IT 17-01
Tax Type: Income Tax
Tax Issue: Claim Issues - Properly and Timely Filed, Statute of Limitations Application

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

COMPANY A, INC., Taxpayer	)	Docket No. 14-IT-XXX
v.	)	
THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	John E. White, Administrative Law Judge

RECOMMENDATION FOR DISPOSITION
PURSUANT TO CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appearances: Valdir Barbosa, Pedersen & Houpt, P.C., appeared for COMPANY A, Inc.; Sean Cullinan, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves COMPANY A, Inc.'s (Taxpayer's) request for a refund of an Illinois withholding income tax overpayment credit, which the Department previously determined to be available to Taxpayer, in the amount of $XX,XXX.XX. On July 30, 2013, the Department issued a Notice of Claim Status (Denial) to Taxpayer, which notified Taxpayer that its claim for refund was being denied because the amended return/claim for refund form that Taxpayer completed, signed and filed with the Department was filed late. Taxpayer protested the Department's Denial. The parties agree that the facts are not in dispute, and that the only issue is one of law ─ specifically, whether Taxpayer timely filed an amended return/claim for refund within the period set by § 911(a) of the Illinois Income Tax Act (IITA).

To resolve that question of law, the parties submitted cross-motions for summary judgment, together with exhibits. During oral argument on their respective motions, counsel for the parties stipulated that the exhibits to each motion were authentic and admissible. After considering the documentary evidence submitted and the parties' arguments, I am including in the recommendation a statement of facts and material facts not in dispute, and conclusions of law. I recommend that the Director deny Taxpayer's Motion, grant the Department's Motion, and finalize the Denial as issued.

Material Facts Not In Dispute:

1. On or about October 19, 2007, a person acting for COMPANY B, Co. (hereinafter "COMPANY B") filed a form IL-941-X to report that COMPANY B had overpaid Illinois withholding income tax in error during the first quarter of 2007, in the amount of $365,119.70. Taxpayer's Motion for Summary Judgment (TMSJ) Ex. G, p. 3 (copy of COMPANY B's 2007 IL-941-X); Department's Cross-Motion for Summary Judgment (DMSJ) Ex. A (same as TMSJ Ex. G).
2. Taxpayer and COMPANY B are not the same person. COMPANY B is an affiliate of Taxpayer, and has a FEIN of *****XXXX. *Id*. Taxpayer has a FEIN of **-***YYYY. *See* TMSJ Ex. G, p. 3; DMSJ Ex. A.
3. On line 10 of the COMPANY B's 2007 IL-941-X, the preparer wrote: "WAGES/TAXES REPORTED IN ERROR, ADDITIONAL CHECK(S) ISSUED. DO NOT REFUND, TRANSFER TO ID # **-***YYYY …." TMSJ Ex. G, p. 3; DMSJ Ex. A.
4. Thereafter, the Department transferred a credit in the amount of the overpayment reported on COMPANY B's 2007 IL-941-X, $XXX,XXX.XX, from COMPANY B's

Illinois withholding income tax account to Taxpayer's Illinois withholding income tax account. DMSJ Exs. B-C (copies of Taxpayer Statements issued by the Department on, respectively, February 8, 2008 and November 14, 2008, showing a credit balance in the amount of $XXX,XXX.XX that was attributable to the first quarter of 2007); TMSJ Ex. E (copy of email from Department counsel to Taxpayer's counsel).

5. On February 8, 2008 and November 14, 2008, the Department notified Taxpayer, in separate documents titled, Taxpayer Statement[s], that the Department's records of Taxpayer's Illinois withholding income tax account showed that Taxpayer had an Illinois withholding income tax credit balance in the amount of $XXX,XXX.XX, which was attributable to the first quarter of 2007. DMSJ Exs. B-C.

6. Regarding the fourth quarter of 2008, Taxpayer had an underpayment of Illinois withholding income tax in the amount of $XXX,XXX.XX. DMSJ Ex. D (copy of Taxpayer Statement, dated April 16, 2009); TMSJ Exs. D (copy of Return Correction Notice for Form IL-941, Illinois Quarterly Withholding Income Tax Return), F (copy of 3 page email chain between Taxpayer and its outside accountant, and attached schedule obtained from the Department regarding Taxpayer's Illinois withholding income tax account history for periods from December 2006 through April 16, 2012), p. 6 (schedule page showing Taxpayer's Illinois withholding income tax account history for 2008, showing application of credit in the amount of $XXX,XXX.XX, on January 31, 2009).

7. In its filed original form IL-941 regarding the fourth quarter of 2008, Taxpayer applied most of the Illinois withholding income tax credit previously determined to be

available to Taxpayer, as a payment toward Taxpayer's Illinois withholding income tax liability for that period. *See* DMSJ Ex. D; TMSJ Ex. D.

8. Taxpayer's original IL-941 regarding the fourth quarter of 2008 was due on January 31, 2009. 35 ILCS 5/704A(b); *see also* TMSJ Ex. F, p. 6 (Department schedule showing, among other things, amounts and dates of all of Taxpayer's estimated and other withholding payments/credits regarding the fourth quarter of 2008).

9. On January 31, 2009, the Department transferred all but $XX,XXX.XX of the Illinois withholding income tax credit overpayment balance previously determined to be available to Taxpayer, to Taxpayer's Illinois withholding income tax liability for the fourth quarter of 2008. TMSJ Ex. F, p. 6.

10. After Taxpayer's original IL-941 regarding the fourth quarter of 2008 return was filed, the Department treated the applied overpayment credit as having been attributable to the fourth quarter of 2008. TMSJ Exs. E, F (p. 6); *see also* 35 ILCS 5/911(a)(1).

11. On April 16, 2009, and June 18, 2009, the Department sent separate notices to Taxpayer, notifying it that the Illinois withholding income tax overpayment credit balance, available to Taxpayer, was $XX,XXX.XX. TMSJ Ex. D; DMSJ Exs. D-E.

<u>Facts Material to the Parties Cross-Motions, and Not In Dispute:</u>

12. On September 11, 2009, an agent for Taxpayer wrote a letter to the Department. TMSJ Ex. H (copy of letter). The body of the September 11, 2009 letter (9/11/09 Letter) provides as follows:

***

> In response to a recent inquiry concerning our client's account, the following course of action has been determined:
>
> For period ending 03/31/09

> Our records indicate that our client has a valid overpayment.
>
> We have verified our client's current liability and, per our research, we do not believe our client will have enough future liability to apply this credit in a reasonable time frame.
>
> Please refund our client directly at the following address:
>
> ATTN: JOHN DOE
> COMPANY A INC
> 180 N LASALLE STE STE […]
> CHICAGO, IL 60609
>
> Please close this account number […], effective 03/31/09
>
> According to our records, our client has ceased employment in your jurisdiction. We are in the process of preparing their final reconciliation, which you will receive soon.
>
> If you have any questions regarding this inquiry, please call or write to us at the above address. We appreciate your assistance in resolving this matter.
>
> ***

TMSJ Ex. H.

13. There was no completed and signed form IL-941-X attached to the 9/11/09 Letter. *See* TMSJ Ex. H; Hearing Recording.

14. On April 16, 2012, the Department deactivated the $XX,XXX.XX Illinois withholding income credit overpayment balance previously determined to be available to Taxpayer. TMSJ Exs. E, F (p. 6).

15. On or about July 23, 2012, Taxpayer obtained a schedule of Taxpayer's withholding income tax account history with the Department from its outside accountant, who, in turn, obtained such schedule from the Department. TMSJ Ex. F, pp. 4-6.

16. On August 12, 2012, Taxpayer wrote another letter to the Department. TMSJ Ex. I. The body of that August 12, 2012 letter (8/12/12 Letter) provides:

> ***
>
> Please accept this letter as a formal request for a refund of the $XX,XXX.XX credit balance on the COMPANY A (FEIN: …YYYY)

> account. This credit is currently sitting in the fourth quarter of 2008. Please remit the overpayment to:
>
> COMPANY A
> Attn: MARY SMITH
> […]
> Atlanta, GA 30339-[…]
>
> If you have any questions, please feel free to contact me at 770-[…].
>
> ***

TMSJ Ex. I.

17. There was no completed and signed form IL-941-X attached to the 8/12/12 Letter. *See* TMSJ Ex. I; Hearing Recording.

18. On or about April 30, 2013, Taxpayer filed a form IL-941-X requesting a refund of the $XX,XXX.XX Illinois withholding income tax overpayment credit balance previously determined to be available to Taxpayer. TMSJ Ex. A, p. 2 (copy of Form IL-941-X, dated April 30, 2013) (4/30/13 form IL-941-X); DMSJ Ex. J.

19. On July 30, 2013, the Department issued its Denial to Taxpayer. TMSJ Ex. B; DMSJ Ex. K. The Denial provided, in pertinent part:

> ***
>
> We have reviewed Form IL-941-X, Amended Illinois Quarterly Withholding Tax Return. We cannot grant this claim because it was filed late. You must file Form IL-941-X within three years after the 15th day of the 4th month following the close of the calendar year in which the tax was withheld, or one year after the date the tax was paid, which is later.
> Based on the information you sent, we have denied your claim.
>
> ***

TMSJ Ex. B; DMSJ Ex. K.

20. In response to the Department's Denial of Taxpayer's 4/30/13 form IL-941-X, Taxpayer timely filed a Protest and Request for Hearing. TMSJ Ex. C. That was the only protest Taxpayer filed regarding any amended Illinois withholding income tax

return form IL-941-X Taxpayer previously filed with the Department regarding the overpayment credit originally attributable to 2007. *Id*.; TMSJ Ex. E.

Conclusions of Law:

Summary judgment is appropriate when resolution of the case hinges on a question of law. First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 651 N.E. 2d 1105 (1995); Kirk Corp. v. Village of Buffalo Grove, 248 Ill. App. 3d 1077, 618 N.E. 2d 789 (1st Dist. 1993). Summary judgment is also appropriate when the parties dispute the correct construction of an applicable statute. Bezan v. Chrysler Motors Corp., 263 Ill. App. 3d 858, 636 N.E. 2d 1079 (2nd Dist. 1994). When both parties file motions for summary judgment, as is the case here, only a question of law is raised. Lake Co. Stormwater Management Comm. v. Fox Waterway Agency, 326 Ill. App. 3d 100, 104, 759 N.E.2d 970, 973 (2d Dist. 2001).

Here, the parties' cross-motions take opposite positions over whether Taxpayer is entitled to a refund regarding a credit for an overpayment of Illinois withholding income tax that was last attributable to the fourth quarter of 2008. TMSJ Ex. D, G, p. 3; DMSJ Exs. A, D-E. Whether Taxpayer is entitled to a refund of the remaining credit turns on whether it timely filed an amended return/claim for refund in such form as was required by the Department. 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1)-(2); Hearing Recording.

Taxpayer's Motion

During oral argument, Taxpayer acknowledged that the only two forms IL-941-X that form the basis of its claim for judgment as a matter of law are the 2007 IL-941-X filed by COMPANY B and the IL-941-X which Taxpayer filed on April 30, 2013. TMSJ Exs. A (p. 2), G (p. 3); Hearing Recording.

Taxpayer's Motion begins with its assertion that there is no dispute that an overpayment had been made. TMSJ § III.B (Since Taxpayer's MSJ lacks page numbers, this recommendation cites to the outline sections where Taxpayer advances a particular argument/assertion).

Taxpayer next asserts that there is no dispute "as to whether *the* refund claim was timely filed." TMSJ § III.C (emphasis added). However, in the same paragraph, it refers to the form IL-941-X which COMPANY B filed with the Department in 2007. *Id.*; TMSJ Ex. G, p. 3. In the following paragraph, Taxpayer then refers to the 9/11/09 Letter, which was filed on Taxpayer's behalf, but which did not include as an attachment a completed and signed form IL-941-X. TMSJ § III.C & Ex. H. In this respect, while Taxpayer's Motion is initially unclear about which document Taxpayer is claiming is *the* refund claim, the whole of Taxpayer's Motion strongly suggests that it considers the 9/11/09 Letter to be a document that the Department is obliged to treat as a form IL-941-X, and as *the* refund claim at issue. TMSJ *passim*; *see also* TMSJ Ex. C (copy of Taxpayer's protest, p. 1 (Step 2, line 2 (on the line of the form IL-941-X which asks a taxpayer to identify the "Date Return or claim was filed[,]" Taxpayer typed, "09/11/2009")).

Taxpayer next reasons that it would be blatantly incorrect to treat the 9/11/09 Letter as an informal claim, as described in IITR § 100.9400(f)(6), since that letter was a mere supplementation to a timely filed claim — which it again identifies as the IL-941-X form which COMPANY B filed in 2007. TMSJ § III.D & Ex. G; *but see* TMSJ § III.F ("Any one of a number of letters to the Department regarding the refund claim at issue satisfied the requirements of the *Kales*-informal-claim doctrine.") (emphasis original).

Taxpayer then refers to a statement by a Department employee, in TMSJ Ex. E, that, "if the taxpayer had submitted an amended return on the 1st Quarter of 2009 requesting the refund, I would make the argument to allow the refund since the taxpayer was told they could do that[,]" (TMSJ § III.E & Ex. E), and contends that, [b]y sending the ADP Letter [— that is, the 9/11/09 Letter —], the Taxpayer did precisely as the Department advised but the claim has yet to be paid. TMSJ § III.E; *but compare* TMSJ Ex. E (9/11/09 Letter) *with* TMSJ Ex. A, p. 2 (completed and signed form IL-941-X).

Finally, Taxpayer posits that its 4/30/13 form IL-941-X — which it consistently refers to not by reference to the form itself, but by reference to the cover letter to which the form was attached — should be considered to be "valid under the relation back doctrine explained in *American Airlines v. Department of Revenue*, 931 N.E.2d 666 (Ill App. Ct. 2009)." TMSJ § III.F. Alternatively, Taxpayer argues that its 4/30/13 form IL-941-X should be treated as a formal claim which perfected informal claims previously made during correspondence with the Department. *Id*. Taxpayer implicitly asserts that, consistent with the decision in U.S. v. Kales, 314 U.S. 186 (1941), the Department is required to treat Taxpayer's prior informal claims as though they were claims for refund in the form required by IITA § 909(d), which were timely filed to claim a refund of income taxes withheld during 2007. TMSJ § III.F.

Department's Motion

The Department's Motion is based on its assertion that the only refund claim at issue is the form IL-941-X Taxpayer filed on 4/30/13, on which Taxpayer requested a refund of the overpayment credit remaining on its account. DMSJ, pp. 4-5. The Department contends that Taxpayer's 4/30/13 form IL-941-X was filed beyond the last

date set by IITA § 911(a). *Id*. The Department argues that the 9/11/09 Letter is an "informal claim" as that term is described within Illinois income tax regulation (IITR) § 100.9400(f)(6), and, as such, that document is not an amended return/claim for refund, under Illinois law. *Id*., pp. 5-7.

Next, the Department contends that the American Airlines court rejected a taxpayer's argument that the relation back doctrine, which is authorized by § 2-616 of the Illinois Code of Civil Procedure (Code), 735 ILCS 5/2–616(b), applied to the statutory procedures the Illinois General Assembly enacted to govern Illinois use tax refunds. DMSJ, pp. 7-10. It argues that the statutory procedures set by IITA § 911(a) similarly govern this Illinois income tax dispute, and not the procedures described within § 2-616(b) of the Code. *Id*.

Finally, the Department argues that the concept and practice of perfecting informal claims for refund, which federal procedures allow, under certain circumstances, for purposes of federal income tax refunds, and discussed in the case of U.S. v. Kales, do not apply to the statutory procedures the Illinois General Assembly enacted to apply to claims for refunds of Illinois income tax overpaid in error. DMSJ, pp. 10-12.

Analysis:

Initially, this recommendation addresses the first fact noted in Taxpayer's MSJ. TMSJ § III.B. There is no dispute that, after Taxpayer applied most of the Illinois withholding income tax overpayment credit to its withholding income tax liability regarding the fourth quarter of 2008, Taxpayer had an Illinois withholding income tax credit balance in the amount of $XX,XXX.XX. TMSJ Ex. D; DMSJ Exs. D-E. But establishing that an overpayment of tax has been made gets a taxpayer only halfway to

demonstrating an unmistakable right to a refund of such an overpayment. 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1)-(2); Dow Chemical Co. v. Department of Revenue, 224 Ill. App. 3d 263, at 267, 586 N.E.2d 516, 519 (1st Dist. 1991). That is because, while § 909 of the IITA grants taxpayers a statutory right to claim a credit or refund for income taxes overpaid in error (35 ILCS 5/909(d)), the General Assembly has also placed clearly stated time limits on a taxpayer's ability to exercise that statutory right. 35 ILCS 5/911(a)(1)-(2). As the Dow court held:

> The plain meaning of section 911 is that the taxpayer has an affirmative duty to file for a tax refund within a prescribed period of time. Furthermore, this time may be extended by agreement with the Department. When section 911 is read in conjunction with sections 904 and 909 it indicates, as determined by the trial judge, that although there is no limitation on the Department's authority to make a refund or a credit, there is a limit on the taxpayer's ability to file for one.

Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519 ("Since Dow filed its claim for refund on December 12, 1983, well beyond the three years allotted by the statute of limitations, and without an agreement for extension thereof, the Department maintains and we agree that such claim is now time-barred.").[1]

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[1] Regarding the Dow court's recognition that, at the time relevant in that case, "there [was] no limitation on the Department's authority to make a refund or a credit," in 2011, the legislature added the following highlighted words to IITA § 909(a):

> a) In general. In the case of any overpayment, the Department, **within the applicable period of limitations for a claim for refund,** may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of the tax imposed by this Act, regardless of whether other collection remedies are closed to the Department on the part of the person who made the overpayment and shall refund any balance to such person or credit any balance to that person pursuant to an election under subsection (b) of this Section.
>
> ***

35 ILCS 5/909(a); P.A. 97-507, § 5 (effective August 23, 2011) (emphasis added).

What I infer from the amendment is that the Illinois General Assembly intended to limit the Department's discretionary authority to issue credits and/or refunds to those regarding which a taxpayer had filed a claim for refund, in the form prescribed by the Department, within the

In this case, the only factual basis the Department advanced for denying Taxpayer's 4/30/13 form IL-941-X was that it was filed late. TMSJ Ex. B; DMSJ Ex. K. The parties' respective motions, moreover, take opposite positions on that question. The plain text of IITA § 911(a)(2) means that the Illinois General Assembly intended the Department to deny income tax credits or refunds if not timely claimed by a taxpayer. 35 ILCS 5/911(a)(1)-(2); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519.

Regarding the issue that is material to both of the parties' respective motions, there is no factual dispute over the evidence. The parties do not dispute what documents Taxpayer submitted to the Department, or when such documents were submitted. Instead, they only dispute the effect of such documents. As a result, when, in this recommendation, a conclusion is made regarding the parties' characterization of a document, for example, as a claim for refund as required by IITA § 909(d), I am not making findings of fact, but only a legal conclusion regarding a particular document.

Was Taxpayer's 4/30/13 Form IL-941-X Filed Within the Period Set By IITA 911(a)(1)

Here, the parties do not dispute that IITA § 911(a) is the provision which identifies the period within which Taxpayer was required to file a claim for refund. TMSJ § III.A ("A refund claim for … withholding tax must be filed within three years after the 15th day of the 4th month following the close of the calendar year in which the tax was withheld. 35 ILCS 5/911(a)(1)."); DMSJ, p. 5 ("COMPANY A's only refund claim, consisting of its IL-941-X dated 4/30/13 for the fourth quarter of 2008, was not filed within 3 years after its withholding tax return for the fourth quarter of 2008, or within 1 year after its withholding tax return for the fourth quarter of 2008 was paid, as required

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applicable statute of limitations. 35 ILCS 5/909(a), (d); P.A. 97-507, § 5 (effective August 23, 2011); 35 ILCS 5/911(a)(1)-(2).

by 35 ILCS 5/911.”).

Section 911 of the IITA provides, in pertinent part:

> Sec. 911. Limitations on Claims for Refund.
>
> (a) In general. Except as otherwise provided in this Act:
>
> (1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and
>
> (2) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.
>
> ***
>
> (c) Extension by agreement. Where, before the expiration of the time prescribed in this section for the filing of a claim for refund, both the Department and the claimant shall have consented in writing to its filing after such time, such claim may be filed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. In the case of a taxpayer who is a partnership, Subchapter S corporation, or trust and who enters into an agreement with the Department pursuant to this subsection on or after January 1, 2003, a claim for refund may be filed by the partners, shareholders, or beneficiaries of the taxpayer at any time prior to the expiration of the period agreed upon. Any refund allowed pursuant to the claim, however, shall be limited to the amount of any overpayment of tax due under this Act that results from recomputation of items of income, deduction, credits, or other amounts of the taxpayer that are taken into account by the partner, shareholder, or beneficiary in computing its liability under this Act.
>
> ***

35 ILCS 5/911(a), (c). Section 911 also includes a separate statute of limitations which is applicable to amended returns which claim an Illinois tax refund based on federal changes which have been made to items previously reported on the taxpayer’s original federal income tax return for a given year, and which federal changes also affect the person’s Illinois income tax liabilities for that particular tax year. 35 ILCS 5/911(b); 35

ILCS 506(b)(2). However, this matter involves no federal changes, and § 911(b) does not apply here.

Put another way, the text of § 911(a)(1) which is applicable to this dispute may be paraphrased as follows:

> A claim for refund shall be filed not later than:
> - 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made, **or**
> - one year after the date the tax was paid,
>
> whichever is the later.

See 35 ILCS 5/911(a)(1).

Statute of limitations challenges ordinarily involve the process of measuring the time between one critical event and another. And since one cannot identify the last date by which a particular statute requires a person to act without first determining when the clock *starts* running, the first task is determine when, pursuant to § 911(a)(1), the statutory period begins to run "in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax …." 35 ILCS 5/911(a)(1); *see* Kraft v. Edgar, 138 Ill. 2d 178, 89, 561 N.E.2d 656, 661 (1990) ("The limitations provision of section 1.17(a)(2) of the 1983 Act commenced running when the taxes or fees 'should have been paid.' ").

Here, the starting points of the two periods expressed within § 911(a)(1) are, respectively, (1) the date of the close of the calendar year in which such withholding was made, and (2) the date the withholding tax was paid. 35 ILCS 5/911(a)(1). In this case, there is no dispute that the closing date of the calendar year regarding which Taxpayer applied the overpayment credit was December 31, 2008. TMSJ Ex. D, G, p. 3; DMSJ Exs. A, D-E. Using this option, December 31, 2008 counts as zero, and January 1, 2009

was the day the period started to run. The first month following the close of 2008 is January 2009, and the fourth month is April 2009. The fifteenth day of the fourth month following the close of 2008 is April 15, 2009, and three years after April 15, 2009 is April 15, 2012. 35 ILCS 5/911(a)(1). In the event April 15, 2012 were to fall on a holiday or weekend, both the Illinois General Assembly (5 ILCS 70/1.11 (Illinois' Statute on Statutes)) and the Department (86 Ill. Admin. Code § 100.5000(b)) would extend the due date to the next business day.

Similarly, there is no dispute that the Department transferred all but $XX,XXX.XX of the Illinois withholding income tax credit overpayment balance previously determined to be available to Taxpayer, on January 31, 2009, which was the date Taxpayer's form IL-941 for the fourth quarter of 2008 was due. TMSJ Ex. F, p. 6; 35 ILCS 5/704A(b). Since there is no dispute that the Department treated all but $XX,XXX.XX of the credit to have been paid to the Department on January 31, 2009, using this option, January 31, 2009 counts as zero, and February 1, 2009 started the statutory period running. *Compare id. with* 35 ILCS 5/911(a)(1). Using the second option, the last date for Taxpayer to file a claim for refund was February 1, 2010. TMSJ Ex. F, p. 6; 35 ILCS 5/911(a)(1).

Since the last date using IITA § 911(a)(1)'s first option is later than the last date using the second option, the last date for Taxpayer timely to file a claim for refund of any withholding income tax overpayment that was attributable to 2008 was April 15, 2012. 35 ILCS 5/911(a)(1); 5 ILCS 70/1.11. Related to that determination of law, this record shows that, as a matter of undisputed fact, the Department deactivated the $XX,XXX.XX credit balance from Taxpayer's account on April 16, 2012. TMSJ Ex. F, p. 6.

After determining the latest date available to Taxpayer to file a required amended return form/claim for refund for an Illinois withholding income tax overpayment that is attributable to 2008, it is easy to see that Taxpayer's form IL-941-X, which is dated April 30, 2013, was *not* filed within the statutory period set by IITA § 911(a)(1). Since Taxpayer's form IL-941-X was filed with the Department after April 15, 2012 (TMSJ Ex. A, p. 2; DMSJ Ex. J), as a matter of law, Taxpayer is barred from recovering any refund of the overpayment credit that was allocable to calendar year 2008. 35 ILCS 5/911(a)(1)-(2). Based on the same undisputed material facts, the Department is entitled to judgment as a matter of law, since the plain text of IITA § 911(a)(2) provides that "No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period." 35 ILCS 5/911(a)(2); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519.

Was Taxpayer's 9/11/09 Letter A Refund Claim, As Required By IITA § 909(d)

Throughout the period at issue, § 909(d) of the IITA provided, in pertinent part:

> Sec. 909. Credits and Refunds.
>
> ***
>
> (d) Refund claim. Every claim for refund shall be filed with the Department in writing **in such form as the Department may by regulations prescribe**, and shall state the specific grounds upon which it is founded.
>
> ***

35 ILCS 5/909(d) (emphasis added). The General Assembly has defined the word "regulations[,]" when used in the IITA, to include "forms prescribed by the Department." 35 ILCS 5/1501(a)(19).

The Illinois General Assembly uses the word "shall" in § 909(d), as it does in § 911(a). Ordinarily, the word shall is understood as a statutory mandate. Andrews v. Foxworthy, 71 Ill. 2d 13, 21, 373 N.E.2d 1332, 1335 (1978) ("The use of the words

"shall" or "must" is generally regarded as mandatory. However, the term "shall" does not have a fixed or inflexible meaning. It can, in fact, be construed as meaning "may," depending on the legislative intent."). The Dow decision, I respectfully submit, may reasonably be read as giving the word shall, when used in IITA §§ 909(d) and 911(a), a mandatory effect. Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519 ("When section 911 is read in conjunction with sections 904 and 909 it indicates, as determined by the trial judge, that … there is a limit on the taxpayer's ability to file for one."). The plain text of § 909(d) requires that "every claim for refund shall be filed with the Department in writing in such form as the Department may by regulations prescribe …." 35 ILCS 5/909(d).

Further, the text of § 909(d) must be read together with the text of § 911(a). Kraft v. Edgar, 138 Ill. 2d at 189, 561 N.E.2d at 661 ("in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered."); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519 (reading the text of IITA §§ 904, 909 and 911 together). The text of § 911(a)(1) begins with the phrase "[a] claim for refund shall be filed not later than …." 35 ILCS 5/911(a). Generally, when "a" is used as an indefinite article, it means one, or any. The American Heritage Dictionary 1 (3d office ed. 1994). The definition section of the IITA provides that "[w]ords importing the singular include and apply to several persons, parties or things …." 35 ILCS 5/1501(b)(1)(A). Thus, when the General Assembly used the phrase "a claim for refund" within § 911(a)(1), it meant *any* claim for refund. *Compare* 35 ILCS 5/911(a)(1) *with* 35 ILCS 5/909(d). Again, by reading the text of the related statutory provisions together, the law plainly requires that any and every claim for refund has to be timely filed with the Department "in writing in

such form as the Department may by regulations prescribe." 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1).

Additionally, § 909(d)'s requirement that "every claim for refund shall be filed with the Department in writing in such form as the Department may by regulations prescribe," also dovetails with the Illinois General Assembly's identical mandate to taxpayers having a duty to file *original* Illinois withholding income tax returns. *Compare* 35 ILCS 5/909(d) *with* 35 ILCS 5/704(b) ("***Every such employer **shall** for each calendar quarter, … **make a return** with respect to such taxes **in such form and manner as the Department may by regulations prescribe** ...) (emphasis added); 35 ILCS 5/704A(b) ("Every employer **shall, in the form and manner required by the Department, make returns** with respect to taxes withheld or required to be withheld under this Article 7 for each quarter beginning on or after January 1, 2008 ….") (emphasis added). As the virtually identical statutory text reflects, the Illinois General Assembly intended to require taxpayers to use return forms prescribed by the Department when filing original Illinois tax returns 35 ILCS 5/704(b); 35 ILCS 5/704A(b)), and other prescribed forms when filing amended Illinois tax returns. 35 ILCS 5/909(d); 86 Ill. Admin. Code § 100.7300(b)(2); *accord* Holding Co. v. Department of Revenue, 214 Ill. App. 3d 390, 392, 574 N.E.2d 11, 12 (1st Dist. 1991) ("Form IL-1120-X, … is the form prescribed for amended returns, …"); *id*. at 393, 574 N.E.2d at 13 ("According to agency regulations, the form prescribed for filing an original return is the IL-1120 form.").

Pursuant to the General Assembly's express authority, the Department has promulgated forms to be used by persons having the statutory duties to file Illinois withholding income tax returns, and to pay over to the Department such withheld income

taxes. 35 ILCS 5/1501(a)(19); 86 Ill. Admin. Code §§ 100.7000 - 100.7380. Original Illinois withholding income tax return forms are forms IL-941 (86 Ill. Admin. Code § 100.7300(a)(2)), and amended Illinois withholding income tax return forms are forms IL-941-X. TMSJ Exs. A (p. 2), G (p. 3); DMSJ Exs. A, J; http://tax.illinois.gov/TaxForms/Withholding.htm (copies of the Department's current and prior years' Illinois original and amended Illinois withholding income tax return forms, are viewable at the Department's web site)[2] (last viewed on March 28, 2017).

Return forms prescribed by the Department for use by taxpayer are required to be signed under penalties of perjury. 35 ILCS 5/503; *see* TMSJ Exs. A (p. 2), G (p. 3); DMSJ Exs. A, J. In this case, the 9/11/09 Letter was signed, but it was not signed under penalties of perjury. TMSJ Ex. H. Nor did it provide all the information required to be included on a completed and signed form IL-941-X. On this point, one has only to compare the completed and signed forms IL-941-X attached to the parties' cross-motions (TMSJ Exs. A (p. 2), G (p. 3); DMSJ Exs. A, J) with the 9/11/09 Letter. *See also* Holding Co., 214 Ill. App. 3d at 396, 574 N.E.2d at 14 ("We thus conclude that the IL-1120-X did not constitute a return. It was not an original return because the form required for an original return was the IL-1120 form, and it was not an amended return because no original return had been filed to amend. … Finally, the form did not contain all of the required information [on] … a return ….").

In addition to the facts this record shows are not in dispute, I also take notice that the Illinois General Assembly's statutory mandate, that taxpayers use prescribed Illinois

[2] The earliest copies of a form IL-941 and accompanying form instructions, which are viewable on the Department's web site, are those the Department revised in December 2009. http://tax.illinois.gov/TaxForms/Withholding/PriorYears/IL-941.pdf. The earliest copies of a form IL-941-X and accompanying form instructions are those the Department revised in December 2010. http://tax.illinois.gov/TaxForms/Withholding/PriorYears/IL-941-X.pdf.

income tax return forms, is not some obscure or little used procedural requirement which is kept hidden from taxpayers or tax practitioners. The plain text of the IITA and the Department's regulations, including forms, notify all taxpayers of what return forms are prescribed for certain uses, and when they must be filed. 35 ILCS 5/502; 35 ILCS 5/704(b); 35 ILCS 5/704A(b); 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1); 35 ILCS 5/1501(a)(19); 86 Ill. Admin. Code § 100.7300(b)(2). Detailed instructions for such prescribed return forms are also available to the public. *See* http://tax.illinois.gov/TaxForms/ (last viewed on March 30, 2017). Moreover, it is the information required by such prescribed tax forms which both the legislature and the Department have determined is necessary for the Department to administer and enforce the different statutory provisions affecting taxpayers' rights and duties (35 ILCS 5/502; 35 ILCS 5/704(b); 35 ILCS 5/704A(b); 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1); 86 Ill. Admin. Code § 100.7300(b)(2)), and to exercise the Department's own statutory powers and duties. 20 ILCS 2505/2505-1 to 2505-795 (Department of Revenue Law).

To apply the plain text of § 909(d) in the manner Taxpayer contends it must — as a matter of law — be applied, I would have to conclude that the Illinois General Assembly really intended § 909(d) to provide that: "[e]very claim for refund shall be filed with the Department in writing ***or*** in such form as the Department may by regulations prescribe …." *See* 35 ILCS 5/909(d). But the General Assembly did not give taxpayers the option of choosing which form of writing each would prefer to use when filing required tax returns with the Department. *Id*. Rather, and throughout the IITA, it plainly stated that taxpayers "shall" use the forms prescribed by the Department. *E.g.* 35 ILCS 5/502; 35 ILCS 5/704A(b); 35 ILCS 5/909(d).

The Illinois General Assembly expressly requires taxpayers to use prescribed forms when timely filing both original and amended Illinois tax returns, including amended tax returns which request a refund of tax previously overpaid in error. 35 ILCS 5/502; 35 ILCS 5/704A(b); 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1). "Legislative intent is best evidenced by the language used by the legislature, and where an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express." Kraft v. Edgar, 138 Ill. 2d at 89, 561 N.E.2d at 661. In sum, Taxpayer's MSJ essentially demands that, in this case, and as a matter of law, the Department should ignore the Illinois legislature's plainly expressed mandate that taxpayers use prescribed tax return forms to report information required by the IITA. *See* 35 ILCS 5/502; 35 ILCS 5/704(b); 35 ILCS 5/704A(b); 35 ILCS 5/909(d); 86 Ill. Admin. Code § 100.7300(b)(2).

Since the undisputed facts show that the 9/11/09 Letter was not in the form prescribed by the Department for "every claim for refund …" (35 ILCS 5/909(d)), that 9/11/09 Letter was not — as a matter of law — a timely filed form IL-941-X. TMSJ Ex. H; 35 ILCS 5/909(d); 35 ILCS 911(a)(1)-(2). The form IL-941-X that Taxpayer later caused to be completed, signed and filed with the Department to claim a refund of the overpayment credit (TMSJ Ex. A, p. 2; DMSJ Ex. J) was, as the Department determined, filed beyond the period set by IITA § 911(a)(1). TMSJ Ex. B; DMSJ Ex. K; 35 ILCS 5/911(a)(1). Since the undisputed facts show that Taxpayer failed timely to file a claim for refund in the form prescribed by Department regulations, it is not entitled to judgment, as a matter of law. 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1)-(2). Based on the same undisputed facts, the Department is entitled to judgment as a matter of law. 35

ILCS 5/909(d); 35 ILCS 911(a)(1)-(2); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519.

Is the Statutory Period Set by IITA § 911(a)(1) Affected By § 2-616 of the Illinois Code of Civil Procedure, or By the Federal Procedural Rule Referred to in U.S. v. Kales, 314 U.S. 186 (1941)

During the period at issue, and as the Dow court noted, § 911 had only one express way for a taxpayer to extend the period set by § 911(a)(1) for filing a claim for refund of Illinois income taxes overpaid in error, which was with the express written agreement with the Department. Dow Chemical Co., 224 Ill. App. 3d at 266-67, 586 N.E.2d at 519 (quoting § 911(a)(1)-(2), (c)); *but see* 35 ILCS 5/911(i)(2014).[3] There is no dispute that the Department and Taxpayer did not agree, in writing, to such an extension of the date set by IITA § 911(a)(1) in this case.

Notwithstanding the absence of any expression of legislative intent to apply the procedures set forth in § 2–616 of the Code of Civil Procedure (735 ILCS 5/2–616(b)) to the period set by IITA § 911(a)(1), Taxpayer asserts that Code § 2-616 should apply in this case. TMSJ § III.F. It cites, as authority for that assertion, American Airlines, Inc. v. Department of Revenue, 402 Ill. App. 3d 579, 931 N.E.2d 666 (1st Dist. 2009). But the American Airlines court did not hold that Code § 2-616 extended the time for a taxpayer to file amended returns to claim a tax authorized by the Illinois' Use Tax Act (UTA). To the contrary, it held:

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> Consequently, for all of the aforementioned reasons, we find that the relation-back doctrine does not apply to refund claim filed under

[3] Effective 2014, the Illinois General Assembly amended § 911 to add paragraph (i), which suspended § 911(a)(1)'s statute of limitations for individuals who are unable to manage theirs financial affairs due to disability. 35 ILCS 5/911(i) (2014); P.A. 97–507, § 5 (eff. Aug. 15, 2014). But Taxpayer here is not an individual, and this 2014 extension, like the one authorized by § 911(c), does not apply to this matter.

> the UTA and that the only way American could have extended the statute of limitations was to follow the procedures outlined in sections 4 and 6 of the ROTA, which was undisputedly not done here.
>
> ***

American Airlines, Inc., 402 Ill. App. 3d at 606, 931 N.E.2d at 689.

The American Airlines case did not involve the same tax Act or statutory provisions that are at issue here. The Act at issue in American Airlines was the Illinois Use Tax Act (UTA) and the related complementary Retailers' Occupation Tax Act (ROTA), and the applicable period of limitations was UTA § 21. *Id*. But in both cases, the statutory filing deadline at issue is one set forth within the tax Act for taxpayers to file claims for refund of the applicable state tax overpaid in error. *Compare* 35 ILCS 5/911 *with* 35 ILCS 105/21. In both cases, the limitations period is clearly stated, and each statute included, during the period at issue, virtually the same, single, method by which the limitations period could be extended. 35 ILCS 5/911(a)(1), (c); 35 ILCS 105/21. Both the UTA (35 ILCS 105/12b) and the IITA (35 ILCS 5/1408) contain an identical provision adopting the Illinois Administrative Procedures Act to "apply to all administrative rules and procedures of the Department of Revenue under [each] Act …." American Airlines, Inc., 402 Ill. App. 3d at 601, 931 N.E.2d at 684-85.

And the facts in American Airlines are not like the undisputed facts reflected by the record in this case. In American Airlines, the taxpayer had completed, signed and filed two separate amended returns, in the form prescribed by the Department, to request a refund of taxes overpaid in error. The Department determined that the first one was timely, and that the second one was not. The appellate court upheld the Department's determination that the second return was not timely. Here, Taxpayer characterizes COMPANY B's form IL-941-X, filed in 2007, as a timely filed return, and that the

9/11/09 Letter "was merely a response to the Department's correspondence regarding the excess left over after the application of the 2007 overpayment with respect to which a timely refund claim had been made." TMSJ § III.C.

Again, though, it is difficult to pin Taxpayer down on what "timely refund claim" it is alluding to. TMSJ § III.C. Even if the relation back doctrine applied to claims for refund filed under the IITA, the undisputed facts show that the only two forms IL-941-X Taxpayer alleges are material to its motion are COMPANY B's form IL-941-X, filed in 2007, and the form IL-941-X that Taxpayer caused to have filed in 2013. TMSJ Exs. A (p. 2), G (p. 3); DMSJ Exs. A, J; Hearing Recording. But COMPANY B's form IL-941-X was not Taxpayer's return, and it did not ask for any refund. TMSJ Ex. G, p. 3; DMSJ Ex. A. Taxpayer's 4/30/13 form IL-941-X, moreover, was not filed within the period set by IITA § 911(a)(1). TMSJ Ex. A, p. p. 2; DMSJ Ex. J; 35 ILCS 5/911(a)(1). Finally, the 9/11/09 Letter was not a claim for refund in the form prescribed by the Department. TMSJ Ex. H; 35 ILCS 5/909(d).

Taxpayer's mere assertion that, in this case, Illinois Code § 2-616 *should* be read into the IITA, does not persuade me that — as a matter of law — Illinois Code § 2-616 *must* be read into the plain text of § IITA 911, so as to extend the period set by IITA § 911(a)(1) for Taxpayer to file an amended return form to claim a refund of Illinois income tax. The period set by IITA § 911(a)(1) is plain and clear, and, during the period at issue, the Illinois General Assembly authorized only a single way for that period to be extended. As a matter of law, the Illinois General Assembly did not adopt the Code's relation back doctrine to extend the time set by IITA § 911(a)(1). 35 ILCS 5/911; Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519. Taxpayer has not shown that it

is entitled to judgment, as a matter of law, that its 4/30/13 form IL-941-X relates back to some timely filed claim for refund that it filed with the Department, in the form prescribed by Department regulations, to claim a refund of the overpayment credit that was attributable to 2008. The plain text of IITA § 911(a)(2) supports the Department's claim for judgment as a matter of law.

Finally, Taxpayer claims that the federal procedural rule addressed in U.S. v. Kales, should be allowed to apply, in this case, to treat its 4/30/13 form IL-941-X as a formal claim which perfected any errors made on prior informal claims, which Taxpayer general describes as the 9/11/09 Letter, or any other correspondence it had with the Department regarding the overpayment credit balance. TMSJ § III.F; U.S. v. Kales, 314 U.S. 186, 192, 62 S.Ct. 214, 217, 86 L.Ed. 132 (1941) ("the Circuit Court of Appeals … held that the letter of March 23, 1925, was a timely informal claim for refund which had been perfected by the formal amended claim filed in September, 1928 …."). Here, Taxpayer implicitly argues that IITA §§ 909(d) and 911(a)(1) must, as a matter of law, be construed to incorporate what has become known as the federal informal claim doctrine (PALA, Inc. Employees Profit Sharing Plan and Trust Agreement, 234 F.3d 873, 877 (5th Cir. 2000); BCS Financial Corp. v. U.S., 118 F.3d 522, 523-24 (7th Cir. 1997)), and that the Department must treat the 9/11/09 Letter, or other letters Taxpayer caused to have written to the Department regarding the overpayment credit, as timely filed informal claims which were perfected by Taxpayer's 4/30/13 form IL-941-X.

There can be no dispute that the federal informal claim doctrine is a recognized part of federal income tax law. *See e.g.* BCS Financial Corp., 118 F.3d at 523-24 (and cases cited therein). But this matter involves Taxpayer's claimed right to a refund of

Illinois income tax overpaid in error. The only reason Taxpayer is obliged to withhold Illinois income taxes from its employees' wages, file Illinois withholding income tax return forms, and pay over such withheld taxes to the Department, is because of the IITA. 35 ILCS 5/704(b); 35 ILCS 5/704A(b); Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (1st Dist. 1978) ("The obligation of a citizen to pay taxes is a purely statutory creation and, conversely, the right to a refund or credit can arise only from the acts of the legislature."). Similarly, the only reason Taxpayer has a right to a refund of Illinois withholding income tax overpaid in error is because of the IITA. 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1); Jones, 60 Ill. App. 3d at 889, 377 N.E.2d at 204.

I respectfully submit that the decision in U.S. v. Kales was not intended to apply to a taxpayer's statutory right to claim a refund of Illinois income taxes, under the IITA. *Compare* U.S. v. Kales, *passim*, *with* 35 ILCS 5/909; 35 ILCS 5/911. Taxpayer, moreover, fails to cite any case law in which a court has held that the federal informal claim doctrine is, or must be treated as having been, incorporated into the IITA. TMSJ, *passim*. Taxpayer's right to a refund in this case depends on Illinois tax law, and not on federal tax law or federal civil procedural rules. 35 ILCS 5/909; 35 ILCS 5/911.

The same Illinois tax act which grants Taxpayer the statutory right to a refund also provides a plainly stated filing deadline that is applicable to "[e]very claim for refund …." 35 ILCS 5/909(d); 35 ILCS 5/911(a); Dow Chemical Co., 224 Ill. App. 3d at 267, 586 N.E.2d at 519. That taxpayers may have a judicially created right, under federal income tax law, to use an informal claim procedure to demand a refund of federal income tax (BCS Financial Corp. v. U.S., 118 F.3d at 524 (referring to "the judge-made informal-claim doctrine")), does not mean that taxpayers enjoy the right to use a similar procedure

to obtain a refund of *Illinois* income tax. 35 ILCS 5/909(d); 35 ILCS 5/911(a)(1)-(2); *see* Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 410 N.E.2d 828, 43 Ill. Dec. 695 (1980) ("*** there is no provision in the [IITA] which specifically adopts all federally allowed deductions.").

Nothing within the text of the IITA incorporates the federal informal claim doctrine Taxpayer alleges must be followed in this case. It would be improper to read into IITA §§ 909(d) and 911(a)(1) exceptions that are not set forth within those provisions' text. Kraft v. Edgar, 138 Ill. 2d at 189, 561 N.E.2d at 661. Since the Illinois General Assembly did not incorporate the informal claim doctrine into Illinois' statutory procedures for timely filing any and every claim for refund of Illinois income taxes (35 ILCS 5/909(d); 35 ILCS 5/911(a)(1)(2)), Taxpayer is not entitled to judgment, as a matter of law, that that doctrine should or must apply in this case.

Conclusion

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

Date: April 3, 2017

John E. White
Administrative Law Judge