 120/6 (“As to any claim for credit or refund filed with the Department on or after each January 1 and July 1, no amounts erroneously paid more than three years prior to such January 1 and July 1, respectively, shall be credited or refunded,”); 35 ILCS 630/10.

But the parties here *did* enter into a written extension for the Department to issue a notice of tax liability under the TETA, and under the TIMFA. TET Stip. ¶ 9; IMF Stip. ¶ 9. More specifically, the parties stipulate that, for the Illinois TET Audit Period of November 1997 through December 2002, and for the Illinois IMF Audit Period of January 1998 through December 2002, they extended the respective statutory periods of limitation “until and including December 31, 2003.” TET Stip. ¶¶ 8-9; IMF Stip. ¶¶ 8-9. Ordinarily, under the express text of TETA § 10 and ROTA § 6, since both parties agreed in writing to an extension of time for the Department to issue a notice of tax liability (NTL) for the Illinois Audit Periods, to December 31, 2003, any credit or refund claims Taxpayer wanted to file regarding the Illinois Audit Periods must also have been filed not later than that same date. 35 ILCS 120/6; 35 ILCS 630/10. But as described below, neither party wants the express texts of TETA § 10 or ROTA § 6 enforced here.

The Department included the following statement in its Brief, “The Department agrees with the taxpayer’s argument that the waiver signed during the audit did not serve to shorten the statute of limitation and therefore it will not address that issue in this brief.” Department’s Brief, p. 5 n.2. Although I am puzzled by the Department’s waiver,² the effect of it is clear. That is, the Department has expressly waived any argument that, pursuant to TETA § 10 and ROTA § 6, Taxpayer’s agreement to extend the time for the Department to issue an NTL for the Illinois Audit Periods, also set the same date as the last date by which Taxpayer could file any amended return seeking a credit or refund regarding the Illinois Audit Periods. Department’s Brief, p. 5 n.2. Instead, the Department argues that the ordinary statutory periods of limitation should apply

² Here, both parties stipulate that they signed a written agreement in which Taxpayer agreed to extend the time in which the Department could lawfully issue an NTL for the Illinois Audit Periods, until December 31, 2003. TET Stip. ¶ 9; IMF Stip. ¶ 9. The text of the applicable statutes of limitation for filing claims for refund or credit plainly provide that, if the parties agree to extend the date by which the Department may issue an NTL, that date is also the last date by which a taxpayer may file a claim for refund or credit. 35 ILCS 630/10; 35 ILCS 635/27.55; 35 ILCS 120/6. Notwithstanding that plain text, Taxpayer has argued that if the Department were to give effect to such text, it would lead to unfair and absurd results. Taxpayer’s Brief, p. 15; *but see* 35 ILCS 630/10; 35 ILCS 635/27.55; 35 ILCS 120/6. The Department bought Taxpayer’s argument, and does not seek to hold Taxpayer to its written agreement in this case. Department’s Brief, p. 5 n.2.

Although the Department has expressly waived any argument on this issue, I see nothing unreasonable — let alone unfair or absurd — about administering the TETA and TIMFA consistent with their plain terms. Nor do I find anything unfair or absurd about a person agreeing to reduce a period of limitations that would otherwise apply, and allow it to perform some action, as part of a broader agreement. After all, in this case, the Department expressly agreed to reduce the amount of time it had to issue an NTL regarding the later months within the Illinois Audit Periods. TET Stip. ¶ 9; IMF Stip. ¶ 9; 35 ILCS 630/10; 35 ILCS 635/27.55; 35 ILCS 120/6. In exchange for Taxpayer’s agreement to give the Department more time to issue an NTL for the earlier months in the Audit Periods, the Department agreed to give up some of the time it would have otherwise had to issue an NTL regarding the later months in the Audit Periods. Such a quid-pro-quo is perfectly logical, reasonable, and authorized by law. And when I say authorized by law, I mean that the law will provide the respective parties with the ability to enforce their mutual agreements, according to their terms. For example, assume that, after December 31, 2003, the Department issued a TET or IMF NTL to Taxpayer regarding tax or fees claimed to be due regarding the Illinois Audit Periods. Absent some exception expressed in their written agreement, I see no reason why the Department’s agreement that it would have until December 31, 2003 to issue an NTL regarding any of the months within the Illinois Audit Periods would not be enforceable against it. If the Department’s agreement could be enforced against it, why should Taxpayer’s corresponding agreement, coupled with the texts of TETA § 10 or ROTA § 6, not be enforceable against it? In any event, while I remain convinced that the plain texts of the applicable statutory sections pertaining to written extension agreements are enforceable, this recommendation makes no conclusion about an argument the Department has expressly waived.

to this case, that is, those that would apply under TETA § 10 and ROTA § 6, if the parties had not entered into a written extension agreement. Department's Brief, pp. 3-4.

As noted earlier, Taxpayer also objects to abiding by the effect that TETA § 10 and ROTA § 6 have on the parties' written extension agreements, referred to in ¶¶ 9 of the parties' TET and IMF stipulations. Taxpayer's Brief, pp. 14-16. There are two critical differences between the parties' respective positions, however. The first is the difference between what the parties view as the erroneous payments. The second difference is that, based on entries made in the Department's audit manual, Taxpayer considers the parties' agreement to extend the date for the Department to issue an NTL for the Illinois Audit Periods "until and including December 31, 2003[.]" as setting the date that time *began* to run on its ability to file a claim for credit or refund for any payment made regarding the Illinois Audit Periods, with the last date being December 31, 2006. Taxpayer's Brief, pp. 12 ("Under the statute of limitations, Illinois Bell had the right to file a claim for credit against that [November 2003] payment at any time before December 31, 2006."), 13-16.

In response, the Department contends that Taxpayer may not rely on any statements made in the Department's audit manual, because such statements do not bind the Department generally, or in this case. *See* Department's Brief, pp. 4-5. The Department also quotes text that, it says, is included within its audit manual, and which advises a reader that, among other things, "[n]othing in this manual constitutes an official policy, legal position or interpretation of law" Department's Brief, pp.4-5.

The parties stipulated to certain text contained in the Department's audit manual, but they did not include a copy of the pertinent sections of the manual as a Stipulation Exhibit. Although an agency fact-finder may take notice of the agency's regulations (Acme Brick & Supply Co. v.

Department of Revenue, 133 Ill. App. 3d 757, 762, 468 N.E.2d 1380, 1384 (2d Dist. 1985)), the Department's audit manual is not a regulation, which is subject to the notice and comment provisions of the Illinois Administrative Procedures Act (IAPA). 5 ILCS 100/5-5 to 5-165. Nor is the Department's audit manual the type of document a court could take judicial notice of. 5 ILCS 100/10-40(c) ("Notice may be taken of matters of which the circuit courts of this State may take judicial notice."). As a result, other than those statements to which the parties stipulated, I do not treat the Department's descriptions of statements in the audit manual (*see* Department's Brief, pp. 4-5), as facts of what the Department has said in that manual.

The parties have stipulated that the audit manual provides, in pertinent part:

A taxpayer has three years to file a claim for credit against both ST-1 and audit payments. This means that the taxpayer can file a claim for credit against ST-1 even if the three years from the payment date has expired. The claim for credit is being filed based on the audit statute date.

For example, ABC Company has been audited for January 1994 through December 1996. A waiver has been obtained to hold open the audit period through December 31, 1997. *** The claim for credit will be against the audit payment because the audit holds open this period. The audit payment statute date expires December 31, 2000. ***

TET Stip. ¶ 25; IMF Stip. ¶ 25. As described below, these quoted statements are inconsistent with the statutory authority under which the Department operates, and with the text of the written extension agreements ordinarily used by taxpayers and the Department.

First, I am unaware of any written extension agreement which "holds open [an] audit period" *See id.* Here, for example, the parties stipulate that "[d]uring the course of the Illinois Audits, the Department requested and Taxpayer agreed to extend the statutes of limitation for issuing a notice of tax liability (NTL) ... until and including December 31, 2003." TET Stip. ¶ 9; IMF Stip. ¶ 9. What is being extended is the period in which the Department may timely issue an NTL, not the audit period itself. The parties stipulate that the Illinois TET Audit Period ran from

November 1997 through December 2002, and that the Illinois IMF Audit Period ran from January 1998 through December 2002. TET Stip. ¶ 8; IMF Stip. ¶ 8. The parties chose to not include within the stipulated record a copy of the actual written extension agreements, so I do not know when those agreements were executed. But if they were executed, for example, in November 2002, without them, the Department would not have been able to issue an NTL for any gross receipts Taxpayer realized prior to July 1, 1999.

Next, the audit manual's instructions suggest that, whenever a written agreement is executed between a taxpayer under audit and the Department, which extends the date by which the Department might timely issue an NTL for a certain audit period, that written agreement will always include the Department's unexpressed agreement that the taxpayer will have an additional three years from the date the parties agreed upon, to file an amended return to claim a credit or refund regarding the audit period and/or the audit payment. This, however, is contrary to basic contract law, which ordinarily seeks to enforce written agreements according to their express terms. Gallagher v. Lenart, 226 Ill. 2d 208, 874 N.E.2d 43 (2007) ("The primary objective in construing a contract is to give effect to the intent of the parties. [citations omitted] A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent."); 12A Ill. Law & Prac. *Contracts* § 131 ("Generally, the terms of a written contract determine the rights of the parties. ... [footnotes omitted] Courts are bound to interpret ... and enforce ... the contract as written.").

No authority for this position is cited in the audit manual, because no such authority exists. *See* 35 ILCS 120/6; 35 ILCS 630/10. That is not what the Department agreed to, in the audit manual example, and the manual's position is not consistent with the Illinois General Assembly's choice of the date by which a taxpayer might file an amended return to claim a

statutory credit or refund, where an extension agreement has been signed. If the legislature had intended to give taxpayers more time to file amended returns to request credits or refund of taxes paid following an audit during which the parties agreed to extend the date for the Department to issue an NTL, it could have done so. But it did not. 35 ILCS 120/6; 35 ILCS 630/10.

The audit manual's instructions are inconsistent with plain text of the statutes which set express limits on a taxpayer's right to obtain a tax credit or refund, when the parties exercise the only means of extending a tax statute of limitations. *E.g.* 35 ILCS 120/6; 35 ILCS 630/10. As a result, such statements are incorrect, as a matter of law. *Id.*; Wesko Plating Inc. v. Department of Revenue, 222 Ill. App. 3d 422, 584 N.E.2d 162 (1st Dist. 1991) (“... an administrative agency cannot thereby extend its authority or impose a limitation on a statute that the legislature did not prescribe.”).

Finally, the Department has adopted a retailers' occupation tax (ROT) regulation (ROTR) which addresses the effect that ROTA § 6 has on an agreement to extend the statute of limitations during the course of an audit. 86 Ill. Admin. Code § 130.1501 (2003). That regulation provides, in pertinent part:

Section 130.1501 Claims for Credit--Limitations--Procedure

a) Limitations Upon Claims

4) The Department cannot approve any claim for credit to the extent that the amount claimed is an amount which has been paid (voluntarily or involuntarily) in total or partial liquidation of an assessment which had become final before the claim for credit to recover the amount so paid is filed with the Department, or if paid in total or partial liquidation of a judgment, order or decree of court. Also, all claims for credit are subject to the statute of limitations, as follows:

Provided that as to any claim for credit 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 the Act) more than 3 years prior to such January 1 and July 1, respectively, shall be credited;...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 the Act, such claim may be filed at any time prior to the expiration of the period agreed upon. (Section 6 of the Act)

This means that the normal statute of limitations will vary from 3 to 3½ years as shown in the following examples:

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 (2003).

This applicable regulation was adopted following notice and comment, and it is presumed to be valid. Granite City Div. of Nat'l Steel Co. v. Illinois Pollution Control Bd., 155 Ill. 2d 149, 164, 613 N.E.2d 719, 726 (1993). The regulation both refers to, and gives effect to the plain meaning of, the text of ROTA § 6. 86 Ill. Admin. Code § 130.1501(a)(4)(E) (“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.)”). So, when the Department has publicly stated how it will enforce and administer ROTA § 6’s statute of limitations for filing a claim for refund or credit, in an instance where a taxpayer has entered into a written agreement to extend the date by which the Department may issue an NTL for an audit period, the Department has stated that the agreed upon date is also the last date by which a taxpayer may file a claim for credit or refund for the audit period. 35 ILCS 120/6; 86 Ill. Admin. Code § 130.1501(a)(4)(E). As between the

Department's formally adopted regulation and its non-public instructions to audit personnel in the audit manual, only the former reflects an authorized expression of how the Department will enforce and administer the text of ROTA § 6. The applicable law on this issue is to be found within ROTA § 6, TETA § 10, and ROTR § 130.1501(a)(4)(E), and not within the Department's audit manual. 35 ILCS 120/6; 35 ILCS 630/10; 35 ILCS 635/27.55; 86 Ill. Admin. Code § 130.1501(a)(4)(E).

But again, the Department does not seek to hold Taxpayer to the effect of its written agreement, in this case, and instead prefers the more general periods set forth in those statutes. Department's Brief, pp. 3-5 & n.2; 35 ILCS 120/6; 35 ILCS 630/10. Under the general periods set by the applicable statutes, since Taxpayer's Credit Claims were filed before July 1, 2006 (TET Stip. ¶ 2; TET Stip. Ex. 2; IMF Stip. ¶ 2; IMF Stip. Ex. 2), the Department is precluded from issuing Taxpayer any credit or refund for any erroneous payments made prior to January 1, 2003. 35 ILCS 120/6; 35 ILCS 630/10; 86 Ill. Admin. Code § 130.1501(a)(4)(E).

Issue 3: Are Taxpayer's Credit Claims Precluded by the Department's 2003 Amnesty Regulations

As an alternative argument, the Department contends that Taxpayer is not entitled to a refund because the Illinois TET and IMF Audit Liabilities were agreed to and paid pursuant to the 2003 Tax Delinquency Amnesty Act (Amnesty Program). Department's Brief, pp. 6-7; TET Stip. ¶ 31; IMF Stip. ¶ 31; 86 Ill. Admin. Code § 521.105(c). The Department argues that, since Taxpayer voluntarily participated in the Amnesty Program, Taxpayer thereby agreed that it was relinquishing all rights to contest the tax liability that was being paid, and that, except as provided in the Amnesty regulations, Taxpayer agreed that it would not be permitted to claim a refund of the money paid under Amnesty, nor would it be permitted to protest the Department's denial of such a claim. Department's Brief, pp. 6-7; 86 Ill. Admin. Code § 521.105(c).

Regarding the Department's Amnesty argument, Taxpayer contends that the Department may not raise Amnesty as a defense to its Credit Claims, because the Department's Informal Conference Board did not identify Amnesty as a basis for denying Taxpayer's Credit Claims, in the Board's Action Decision. TET Stip. ¶ 40; IMF Stip. ¶ 40; Taxpayer's Brief, pp. 17-18 (*citing* 86 Ill. Admin. Code § 215.120).

Taxpayer also argues that, if Amnesty regulation § 521.105 applies, ¶ (k) expressly provides that, "The Department may in its discretion refund overpayments of tax that were caused by computational error. All other overpayments will be credited to the taxpayer." TET Stip. ¶ 41; IMF Stip. ¶ 41; 86 Ill. Admin. Code § 521.105(k). Taxpayer asserts that the Illinois TET and IMF Audit Liabilities should be treated as computational errors, or that they otherwise fall within the meaning of "[a]ll other overpayments ...", as referred to in 86 Ill. Admin. Code section 521.105(k). Taxpayer's Brief, pp. 19-21.

My initial reaction is that the Amnesty regulation the parties are relying on in their respective, alternative, arguments is irrelevant to this dispute. That conclusion is based on my agreement with the Department's factual determination that Taxpayer's erroneous payments of Anywhere Taxes to the Department, for the months of July 2000 through December 2002, did not occur as a result of the audit pursuant to which Taxpayer made its Amnesty payments. As a simple matter of undisputed fact, Taxpayer did not pay its Anywhere Taxes to the Department, in error, in November 2003. TET Stip. ¶¶ 15-16; IMF Stip. ¶¶ 15-16. Instead, the Department determined that Taxpayer made the last of its erroneous payments to the Department no later than December 2002. TET Stip. ¶¶ 15, 27; IMF Stip. ¶¶ 15, 27. Taxpayer has produced no evidence which rebuts this Department determination.

But the Department made clear that it is making its alternative, Amnesty, argument in case I (or some other, downstream, reader) were to accept Taxpayer's argument that its payments of its Illinois Liabilities, in November 2003, were the real source of its erroneous payments of taxes to the Department. Department's Brief, p. 6. If that is the case — and only if that is the case — then the parties' arguments regarding the Amnesty regulation are relevant. However, I would still agree that the Department has the better argument.

I first address Taxpayer's argument that the Department is precluded from raising the 2003 Amnesty regulations, because the Department's Informal Conference Board (ICB) did not base its decision to deny relief to Taxpayer on the 2003 Amnesty regulations. Taxpayer's Brief, pp. 17-18. Taxpayer suggests that the ICB's Action Decision was a ruling, on the merits, which rejected the Department's assertion that the 2003 Amnesty regulations supported the proposed denial of Taxpayer's Credit Claims. *Id.* (citing 86 Ill. Admin. Code § 215.120(f)).

The ICB is the reviewing stage between the Department's preliminary audit decisions and the Department's issuance of a protestable notice. *See* 86 Ill. Admin. Code § 215.100. Taxpayer requested ICB review of the Department's proposed denials of its Credit Claims. TET Stip. ¶¶ 21-22; TET Stip. Exs. 3, 6; IMF Stip. ¶¶ 21-22; IMF Stip. Exs. 3, 6. Following a hearing, the ICB denied Taxpayer's request for relief. TET Stip. ¶ 22; IMF Stip. ¶ 22.

The substantive text of the ICB's decisions provides:

The Informal Conference Board has reviewed the Illinois Department of Revenue Audit Bureau's proposed adjustments in this matter and finds that no adjustments were noted as requiring change. The Audit Bureau is instructed to conclude and process the audit in a manner consistent with this decision.

The Taxpayer did not file the amended ... returns within the statutory period.

Taxpayer Request for Audit Adjustments Denied.

TET Stip. Ex. 4; IMF Stip. Ex. 4.

Taxpayer bases its issue preclusion argument on one sentence of paragraph (f) of the ICB's regulation § 215.120, which provides, in part, "[t]he [ICB] Action Decision is final and binding on the Department" 86 Ill. Admin. Code § 215.120(f).³ Taken in context, however, the sentence Taxpayer cites reflects the Department's regulatory pronouncement that, when an ICB Action Decision determines that a taxpayer's audit position was correct, and the Department's audit position was not correct, "[t]he [ICB] Action Decision is final and binding on the Department" 86 Ill. Admin. Code § 215.120(f) ("Action Decisions must be implemented by those areas of the Department to which they are directed."). In such a case, the Department would not be able to issue a protestable notice that was based on the rejected Department audit position.

But Taxpayer did not win its Credit Claim cases at the ICB, the Department went on to

³

The pertinent regulation provides:

Section 215.120 Review of Requests by the Informal Conference Board

(f) The ICB is charged with the responsibility of making a determination of whether the amount of the proposed audit adjustment is accurate. After a complete review of the request, accompanying information and any evidence and arguments submitted on behalf of the taxpayer at an in-person conference, if requested, the ICB shall issue an Action Decision. Whenever possible, the Action Decision shall be issued within 120 days after receipt of the taxpayer's request. An Action Decision shall be issued only upon the approval of no fewer than 2 of the 3 members of the ICB panel assigned to the matter. The ICB may expedite the processing of requests for review that involve proposed liabilities, deficiencies or claim denials in an amount of \$5,000 or less. In determining whether a request should be expedited, the ICB administrator will consider such factors as whether the amount at issue exceeds \$5,000, or whether the issue is one of first impression or controversial. The ICB administrator will notify the taxpayer in writing if it is determined that the matter should be expedited. The expedited process would mean that only the conferee assigned to the matter will attend the in-person conference, if one is requested. In addition, an Action Decision issued in an expedited matter shall be issued upon the approval of one member of the ICB panel. The Action Decision is final and binding on the Department except where there is a misrepresentation of material fact or a clerical or mathematical error made by the taxpayer, the ICB or a member of the ICB staff. In such situations, the Board may amend or vacate the Action Decision. Action Decisions must be implemented by those areas of the Department to which they are directed. The taxpayer and its representative will be provided with a written notice of the Action Decision. Section 521.105 Amnesty Program Requirements

86 Ill. Admin. Code § 215.120(f).

deny its Credit Claims. TET Stip. ¶¶ 21-23; TET Stip. Exs. 5-6; IMF Stip. ¶¶ 21-23; IMF Stip. Exs. 5-6. Nor did the ICB decisions set forth detailed expositions regarding the merits of every argument advanced by the parties at the ICB. *See* TET Stip. Ex. 6; IMF Ex. 6. Rather than rejecting one of the Department’s audit positions, the ICB generally agreed with all of the Department’s audit positions, and generally disagreed with all of Taxpayer’s audit positions. TET Stip. Ex. 6; IMF Ex. 6.

Finally, the first paragraph of the same regulation provides:

- a) The informal conference process is the first step in attempting to resolve a tax dispute with the Department. It provides an opportunity for the ICB and the taxpayer to review and discuss the issues relating to the proposed audit adjustments brought into question. The informal conference process is not subject to the requirements of the Illinois Administrative Procedure Act [5 ILCS 100] and any final action taken by the ICB is not subject to administrative review.

86 Ill. Admin. Code § 215.120(a). The ICB decisions were issued at a preliminary stage in this administrative dispute, and nothing within them precludes the Department from making its Amnesty arguments here. TET Stip. Ex. 6; IMF Ex. 6; 86 Ill. Admin. Code § 215.120(a), (f).

I move now to the substance of the parties’ Amnesty arguments. On its face, paragraph (c) of the 2003 Amnesty regulation § 521.105 provides that, “[b]y participating in the Amnesty Program, a taxpayer affirms and agrees to all of the following conditions: 1) the taxpayer relinquishes all rights to contest the tax liability that is being paid; 2) except as provided herein, the taxpayer may not claim a refund of the money paid or protest the Department's denial of such a claim” 86 Ill. Admin. Code § 521.105(c)(1)-(2).⁴ In other words, the regulation does allow

⁴ The pertinent regulation provided:
Section 521.105 Amnesty Program Requirements

- c) Taxpayer Agreement. Unless the taxpayer informs the Department otherwise in writing, the Department will deem all taxpayers that make payments during the Amnesty Program Period to be participants in the Amnesty Program. By participating

in the Amnesty Program, a taxpayer affirms and agrees to all of the following conditions:

- 1) the taxpayer relinquishes all rights to contest the tax liability that is being paid;
- 2) except as provided herein, the taxpayer may not claim a refund of the money paid or protest the Department's denial of such a claim;
- 3) the taxpayer will promptly correct any underpayment of the tax liability; and
- 4) the taxpayer cannot withdraw from the Amnesty Program.

k) Underpayment and Overpayment of Tax Due. Taxpayers, including taxpayers under audit during the Amnesty Program Period, who are unsure of the exact amount of a tax liability should make a good faith estimate of the amount of the liability. If the Department later determines that a payment made during the Amnesty Program Period is insufficient to completely satisfy the tax liability for which the payment was made, and the applicable statute of limitations has not yet expired, the Department may send a bill to the taxpayer for the remaining taxes due. Pursuant to 35 ILCS 735/3-2, 3-3, 3-4, 3-5, 3-6 and 3-7.5, the Department will assess 200% of the penalties and interest that would otherwise be applied to the portion of the liability that was not paid. The taxpayer must pay the bill by the due date. A taxpayer who fails to pay the bill by the due date will be liable for 200% of the penalties and interest imposed under 35 ILCS 735/3-2, 3-3, 3-4, 3-5, 3-6 and 3-7.5 as if no payment had been made during the Amnesty Program Period. The Department may in its discretion refund overpayments of tax that were caused by computational error. All other overpayments will be credited to the taxpayer. The following examples are illustrative:

- 2) An audit is being conducted in November, 2003 of the taxpayer's calendar year 2000 income tax return. The taxpayer is considering whether to participate in the Amnesty Program and asks the auditor to complete the audit prior to the November 17, 2003 amnesty deadline. The auditor advises the taxpayer that the audit cannot be completed prior to November 17, 2003. The taxpayer makes a good faith estimate that \$3000 in Income Tax liability will be owed at the end of the audit. The taxpayer pays the \$3,000 with an amended return during the Amnesty Program Period. After November 17, 2003, the auditor determines that an additional \$500 in Income Tax liability attributable to tax year ending 2000, is due. The Department sends a bill to the taxpayer for the additional \$500 in income tax, plus double interest and penalties. The taxpayer can avoid paying double interest and penalties on the entire \$3000 amount of Income Tax liability attributable to tax year ending 2000, by paying the additional \$500 tax, plus double interest and penalties, by the bill's due date.

l) A taxpayer who is under federal audit may participate in the Amnesty Program by following the procedure set out in subsection (k) above and making a good faith estimate of the increased liability that may be owed to the Department. For purposes of participating in the Amnesty Program only, a taxpayer may file an amended return reporting a federal change prior to receiving final notification from the Internal Revenue Service that the change has occurred. Although participants in the Amnesty Program may not seek or claim refunds, a limited exception to this rule will be permitted for taxpayers whose refund claims are based upon final determinations of the Internal Revenue Service or the federal courts.

a taxpayer to obtain a credit or refund for the money paid, but only as provided within the regulation. 86 Ill. Admin. Code § 521.105(c)(1). Paragraph (k) authorizes a credit to taxpayers “who are unsure of the exact amount of a tax liability [and who] ... make a good faith estimate of the amount of the liability.” 86 Ill. Admin. Code § 521.105(k).

In this way, Taxpayer’s arguments that paragraph (k) of the regulation requires the Department to “refund overpayments of tax that were caused by computational error[,]” and to credit “[a]ll other overpayments ... to the taxpayer[,]” (*see* Taxpayer’s Brief, pp. 18-21), take the sentences out of context with the other text of paragraph (k), and with the text of paragraph (c). The sentences at the end of paragraph (k) apply to taxpayers who were unsure of the exact amount of an Illinois tax liability at the time of the Amnesty Program, and whose Amnesty payment was intended only to be a good faith estimate of the amount of the person’s actual liability. 86 Ill. Admin. Code § 521.105(k). Part of the good faith required by the regulation, moreover, is paragraph (c)’s requirement that such a taxpayer inform the Department in writing of its uncertainty, as well as the fact that its Amnesty payments were intended to be only an estimate of its actual liability. 86 Ill. Admin. Code § 521.105(c), (k)(2).

Participation in Illinois’ 2003 Amnesty Program was designed to bring finality to Amnesty payments and Amnesty issues between taxpayers and the Department for the Amnesty period. *See* 86 Ill. Admin. Code § 521.105(c). That is why taxpayers were required to inform the Department, in writing, if payments made during the Amnesty Program Period were not intended

m) Statutes of Limitation and Other Filing Periods. Participation in the Amnesty Program does not toll any applicable statute of limitations or other time period for the filing of protests with the Department, or actions in circuit court under the Protest Monies Act [30 ILCS 230]. A statute of limitations or other time period that expires during the Amnesty Program Period cannot be revived, even if the taxpayer has failed to satisfy all the requirements of the Amnesty Program. The Department’s procedures for obtaining waivers of statutes of limitations for taxpayers under audit shall continue to apply.
86 Ill. Admin. Code § 521.105 (2003).

to reflect the taxpayer's participation in the Amnesty Program. 86 Ill. Admin. Code § 521.105(c). Here, however, when Taxpayer made its Amnesty payments in November 2003, there is no evidence that Taxpayer also informed the Department that it was making such payments as a good faith estimate of its Illinois Liabilities, because it was unsure of what its liabilities actually were. TET Stip. Ex. 1; IMF Stip. Ex. 1. Instead, the evidence shows that the Department notified Taxpayer of what its Illinois Liabilities were (*see id.*), and the parties' stipulations show that Taxpayer voluntarily paid them. TET Stip. ¶¶ 8-13; TET Stip. Ex. 1; IMF Stip. ¶¶ 8-13; IMF Stip. Ex. 1.

The evidence and stipulations show that Taxpayer voluntarily took part in the 2003 Amnesty Program. TET Stip. ¶¶ 8-13; TET Stip. Ex. 1; IMF Stip. ¶¶ 8-13; IMF Stip. Ex. 1; 86 Ill. Admin. Code § 521.105(c). Taxpayer's later discovery, in 2006, that it erroneously paid its Anywhere Taxes to the Department, instead of to Anywhere, for the months of July 2000 through December 2002, does not retroactively transform Taxpayer's voluntary 2003 Amnesty payments into a good faith estimate of what its actual Illinois Liabilities might have been. 86 Ill. Admin. Code § 521.105(k). Since there is no evidence to show that Taxpayer was a member of the class described by Amnesty regulation § 521.105(k), then "[b]y participating in the Amnesty Program, Taxpayer "relinquishe[d] all rights to contest the tax liability that [was] ... paid" 86 Ill. Admin. Code § 521.105(c)(1). If the 2003 Amnesty regulation applied to this dispute, it would bar Taxpayer's Credit Claims. *Id.*

But as already discussed, the parties' stipulations and stipulated exhibits show that Taxpayer did not make any of its erroneous payments of Anywhere Taxes to the Department in November 2003. TET Stip. ¶¶ 15-16; IMF Stip. ¶¶ 15-16. Instead, Taxpayer made the last of its erroneous payments to the Department no later than December 2002. TET Stip. ¶¶ 15, 27; IMF

Stip. ¶¶ 15, 27. As a result, Taxpayer's erroneous payments of Anywhere Taxes to the Department were not made in November 2003, pursuant to Amnesty. The 2003 Amnesty regulation does not apply to this dispute.

Conclusion:

I respectfully recommend that the Director finalize the Department's Denials as issued.

January 6, 2015

**John E. White
Administrative Law Judge**