

ILLINOIS INDEPENDENT TAX TRIBUNAL

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CAPITAL ONE FINANCIAL CORPORATION )	)	
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Petitioner, )	)	
	)	
v. )	)	No. 16-TT-49
	)	
ILLINOIS DEPARTMENT OF REVENUE, )	)	Judge Brian Barov
	)	
Respondent. )	)	

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**RESPONDENT’S MOTION TO RECONSIDER**

The Respondent, the Illinois Department of Revenue (“Department”), by and through its attorney, LISA MADIGAN, Illinois Attorney General, respectfully moves this Tribunal to reconsider its Order on Motion to Dismiss (“Decision”) entered in this matter on August 1, 2016, with respect to its holding that this Tribunal has jurisdiction over the Notice of Deficiency issued to Petitioner on August 11, 2014. The Department believes this Tribunal failed to consider certain provisions of the Illinois Income Tax Act and case law interpreting it causing a misapplication of the law, and therefore, its Decision should be reconsidered and reversed.

I. Introduction

This Motion relates only to the Tribunal’s holding that it has “jurisdiction to review whether the Notice of Deficiency complied with section 904(c)” of the Illinois Income Tax Act. Order on Motion to Dismiss dated August 1, 2016.

Department’s Motion to Dismiss concerned only the claims raised by Petitioner regarding the Notice of Deficiency issued August 11, 2014 (“August 11, 2014 NOD”). Department argued that this Tribunal does not have jurisdiction to entertain either the procedural or substantive issues that were raised by the August 11, 2014 NOD or could have been raised by Petitioner in

response to the August 11, 2014 NOD because the August 11, 2014 NOD became final by operation of law.<sup>1</sup>

Although it could have done so, Petitioner never invoked this Tribunal's jurisdiction over the August 11, 2014 NOD by following the procedures in Section 1-50 of the Independent Tax Tribunal Act ("Tribunal Act"). 35 ILCS 1010/1-50. Petitioner failed to file a protest of the August 11, 2014 NOD in any forum – either in the Circuit Court pursuant to the State Officers and Employees Money Disposition Act or in the Independent Tax Tribunal Act – as provided in Section 908(d) of the Illinois Income Tax Act ("IITA"). Thus, the August 11, 2014 NOD became final by operation of law on October 10, 2014. 35 ILCS 5/908(d). Once final, the August 11, 2014 NOD was not reviewable by any jurisdiction. Petitioner was required to protest the August 11, 2014 NOD in order to invoke the circuit court's jurisdiction under the administrative review law. The only way a taxpayer may revive, or un-finalize, a final notice is by requesting a late discretionary hearing. 35 ILCS 5/908(d); 86 Ill. Adm. Code 200.175. Courts prohibit a taxpayer from attacking a final notice in any other proceeding. Petitioner did not request a late discretionary hearing.

In its Motion to Dismiss dated June 6, 2016, Department moved to dismiss those Counts in which Petitioner asked this Tribunal to make a determination regarding the correctness of the Notice of Deficiency issued August 11, 2014, which became final on October 10, 2014 ("at the end of the 60th day"), because the Tribunal (and in fact no tribunal or court) has jurisdiction to review the August 11, 2014 NOD.

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<sup>1</sup> Department does not dispute this Tribunal's jurisdiction to determine the correctness of the Notice of Claim Denial issued to Petitioner on January 13, 2016, which Petitioner protested by filing a Petition on March 14, 2016, pursuant to the Independent Tax Tribunal Act (35 ILCS 1010/1-1 et seq.). This Notice of Claim Denial is the result of an amended return filed by Petitioner on or about July 22, 2015. Thus, this matter, docket number 16-TT-49, concerns the correctness of the Department's Notice of Claim Denial as it relates to the Petitioner's amended return dated July 22, 2015.

## II. Argument

Motions to reconsider are allowed in any of three circumstances: (1) where newly discovered evidence unavailable at trial subsequently comes to light; (2) changes in law; and (3) to point out errors in the court's previous application of law. *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 929 (2d Dist. 1997). It is the third condition which applies here. The Department's Motion to Reconsider is proper because it seeks to point out errors in the Tribunal's previous application of law.

Specifically, the Decision contained the following Analysis:

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).

Order on Motion to Dismiss, pg. 3-4.

The mistake of law in this analysis is the Tribunal’s determination that it has jurisdiction to review a Notice of Deficiency that became final by operation of law pursuant to Section 908(d) of the Illinois Income Tax Act, where the taxpayer “pay[s] the tax assessed, file[s] an amended return, and s[eeks] a refund under section 909 of the IITA,” and is issued a Notice of Claim Denial by the Department. Decision, pg. 3. It is the protest of the Notice of Claim Denial that gives this Tribunal its jurisdiction to review the correctness of the Notice of Claim Denial and the taxpayer’s amended return. 35 ILCS 1010/1-45(a); 35 ILCS 5/910(a)<sup>2</sup>. However, by the time the Petitioner filed its Petition with this Tribunal, the August 11, NOD was final, unappealable, and unreviewable by any tribunal, including the Independent Tax Tribunal. 35 ILCS 5/908(d); 35 ILCS 5/1201; 735 ILCS 5/3-101, 102, 103. Once the August 11, NOD became final, it could not be protested, *at all*.<sup>3</sup>

The Department’s position is premised upon the following undisputed facts:

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<sup>2</sup> Section 910 holds: “(a) Time for protest. Within 60 days after the denial of the claim, the claimant may file (i) a protest with the Department or (ii) a petition with the Illinois Independent Tax Tribunal, as provided in this subsection (a). . . . A claimant who, on or after July 1, 2013, wishes to protest a denial that is subject to the jurisdiction of the Illinois Independent Tax Tribunal shall do so by filing a petition with the Illinois Independent Tax Tribunal pursuant to the Illinois Independent Tax Tribunal Act of 2012.”). 35 ILCS 5/910.

<sup>3</sup> The only exception to the prohibition on the protest of a final notice is the Department’s Chief ALJ’s discretion to grant a late discretionary hearing pursuant to 86 Ill. Admin. Code 200.175.

1. After conducting an audit of Petitioner for the tax year ending December 31, 2008, the Department issued a Notice of Deficiency to Petitioner on August 11, 2014 (hereafter “August 11, 2014 NOD”) assessing additional tax of \$7,401,349, interest of \$2,339,642.36, and penalties of \$2,961,039.60. First Amended Petition, ¶31.
2. The NOD was attached to the First Amended Petition in Exhibit B.
3. On October 1, 2014, Petitioner issued a check to the Department in the amount of \$12,702,030.96 as payment under protest pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/1 et seq.). 30 ILCS 230/2a.
4. Petitioner failed to file a complaint pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/2a), and therefore, failed to secure a temporary restraining order preventing the transfer of the protest payment from the protest fund. 30 ILCS 230/2a
5. Petitioner did not protest the August 11, 2014 Notice of Deficiency pursuant to IITA Section 908 either in the Tribunal or with the circuit court.<sup>4</sup>
6. On or about July 22, 2015, Petitioner filed an amended return (Form IL-1120-X) for the tax year ending December 31, 2008, on which Petitioner claimed a refund of \$13,452,787. First Amended Petition, ¶35.
7. On January 13, 2016, Department issued Petitioner a Notice of Claim Denial in which Department denied Petitioner’s claim for refund on its 2008 amended return (Form IL-1120-X).

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<sup>4</sup> Although Petitioner made a payment under protest in accordance with Section 2a.i. of the Protest Monies Act (30 ILCS 230/2a.i.), Petitioner failed to file a complaint, secure a preliminary injunction or temporary restraining order, and serve the Treasurer with same within 30 days of that payment. 30 ILCS 230/2a. Thus, Petitioner’s protest payment was “transferred from the protest fund to the appropriate fund in which it would have been placed had there been payment without protest,” as required by the Protest Monies Act. 30 ILCS 230/2a. Therefore, no protest was effectuated and no jurisdiction was conferred upon the circuit court.

8. On March 14, 2016, Petitioner filed a Petition with this Tribunal protesting the Department's January 13, 2016 Notice of Claim Denial.
  9. On April 28, 2016, Petitioner filed a Motion for Leave to File (instant) a First Amended Petition.
  10. On April 28, 2016, the Administrative Law Judge entered an order accepting Petitioner's First Amended Petition.
  11. Petitioner never requested a late discretionary hearing for the August 11, 2014, and no late discretionary hearing was granted.
- A. *The IITA holds that a "proposed assessment" in a Notice of Deficiency that is "deemed assessed" by operation of law is final and unreviewable.*

The Illinois Income Tax Act ("IITA") (35 ILCS 5/101 et seq.) provides for the filing of income tax returns, the time for payment of income taxes, the review of returns by the Department, the issuance of income tax refunds and assessments, including penalties and interest, and the collection of tax assessments. 35 ILCS 5/101 et seq. Where the Department determines a tax deficiency exists for a particular period, the Department must notify the taxpayer of that deficiency by means of a "Notice of Deficiency." 35 ILCS 5/904(a). Section 904 of the IITA provides:

Sec. 904. Deficiencies and Overpayments.

(a) Examination of return. As soon as practicable after a return is filed, the Department shall examine it to determine the correct amount of tax. If the Department finds that the amount of tax shown on the return is less than the correct amount, it shall issue a notice of deficiency to the taxpayer which shall set forth the amount of tax and penalties proposed to be assessed.

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(c) Notice of deficiency. A notice of deficiency issued under this Act shall set forth the adjustments giving rise to the proposed assessment and the reasons therefor. . . .

35 ILCS 5/904(a), (c). Once a taxpayer is notified of a deficiency (via a Notice of Deficiency), the taxpayer has the option to accept the proposed assessment in the Notice of Deficiency or protest the proposed assessment in the Notice of Deficiency. 35 ILCS 5/908. To protest a Notice of Deficiency in excess of \$15,000, the taxpayer must, within 60 days, file either a Petition with the Tax Tribunal pursuant to the Independent Tax Tribunal Act (35 ILCS 1010/1-1 et seq.) or make a payment under protest and within 30 days of that payment file a complaint in an Illinois circuit court, obtain a preliminary injunction or temporary restraining order (“TRO”) and serve the Treasurer of Illinois with the preliminary injunction or TRO pursuant to the State Officers and Employees Money Disposition Act (30 ILCS 230/1 et seq.). 35 ILCS 5/908(a); 35 ILCS 1010/1-5, 1-45, 1-50; 30 ILCS 230/2a., 2a.1. If the taxpayer files a protest within 60 days, the protest proceeds to litigation before the chosen tribunal (Tax Tribunal or circuit court) until the parties come to an agreed determination, the Tax Tribunal enters a “final decision,” or the circuit court enters a “final judgment.” 35 ILCS 1010/1-65; Ill. Sup. Ct. R. 272. Appeal of that decision is governed by the Tax Tribunal Act or the Code of Civil Procedure, respectively.

When a Notice of Deficiency is issued for \$15,000 or less, the taxpayer may protest by filing a form EAR-14 with the Department’s Office of Administrative Hearings within 60 days of the date of issuance of the Notice of Deficiency. 35 ILCS 5/908(a); <http://tax.illinois.gov/TaxForms/Misc/Protest/EAR-14.pdf>. The Department then “shall reconsider the proposed assessment and, if the taxpayer has so requested, shall grant the taxpayer or his authorized representative a hearing.” 35 ILCS 5/908(a). “[A]s soon as practicable after such reconsideration and hearing, if any, the Department shall issue a notice of decision. *Id.* Once the Department issues a Notice of Decision, the taxpayer has 30 days to request a rehearing or 35

days to appeal the Department's decision to the circuit court. 35 ILCS 5/908(c); 35 ILCS 5/1201; 735 ILCS 5/3-103.

However, *when no protest is filed* within 60 days, the Notice of Deficiency becomes final "at the end of the 60<sup>th</sup> day." 35 ILCS 5/903, 5/904(d), 5/908(d).

Sec. 903. Assessment. (a) In general.

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(2) Notice of deficiency. If a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in section 904(d) if no protest is filed; or, if a protest is filed, then upon the date when the decision of the Department becomes final.

35 ILCS 5/903(a)(2).

Sec. 904. Deficiencies and Overpayments.

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(d) Assessment when no protest. Upon the expiration of 60 days after the date on which it was issued (150 days if the taxpayer is outside the United States), 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).

Section 100.9300 Deficiencies and Overpayments (IITA Section 904)

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(d) Assessment when no protest. The amount of tax and penalties specified in a notice of deficiency shall be deemed assessed upon the expiration of 60 days (150 days if the taxpayer is outside the United States) from the date of issuance to the taxpayer except only for such amounts as to which the taxpayer shall have filed a protest as provided in IITA Section 908. (See 86 Ill. Adm. Code 200.120(b).)

86 Ill. Adm. Code 100.9300(d).

Sec. 908. Procedure on protest.

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(d) Finality of decision. If the taxpayer fails to file a timely protest or petition under subsection (a) of this Section, then the

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 of deficiency (or the 150th day if the taxpayer is outside the United States). If the taxpayer files a protest with the Department, and the taxpayer does not elect to be subject to the provisions of the Illinois Independent Tax Tribunal Act of 2012, then the action of the Department on the taxpayer's protest shall become final:

- (1) 30 Days after issuance of a notice of decision as provided in subsection (b); or
- (2) if a timely request for rehearing was made, upon the issuance of a denial of such request or the issuance of a notice of final decision as provided in subsection (c).

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35 ILCS 5/908(d).

In sum, the Notice of Deficiency is a “proposed assessment” until such time as that deficiency becomes an “assessment” either by operation of law (a “deemed assessment”) or by the issuance of a Notice of Decision, Notice of Denial for rehearing, or Notice of Final Decision after rehearing rendered by the Department after reconsidering the proposed assessment. 35 ILCS 5/908(d).

The reason that a determination of finality of a Department’s Notice of Deficiency - when a “proposed assessment” becomes an “assessment” - is so important is that the Department can engage in collection of only assessments, not proposed assessments. 35 ILCS 5/902(a).

Sec. 902. Notice and Demand.

(a) In general. Except as provided in subsection (b) the Director shall, as soon as practicable after an amount payable under this Act is deemed assessed (as provided in Section 903), give notice to each person liable for any unpaid portion of such assessment, stating the amount unpaid and demanding payment thereof . . .

For it is the purposes of the IIITA to impose a “tax measured by net income . . . on every individual, corporation, trust and estate for each taxable year ending after July 31, 1969 on the privilege of earning or receiving income in or as a resident of this State.” 35 ILCS 5/201(a).

The only way to protest an assessment in a final notice of the Department is to request a late discretionary hearing from the Department's Chief Administrative Law Judge. 86 Ill. Admin. Code 200.175.

Regulation 200.175 provides in relevant part,

Section 200.175 Rehearings.

a) After the issuance of a final assessment or a Notice of Tax Liability which has become final pursuant to Section 4 or Section 5 of the Retailers' Occupation Tax Act [35 ILCS 120/4 or 5] or another Act in which Section 4 or Section 5 is incorporated by reference, the Department, at any time before such assessment is reduced to judgment, may grant a rehearing or grant review and hold an original hearing (in cases of failure to timely protest) upon the application of the person aggrieved. This provision shall not apply in any situation in which an assessment that has become final and unappealable has been paid by or on behalf of the taxpayer in liquidation of that assessment.

b) To be considered for initial review or rehearing, a taxpayer must submit a written application therefor to the Chief Administrative Law Judge, offering specific and detailed rationale for each basis used to support the request. \*\*\* In determining whether to permit an initial review or rehearing, the Department shall consider such factors as: the offer of proof with respect to matters in controversy; new evidence and the nature and complexity of legal issues raised; the diligence of the person seeking the rehearing; the passage of time between the finalization of the assessment and the request for review. No second or subsequent application for review or rehearing relating to the same operative set of facts shall be considered by the Department.

86 Ill. Admin. Code 200.175. Where the taxpayer cannot receive or is not granted a late discretionary hearing, a taxpayer may still reverse the Department's final assessment by paying the assessment and filing an amended return within one year of the date of payment. 35 ILCS 5/911(a). However, unlike a late discretionary hearing, this method does not revive or un-finalize the final notice of deficiency. See sections B, C, and D, *infra*.

In the case at bar, the August 11, 2014 Notice of Deficiency became final by operation of law on October 10, 2014 when, at the end of the 60<sup>th</sup> day after issuance, the Petitioner had failed

to protest the notice by filing a petition with this Tribunal or by filing a complaint in circuit court and securing a preliminary injunction or TRO. 35 ILCS 5/908(d) (“(d) Finality of decision. If the taxpayer fails to file a timely protest or petition under subsection (a) of this Section, then the 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 of deficiency . . .”). Thus, the proposed assessment in the August 11, 2014 NOD became a “final assessment” of the Department on October 10, 2014. 35 ILCS 5/908(d). Petitioner was not eligible for a late discretionary hearing of the August 11, 2014 NOD, because Petitioner had paid the assessment on October 1, 2014, before the proposed assessment became final on October 10, 2014. 86 Ill. Admin. Code 200.175(a). Thus, pursuant to Section 911(a) of the IITA, on or about July 22, 2015, Petitioner filed an amended return (Form IL-1120-X) for the tax year ending December 31, 2008, on which Petitioner claimed a refund of \$13,452,787. Department issued Petitioner a Notice of Claim Denial. It is the Notice of Claim Denial that Petitioner protested and which this Tribunal has jurisdiction to consider its correctness.

*B. A taxpayer must timely protest and raise the statute of limitations as a defense to the proposed assessment; otherwise, the assessment becomes final.*

It is well-settled that a statute of limitations is a defense that must be raised. *Shipley v. Hoke*, 2014 IL App (4th) 130810, ¶ 82 (“a time bar offers an affirmative defense, which a defendant may, in its sole discretion, assert or waive.”); *Jenna R.P. v. City of Chicago School Dist. No. 229*, 2013 IL App (1st) 112247 ¶ 75 (“The expiration of a statute of limitations is an affirmative defense, which is forfeited if not timely raised in the trial court.”); *Fox v. Heimann*, 375 Ill.App.3d 35, 45 (1st Dist. 2007) (holding that defendant did not timely raise statute of limitations as defense in the trial court and therefore, waived the defense; therefore, court would “not comment on whether the breach of contract claim brought by the plaintiff was governed by

the ten-year statute of limitations applicable to written contracts in general or by the one-year limitations period set forth in the Disclosure Act.”). It is also well settled that if a proceeding is not protested and “not brought under the Administrative Review Act for judicial review of the Department's final assessment the assessment will be conclusive as to all questions affecting its merits. A defense as to the merits of the case must be raised through administrative review or will be considered waived.” *Calderwood Corp. v. George E. Mahin*, 57 Ill. 2d 216, 220 (1974); *Dep’t of Revenue v. Steacy*, 38 Ill.2d 581, 583 (1967) (“The issues sought to be raised by the defendant in this action could have been raised in administrative proceedings before the Department, and its determination could have been challenged under the Administrative Review Act. They are not open for consideration in the present action. \*\*\* If the assessment was not proper or regular, the taxpayer should have, within the time provided, protested the assessment, and the Department of Revenue would have set a hearing on the matter. If the taxpayer is not satisfied, there is provision for judicial review of the determination.”); *Dep’t of Revenue for Use of People v. Jones*, 141 Ill. App. 3d 968, 970 (1st Dist. 1986) (“once the assessment becomes final, the amount of liability and more generally, any issue of law or fact concerning the retailer's liability, cannot be questioned.”); *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill.2d 200, 212-213 (2008) (“It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review.”). Thus, to assert the statute of limitations as a defense, the taxpayer must protest the Department’s proposed assessment in the Notice of Deficiency and must raise the statute of limitations as a defense to assessment.

In the case at bar, the Petitioner failed to timely protest the August 11, 2014 NOD. Thus, the August 11, 2014 NOD became final on October 10, 2016, and the proposed assessment

therein became an “assessment.” 35 ILCS 5/908(d). According to the well-established caselaw, the Department's assessment in the August 11, 2014 NOD is “conclusive as to all questions affecting its merits.” *Calderwood Corp. v. George E. Mahin*, 57 Ill. 2d 216, 220 (1974). And the Petitioner’s defense of the statute of limitations is waived. *Id.*; *Shipley v. Hoke*, 2014 IL App (4th) 130810, ¶ 82; *Dep’t of Revenue v. Steacy*, 38 Ill.2d 581, 583 (1967).

C. *Shell Oil Co. v. Dep’t of Revenue*, (95 Ill. 2d 541) *does not hold that paying the tax assessed in a final Notice of Deficiency, filing a timely amended return claiming a refund, and protesting the Department’s denial of that refund revives a final Notice of Deficiency.*

In its Decision, this Tribunal cited *Shell Oil Co. v. Dep’t of Revenue*, 95 Ill. 2d 541, 545-46 (1983) for the principle that: “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).” This Tribunal then concluded that it has “authority to adjudicate procedural challenges to the issuance of the Notice [of Deficiency] within the context of the Petitioner’s refund claim,” and “jurisdiction to review whether the Notice of Deficiency complied with section 904(c) of the IITA.”

The *Shell* court held as follows:

A taxpayer who questions the correctness of an assessment of retailers' occupation tax may (1) withhold payment of the tax and receive an administrative hearing following receipt of a notice of tax liability from the Department of Revenue; or (2) pay the tax, file a claim for credit or refund, and have an administrative hearing after protesting the Department's notice of tentative determination of claim; or (3) pay the tax under protest pursuant to the Protest Monies Act and have the circuit court pass upon the protest.

*Shell Oil Co. v. Dep’t of Revenue*, 95 Ill. 2d 541, 545-46 (1983) (citing *Chicago & Illinois Midland Ry. Co. v. Dep’t of Revenue* (1976), 63 Ill.2d 474, 349 N.E.2d 22) (internal citations omitted). The Department agrees that these three options are available to a “taxpayer who

questions the correctness of an assessment of” Illinois Income Tax, as well. Regarding method (2), the method applicable in the current case, if timely filed (within one year of the date of payment), a taxpayer could raise any substantive issue to claim a refund of tax in an amended return. 35 ILCS 5/911(a). A taxpayer is not limited to the claims taxpayer would have or could have raised in response to the proposed assessment in the Notice of Deficiency, which became final (an “assessment”) and collectible. However, a taxpayer is prohibited from challenging the correctness of the Notice of Deficiency itself, because the Notice of Deficiency is final; it is an “assessment” and unappealable to this Tribunal, which may only review notices before they become final.<sup>5</sup> 35 ILCS 5/908(d), 35 ILCS 1010/1-45.

It is undisputed that the Petitioner has chosen method (2) – paying the tax assessed on a Notice of Deficiency, filing a claim for credit or refund, and having an administrative hearing after protesting the Department’s Notice of Claim Denial – in the instant case. In such circumstances, it is the *Notice of Claim Denial* which a taxpayer is protesting and which gives this Tribunal jurisdiction to hear the taxpayer’s claims against the assessment. 35 ILCS 1010/1-45. However, jurisdiction over the final Notice of Deficiency is not conferred on this Tribunal. 35 ILCS 5/908(d), 5/1201; 735 ILCS 5/3-101 through 104.

To summarize: paying the tax assessed in a final Notice of Deficiency, filing an amended return, and protesting the Notice of Claim Denial (*Shell Method 2*) does not revive the final Notice of Deficiency. Rather, the Notice of Deficiency is final and unappealable – no collateral attack, either substantive or procedural may be made against it. 35 ILCS 5/908(d); 5/1201.

However, a taxpayer may timely file an amended return within one year of the date of payment claiming a refund of that payment and adjudicate the Department’s denial of that refund. 35

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<sup>5</sup> Pursuant to Section 1201 of the IITA, review of the Department’s “final actions” is appealable only to the circuit courts via the administrative review law. 35 ILCS 5/1201.

ILCS 5/909. The taxpayer can then raise any substantive issue to support its claim for refund. But, a taxpayer cannot raise a procedural issue that it could have asserted only against the Notice of Deficiency because the Notice of Deficiency is final and unappealable. 35 ILCS 5/908(d); 5/1201.

This Tribunal's jurisdiction to hear a protest of a Notice is similar to the jurisdiction conferred upon circuit courts under the Protest Monies Act – a timely protest must be filed. (However, payment is not required to confer jurisdiction upon the Tribunal.) The Illinois Supreme Court has held that a court has jurisdiction to hear a protest under the Protest Monies Act (30 ILCS 230/1 et seq.) only when the agency's decision is not final because, once final, the Administrative Review Law is applicable. *Chicago & Illinois Midland Ry. Co. v. Dep't of Revenue*, 63 Ill.2d 474, 482 (1976) (“The Administrative Review Act by its terms applies only to ‘final decisions’ of administrative agencies and nothing in that act required any change in use of the Protest Act by taxpayers willing to pay taxes under protest and as to whom the administrative decision had not become final.” Courts are “free to consider the merits of a [Protest Act] claim in those cases where no final administrative decision has been made.”). Thus, a circuit court does not have jurisdiction to hear the protest of a final Notice of Deficiency under the Protest Monies Act because jurisdiction lies only via the Administrative Review Law. Likewise, this Tribunal does not have jurisdiction to hear the protest of a final Notice of Deficiency under the Tribunal Act because jurisdiction lies only with the circuit courts via the Administrative Review Law. 35 ILCS 5/1201; 735 ILCs 5/3-101 et seq.

*D. The Tribunal's assertion of jurisdiction over the Final Notice of Deficiency is the allowance of a Collateral Attack against the Notice, which is prohibited.*

Illinois courts have held that once a notice issued by the Department is final, it is not subject to collateral attack. *People ex rel. Scott v. Pintozzi*, 50 Ill.2d 115, 127 (1971) (“In an

action to collect the unpaid tax the issue of the amount due cannot be retried. The assessments are not subject to collateral attack in a suit to collect the tax.”); *Dep't of Revenue v. Roman S. Dombrowski Enterprises, Inc.*, 202 Ill.App.3d 1050, 1054 (1st Dist. 1990) (“The Department issued a Final Assessment on October 7, 1974, \*\*\* defendant had 35 days from the date of service of the Final Assessment to file an action seeking judicial review of the agency determination. Having failed to file such an action, he has instead improperly sought judicial review of the Department's action as part of his defense to the instant lawsuit; but because of defendant's failure to comply with the ARA, we are not empowered to review the merits of the Final Assessment or the Revised Final Assessment.”); *Dep't of Revenue for Use of People v. Jones*, 141 Ill.App.3d 968, 970 (1st Dist. 1986) (“The Department contends that once the assessment becomes final, the amount of liability and more generally, any issue of law or fact concerning the retailer's liability, cannot be questioned. This contention is correct.”); *Calderwood Corp. v. George E. Mahin*, 57 Ill.2d 216, 220, (1974) (“[I]f a proceeding is not brought under the Administrative Act for judicial review of the Department's final assessment the assessment will be conclusive as to all questions affecting its merits. A defense as to the merits of the case must be raised through administrative review or will be considered waived.”).

In *Dombrowski*, the taxpayer protested a notice of personal liability penalty issued pursuant to what is now the responsible officer provision of Section 3-7 of the Uniform Penalty and Interest Act (“UPIA”). *Dep't of Revenue v. Roman S. Dombrowski Enterprises, Inc.*, 202 Ill. App. 3d 1050, 1054 (1st Dist. 1990). As part of his defense, Dombrowski argued that the underlying amount of ROT assessed by the Department was overstated. In holding that Dombrowski was prohibited from challenging the underlying ROT assessment, the court held:

[A] taxpayer with unpaid retailers' occupation taxes is initially sent a Notice of Tax Liability. If no protest is received within 20 days,

the assessment becomes final; if a timely protest is made, the Department holds a hearing and subsequently issues a Final Assessment. Once an assessment becomes final, the taxpayer may obtain judicial review of the agency determination only if he or she complies with the provisions of the Illinois Administrative Review Act (ARA). The ARA provides that a person seeking judicial review of a final agency action must file an action in the circuit court within 35 days after service of the final agency determination.

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Having failed to file such an action, [defendant taxpayer] has instead improperly sought judicial review of the Department's action as part of his defense to the instant lawsuit; but because of defendant's failure to comply with the ARA, we are not empowered to review the merits of the Final Assessment or the Revised Final Assessment.

*Id.* at 1053-1054. See also Administrative Hearing Decisions IT 14-02 available at:

<<http://tax.illinois.gov/LegalInformation/Hearings/it/IT14-02.pdf>> (holding that: “As a consequence of ABC Business’s failure to contest the Department's audit determination of its gross receipts during the Department’s ROT audit of ABC Business, the taxpayer is barred from contesting this audit determination. Because the Department’s determination of the amount of ABC Business’s gross receipts has become final and is legally binding, the taxpayer cannot challenge the correctness of the amount of ABC Business’s gross receipts that have been passed through to the taxpayer for purpose of computing the taxpayer’s distributive share income.”), and IT 16-10 available at: <<http://tax.illinois.gov/LegalInformation/Hearings/it/IT16-10.pdf>>.

Like *Dombrowski*, Petitioner failed to file a timely protest of the August 11, 2014 NOD, which could then have been reviewed upon the timely filing of a complaint for judicial review of the assessment, and has instead “improperly sought judicial review of the Department's action as part of” its claim for a refund on its amended return. 35 ILCS 5/1201. Thus, like *Dombrowski*, Petitioner is prohibited from collaterally attacking the August 11, 2014 Notice of Deficiency in the instant matter.

*E. Holding that the Notice of Deficiency is reviewable by This Tribunal is not a reasonable interpretation of the statute for practical purposes because such an interpretation would place an undue burden on the Department and hinder the Department's ability to collect the assessment.*

This Tribunal's holding in its Decision is essentially that a notice that is "deemed assessed" is not actually final because a taxpayer can pay the assessment, file an amended return within one year of payment and "revive" the final notice. This interpretation is contrary to the IITA and case law, as explained *supra*. Such an interpretation also results in the absurdity that a "final assessment" by operation of law is not enforceable or collectible and which could be attacked at anytime.

As explained previously, only an "assessment" is collectible by the Department. 35 ILCS 5/902(a) ("the Director shall, as soon as practicable after an amount payable under this Act is deemed assessed (as provided in Section 903), give notice to each person liable for any unpaid portion of such assessment, stating the amount unpaid and demanding payment thereof. . ."); 35 ILCS 5/903(a) ("If a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in section 904(d) if no protest is filed; or, if a protest is filed, then upon the date when the decision of the Department becomes final."). Under the Department's interpretation of the IITA, a notice that is "deemed assessed" is only protestable if the taxpayer seeks and is granted a late discretionary hearing. 86 Ill. Adm. Code 200.175(a), (b).

This process is less clear under this Tribunal's Decision. Pursuant to this Tribunal's decision if a taxpayer "pay[s] the tax assessed, file[s] an amended return, and s[ee]ks a refund under section 909 of the IITA" the "deemed assessment" is not final and is reviewable by this Tribunal. Decision, pg. 3. Such an interpretation raises other issues regarding the notice. Such as: Is a deemed assessment ever final? Is it collectable? Is the deemed assessment final and

collectable until payment? If so, can the taxpayer revive a final notice by paying only part of the assessment?

The following example demonstrates the ambiguity and unreasonableness of the Tribunal's Decision. The Department issues a Notice of Deficiency to TaxpayerA on January 1, 2016 for tax of \$100. TaxpayerA does not protest the Notice of Deficiency. The January 1, 2016 Notice of Deficiency becomes final on Tuesday, March 1, 2016 - at the end of the 60<sup>th</sup> day. TaxpayerA does not file a complaint in circuit court for review under the administrative review law. In fact, TaxpayerA does nothing for 20 years. Then, on March 1, 2036, TaxpayerA pays \$50 of the \$100 assessment. On February 28, 2037, TaxpayerA files an amended return to reverse the assessment in the January 1, 2016 Notice of Deficiency and claims a refund of \$50. The Department denies the claim for refund in a Notice of Claim Denial, which TaxpayerA protests. Under this Tribunal's Decision, TaxpayerA could litigate the correctness of the January 1, 2016 Notice of Deficiency. This requires the Department to actually keep the January 1, 2016 Notice of Deficiency and the documentation to support that assessment. Assume then that TaxpayerA loses his protest and his refund claim of \$50 is denied. TaxpayerA then refuses to pay the remaining \$50 assessment. Some 20 years later, on January 1, 2058, TaxpayerA pays the remaining \$50 of the \$100 initial assessment. On December 31, 2058, TaxpayerA files an amended return to reverse the assessment in the January 1, 2016 Notice of Deficiency and claims a refund of the \$50 paid on January 1, 2058. The Department denies the claim for refund in a Notice of Claim Denial, which TaxpayerA protests. Again, under this Tribunal's Decision, TaxpayerA could litigate the correctness of the January 1, 2016 Notice of Deficiency simply by making a payment on a final assessment, filing an amended return for the refund of that payment and protesting the denial of that refund.

Under this Tribunal’s Decision, the Department would have to maintain records to support the January 1, 2016 Notice of Deficiency indefinitely because the Petitioner can raise the statute of limitations or some other challenge to the notice 20, 40, or 100 or more years later. This interpretation is either prejudicial or unduly burdensome to the Department – depending on whether the Department complies with current document retention policies by destroying old documents, or instead maintains, stores, and organizes the documents - and does not promote judicial economy.

Finally, only the Chief Administrative Law Judge of the Department is possessed with the power to un-finalize an assessment in a final notice by granting a late discretionary hearing. 86 Ill. Adm. Code 200.175. The Tax Tribunal is not possessed with that authority.

*F. The Tribunal’s interpretation of Tribunal Act Section 1-45 is improper.*

In its Decision this Tribunal held that:

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).

Section 1-45(e) of the Independent Tribunal Act provides, in part:

(e) The Tax Tribunal shall not have jurisdiction to review:

\* \* \*

(4) 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;

35 ILCS 1010/1-45(a).

As the Department previously pointed out in its original Motion, an administrative agency's powers are "strictly confined to those granted in [its] enabling statutes." *City of Chicago v. Fair Employment Practices Comm'n.*, 65 Ill.2d 108, 115 (1976). See also *Vuagniaux v. Dep't of Prof'l Regulation*, 208 Ill.2d 173, 186 (2003) (holding that an administrative agency "has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute."); *Commonwealth Edison Co. v. Illinois Commerce Comm'n.*, 2014 IL App (1st) 130544, ¶ 16 (holding that administrative agencies, including quasi-judicial ones, do not possess any common law powers or general jurisdiction that a circuit court exercises or possesses). *Pearce Hospital Foundation v. Illinois Public Aid Com.*, 15 Ill. 2d 301, 307 (1958) ("The commission is a creature of statute and has no greater powers than those conferred upon it by the legislature."). In *City of Chicago v. FEPC*, the Illinois Supreme Court held: "Since the Commission is a statutory creature, its powers are dependent thereon, and it must find within the statute the authority which it claims. Such agencies have no general or common law powers." *FEPC*, 65 Ill.2d at 113 (internal citations omitted).

Rather than acknowledging that its enabling act does not expressly authorize the Tribunal to review Department notices that are final – assessments that are unappealable – this Tribunal instead misconstrued the express language of Section 1-45(e) of the Tribunal Act and held that it

was not prohibited from reviewing the August 11, 2014 NOD. Such a ruling is improper first because the Tribunal Act does not expressly grant the Tribunal the authority to review deemed assessments. Second, this Tribunal ignored the express prohibition in Section 45(e) of the Tribunal Act when it concluded that “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.”

In considering whether the August 11, 2014 NOD is the type of “action or determination of the Department” contemplated by Section 1-45(e) we look to the language of the Tribunal Act and the IITA. “The best indicator of legislative intent is the language of the statute, given its plain and ordinary meaning.” *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, ¶ 17. A court will not read statutory language in isolation but must consider it in the context of the statute as a whole. *Id.* Statutes should be construed as to render no word or phrase superfluous or meaningless. *Duffy v Ill. Dep’t of Human Rights*, 354 Ill. App. 3d 236, 238 (4th Dist. 2004). Where the language of the statute is clear and unambiguous, courts must apply the statute as written without resort to aids of statutory construction. *People v. Diggins*, 235 Ill.2d 48, 54-55 (2009).

The Tribunal Act expressly provides that “The Tax Tribunal shall not have jurisdiction to review: \*\*\* (4) 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.” 35 ILCS 1010/1-45(e) (emphasis added.).

Here, there is no need to employ aids of statutory construction, such as *ejusdem generis*, because the language of the statute is clear and unambiguous: If the August 11, 2014 NOD was

“finalized by law” prior to the Petition date, the “Tax Tribunal shall not have jurisdiction to review” it. *People v. Diggins*, 235 Ill.2d 48, 54-55 (2009).

According to the IITA, a Notice of Deficiency becomes finalized by law when (1) no timely protest is made, (2) a timely protest is made and a decision is issued, (3) a timely protest is made and a request for rehearing is made and the request for rehearing is denied, or (4) a timely protest is made and a request for rehearing is made and the request for rehearing is granted and a revised final assessment is issued. 35 ILCS 5/903(a)(2), 904(d), 908(d); 86 Ill. Adm. Code Section 100.9200(a)(3). According to Section 1201 of the IITA, each of these determinations of the Department is a “final action.” 35 ILCS 5/1201.

A proper construction of the IITA holds that the Tribunal would not have jurisdiction over a Notice of Deficiency issued August 11, 2014 where the taxpayer failed to file a Petition protesting that notice by October 10, 2014 because the taxpayer did not file a Petition within 60 days as required by Section 908(d) of the IITA and therefore, said Notice of Deficiency became final by operation of law “at the end of the 60th day after the date of issuance of the notice of deficiency.” 35 ILCS 5/908(d). To hold, as this Tribunal has in its Decision, that the prohibition in Section 45(e) against “review[ing]” “any action or determination of the Department regarding tax liabilities that have become finalized by law” does not include a Notice of Deficiency where the time for filing a protest of that notice (60 days) has expired is to ignore the express statutory language in the IITA and give this Tribunal unlimited authority to review all notices issued by the Department at any time. Such an interpretation is an impermissible overreach of the Tribunal’s statutory authority. The August 11, 2014 Notice of Deficiency here was “finalized by law” at the end of the day on October 10, 2014. 35 ILCS 5/908(d). Therefore, it is not reviewable by this Tribunal. 35 ILCS 1010/1-45(e).

III. Conclusion

For the reasons stated herein, Department prays this Tribunal enter an Order granting Department's Motion to Reconsider, holding that the Notice of Deficiency issued August 11, 2014 became final by operation of law at the end of the day on Friday October 10, 2014, holding that, as a matter of law, this Tribunal does not have subject matter jurisdiction to review the Notice of Deficiency issued August 11, 2014 pursuant to Section 1-45(e) of the Tribunal Act, and dismissing with prejudice Counts I, II, and V of the First Amended Petition.

Respectfully Submitted,

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DATED: August 31, 2016