

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

CAPITAL ONE FINANCIAL CORPORATION,)	
)	
Petitioner,)	
)	
)	
v.)	16 TT 49
)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE,)	
)	
Respondent.)	

ORDER ON MOTION TO DISMISS

The Petitioner filed a ten-count amended petition challenging the Department’s Notice of Claim Denial, which denied it a corporate income tax refund for the tax year ending December 31, 2008. The Department filed a motion to dismiss Counts I, II and V of the amended petition, under section 2-619(a)(1) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(1), for lack of subject matter jurisdiction. The motion is granted in part and denied in part.

Background

The Petitioner, a multistate financial services holding company, filed an Illinois combined unitary corporate income tax return for the 2008 tax year. The Department audited the Petitioner for that year, and on August 11, 2014 issued a Notice of Deficiency. The Petitioner did not contest the Notice but paid it on October 1, 2014. On October 10, 2014, the Notice became a final assessment under section 908(d) of the Illinois Income Tax Act (“IITA”), 35 ILCS 5/908(d). (“[T]he Department’s notice of deficiency shall become a final assessment at the end of the 60th day after the date of issuance of the notice . . .”). The Petitioner timely filed an amended return seeking a refund of the amount assessed under section 909 of

the IITA, 35 ILCS 5/909. The Department denied the refund, and the Petitioner brought this action to contest that denial.

The Petitioner's amended petition attacked the Department's assessment on substantive grounds—alleging that the assessment ran afoul of U.S. constitutional limits, and misapplied federal and state law—and, in Counts I, II and V, on procedural grounds. In Count I, the Petitioner alleged that the Notice was “without effect” because it was not timely issued within the applicable limitations period. Pet. ¶ 49. In Counts II and V, Petitioner alleged that the Notice violated section 904(c) of the IITA, 35 ILCS 5/904(c), by not providing a sufficient reason for the tax adjustments. *Id.* at ¶¶ 54-57, 98-99. Count II further alleged that the section 904(c) violation invalidated the Notice, as it applied to the Department's inclusion of certain dividend income in Petitioner's Illinois combined taxable income. *Id.* at ¶¶ 55-59. Count V alleged that by violating section 904(c), the Department did not establish its prima facie case as to the inclusion of certain receipts in the Petitioner's Illinois apportionment factor's numerator. *Id.* at ¶¶ 98-103.

Finally, the Petitioner alleged that in failing to provide an adequate explanation of the reasons for the adjustments, the Department violated section 4 of the Taxpayers' Bill of Rights Act (“TABOR”), 20 ILCS 2520/4(b). As relief for the TABOR violation, the Petitioner sought damages and attorney fees allowed under sections 5 and 7 of that Act, 20 ILCS 2520/5, 2520/7. *Id.* at p. 8, 13.

Analysis

The Department's section 2-619(a)(1) motion admits “the legal sufficiency” of the amended petition but challenges the Tribunal jurisdiction to hear Counts I, II and V. *See Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 14. The extent of the Tribunal's subject matter jurisdiction is governed by the Tribunal Act and must be specifically authorized by its provisions. *Ferris, Thompson & Zweig, Ltd.*, 2015 IL 117443, ¶ 16.

The question of whether the Tribunal has the authority to hear Counts I, II and V is thus a matter of statutory construction, the basic rules of which are well-

known. The purpose of statutory construction is to determine the legislature's intent, as manifested by the statute's plain and ordinary statutory language. *Id.* at ¶ 17. Statutory plain language, however, must be read in context and words should not be construed in isolation. *Id.*

Section 1-45(a) of the Illinois Independent Tribunal Act ("Tribunal Act"), 35 ILCS 1010/1-45(a), authorizes the Tribunal to exercise "original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency, Notice of Tax Liability, Notice of Claim Denial, or Notice of Penalty Liability," under a specific set of taxing statutes, including the IITA, where the amount in question exceeds \$15,000. Section 1-45(e)(4) also expressly states that the Tribunal "shall not have jurisdiction to review" . . . "any action or determination of the Department regarding tax liabilities that have become finalized by law, including but not limited to the issuance of liens, levies, and revocations, suspensions, or denials of licenses or certificates of registration or any other collection activities." *Id.* at 1-45(e)(4).

The Department relies on section 1-45(e)(4)'s language to argue that the Tribunal lacks jurisdiction to review the Notice's timeliness or the adequacy of its reasons for the tax adjustment reflected on the Notice. According to the Department, once the Notice became final, the Tribunal had no authority to review "the correctness of that Notice, including its *prima facie* correctness, or any other determinations of the Department encompassed by the Notice." Dep't Mot. to Dismiss, at ¶ 21.

The initial flaw in the Department's argument is that the present case is not a protest of the Notice brought under section 908 of the IITA, 35 ILCS 5/908. Rather, the Petitioner paid the tax assessed, filed an amended return, and sought a refund under section 909 of the IITA, 35 ILCS 5/909. Paying a deficiency and seeking a refund is a recognized alternative procedure for challenging a Department tax assessment. *See Shell Oil Co. v. Dep't of Revenue*, 95 Ill. 2d 541, 545-46 (1983).

There is no language in section 909 that limits the reasons for allowing a refund. Section 909(d) simply states, "[e]very claim for refund shall be filed with the Department in writing in such form as the Department may by regulations

prescribe, and shall state the specific grounds upon which it is founded.” 35 ILCS 5/909(d).

Moreover, if the Tribunal cannot review “any other determinations of the Department encompassed by the Notice” once it becomes final, then the Department also cannot review the Petitioner’s substantive objections to the assessment either. But that would make the Petitioner’s section 909 refund proceeding a nullity, and the Department is not questioning the Tribunal’s authority to address the substantive constitutional and statutory objections to the assessment in the refund proceeding. It is only contesting the Tribunal’s authority to address the procedural challenge to the Notice’s timeliness and sufficiency.

The Department’s argument can only succeed then if there is a material distinction between a substantive challenge to an assessment and a procedural challenge. It offers no authority to support such a distinction nor can one be found in the language of section 1-45(e)(4). The types of tax liabilities that have become “finalized by law,” which are outside the Tribunal’s purview— “the issuance of liens, levies, and revocations, suspensions, or denials of licenses or certificates of registration or any other collection activities”—arise from the Department’s post-adjudication enforcement of the tax laws. They are not akin to the Petitioner’s claim that the Notice was defective when issued and section 1-45(e)(4) cannot be read to limit the Tribunal’s authority to adjudicate procedural challenges to the issuance of the Notice within the context of the Petitioner’s refund claim. *See Ferris, Thompson & Zweig, Ltd.*, 2015 IL 117443, ¶¶ 23-24; *see also Duffy v Ill. Dep’t of Human Rights*, 354 Ill. App. 3d 236, 239 (4th Dist. 2004) (applying canon of *ejusdem generis* to question of agency jurisdiction).

In considering the Petitioner’s claim for relief under the TABOR, however, section 1-45’s language leads to the opposite result. There is no mention of the TABOR in the list of tax notices that the Tribunal is authorized to review under section 1-45. This omission is pertinent because the TABOR is not a taxing statute; it provides a remedy for taxpayers damaged by the Department’s tax collection activity. Although the Tribunal Act should be construed liberally, *see* 35 ILCS

1010/1-5(e), in the absence of specific language, section 1-45 cannot be read to encompass the Tribunal's authority to adjudicate a remedial claim like a TABOR action. *See Ferris, Thompson & Zweig, Ltd.*, 2015 IL 117443, ¶ 23-24.

Moreover, while the TABOR allows the recovery of attorney's fees as costs, *see* 20 ILCS 2520/5, 2520/7, section 1-55(d) of the Tribunal Act expressly prohibits the Tribunal from "assign[ing] any costs or attorney's fees incurred by one party against another party," 35 ILCS 5/1-55(d). The Tribunal Act's blanket prohibition on the award of attorney fees is not qualified or undermined by the second sentence of section 1-55(d), which sets out procedures for processing fee claims under only section 10-55 of the Administrative Procedure Act. *See id.* The Petitioner argues that the legislative silence on fee awards under the TABOR signals intent to allow them. *See* Pet's Resp. at 7-8. It does not; it implies the opposite. *See, e.g., Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415, 423 (1960) (stating "the silence of our refund statute on the question of interest discloses a legislative intention to deny it"). Thus, the Tribunal cannot provide the full relief authorized by the TABOR.

Finally, the Petitioner contends that the Tribunal should take jurisdiction of its TABOR claim in the interest of efficiency and suggests that its due process rights may be infringed if it has no remedy here. *See* Pet. Resp. at 8-9. The Department, by contrast, argues that TABOR actions must be brought in a "court," that the Tribunal is not a "court" within the meaning of the TABOR, and it suggests that the proper forum to hear Petitioner's TABOR claims is the Illinois Court of Claims. Dep't Mot. to Dismiss at 10. None of these arguments need or should be decided by the Tribunal. It must be noted, however, that TABOR claims have been heard in circuit courts, *see, e.g., McClean v. Dep't of Revenue*, 184 Ill. 2d 341, 365-66 (1998) (reviewing and reversing circuit court judgment of TABOR attorney fees imposed on Department), and the Petitioner cites no authority to suggest that such claims are jeopardized if they are heard there, rather than here.

In sum, because section 1-45 does not specifically authorize the Tribunal to hear TABOR actions and because the Tribunal is barred from awarding TABOR

relief, the Tribunal lacks subject matter jurisdiction over Petitioner's TABOR claims. Petitioner has not shown that any potential TABOR action is prejudiced by disallowing them in the Tribunal, and its claims for TABOR relief must be dismissed.

Conclusion

The Department's motion to dismiss Count I is DENIED. The motion to dismiss Counts II and V is DENIED to the extent it challenges the Tribunal's jurisdiction to review whether the Notice of Deficiency complied with section 904(c) of the IITA but GRANTED as to the Petitioner's request for relief under the Taxpayers' Bill of Rights Act.

s/ Brian Barov
BRIAN F. BAROV
Administrative Law Judge

Date: August 1, 2016