

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

PEPSICO INC. AND AFFILIATES,)	
Petitioner,)	
)	
v.)	16 TT 82 and 17 TT16
)	Chief Judge James M. Conway
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

**ORDER ON DEPARTMENT’S MOTION FOR LEAVE TO FILE INSTANTER
ITS SUR-REPLY BRIEF IN SUPPORT OF ITS CROSS MOTION FOR
SUMMARY JUDGMENT- 80/20 ISSUE PENALTIES**

On August 22, 2022, the Department requested permission to file instanter its Sur-Reply brief.¹ In that brief, the Department argues that PepsiCo, in its Memorandum in Support of Summary Judgment, cited to dicta in *Zebra Technologies Corp. v. Ill. Dept. of Revenue*, 344 Ill. App. 3d 474 (1st Dist. 2003), another 80/20 case, in which penalties were not assessed. While the Department states it addressed *Zebra* in both its Response and Reply briefs, it further notes that PepsiCo attached, as Exhibit B to its recently filed Reply memorandum, part of the audit file in *Zebra* which reflects no penalties were imposed at the conclusion of the *Zebra* audit.

Putting aside for a moment the propriety of attaching a document that is not part of the stipulated records or exhibits in this case in a Reply memorandum and further putting aside addressing the relevancy of a completely unrelated case, the Department’s request to file its Sur-Reply brief is premised on its review of the *Zebra* audit document and its claim that the *Zebra* audit occurred in a time period

¹ All reference to filings related to the Penalty Abatement issue unless otherwise noted.

in which the Department did not have authority to assess late payment penalties at the conclusion of an audit.

The Department's review of the audit statement and its view of the penalty statutes at play both for Zebra and PepsiCo during the relevant time periods have not been reviewed or tested by PepsiCo, but, if true, they would leave a reader of PepsiCo's Reply brief coming away with a complete mischaracterization of the *Zebra* case as PepsiCo claims "Having determined that Zebra's actions satisfied the reasonable cause penalty abatement standard, the Department's refusal to abate penalties for reasonable cause here-- under a significantly more developed factual record and the parties' good faith dispute over a narrow legal issue of first impression -- violates equal protection." Reply Memorandum at 8.

It is appropriate in these circumstances to grant the Department's Motion to file its Sur-Reply instanter to clear up any confusion and the motion is granted. It is quite possible that PepsiCo made an inadvertent claim, not realizing the different statutes at play, or it may be that the Department is entirely wrong, or it may be something else altogether. In any event, the parties can address Exhibit B at oral argument.

/s/ James Conway
JAMES M. CONWAY
Chief Administrative
Law Judge

Date: August 22, 2022