ILLINOIS INDEPENDENT TAX TRIBUNAL

CAPITAL ONE FINANCIAL CORPORATION	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 16-TT-49**
	)	
THE ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

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PETITIONER'S RESPONSE TO DEPARTMENT'S § 2-619 MOTION TO DISMISS COUNTS I, II, AND V OF FIRST AMENDED PETITION

Petitioner Capital One Financial Corporation ("Capital One" or "Petitioner"), through undersigned counsel, respectfully submits Petitioner's Response Memorandum in Opposition to Respondent Illinois Department of Revenue's Motion to Dismiss, and in support, states as follows:

INTRODUCTION

The Illinois Department of Revenue's ("Department" or "Respondent") Motion to Dismiss Counts I, II, and V of Petitioner's First Amended Petition must be denied because the Illinois Independent Tax Tribunal Act, 35 LCS 1010/1-1 et seq., (the "Tribunal Act") imbues the Illinois Independent Tax Tribunal ("Tribunal") with the same jurisdiction to hear Illinois tax controversies regarding notices of claim denial or deficiency notices as the Illinois circuit courts. With respect to the Notice of Deficiency issued on August 11, 2014, the Tribunal maintains jurisdiction over whether the Notice was ever valid, and therefore, whether it ever could have gone final. This Tribunal also has jurisdiction over the Notice of Claim Denial that was issued on January 13, 2016, which suffered from the same failure to provide a basis for the adjustments

as the original Notice of Deficiency. Hence, to the extent Petitioner is barred from challenging the Notice of Deficiency, this case should not be dismissed, as the appropriate remedy would be to amend the Petition to refer to the Notice of Claim denial rather than the Notice of Deficiency.

This Tribunal also has the jurisdiction to hear cases that claim that the Department has violated at taxpayer's rights under the Taxpayer Bill of Rights. 20 ILCS 2520/1 et seq. Nothing in the Tribunal Act or the Taxpayer Bill of Rights deprives the Tribunal of the jurisdiction to hear Taxpayer Bill of Rights claims. However, if the Department's argument were taken to its logical conclusion, a taxpayer would never be able to allege that its rights under the Taxpayer Bill of Rights were violated in the context of a denied refund claim, because such cases must be appealed to the Tribunal. Because the General Assembly must be explicitly clear when depriving a party of a vested procedural right, Petitioner should not be deprived of its ability to argue that its rights under the Taxpayer Bill of Rights were violated based on the Department's attenuated statutory interpretation drawing a distinction between "court and suit" and "tribunal and petition." As such, the Department's Motion to Dismiss Counts I, II, and V must be denied.

BACKGROUND

On August 11, 2014, the Department issued Capital One a Notice of Deficiency in the amount of $12,702,030.96 for the Tax Year Ending December 2008 ("Year at Issue"). A copy of the Notice is attached to Petitioner's First Amended Petition as Exhibit B. In response to this Notice, Petitioner submitted a payment, which it also marked as being made under protest. On or about July 22, 2015, Petitioner submitted its IL 1120-X for the Year at Issue, requesting a refund for all amounts paid pursuant to the Notice of Deficiency. On January 13, 2016, the Department issued to Petitioner a Notice of Claim Denial for the entire amount claimed for

refund. A copy of the Notice of Claim Denial is attached to Petitioner's First Amended Petition as Exhibit A. The Notice of Claim Denial, while using slightly different language, applied the same rationale for the adjustments to the refund claim as the initial Notice of Deficiency used for the reasons for the deficiency.

Petitioner filed its original Petition with the Tribunal on March 14, 2016, within sixty days of receiving the Notice of Claim Denial, and brought this case pursuant to Section 1-45 of the Tribunal Act. 35 ILCS 1010/1-45. Prior to the Department's filing of its Answer, Petitioner filed a Motion for Leave to File First Amended Petition on April 28, 2016, which was granted. On June 6, 2016, the Department filed the instant Motion to Dismiss with respect to Counts I, II, and V of Petitioner's First Amended Petition.

STANDARD OF REVIEW

"A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). When reviewing a 2-619 motion, "a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). "Moreover, it is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts can be proved under the pleadings which would entitle plaintiffs to relief." *Id.* (citing *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85 (2003)). For purposes of a Section 2-619 motion to dismiss, the defendant bears the initial burden to prove the affirmative matter defeating the plaintiff's claim. *Pruitt v. Pruitt*, IL App (1st) 130032, p. 14 (1st dist. 2013).

ANALYSIS

Respondent's Motion to Dismiss is premised on the argument that the Tribunal lacks subject matter jurisdiction over the Notice of Deficiency that was issued on August 11, 2014 because Petitioner's action was timely filed within sixty days of the issuance of the Notice of Claim Denial. Therefore, according to the Department, the Notice of Deficiency has gone final and cannot be challenged. Respondent also contends that Counts II, V, and VIII[1] should be dismissed because the Tribunal is prohibited from awarding attorneys' fees and, additionally, the Tribunal lacks subject matter jurisdiction to hear suits filed under the Taxpayer Bill of Rights. For the reasons stated below, Respondent fails to satisfy its burden to have any of the Counts at issue dismissed.

A. The Tribunal has subject matter jurisdiction over the validity of the Notice of Deficiency and the procedural deficiencies with the Department's issuance of the Notice of Deficiency.

Admittedly, Petitioner's case is before this Tribunal based on its appeal of the Notice of Claim Denial. See Petitioner's First Amended Petition, paragraphs 6-9. However, the Notice of Claim Denial incorporates the initial Notice of Deficiency's explanations for the adjustments. Thus, with respect to any of Petitioner's arguments that the explanation for the Notice of Deficiency was insufficient for failure to explain the adjustments to Petitioner's taxable income (see Counts II, V), these arguments would apply equally to the Notice of Claim Denial. Hence, while, for the reasons stated below, this Tribunal does have jurisdiction over the inadequacy of the Notice of Deficiency, even if this Tribunal were to determine that it does not have subject matter jurisdiction over the Notice of Deficiency, the correct remedy would be to require

[1] Although Subsections B and C of Respondent's Motion to Dismiss reference Count VIII, this reference would appear to be in error. Petitioner's Count VIII, which relates to whether the United Kingdom Trust receipts should be excluded from the numerator of Petitioner's Illinois apportionment factor, does not make reference to the Notice of Deficiency or the Taxpayer Bill of Rights.

Petitioner to amend the First Amended Petition to refer to the Notice of Claim Denial in Counts II and V rather than to simply dismiss the Counts. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994); *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722 (Ill App. 1st. 2009).

Of course, the timeliness of the issuance of the Notice of Deficiency cannot be resolved merely by amending the Petition to refer to the Notice of Claim Denial. However, the Illinois Income Tax Act provides that "[a] notice of deficiency shall be issued not later than 3 years after the date the return was filed..." 35 ILCS 5/905(a)(2). It is true that the Income Tax Act also provides that "[u]pon the expiration of 60 days after the date on which it was issued... a notice of deficiency shall constitute an assessment of the amount of tax and penalties specified therein, except only for such amounts as to which the taxpayer shall have filed a protest with the Department, as provided in Section 908." 35 ILCS 5/904(d). However, the Department attempts to give priority to the provision in Section 904(d), there is no indication anywhere in the Illinois Income Tax Act that Section 904(d) should be given priority over Section 905(a)(2). Indeed, the only way to read these two provisions consistently is to require that, under Section 904(d), a notice of deficiency that is issued timely under Section 905(a)(2) shall constitute an assessment of tax after 60 days of the date on which it was issued. *See Madison Two Assocs. v.* Pappas, 227 Ill. 2d 474, 493 (noting that one of the "most basic precepts of statutory interpretation [is that] whenever possible courts must construe statutes so that no part is rendered a nullity."). The Department's reading would instead allow a notice of deficiency to become final even if it was issued later than 3 years after the date the return was filed despite the mandatory "shall" in Section 905(a)(2). *See IP Plaza v. Bean*, 963 N.E. 2d 252, 260 (Ill. App. 4th 2011) ("When used in a statute, the word 'shall' is generally interpreted to mean something that is mandatory."). In other words, because the Department's Notice of Deficiency was issued beyond the statute of

limitations, it could never have gone final, as it was never properly issued. *Am. Airlines, Inc. v. Dep't of Revenue*, 402 Ill. App. 3d 579 (Ill. App. 1st Dist. 2009) ("Illinois case law... holds that no exceptions which toll a statute of limitations or enlarge its scope will be implied[.]"); *Dow Chem. Co. v. Dep't of Revenue*, 224 Ill. App. 3d 263 (Ill. App. 1st Dist. 1991). Nothing in Illinois law would thus prohibit this Tribunal from determining whether the Notice of Deficiency was ever "issued" pursuant to Section 904(d).

As with the requirement that the Notice of Deficiency be issued within the statute of limitations, the Illinois Income Tax Act also provides that the notice "shall set forth the adjustments giving rise to the proposed assessment and the reasons therefor." 35 ILCS 5/904(c). Again, the Department has failed to satisfy the preliminary requirements for issuing a notice of deficiency, and therefore, the Notice of Deficiency cannot be deemed to have been "issued" pursuant to Section 904(d).

The Department's arguments with respect to whether the Tribunal has jurisdiction over the Notice of Deficiency attempt to craft one set of rules for taxpayers and another for the Department of Revenue; the Department, it would appear, does not believe its procedural requirements for issuing a notice of deficiency are constrained in the same manner as a taxpayer's ability to protest such a notice of deficiency. Of course, the Department's approach here flies in the face of the long established rule that "[t]axing laws are to be strictly construed... If there is any doubt in their application they will be construed most strongly against the government and in favor of the taxpayer." *Getto v. Chicago*, 77 Ill. 2d 346, 359 (1979) (*quoting Oscar L. Paris Co. v. Lyons*, 8 Ill. 2d 590, 598 (1956) (internal quotations omitted). Because Section 904 and 905 must be construed strongly against the Department and in favor of Petitioner, the Department's reliance on Section 904(d) cannot trump the requirements in Section

904(c) and 905(a) for issuing a notice of deficiency. As the Notice of Deficiency was never "issued" per the meaning of Section 904(d), this Tribunal has jurisdiction over the Notice.

B. The Tribunal possesses the jurisdiction to award attorney's fees pursuant to the Illinois Taxpayer Bill of Rights.

Respondent's arguments that this Tribunal may not award attorney's fees are basically two-fold: first, the Tribunal Act specifically proscribes the Tribunal of jurisdiction to award attorney's fees and, second, the Tribunal lacks jurisdiction to hear any cases filed under the Taxpayer Bill of Rights. With respect to this first argument, Respondent relies on 35 ILCS 1010/1-55(d), which provides in full:

> The Tax Tribunal shall not assign any costs or attorney's fees incurred by one party against another party. Claims for expenses and attorney's fees under Section 10-55 of the Illinois Administrative Procedure Act shall first be made to the Department of Revenue. If the claimant is dissatisfied because of the Department's failure to make any award or because of the insufficiency of the award, the claimant may petition the Court of Claims for the amount deemed owed.

Based on the language of the first sentence of this provision, it would appear that the Tribunal Act disallows any opportunity for taxpayers to obtain attorney's fees at the Tribunal. However, read as a whole, the Tribunal Act only anticipates attorney's fees being issued under the Administrative Procedure Act, it does not anticipate attorney's fees being awarded based on the Taxpayer Bill of Rights, which are awarded in a distinctly different manner than costs or fees. Indeed, 20 ILCS 2520/5 provides that "[t]axpayers have the right to sue the Department of Revenue if such Department intentionally or recklessly disregards tax laws or regulations in collecting taxes. The maximum recovery for damages in such a suit shall be $100,000." Section 7 of the Taxpayer Bill of Rights further provides that the "fees for an attorney or accountant to aid a taxpayer in an administrative hearing relating to the tax liability or in court shall be

recoverable against the Department of Revenue if the taxpayer prevails in an action under the Administrative Review Law and the Department has made an assessment or denied a claim without reasonable cause." 20 ILCS 2520/7. Neither of these provisions is addressed in 35 ILCS 1010/1-55(d), which limits itself to attorney's fees under Section 10-55 of the Illinois Administrative Procedure Act.

The Department's argument that the Tribunal may not award attorney's fees or damages when the Department issues a notice of deficiency or claim denial without reasonable cause becomes even more untenable when considering that taxpayer have no option but to file a petition at the Tribunal in instances of refund claims exceeding $15,000 in tax. *See* 35 ILCS 1010/1-45(a). Thus, the Department is attempting to craft a different rule for refund claims than for protests of deficiency notices notwithstanding the fact that Section 7 of the Taxpayer Bill of Rights specifically states that fees can be obtained in the context of claim denials.

The Department's argument entirely disregards the fact that Section 5 of the Taxpayer Bill of Rights allows taxpayers that are subject to actions from the Department that has recklessly disregarded tax laws or regulations in collecting tax laws to obtain damages. Given the basic interest of judicial economy, it would be absurd to require a taxpayer to pursue two separate litigation tracks, one substantive and one as a Taxpayer Bill of Rights taxpayer suit, in which the Department recklessly disregarded Illinois tax laws. *See Neofotistos v. Center Ridge Co.*, 241 Ill. App. 3d 951 (Ill App. 1st 1993) (discussing the need for judicial economy). Indeed, the Tribunal Act specifically states that the Tribunal shall provide hearings "in all tax matters except those matters reserved to the Department of Revenue of another entity by statute," and that it has original jurisdiction over notices of claim denial and deficiency notices. 35 ILCS 1010/1-5(b); 35 ILCS 1010/1-45(a). Because Petitioner's claims under Section 5 and 7 of the

Taxpayer Bill of Rights relate to the Notice of Claim Denial and Notice of Deficiency, over which this Tribunal has original jurisdiction, the Department's Motion to Dismiss must be denied. *River Park v. City of Highland Park*, 184 Ill. 2d 290, 319 (1998) (in the context of res judicata, noting that judicial economy is promoted by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts and also to prevent the unjust burden that would result if a party could be forced to re-litigate what is essentially the same case).

C. The Tribunal possesses the jurisdiction to hear suits filed under the Taxpayer Bill of Rights.

The second half of Respondent's argument that Petitioner may not bring a taxpayer suit or obtain attorney's fees under the Taxpayer Bill of Rights is that this Tribunal lacks subject matter jurisdiction to hear suits filed under the Taxpayer Bill of Rights. However, as explained above, this Tribunal has original jurisdiction over the Notice of Claim Denial and Notice of Deficiency, which is the underlying basis for the claim. 35 ILCS 1010/1-45(a). Petitioner's claims under the Taxpayer Bill of Rights stem from both notices, so this Tribunal undoubtedly has jurisdiction to address Taxpayer Bill of Rights claims relating to the notices. To that end, while a taxpayer may not bring an argument that, for instance, the Commerce Clause has been violated if such a claim is unrelated to an Illinois notice of deficiency or claim denial, it may make such an argument if the claim relates to an Illinois notice. 35 ILCS 1010/1-45(f). Similarly, here, Petitioner is not bringing a suit exclusively under the Taxpayer Bill of Rights; instead, it has claimed that the Notice of Claim Denial and Notice of Deficiency, over which this Tribunal has original jurisdiction, violated the Taxpayer Bill of Rights. For this reason, the Department's contention that this Tribunal is precluded from hearing arguments relating to Section 5 of the Taxpayer Bill of Rights because a "court" and "tribunal" and a "suit" and

"petition" are fundamentally different is entirely unavailing. Taxpayer's vested procedural rights cannot be undermined by implication.[2]

The Taxpayer Bill of Rights was adopted to ensure that "the rights, privacy, and property of Illinois taxpayers are adequately protected during the process of assessment and collection of taxes." 20 ILCS 2520/2. However, although no language in the Taxpayer Bill of Rights or the Tribunal Act curtails a taxpayer's ability to raise a Taxpayer Bill of Rights argument in the context of a petition to the Tribunal, the Department would deprive taxpayers of their rights under the Taxpayer Bill of Rights in all cases before the Tribunal despite the broad purpose of the Taxpayer Bill of Rights to adequately protect taxpayer rights in the assessment and collection of taxes.

CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss Counts I, II, and V should be dismissed. Moreover, to the extent this Tribunal is deprived of subject matter jurisdiction with respect to the Notice of Deficiency, the Notice of Claim Denial presents the same deficiencies,

[2] "At a minimum, the holder of a due process property right is entitled to notice of the government's decision and an opportunity to respond prior to enforcement of the government's decision." *Interstate Material Corp. v. Chicago*, 150 Ill. App. 3d 944, 953 (1986). Here, the Department is suggesting that all taxpayers lost their right to raise Taxpayer Bill of Rights arguments in the context of tax appeals to the Tribunal despite no explicit language that could be considered to have given notice to any affected taxpayers.

and Petitioner should be permitted to amend its Petition to refer to the Notice of Claim Denial rather than the Notice of Deficiency.

Respectfully submitted,

CAPITAL ONE FINANCIAL CORPORATION
Petitioner

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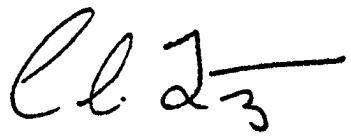
CERTIFICATE OF SERVICE

Undersigned counsel of record hereby certifies that he caused a copy of the foregoing PETITIONER'S RESPONSE TO DEPARTMENT'S § 2-619 MOTION TO DISMISS COUNTS 1, II, AND V OF FIRST AMENDED PETITION to be served upon other counsel of record by electronic mail before the hour of 5:00 p.m. on the 12th day of July, 2016, addressed as follows:

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