2013 IL App (1st) 113410-U

FOURTH DIVISION
January 17, 2013

No. 1-11-3410

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CON-WAY TRANSPORTATION SERVICES, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 08L050477
BRIAN A. HAMER, as Director of the ILLINOIS DEPARTMENT OF REVENUE; and the ILLINOIS DEPARTMENT OF REVENUE,	)	The Honorable Alexander P. White, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Epstein and Pucinski concur in the judgment.

Held: Plaintiff taxpayer is due a tax payment refund where its return was timely pursuant to the applicable statute of limitations set forth in section 911(b) of the Illinois Income Act. The judgment of the circuit court of Cook County affirming the decision of the Illinois Department of Revenue is reversed.

ORDER

¶ 1 This is an action for administrative review of the Illinois Department of Revenue's (the Department) determination that plaintiff Con-Way Transportation Services, Inc. (Con-Way), was not due a refund of funds it overpaid during a corporate tax amnesty program. The circuit court

affirmed the Department's determination. On appeal, Con-Way contends it is entitled to a refund of its Illinois tax overpayment because (1) the plain language of the Tax Amnesty Emergency Rules allows for such refund; (2) its second-amended return reporting a refund claim was timely filed; and (3) the Department's decision prejudices the taxpayer. For the following reasons, we reverse.

¶ 2 I. BACKGROUND

¶ 3 The parties herein proceeded by way of stipulation. Appellant Con-Way and its affiliates operate a transportation business throughout the United States, including Illinois. On October 12, 1998, Con-Way timely filed its 1997 Illinois corporate income tax return. On September 14, 2000, Con-Way amended its 1997 Illinois corporate income tax return and reported its federal taxable income as $106,975,303 (original return).

¶ 4 In 2003, in an effort to raise revenue for the State of Illinois, the Illinois legislature passed the Tax Delinquency Amnesty Act (Amnesty Act) (35 ILCS 745/10 (West 2008)); Pub. Act 93-26 § 10 (eff. June 20, 2003). Under the Amnesty Act, participating taxpayers who paid delinquent taxes for any taxable period after June 30, 1983, and prior to July 1, 2002, received a waiver of penalties and interest, while non-participating taxpayers were subject to double interest and penalties. 35 ILCS 745/10 (2008); 35 ILCS 735/3-2(f) (West 2008); 35 ILCS 735/3-3(I) (West 2008). To participate in the amnesty program, taxpayers had to make their full payment during the amnesty period from October 1, 2003, through November 15, 2003.[1]

[1]November 15, 2003, was a Saturday. Consequently, the actual final day to participate in the amnesty program was Monday, November 17. 86 Ill. Admin. Code § 521.105(a).

¶ 5 Section 10 of the Amnesty Act provided:

> "[U]pon payment by a taxpayer of all taxes due from that taxpayer to the State of Illinois for any taxable period ending after June 30, 1983 and prior to July 1, 2002, the Department [of Revenue] shall abate and not seek to collect any interest or penalties that may be applicable and the Department shall not seek civil or criminal prosecution for any taxpayer for the period of time for which amnesty has been granted to the taxpayer." 35 ILCS 745/10 (West 2008).

The legislature also provided for a double interest penalty for those taxpayers that had a tax liability eligible for amnesty but did not pay the liability during the amnesty period:

> "If a taxpayer has a tax liability that is eligible for amnesty under the [Amnesty Act] and the taxpayer fails to satisfy the tax liability during the amnesty period provided for in that Act, then the interest charged by the Department under this Section shall be imposed at a rate that is 200% of the rate that would otherwise be imposed under this section." 35 ILCS 735/3-2(f) (West 2008).

The Department adopted emergency rules that implemented the Amnesty Act's tax amnesty program. See 86 Ill. Adm. Code 521.105. These rules permitted participating taxpayers to make a good faith estimate of their tax liability:

> "[t]axpayers, including taxpayers under audit during the

> Amnesty Program Period, who are unsure of the exact amount of a tax liability should make a good faith estimate of the amount of the liability." 86 Ill. Adm. Code 521.105(k), adopted at 27 Ill. Reg. 15161, 15168-69 (eff. Sept. 11, 2003).

The rules also provided that a taxpayer under federal audit could participate in the amnesty program by making a good-faith estimate of its liability. Although the rules generally prohibited participants from seeking a refund, they permitted a limited exception for taxpayers whose refund claims were based upon final determinations of the Internal Revenue Service (IRS) or the federal courts:

> "A taxpayer who is under federal audit may participate in the Amnesty Program by following the procedure set out in subsection (k) above and making a good faith estimate of the increased liability that may be owed to the Department * * * Although participants in the Amnesty Program may not seek or claim refunds, a limited exception to this rule will be permitted for taxpayers whose refund claims are based upon final determination of the Internal Revenue Service or the federal courts." 86 Ill. Adm. Code 521.105(l), adopted at 27 Ill. Reg. 15161, 15170 (eff. Sept. 11, 2003).

¶ 6 Prior to the beginning of the 2003 amnesty program, the IRS began an audit of Con-Way that pertained to 1997, the year at issue. That federal audit continued throughout the amnesty

period and was still continuing on November 17, 2003, the deadline for participating in the amnesty program. On November 17, 2003, Con-Way participated in the amnesty program by filing an amended 1997 tax return (first-amended return). A copy of this first-amended return is included in the record on appeal.

¶ 7 In its first-amended return, Con-Way estimated its increased tax liability to the Department based on what it anticipated the changes made by the federal audit would be, even though the federal audit had not yet been completed. Specifically, Con-Way reported its estimated federal taxable income as $148,170,752, which was an increase of $41,195,449 from the previously-reported figure of $106,975,303 it had reported on its original tax return. Based on this new estimate of its increased federal taxable income, Con-Way reported and paid additional Illinois income tax of $100,670.

¶ 8 Approximately nine months after the expiration of the amnesty period and the day Con-Way paid its estimated tax, on August 18, 2004, the IRS completed its audit. It determined that Con-Way's federal taxable income was $130,596,080, which was less than Con-Way had estimated. Con-Way then executed the applicable federal form, the "waiver of restrictions on assessment and collection of deficiency in tax and acceptance of overassessment", acknowledging and accepting this determination.

¶ 9 On November 29, 2004, Con-Way submitted a second amended 1997 tax return (second-amended return), reporting the IRS's final changes. In this return, Con-Way reported a decrease in federal taxable income of $17,574,672, from their previous estimate of $148,170,752 to its federal taxable income as finally determined by the IRS of $130,596,080. Because Con-Way's

federal taxable income as finally determined by the IRS was less than the amount of federal taxable income it estimated in its first-amended return, Con-Way sought a tax refund of $43,372, the amount of tax corresponding to the difference between the estimated and actual federal taxable income. This second-amended return is included in the record on appeal.

¶ 10 On February 27, 2007, the Department issued a notice of denial (notice), in which it declined to issue the refund Con-Way sought. The notice stated that the claim was being denied because "[f]or the taxable year ended December 31, 1997, the Department holds that your claim for refund was not filed timely. [35 ILCS 5/911(b)(1)]."

¶ 11 Thereafter, Con-Way timely filed a protest and request for hearing in response to the Department's notice. The matter was submitted to an administrative law judge (ALJ), with Con-Way and the Department supplying stipulated facts and exhibits, as well as briefs. On March 12, 2008, the ALJ issued his recommendation for disposition.

¶ 12 In his recommendation for disposition, the ALJ concluded that Con-Way was not entitled to a tax refund. He determined that Con-Way's claim was untimely under the generally applicable limitations period set forth in section 911(a) of the Income Tax Act (35 ILCS 5/911(a) (2008)), because Con-Way sought its refund neither within one year of when the tax was paid, nor within three years of filing the original tax return. Specifically, Con-Way paid the increased tax on November 17, 2003, but did not file its refund claim until November 29, 2004, over one year later, and the original return was filed in 1998, but Con-Way did not file its refund claim until 2004.

¶ 13 In addition, the ALJ determined that Con-Way was not entitled to the benefit of the

extended two-year limitations period set forth in section 911(b) of the Income Tax Act (35 ILCS 5/911(b) (West 2008)), which pertains to refunds based on federal changes. The ALJ observed that, although "the taxpayer's [second-amended return] claiming a refund based upon Federal Changes was filed within the [two-year] limitations period set forth in section 911(b), the amount sought by the taxpayer as a refund exceeds the limitation on allowable refunds contained in that section."

¶ 14 The ALJ also noted that section 911(b) requires that a taxpayer seeking a refund based upon federal changes "can recover only Illinois income tax overpayments determined by recomputation of the taxpayer's Illinois net income 'after giving effect to [federal change items] . . . required to be reported' by Illinois law." The ALJ considered section 506(b) of the Illinois Income Tax Act and explained that, under the relevant statutes, the changes "required to be reported" are final federal changes. Section 506(b) provides that a taxpayer must notify the Department of final federal changes to their income tax within 120 days. 35 ILCS 5/506(b) (West 2008).

¶ 15 Pursuant to section 506(b), then, the ALJ reasoned, a taxpayer is required to report only alterations to federal taxable income that have been either agreed to or finally determined by the IRS, since no report pursuant to this section can be filed before such finalization of federal liability occurs. Con-Way argued that its second-amended return reported a decrease in federal taxable income of $17,574,672, from $148,170,752 to $130,596,080, with the former figure corresponding to the estimated income Con-Way had included in its first-amended return. Con-Way could not rely on this decrease, the ALJ explained, because:

> "The additional amounts reported and paid by the taxpayer [Con-Way] with its November 17, 2003 return arose not from IRS adjustments but, rather, from an amount determined by the taxpayer based upon its estimate of adjustments and computations it anticipated the IRS would make. None of these adjustments and computations was ever actually made by the IRS."

¶ 16 The ALJ determined that Con-Way's original return reported federal taxable income of $106,975,303, while the IRS audit determined that its federal taxable income was $130,596,080. Therefore, the final federal change required to be reported was an income increase of $23,620,777, which, unlike a decrease, did not entitle Con-Way to a tax refund because it did not cause an Illinois overpayment.

¶ 17 The ALJ determined that Con-Way was not entitled to a refund. On March 13, 2008, the Director of the Department accepted the ALJ's recommended decision, making it a final administrative determination. On April 11, 2008, Con-Way filed a request for a rehearing. On April 14, 2008, the ALJ issued an order denying Con-Way's request. On April 15, 2008, the Director accepted the ALJ's order.

¶ 18 Con-Way timely filed a complaint for judicial review in the circuit court of Cook County, asserting that the Department erred. Both parties briefed the issues. On October 20, 2011, the circuit court issued a memorandum order in which it affirmed the Department's decision, stating:

> "1. The Department of Revenue's denial of the refund claim by [Con-Way] for the calendar year ending December 31,

1997 is CONFIRMED.

2. Con-Way is NOT entitled to recover overpayments made in connection with Con-Way's participation in the tax amnesty program authorized by the Illinois legislature in 2003."

¶ 19 Con-Way appeals.

¶ 20 II. ANALYSIS

¶ 21 On appeal, Con-Way contends that, pursuant to the plain language of the Department's tax amnesty emergency rules, Con-Way is entitled to a refund of its Illinois tax overpayment. Specifically, Con-Way argues: (1) that it should receive a refund under the exception to the no-refund rule found in the Emergency Rules where, while under federal audit, it gave a good-faith estimate of its increased tax liability; and (2) its return was timely pursuant to the applicable statute of limitations set forth in section 911(b) of the Illinois Income Tax Act. For the following reasons, we agree.

¶ 22 As a threshold matter, we note that the parties disagree regarding the appropriate standard of review in this cause. Plaintiff proposes a *de novo* standard, arguing that we are being asked to interpret section 521.105(l) of the Illinois Administrative Code, which allows refund claims for overpayments made under amnesty, and section 911(b) of the Illinois Income Tax Act, which provides the statute of limitations on refund claims. Thus, plaintiff argues, a purely legal question is involved. The Department, meanwhile, cites general principles of administrative law, asserting that a clearly erroneous standard is required since an administrative body has already made determinations of fact. In addition, the Department argues that, even if we determine our

review herein is *de novo*, the Department's interpretation is still entitled to substantial weight and deference because the Department is charged with enforcing taxation statutes.

¶ 23 Both parties are partially correct. In an appeal from a decision of the trial court on a complaint for administrative review, we review the decision issued by the Board rather than that of the trial court. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007) (in administrative cases such as the one at bar, this court reviews the decision of the administrative agency, not the determination of the circuit court). In reviewing the decision of the administrative agency, " '[t]he applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law.' " *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008) (quoting *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005).

¶ 24 The Department's findings of fact are considered to be *prima facie* true and correct, and we may not reverse these or the Department's decision on review unless they are against the manifest weight of the evidence. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). However, the issue before us is whether the facts surrounding Con-Way's amended returns entitle it to a refund under the narrow extended limitations provision of section 911(b) of the Income Tax Act. See, *e.g.*, *Cinkus*, 228 Ill. 2d at 211 (noting that "[mixed questions of fact and law 'are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the

established facts is or is not violated" ' ") (quoting *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board*, 216 Ill. 2d 569, 577 (2005), citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001); see also *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 2005 (1998) (an examination of the legal effect of a given state of facts involves a mixed question of law and fact, with a "clearly erroneous" standard of review").

¶ 25 Although Con-Way asserts that the *de novo* standard of review applies here because the only question is the legal conclusion to be drawn from undisputed facts, Con-Way clearly disputes the ALJ's factual determinations and the way the ALJ weighed the evidence before it. The ALJ's determination was, in part, factual because it involved considerations of whether specific facts surrounding Con-Way's amended returns entitled it to a refund under section 911(b) of the Income Tax Act. In lights of these analyses and the ultimate legal question as to whether Con-Way is entitled to a refund, we characterize the Department's ruling as a mixed question of law and fact. Accordingly, we apply the largely deferential clearly erroneous standard. See *Cinkus*, 228 Ill. 2d at 211. Under the clearly erroneous standard, an administrative agency's decision is deemed "clearly erroneous" when the reviewing court is left with the " 'definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc.*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co*., 334 U.S. 364, 395 (1948)). Throughout our analysis, we remain cognizant of our supreme court's admonition: "[t]hat the clearly erroneous standard is largely deferential does not mean, however, that a reviewing court must blindly defer to the agency's decision." *AFM Messenger Service, Inc*., 198 Ill. 2d at 395.

¶ 26 The Illinois General Assembly established a tax amnesty program in 2003 through Public Act 93-0026. Public Act 93-0026 created the Tax Delinquency Amnesty Act, codified at 35 ILCS 745/1 *et seq*. (West 2008) (Amnesty Act), and amended the Uniform Penalty and Interest Act (35 ILCS 735/3-1 *et seq.* (West 2008)). The Amnesty Act authorized the Department to adopt rules implementing its provisions. 735 ILCS 745/10 (West 2008). The Department did so, issuing emergency rules pertaining to the Amnesty Act. See 86 Ill. Admin. Code § 521.101 *et seq*. (2003).

¶ 27 Section 10 of the Amnesty Act provided:

> "[U]pon payment by a taxpayer of all taxes due from that taxpayer to the State of Illinois for any taxable period ending after June 30, 1983 and prior to July 1, 2002, the Department [of Revenue] shall abate and not seek to collect any interest or penalties that may be applicable and the Department shall not seek civil or criminal prosecution for any taxpayer for the period of time for which amnesty has been granted to the taxpayer." 35 ILCS 745/10 (West 2008).

The legislature also provided for a double interest penalty for those taxpayers that had a tax liability eligible for amnesty but did not pay the liability during the amnesty period:

> "If a taxpayer has a tax liability that is eligible for amnesty under the [Amnesty Act] and the taxpayer fails to satisfy the tax liability during the amnesty period provided for in that Act, then

> the interest charged by the Department under this Section shall be imposed at a rate that is 200% of the rate that would otherwise be imposed under this section." 35 ILCS 735/3-2(f) (West 2008).

¶ 28 Participation in the amnesty program was voluntary. 35 ILCS 745/10 (West 2008); 86 Ill. Admin. Code § 521.105(b) (2008). Participation was limited by certain conditions, including: taxpayers electing to participate were required to pay the full tax amount they owed between October 1, 2003, and November 17, 2003; participating taxpayers could not contest the tax liability being paid; participating taxpayers were required to promptly correct underpayments and could not later choose to withdraw; and, except in limited circumstances, participating taxpayers could not seek a refund of the money paid. 35 ILCS 745/10 (West 2008); 86 Ill. Adm. Code 521.105(b), (c).

¶ 29 The Department adopted emergency rules implementing the Amnesty Act's tax amnesty program which permitted participating taxpayers who were uncertain how much back tax they owed to participate in the amnesty program by making a good-faith estimate of their tax liability and paying their estimated liability:

> "k) Underpayment and Overpayment of Tax Due.
>
> Taxpayers, including taxpayers under audit during the Amnesty Program Period, who are unsure of the exact amount of a tax liability should make a good faith estimate of the amount of the liability. If the Department later determines that a payment made during the Amnesty Program Period is insufficient to completely

> satisfy the tax liability for which the payment was made, and the applicable statute of limitations has not yet expired, the Department may send a bill to the taxpayer for the remaining taxes due. Pursuant to 35 ILCS 735/3-2, 3-3, 3-4, 3-5, 3-6, and 3-7, the Department will assess 200% of the penalties and interest that would otherwise be applied to the portion of the liability that was not paid. The taxpayer must pay the bill by the due date. A taxpayer who fails to pay the bill by the due date will be liable for 200% of the penalties and interest imposed under 35 ILCS 735/3-2, 3-3, 3-4, 3-5, 3-6 and 3-7.5 as if no payment had been made during the Amnesty Program Period. The Department may in its discretion refund overpayments of tax that were caused by computational error. All other overpayments will be credited to the taxpayer." 86 Ill. Adm. Code 521.105(k), adopted at 27 Ill. Reg. 15161, 15170 (eff. Sept. 11, 2003).

The rules also specifically provided that a taxpayer under federal audit could participate in the amnesty program by making a good-faith estimate of its liability. Although the rules generally prohibited participants from seeking a refund, they permitted a limited exception for taxpayers whose refund claims were based upon final determinations of the IRS or the federal courts:

> "A taxpayer who is under federal audit may participate in the Amnesty Program by following the procedure set out in

> subsection (k) above and making a good faith estimate of the increased liability that may be owed to the Department * * * Although participants in the Amnesty Program may not seek or claim refunds, a limited exception to this rule will be permitted for taxpayers whose refund claims are based upon final determination of the Internal Revenue Service or the federal courts." 86 Ill. Adm. Code 521.105(l), adopted at 27 Ill. Reg. 15161, 15170 (eff. Sept. 11, 2003).

¶ 30 There was no special limitations period for refunds sought based on good faith estimates made in order to participate in the amnesty program. Section 521.105(m) of the rules cautioned the participants that participation did not toll applicable limitations periods:

> "Statutes of Limitation and Other Filing Periods. Participation in the Amnesty Program does not toll any applicable statute of limitations or other time period for filing protests with the Department, or actions in the Circuit Court under the Protest Monies Act [30 ILCS 230] . . . The Department's procedures for obtaining waivers of statutes of limitations for taxpayers under audit shall continue to apply." 86 Ill. Adm. Code 521.105(m), adopted at 27 Ill. Reg. 15161, 15170 (eff. Sept. 11, 2003).

¶ 31 In November 2004, the Department issued an informational bulletin that, in pertinent part, reiterated that statutes of limitation were unaltered by the amnesty program:

"To: All tax professionals and taxpayers who paid a tax liability under amnesty and expect a refund based on anticipated changes to federal liabilities.

The purpose of this bulletin is to clarify when a taxpayer may file a claim for refund for liabilities that were paid under the Illinois Department of Revenue's Amnesty program that was held October 1, 2003, through November 17, 2003.

Many taxpayers filed amended returns and reported federal changes that had not become final in order to avoid the doubling of penalties and interest as a result of not paying liabilities during the amnesty period, with the understanding that they would be able to claim a refund once the federal audit was completed.

What is the normal statute of limitations for filing a claim for a refund?

The Illinois Income Tax Act (IITA) specifies that refund claims must be within the latter of

three years from the date the taxpayer's original return was filed for the taxable year, or

one year after a payment was made.

Can the statute of limitations for refunds be extended?

Yes. The department may enter into an agreement with a

taxpayer to extend the period for filing a refund claim.

However, if a refund claim is not filed within the statutory or extended time frame, no refund may be paid.

How are the statute of limitations and extensions affected by the amnesty program?

The rules for the amnesty program do not make exceptions for the existing rules. Any taxpayer that paid a liability under the amnesty program is eligible to file a claim for refund within the limitations of the IITA." Revenue Informational Bulletin No. FY 2005-10.

¶ 32 The limitations periods for refund claims are set forth in section 911 of the Income Tax Act. 35 ILCS 5/911 (2008). Section 5/911(a) provides:

"(a) In general. Except as otherwise provided by this Act:

(1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this Act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and

> (2) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period." 35 ILCS 5/911(a) (West 2008).

By statute, the time for filing a refund claim may be extended by written agreement of the Department and the taxpayer, which agreement must be entered into before the limitations period expires. 35 ILCS 5/911(c) (West 2008). In most circumstances, a refund claim not filed within the time frame of section 911(a) or within an agreed-upon extension under section 911(c) would be untimely.

¶ 33 Section 911(b), however, provides an extended two-year limitations period for certain refund claims based on federal changes:

> "(b) Federal changes.
>
> (1) In general. In any case where notification of an alteration is required by Section 506(b), a claim for refund may be filed within 2 years after the date on which such notification was due (regardless of whether such notice was given), but the amount recoverable pursuant to a claim filed under this Section shall be limited to the amount of any overpayment resulting under this Act from recomputation of the taxpayer's net income, net loss, or Article 2 credits for the taxable year after giving effect to the item or items

reflected in the alteration required to be reported." 35 ILCS 5/911(b) (West 2008).

¶ 34 Here, the IRS was conducting an income tax audit of Con-Way when Illinois passed the Amnesty Act. The IRS's audit of Con-Way was still on-going on November 17, 2003, the last day to participate in the tax amnesty program. On November 17, 2003, pursuant to the Department's emergency rules, Con-Way made a good faith estimate of the amount of its additional Illinois income taxes it anticipated it would owe after the federal audit was completed. Con-Way estimated that its federal income tax liability might increase by $41,195,449, from $106,975,303 (as reported on its original return) to $148,170,752 (its good faith estimate). On November 17, 2003, Con-Way filed its first-amended return, reporting additional Illinois income taxes due, attributable to its estimated increase in federal taxable income. It paid the estimated Illinois tax.

¶ 35 The following year, on August 18, 2004, the IRS finalized its audit. As a result of this audit, Con-Way's federal taxable income was changed to $130,596,080. This amount represented a decrease of $17,574,672 from the previous reported amount of $148,170,752 (as reported on Con-Way's first-amended return, reflecting its good-faith estimate), but an increase of $23,620,777 from the $106,975,303 figure reported on Con-Way's original return.

¶ 36 The triggering event for section 911(b) is a "notification of an alteration" that must be reported to the Department under section 506(b). By statute, Illinois taxpayers are required to report federal changes to the Department within 120 days. Section 506(b) provides:

"(b) Changes affecting federal income tax. A person shall notify the Department if:

1) the taxable income, any item of income or deduction, the income tax liability, or any tax credit reported in a federal income tax return of that person for any year is altered by amendment of such return or as a result of any other recomputation or redetermination of federal taxable income or loss, and such alteration reflects a change or settlement with respect to any item or items, affecting the computation of such person's net income, net loss, or of any credit provided by Article 2 of this Act for any year under this Act, or in the number of personal exemptions allowable to such person under Section 151 of the Internal Revenue Code, or

2) the amount of tax required to be withheld by that person from compensation paid to employees required to be reported by that person on a federal return is altered by amendment of the return or by any other recomputation or redetermination that is agreed to or finally determined on or after January 1, 2003, and the alteration affects the amount of compensation subject to withholding

> by that person under Section 701 of this Act. Such notification shall be in the form of an amended return or such other form as the Department may by regulation prescribe, and shall be signed by such person or his duly authorized representative, *and shall be filed not later than 120 days after such alteration has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund, tentative carryback adjustment, abatement or credit resulting therefrom has been assessed or paid, whichever shall first occur.*"
> [emphasis added] 35 ILCS 5/506 (West 2008).

Con-Way did so. In the case at bar, both parties agree that the alteration in question is the post-audit determination in August 2004 that Con-Way had $130,596,080 in federal taxable income. On November 29, within the required 120-day statutory period to report federal changes to the Department, Con-Way filed its second-amended return. This return corrected its federal taxable income amount from $148,170,752 (as reported on Con-Way's first-amended return) to $130,596,080 (as determined by the IRS). This reflected a $17,574,672 decrease in federal taxable income. Con-Way sought a refund of $43,372. The parties agree that the federal change was timely reported.

¶ 37 Section 911(b) next directs parties to "giv[e] effect to the item or items reflected in the alteration," though "the amount recoverable pursuant to a claim filed under this Section shall be

limited to the amount of any overpayment resulting under this Act from recomputation of the taxpayer's net income." 35 ILCS 5/911(b) (West 2008). That is to say, to give effect to the items reflected in the alteration, the new federal taxable income figure must be applied to the existing Illinois return to determine any change in the taxpayer's net income for the taxable year. If there is any change in net income, the question becomes whether such change results in an overpayment. If it does, the taxpayer is entitled to a refund.

¶ 38 The Department argues that Con-Way's tax overpayment is actually a tax *under*payment because "a taxpayer must have an overpayment of Illinois tax resulting from giving effect to the final federal change" and, it argues, the final federal change here is the difference in federal taxable income between Con-Way's federal taxable income as finally determined by the IRS (approximately $130 million) and the amount it reported on its 2000 Illinois tax return (approximately $106 million). Approaching the issue from this angle, the Department contends that the change from $106 million to $130 million does "not entitle Con-Way to a tax refund as it did not cause an Illinois *overpayment*; to the contrary, based on the federal change, Con-Way *underpaid* its Illinois taxes." Moreover, it argues that the $106 million figure is the appropriate amount to consider because the $148 million reported in the first-amended return "arose solely from an amount determined by Con-Way as its estimate of anticipated federal changes; it did not reflect any changes actually made by the IRS." The Department argues that, when the "final change," *e.g.*, the $24 million increase, is given effect, it results in an underpayment of Illinois taxes, thereby removing Con-Way from the section 911(b) refund exception. We disagree with this assessment.

¶ 39 There is no requirement in section 911(b) that an overpayment must arise solely from a final federal action. As quoted above, section 911(b) refers to "any case where notification of an alteration is required by Section 506(b)," and never to a "final federal action." Although neither section 911(b) nor section 506(b) defines the term "alteration," section 506(b) describes it in regard to changes in "taxable income, * * * deduction, or any tax credit reported in a federal income tax return" that "affect[s] the computation of such person's net income * * * provided by Article 2 of [the Income Tax Act]." 35 ILCS 5/506(b) (West 2008).

¶ 40 The decrease in federal taxable income along with the resulting overpayment of Illinois taxes in the case at bar arose from a combination of Con-Way's actions as well as from a final federal action. Specifically, but for Con-Way having reported a good faith estimated tax liability of $148 million in the first-amended return, and subsequent payment of the appropriate tax due under this estimate, there would be no overpayment. In addition, however, the overpayment itself arose from a final federal action, where but for the change to the $130 million tax liability, there would be no overpayment. Both Con-Way's 2000 tax return in which it reported a $106 million tax liability and its first-amended tax return in which it reported good faith estimate of $148 million tax liability are numbers reported by Con-Way itself to the Department on its Illinois income tax returns. The only federal change was the post-audit final determination of $130 million in federal income tax liability.

¶ 41 911(b) is silent regarding a causal relationship between the final action taken by the IRS and any overpayment by the taxpayer. The parties agree that the final determination of $130 million federal tax liability is an "alteration required to be reported" under section 506(b).

Accordingly, the next step under section 911(b) is to "giv[e] effect to the item or items reflected in the alteration."

¶ 42 In order to "giv[e] effect to the item or items reflected in the alteration" pursuant to section 911(b), the relevant inquiry is whether the items in the alteration have an effect on the numbers in Con-Way's first-amended Illinois tax return. The statute references an "overpayment *resulting under this Act from recomputation of the taxpayer's net income * * * for the taxable year* after giving effect to the item or items reflected in the alteration required to be reported." Accordingly, we focus on the taxpayer's net income as reported for the relevant year in its Illinois tax return, inquiring as to whether the number reported in the alteration alters the taxpayer's net income.

Con-Way's first-amended return is the appropriate return to consider in this inquiry because Con-Way paid Illinois taxes based on the net income figure in that return. By ignoring the first-amended return, as the Department urges us to do, the Department ignores the Illinois taxes actually paid by Con-Way. When Con-Way filed its first-amended return, it paid Illinois taxes based on a federal taxable income of $148 million (its good faith estimate). There is no language in section 911(b) to support the view that the first-amended return–with which Con-Way paid its Illinois taxes–should be disregarded.

On the merits, then, we must consider whether Con-Way's net income of $148 million as reported for the relevant year in its Illinois tax return (Con-Way's good faith estimate, as reported in its first-amended return) was altered by the alteration required to be reported by section 506(b), that is, the post-audit figure of $130 million. It was. As such, this situation fits the

requirements of section 911(b), there being an "overpayment resulting * * *from recomputation of the taxpayer's net income * * * for the taxable year after giving effect to the item or items reflected in the alteration required to be reported." 35 ILCS 5/911(b) (West 2008). Therefore, the 2-year statute of limitations provided for in section 911(b) applies. Because Con-Way filed its refund request within that time period, the request for a refund was timely.

¶ 43 We find that Con-Way's return was timely pursuant to the applicable statute of limitations set forth in section 911(b) of the Illinois Income Act, and, therefore, find clear error in the decision of the Department.

¶ 44 III. CONCLUSION

¶ 45 Accordingly, the judgment of the circuit court of Cook County affirming the decision of the Department is reversed.

¶ 46 Reversed.