

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

PEPSICO, INC. & AFFILIATES,)	
)	
Petitioner,)	
)	
v.	)	Case Nos. 16 TT 82
	)	17 TT 16
ILLINOIS DEPARTMENT OF REVENUE,)	
	)	Chief Judge James Conway
Respondent.)	

**ILLINOIS DEPARTMENT OF REVENUE’S MOTION TO FILE ITS SUR-REPLY
BRIEF IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT – 80/20
ISSUE PENALTIES**

ALAN V. LINDQUIST
JOSEPH T. KASIAK
ILLINOIS DEPARTMENT OF REVENUE
555 W. Monroe Street, Suite 1100
Chicago, IL 60661
Phone: (312)814-7054
alan.lindquist@illinois.gov
joseph.kasiak@illinois.gov

*Attorneys for Respondent,
Illinois Department of Revenue*

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

PEPSICO, INC. & AFFILIATES,)	
)	
Petitioner,)	
)	
v.	)	Case Nos. 16 TT 82
	)	17 TT 16
ILLINOIS DEPARTMENT OF REVENUE,)	
	)	Chief Judge James Conway
Respondent.)	

**Illinois Department of Revenue’s Motion to File its Sur-Reply Brief
In Support of its Cross Motion for Summary Judgment – 80/20 Issue Penalties**

NOW COMES, the Movant, the Illinois Department of Revenue (the “Department”), by and through its attorneys, Alan Lindquist and Joseph Kasiak, and hereby requests that this Tribunal enter an order allowing the Department to file its Sur-Reply Brief in Support of its Cross Motion for Summary Judgment – 80/20 Issue Penalties, *instanter*. In support of its motion, the Department states as follows:

1. On August 11, 2022, PepsiCo, Inc. & Affiliates (“PepsiCo”) filed its Reply Memorandum in Support of its Motion for Summary Judgment, which again addressed an equal protection argument in support of its position for penalty abatement.
2. In Section IV of PepsiCo’s Reply Memorandum in Support of its Motion for Summary Judgment, it argued that the Department did not assess penalties against a taxpayer, Zebra Technologies Corporation, but did assess penalties against PepsiCo.

3. Attached to its Memorandum as Exhibit B, PepsiCo attached the Department's audit report from *Zebra Technologies Corporation v. Judy Baar Topinka, as Treasurer of the State of Illinois and Illinois Department of Revenue*, 1998 L 50479.
4. The Department was not provided with a copy of this audit report by PepsiCo prior to PepsiCo' Reply Memorandum filing.
5. PepsiCo claims that these documents purport to show that the Department found that Zebra Technologies Corporation had "satisfied the reasonable cause abatement standard," and abated penalties, whereas it has not done so for PepsiCo. At p.8 of PepsiCo Reply
6. The Department will be prejudiced if it is not allowed to address the newly introduced documentation and supporting argument made by PepsiCo in its August 11, 2022, Reply Memorandum.
7. The Department has attached, as Exhibit A, its Sur-Reply Brief in Support of its Cross Motion for Summary Judgment – 80/20 Issue Penalties, which it will file, *instanter*, upon grant of its motion.

WHEREFORE, the Department prays for:

- a. An Order allowing it to file its Sur-Reply Brief in Support of its Cross Motion for Summary Judgment – 80/20 Issue Penalties, *instanter*; and
- b. Any other relief this Tribunal finds just and proper.

Respectfully submitted,
Illinois Department of Revenue

By: /s/Alan V. Lindquist
Attorney for Respondent

ALAN V. LINDQUIST
JOSEPH T. KASIAK
ILLINOIS DEPARTMENT OF REVENUE
100 W. Randolph Street, Level 7-900
Chicago, IL 60601

Phone: (312)814-7054
alan.lindquist@illinois.gov
joseph.kasiak@illinois.gov

Exhibit A

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

PEPSICO, INC. & AFFILIATES,)	
)	
Petitioner,)	
)	
v.	)	Case Nos. 16 TT 82
	)	17 TT 16
ILLINOIS DEPARTMENT OF REVENUE,)	
	)	Chief Judge James Conway
Respondent.)	

**ILLINOIS DEPARTMENT OF REVENUE’S SUR-REPLY BRIEF IN SUPPORT OF ITS
CROSS MOTION FOR SUMMARY JUDGMENT – 80/20 ISSUE PENALTIES**

ALAN V. LINDQUIST
JOSEPH T. KASIAK
ILLINOIS DEPARTMENT OF REVENUE
555 W. Monroe Street, Suite 1100
Chicago, IL 60661
Phone: (312)814-7054
alan.lindquist@illinois.gov
joseph.kasiak@illinois.gov

*Attorneys for Respondent,
Illinois Department of Revenue*

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
 ARGUMENT	
I. PepsiCo’s Equal Protection Claim Does Not Document Facts, Nor Cite Legal Authority, Supporting Its Request for Relief and Accordingly Should Be Dismissed Out-of-Hand	2
II. PepsiCo Has No Equal Protection Claim Because the Department Did Not Abate Penalties in <i>Zebra</i>	3
 CONCLUSION	 7

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

PEPSICO, INC. & AFFILIATES,)	
)	
Petitioner,)	
)	
v.	)	Case Nos. 16 TT 82
	)	17 TT 16
ILLINOIS DEPARTMENT OF REVENUE,)	
	)	Chief Judge James Conway
Respondent.)	

SUMMARY OF ARGUMENT

PepsiCo, in its March 17, 2022, Memorandum in Support of its Motion for Summary Judgement for Reasonable Cause Penalty Abatement, cited dicta found in *Zebra Technologies Corp. v. Ill. Dept. of Revenue*, 344 Ill. App. 3d 474 (1st Dist. 2003), with no supporting facts or accompanying documentation. PepsiCo merely argued that the Department assessed penalties against PepsiCo , but not against Zebra Technologies Corporation.

The Department refuted PepsiCo’s equal protection allegations in both its Response and Reply briefs filed with the Tribunal. However, in its August 11, 2022, Reply Memorandum, PepsiCo attached documentation in the *Zebra* circuit court case, 98 L 50479, from the Department’s audit file. The documentation attached by PepsiCo, as Exhibit B, does nothing to reinforce its equal protection allegation, either in documenting why no penalties were imposed in Zebra or why the factual circumstances in that case were effectively the same as in PepsiCo’s case. This documentation merely confirms that penalties were not assessed against Zebra in the Department audit report attached as Exhibit B to PepsiCo’s Reply Memorandum.

PepsiCo's entire "equal protection" argument is wholly unsupported and irrelevant. PepsiCo cited no facts or law other than to state that penalties were not assessed against Zebra, while penalties are being assessed against PepsiCo. PepsiCo has offered no documented explanation of why this is relevant, or why penalties were not at issue in the *Zebra* matter. Based on this alone, the Tribunal should disregard the argument entirely, as it is misleading as to the Department's actions.

Furthermore, upon review of PepsiCo's Exhibit B, the Department investigated why penalties were not at issue in *Zebra*. Penalties were not assessed against Zebra because the penalty statute in effect for the years at issue in that case, 1993, 1994 and 1995, did not impose penalties at the time a notice of deficiency was issued. Instead, penalties were imposed on an audit assessment only after a taxpayer had exhausted rights of appeal, and then only if the taxpayer failed to pay additional tax assessed within 30 days of Department issuance of a final assessment. By contrast, the penalty statute in effect for the years at issue here, 2011, 2012, and 2013, dictates that penalties are imposed at the conclusion of an audit when the Department issues its notice of deficiency. The different treatment of Zebra and PepsiCo was dictated by different statutory provisions in effect in 1993-1995 as compared to 2011-2013. The Department *did not*, as PepsiCo mistakenly asserts, abate penalties in *Zebra*. PepsiCo's equal protection claim, based on this mistaken factual assertion, fails on its face.

I. PepsiCo's Equal Protection Claim Does Not Document Facts, Nor Cite Legal Authority, Supporting Its Request for Relief and Accordingly Should Be Dismissed Out-of-Hand

PepsiCo contends that since penalties were not assessed in *Zebra*, another 80/20 company case, but were assessed against PepsiCo, the Department has violated the Illinois equal protection

clause. PepsiCo has not explained why the facts in *Zebra* are effectively similar to those at issue here, and what legal authority applied to these facts renders the application of penalties against PepsiCo a violation of Illinois's equal protection clause. *See e.g. Englum v. Charleston*, 414 Ill. Dec. 32, [*76](4th Dist. Ill App. Ct. 2017) (court dismissed equal protection claim where plaintiff failed to cite any legal authority in support of its claim). PepsiCo bears the burden of proof in demonstrating that legal authority applied to its facts provide it with relief from Illinois income tax late payment penalties. 35 ILCS 5/904(a) (findings in Department's Notices of Deficiency are prima facie correct and are prima facie evidence that the amount of tax and penalties calculated are correct). PepsiCo has documented neither facts nor legal authority that support its position for relief under the equal protection clause. PepsiCo's equal protection claim accordingly should be dismissed out-of-hand.

II. PepsiCo Has No Equal Protection Claim Because the Department Did Not Abate Penalties in *Zebra*

Even if PepsiCo's equal protection argument is not dismissed out-of-hand, a cursory review of this claim demonstrates that it fails on its face. PepsiCo mistakenly asserts at page 7 of its Reply Memorandum that the "Department's refusal to exercise discretion and abate late payment penalties for reasonable cause here, while previously abating penalties imposed against other similarly situated companies, violates the Equal Protection Clause." The *only* documentary proof of this assertion proffered by PepsiCo is the *Zebra* audit report, which does not include late payment penalties in its computations. PepsiCo simply assumes that since penalties were not included in these audit computations that the Department abated penalties. A review of the late payment penalty statute in effect in 1993-1995 reveals that PepsiCo was mistaken in this

assumption. This statute, unlike the statute in effect in 2011, 2012, and 2013, did not authorize imposition of late payment penalties at the time of initial audit assessment.

Section 3-3(b)(2) of the UPIA governs imposition of late payment penalties for the 1993 through 1995 tax years at issue in *Zebra*. This statute states in relevant part:

Section 3-3:

(b) This subsection is applicable before January 1, 1998. A penalty of 15% of the tax shown on the return or the tax required to be shown due on the return shall be imposed for failure to pay: . . .

(2) the full amount of any tax required to be shown due on a return and which is not shown (penalty for late payment or nonpayment of additional liability), **within 30 days after a notice of arithmetic error, notice and demand, or a final assessment is issued by the Department.** In the case of a final assessment arising following a protest and hearing, the **30-day period shall not begin until all proceedings in court for review of the final assessment have terminated or the period for obtaining a review has expired without proceedings for a review having been instituted.**

35 ILCS 735/3-3 (b). (emphasis added). In other words, prior to 1998 a 15% late payment penalty did not apply until a taxpayer had exhausted its appeal rights, and then only if the taxpayer failed to pay additional tax due within 30 days of the Department's issuance of a final assessment. An example, of this limited application of late payment penalties prior to 1998 is set forth in the Department's regulations, which read in relevant part:

.EXAMPLE 1: Corporation timely filed its income tax return for calendar year 1994 by the March 15, 1995 un-extended due date for calendar year filers. Corporation properly made all estimated tax payments and paid the remainder of its tax liability with the return. In 1997, the Department completed an audit of Corporation's 1994 return and issued a notice of deficiency for an additional liability of \$5,000. Corporation protested the notice of deficiency, which was ultimately upheld by the courts. **Corporation is subject to the late payment penalty of \$750 (15% of \$5,000) only if it does not pay the additional liability within 30 days after the Department has issued a Notice and Demand for Payment.**

Title 86, Part 700, Section 700.305(a)(2)(B) (emphasis added). Furthermore, it should be noted that Zebra paid its final audit assessment on a timely basis and accordingly late penalties were never imposed against it. Once Zebra's litigation of its 80/20 issue ended unsuccessfully, the Illinois Cook County Circuit Court issued an order directing funds be disbursed to the Department, out of payments Zebra had previously made into the Protest Monies Fund, in satisfaction of the Department's 80/20 tax assessment. See Cook County Circuit Court Final Order, dated November 14, 2003, entered in *Zebra Technologies Corporation v. Topinka*, Circ. Ct. Cook County Dckt. No. 03 L 51418 attached as Exhibit A.

By contrast, the late payment penalty statute in effect for PepsiCo's 2011, 2012, and 2013 tax years at issue here requires assessment of late payment penalties at the time an audit is concluded and an assessment is issued:

(b-20) This subsection (b-20) is applicable to returns due on and after January 1, 2005.

...

(2) A penalty shall be imposed for failure to pay the tax shown due or required to be shown due on a return on or before the due date prescribed for payment of that tax .

. . . The amount of penalty imposed under this paragraph (2) shall be . . . 20% of any amount that is paid after the date the Department has initiated an audit or investigation of the taxpayer; provided that the penalty shall be reduced to 15% if the entire amount due is paid not later than 30 days after the Department has provided the taxpayer with an amended return (following completion of an occupation, use, or excise tax audit) or a form for waiver of restrictions on assessment (following completion of an income tax audit);

(3) The penalty imposed under this subsection (b-20) shall be deemed assessed at the time the tax upon which the penalty is computed is assessed . . .

35 ILCS 735/3-3 (b-20). The Department imposed late payment penalties against PepsiCo as dictated by this statute at the time the Department concluded its audit and issued Notices of

Deficiency to PepsiCo for 2011, 2012 and 2013. See Joint Stipulation Exhibit 38, Notices of Deficiency. As the Department explained to PepsiCo in these Notices:

We are imposing a penalty because you did not pay the amount required to be shown due on your return by the due date for payment. **Once an audit has been initiated, the late payment penalty is assessed at 15 percent of the late payment.**

Id. at pp. 12, 17 and 22.

PepsiCo emphasized at page 7 of its Reply Memorandum that it “does not contest the constitutionality of the Uniform Penalty and Interest Act.” Instead it asserted:

[r]ather, the Department’s **refusal to exercise discretion and abate late payment penalties for reasonable cause here, while previously abating penalties imposed against other similarly situated companies,** violates the Equal Protection Clause.

The Department **did not** abate late payment penalties in *Zebra*. No penalties were imposed by statute against *Zebra* because under the penalty statute in effect for 1993-1995 the Department did not assess penalties when it issued its audit assessment, and *Zebra* subsequently timely paid under protest. 35 ILCS 735/3-3 (b)(2). By contrast, under the penalty statute in effect for 2011-2013, the Department was required to impose late payment penalties at the time it concluded its audit and issued notices of deficiency to PepsiCo. 35 ILC 735/3-3(b-20)(2). The Department’s actions in each instance were dictated by the statutory requirements of the Uniform Penalty and Interest Act. There is no factual or legal basis for PepsiCo’s equal protection claim. The Department did not treat similarly situated taxpayers, *Zebra* and PepsiCo, differently because the Department did not abate penalties in *Zebra*. PepsiCo’s equal protection claim fails on its face.

CONCLUSION

PepsiCo's equal protection challenge of the Department's imposition of penalties against it states neither sufficient facts nor legal authority to be considered a valid legal claim for relief and accordingly should be dismissed out-of-hand. Furthermore, the Department did not abate late payment penalties in Zebra. The Department has not treated similarly situated taxpayers differently, there is no legal basis for PepsiCo's equal protection claim, and this claim fails on its face.

Respectfully submitted,
Illinois Department of Revenue

By: /s/Alan V. Lindquist
Attorney for Respondent

ALAN V. LINDQUIST
JOSEPH T. KASIAK
ILLINOIS DEPARTMENT OF REVENUE
555 W. Monroe Street, Suite 1100
Chicago, IL 60661
Phone: (312)814-7054
alan.lindquist@illinois.gov
joseph.kasiak@illinois.gov

Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS SECTION

ZEBRA TECHNOLOGIES CORPORATION,)

Plaintiff,)

vs.)

JUDY BAAR TOPINKA, as Treasurer of the State of)
Illinois, and THE ILLINOIS DEPARTMENT OF)
REVENUE,)

Defendants.)

No.

03 L 51418

renumbered from

98 L 50479

AGREED FINAL JUDGMENT ORDER

This matter coming on by agreement of the parties, due notice having been given, the parties having fully compromised, resolved and settled all issues, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT:

1. This matter is removed from the appeals/stay calendar;
2. The prior order of the Court dated January 23, 2002 is vacated;
3. In accordance with the settlement agreement reached between the parties, Zebra Technologies Corporation is entitled to receive \$1,192,316 from the protest fund, together with interest as provided for in Section 2a of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a);
4. In accordance with the settlement agreement reached between the parties, the Department is entitled to receive \$1,477,899; and,

5. This case is dismissed in accordance with this final judgment order.

Dated: November 14, 2003

JUDGE STUART A. NUDELMAN

NOV 14 2003

Judge

Circuit Court - 202

AGREED AS TO FORM AND SUBSTANCE:

Zebra Technologies Corporation

Illinois Department of Revenue and Judy
Baar Topinka, in her capacity as Treasurer
of the State of Illinois

By: 

One of Its Attorneys
Lisa A. Hausten
Scott J. Heyman
SIDLEY AUSTIN BROWN
& WOOD LLP
10 S. Dearborn Street
Chicago, IL 60603
312-853-7000
Atty. I.D. No. 38315

By: 

One of Their Attorneys
Brian E. Fliflet
Assistant Attorney General
Revenue Litigation Bureau
100 West Randolph Street
Room 13-225
Chicago, IL 60601
312-814-5685
Atty I.D. No. 99000

CERTIFICATE OF SERVICE

The undersigned counsel of record certifies that a copy of **Illinois Department Of Revenue’s Motion To File Its Sur-Reply Brief In Support Of Its Cross Motion For Summary Judgment – 80/20 Issue Penalties**, was served on August 22, 2022, to the following persons:

Judge James M. Conway Chief Administrative Law Judge Illinois Independent Tax Tribunal 160 N. LaSalle Street, Room N506 Chicago, IL 60601 James.Conway@illinois.gov	Theodore R. Bots BAKER & MCKENZIE LLP 300 E. Randolph Street, Ste. 5000 Chicago, IL 60601 Theodore.Bots@bakermckenzie.com
David A. Hemmings 300 E. Randolph Street, Ste. 5000 Chicago, IL 60601 Drew.Hemmings@bakermckenzie.com	George M. Clarke BAKER & MCKENZIE LLP 815 Connecticut Avenue, NW Washington, DC 20006 George.Clarke@bakermckenzie.com

Respectfully submitted,

By: /s/ Joseph T. Kasiak
One of the Attorneys for Respondent,
Illinois Department of Revenue

ALAN V. LINDQUIST
JOSEPH T. KASIAK
ILLINOIS DEPARTMENT OF REVENUE
555 West Monroe Street, Suite 1100
Chicago, Illinois 60661
alan.lindquist@illinois.gov
joseph.kasiak@illinois.gov