

ORIGINAL

IN THE SUPREME COURT OF OHIO

International Business Machines Corporation	:	
and IBM Credit Corporation,	:	
	:	
Appellants,	:	Supreme Court Case No. 09-1296
	:	
v.	:	Appeal from the
	:	Ohio Board of Tax Appeals
	:	
Richard A. Levin,	:	
Tax Commissioner of Ohio,	:	BTA Case Nos. 2007-Z-1140
	:	2007-Z-1141
Appellee.	:	2007-Z-1143
	:	

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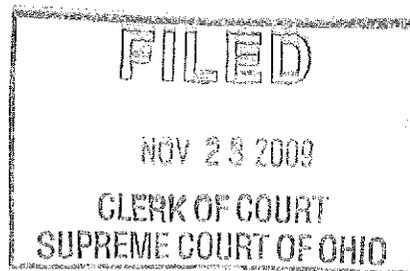


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REPLY BRIEF OF APPELLANTS

I. INTRODUCTION

Four principal arguments made in the Brief of Appellant are the following:

1. Most of the refunds at issue were filed and granted under R.C. 5741.10 and the statutory provision for the payment of interest, R.C. 5739.132, expressly states that interest is paid on **all** refunds granted pursuant to R.C. 5741.10.
2. The General Assembly did not intend to limit payment of interest on refunds of use tax (principally purchases from outside Ohio) in preference to refunds of sales tax (purchases made in-state).
3. The cross-references from R.C. 5739.071 to other sections of the Revised Code manifest an explicit legislative directive to pay interest as surely as if the authorization to pay interest were repeated in R.C. 5739.071.
4. R.C. 5739.071 was not intended to stand on its own and when that section is read

in pari materia with R.C. 5739.07, 5739.132 and 5741.10, the authorization for the payment of interest is expressly stated.

In the Brief of Appellee, the Tax Commissioner chose not to respond directly to these arguments. Instead, the Tax Commissioner advanced other arguments, including the following:

1. Although the Tax Commissioner does not dispute that several of the refunds were properly filed pursuant to R.C. 5741.10 and that the Tax Commissioner specifically referenced R.C. 5741.10 in the final determination approving the refunds, he now makes the extraordinary assertion that the refunds were not granted pursuant to R.C. 5741.10 and further asks the Court to disregard the Tax Commissioner's own findings that R.C. 5741.10 was applicable.
2. The Tax Commissioner argues that interest is not payable because R.C. 5739.071 does not repeat the directive to pay interest already expressly set forth in R.C. 5739.07 and R.C. 5739.132.
3. The Tax Commissioner defends the denial of interest by applying an overly narrow statutory construction against the taxpayer contrary to a plain reading of the statute as written and ignoring well-established rules of statutory construction.

II. LAW AND ARGUMENT

A Taxpayer Entitled To A Partial (25%) Refund Of Sales And Use Tax On Purchases Of Certain Computer Equipment Is Entitled To Payment Of Interest On The Refund.

A. A Refund Granted Pursuant To R.C. 5741.10 Is Subject To Interest.

The Tax Commissioner does not dispute that a refund granted pursuant to R.C. 5741.10 is subject to interest. Such an argument would be untenable in any case considering the clear

directive of R.C. 5739.132 that “interest shall be allowed and paid on any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment.”

On page 5 of the Brief of Appellee, however, the Tax Commissioner makes the curious argument that a claim *filed* pursuant to R.C. 5741.10 is not *granted* pursuant to R.C. 5741.10. The Tax Commissioner provides no basis for his bald assertion that the use tax refunds, while filed pursuant to R.C. 5741.10, were not approved pursuant to the same section. The Tax Commissioner then takes a statement of this Court in *Key Servs. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 764 N.E.2d 1015, wholly out of context to support his position. The Court in *Key*, while addressing the scope of the EIS exemption, observed that the refund was filed under R.C. 5739.071. The Court made this statement, however, in the context of a case that did not address the payment of interest issue or even the manner in which R.C. 5739.071 interacts with the other statutes at issue in this case, R.C. 5739.07, 5739.132 and 5741.10. Ultimately, because the refunds of use tax here were filed under both R.C. 5739.071 **and** R.C. 5741.10 (because the claims are for use tax), it follows that refunds are filed and granted under R.C. 5741.10, thereby implicating the express language of R.C. 5741.10 that all such refunds are subject to interest.

Also on page 5 of the Brief of Appellee, the Tax Commissioner advances the astounding proposition that this Court should ignore the Tax Commissioner’s own reliance on R.C. 5741.10 in the final determinations because the Tax Commissioner’s legal conclusion is not binding on this Court. The Tax Commissioner does not provide this Court with any reason whatsoever to reject the Tax Commissioners’ reliance on R.C. 5741.10 in the final determinations. While the Tax Commissioner’s determination is not binding on the Court, the Court could find the determination binding on the Tax Commissioner. As the determinations state, the use tax refunds were filed and granted under R.C. 5741.10. R.C. 5741.10 explicitly provides for the

payment of interest and that settles the matter that interest is to be paid.

B. A Refund Granted Pursuant To R.C. 5739.071 Is Subject To Interest.

The one sales tax refund at issue also is entitled to interest. While that claim was approved under R.C. 5739.071, that refund also was approved pursuant to R.C. 5739.07 because the General Assembly directed that the general sales tax refund provision would apply to EIS sales tax refund claims. The General Assembly made R.C. 5739.07 and its requirement of payment of interest in Division (F) applicable to the EIS refund by the cross-reference in R.C. 5739.071.

In the remainder of this Reply Brief, IBM will address the Tax Commissioner's various objections to the payment of interest. The present appeal, however, can and should be resolved by the specific reference to payment of interest on all refunds under R.C. 5739.132. The Tax Commissioner's failure to overcome this explicit statutory directive is reason enough to reverse the Board of Tax Appeals and recognize that statutory interest is paid on these refunds.

C. The Cross-Reference In R.C. 5739.071 To R.C. 5739.07 Results In The Authorization Of Interest.

The various theories of the Tax Commissioner do not overcome the unmistakable provision for interest on EIS refunds resulting from the cross-reference from R.C. 5739.071 to R.C. 5739.07. The procedures for applying for and granting refund claims, including the requirement for payment of interest, are set forth in R.C. 5739.07. The General Assembly instructed both the taxpayers and the Tax Commissioner to process the EIS refunds in the same manner as other sales and use tax refunds. Contrary to the implications of the Brief of Appellee, the Tax Department applies the same procedures for all refunds, with the single exception of refusing to pay interest. Nowhere in the Brief of Appellee is there a reasoned basis for applying the general refund procedures generally while at the same time denying interest. Contrary to the

Tax Commissioner, nothing suggests that the General Assembly sought to treat EIS refunds differently than other sales and use tax refunds with respect to the payment of interest.

No dispute exists that R.C. 5739.071 refers to R.C. 5739.07 and not merely to Division (D) of R.C. 5739.07. The cross-reference to the entire section should be read as written and not be limited to only a portion of the referred-to statute. The Ohio Revised Code is replete with cross-references to divisions of statutes. If the General Assembly had intended a limitation to Division (D), it would have imposed that limitation. To limit the cross-reference to R.C. 5739.07 to only a portion of the statute as the Tax Commissioner proposes would misapply what R.C. 5739.071 actually states.

The Tax Commissioner's own statement of the effect of statutory cross-reference at issue contradicts his position limiting the cross-reference in R.C. 5739.071 solely to Division (D) of R.C. 5739.07. In particular, the Tax Commissioner would limit the cross reference in R.C. 5739.071 only to the application process and would deny any effect on the refund process once the application is received within the statute of limitations. Division (E) applies to refunds under R.C. 5739.071 in that it provides for actions taken by the Tax Commissioner **after** the refund application is filed:

- On the filing of an application for a refund, the commissioner shall determine the amount of refund to which the applicant is entitled.
- If the amount is not less than that claimed, the commissioner shall certify that amount to the director of budget and management and the treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code.
- If the amount is less than that claimed, the commissioner shall proceed in accordance with section 5703.70 of the Revised Code.

Each of these actions—identified as separate bullet points above—unquestionably are actions that the Tax Commissioner must take with respect to R.C. 5739.071 refunds. Under the

Tax Commissioner's argument that only Division (D) of R.C. 5739.07 applies to R.C. 5739.071, however, the Tax Commissioner would not be empowered to (1) review the refund claim, (2) certify the refund claim for payment, or (3) proceed under R.C. 5703.70 if a portion of the refund claim should be denied. The language of the statute thus directly contradicts the Tax Commissioner's unsupported assertion that the reference to R.C. 5739.07 is limited to how and when the refund claims are filed. The review and resolution of the EIS refund claims are undertaken by the Tax Department pursuant to the general refund provisions of R.C. 5739.07. The Tax Commissioner's argument that the provisions of R.C. 5739.07 have no application after the filing of the refund claim is not accurate and is not consistent with the manner in which the Tax Department handled the refund claims filed by IBM. Divisions (E) and (F) of R.C. 5739.07, both also apply to refunds under R.C. 5739.071 and Division (F) is the authorization for interest and the gateway to the interest provisions of R.C. 5739.132.¹

R.C. 5739.07(F) reads: "when a refund is granted under this section, **it shall include interest** thereon as provided by section 5739.132 of the Revised Code." (Emphasis added.) R.C. 5739.132 (B), in turn, mandates the payment of interest on "any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment." Because the text of R.C. 5739.071 mandates that refunds shall be made in the manner of R.C. 5739.07 and R.C. 5741.10, and because the text of R.C. 5739.132 directs that interest shall be paid on refunds made pursuant to both of these provisions, the Tax Commissioner is required to order the payment of interest on refunds to providers of EIS.

¹ Divisions (A), (B), and (C) of R.C. 5739.07 speak to the relationships between the vendor and consumer, i.e. who paid the tax and who can claim a refund, and are not instructive on the issue of payment of interest.

D. The Doctrine Of In Pari Materia Also Supports The Payment Of Interest.

The well-established rule of statutory construction employing the doctrine of in pari materia likewise results in reading R.C. 5739.07, 5739.071, 5739.132 and 5741.10 together, requiring payment of interest on the refunds in question. The fleeting reference to the in pari materia principle on page 16 of the Brief of Appellee properly can be viewed as a recognition by the Tax Commissioner that he can muster no meaningful argument against reading R.C. 5739.07, 5739.071, 5739.132 and 5741.10 together such that interest is to be paid on EIS claims. While the Tax Commissioner ignored *Knoke v. Lindley* (1982), 70 Ohio St.2d 16, 434 N.E.2d 275, that case strongly supports the application of in pari materia to support the payment of interest.

E. The Tax Commissioner Seeks Ambiguity Where None Exists.

Contrary to the argument of the Tax Commissioner, R.C. 5739.07(F) and 5739.132 expressly provide for the payment of interest. No requirement exists that the authorization for interest must be repeated in R.C. 5739.071 when other statutes that are to be read together with R.C. 5739.071—R.C. 5739.07, 5739.132 and R.C. 5741.10—unambiguously provide for interest. The Tax Commissioner can point to nothing in the Revised Code or to accepted rules of statutory construction that support the Tax Commissioner's position that the failure to repeat the statutory requirements for payment of interest on sales and use tax refund claims within R.C. 5739.071 prevents such payment for EIS refunds.

The frequent references to the rule of narrow construction to be applied against a taxpayer, even if applicable to the issue of the payment of interest, cannot support the Tax Commissioner's position. The rule of narrow construction is applied only to deal with an ambiguity not to create one. It is improper to use aids in construction to create ambiguity, as opposed to addressing an ambiguity existing in the language. See *RR. Comm. of Wisconsin v. Chicago, Burlington & Quincy RR. Co.* (1922), 257 U.S. 563, 589; 42 S. Ct. 232, 237-238; 66

L.Ed. 371, 383. Thus, because the relevant statutes when read together expressly provide for interest, the rule of narrow construction does not come into play. Moreover, a rule of statutory interpretation cannot override the effect of the express cross reference from one statute to another when considering whether statutes are to be read together or in isolation.

The Tax Commissioner also asserts on page 14 of the Brief of Appellee, that only refunds of illegal and erroneous overpayments are subject to interest. That conclusion cannot be reconciled with the statement in R.C. 5739.132 that interest is due “on any refund pursuant to section 5739.07 or R.C. 5741.10 of the Revised Code.” A comparison of the language relevant before January 1, 1998 and after illuminates the point.

For periods prior to 1998, interest was paid on an illegal or erroneous assessment:

(B) For tax payments due prior to January 1, 1998, interest shall be allowed and paid upon any refund granted in respect to the payment of an *illegal or erroneous* assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. (Emphasis added.)

For periods after 1997, the reference to “illegal and erroneous” is removed as the statute provides:

(B)...For tax payments due on or after January 1, 1998, interest shall be allowed and paid on any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment...

The Tax Commissioner’s argument fails to reflect the statutory change.

Moreover, the application of the Tax Commissioner’s standard would result in absurd and unacceptable results. One example of the problems created by the Tax Commissioner’s focus on distinguishing illegal and erroneous payments from other sales and use tax payments is determining the period within which an EIS provider can seek a refund. In R.C. 5739.071, the refund period is defined as “subject to the same time limitation as provided in sections 5739.07

and 5741.10 of the Revised Code.” The use tax refund of R.C. 5741.10 states that it “shall be made in the same manner” as R.C. 5739.07. R.C. 5739.07 then states that absent waiver of the time period, the refund shall be filed “within four years from the date of the illegal or erroneous payment of the tax.”

If the EIS refund is considered to be distinct from those refunds paid illegally or erroneously, then **no** period of limitation limits the filing of EIS refunds because the sole limitation is expressed by reference to those payments that were made illegally or erroneously. Of course the General Assembly intended no such indefinite period for EIS refunds and one can be sure that the Tax Commissioner would not accept a late refund claim on the strength of this supposed difference between EIS and other refunds. The simple fact is that EIS refunds procedurally are treated the same as other sales and use tax refunds under the statutes.

Further, the General Assembly could not reasonably be found to have willingly enacted an advantage for those that mistakenly overpay in preference to those who qualify for a refund by making a required payment. Such a perverse reading of the statute would have to be supported by some citation to authority by the Tax Commissioner but he totally fails to provide such a basis. The basic tenet of statutory construction pursuant to R.C. 1.47(C) that the General Assembly intends to enact statutes that effect a just and reasonable result cannot be reconciled with the Tax Commissioner’s position.

F. The Fairness Issue First Raised By The Tax Commissioner Supports IBM.

In the Brief of Appellee, the Tax Commissioner “answers” two arguments never raised by IBM: (1) the constitutionality of the denial of a refund and (2) a fairness challenge to such denial. The unilateral raising of these arguments by the Tax Commissioner is a recognition by the Tax Commissioner of the inherent unfairness of his position. IBM did not raise the fairness issue in its initial brief because the statutory argument is straight forward on its own and a focus

on the fairness issue was unnecessary. The Tax Commissioner, however, now opens the door to a discussion of fairness.

IBM invested in an EIS project as the Tax Commissioner acknowledges by granting the refund. The Tax Commissioner failed to approve the refunds until September 13, 2007 even though the qualifying refunds related back to January 1, 1998. That delay in payment was not justified and such a long delay without payment of interest is patently unfair. The average interest rate paid by the state for the years 1998 through 2009 is 7.0%.² A nine year delay in making a payment of one dollar (\$1) at a discount rate of seven percent (7.0%) would yield a current value of 54¢.³ Thus, the delay in payment of refunds by nine years without payment of interest was equivalent to a denial of 46% of the benefit of the refund to which even the Tax Commissioner concluded IBM was entitled.

The companion issue to the analysis of the effect on the taxpayer is the question of sound tax policy. Thus, a result can be perceived as unfair to the taxpayer but be appropriate as a matter of sound tax policy. In the present case, however, the denial of interest does not advance the interests of the state because the denial of interest represents a disincentive for taxpayers to invest in EIS projects in Ohio. See also Brief of Appellant on pages 15-16. In particular, a taxpayer must pay one dollar (\$1) in sales or use tax to obtain a benefit of twenty-five cents (25¢). Thus, the revenues of the State of Ohio would benefit from greater, not less participation in this incentive.

² Seven percent (7%) discount rate is calculated by adding Annual Certified Interest Rates for the years 1998 through 2007 as set forth at <http://www.investopedia.com/calculator/PVCal.aspx>, Appendix page APP01 divided by ten (10).

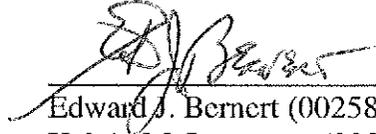
³ See present value calculator at <http://www.investopedia.com/calculator/PVCal.aspx>, Appendix page APP04. Last visited on November 23, 2009 employing values of \$1, nine periods and a discount rate of 7.0%.

III. CONCLUSION

Interest is properly paid on refunds of sales and use tax qualifying for the EIS incentive.

The BTA should be reversed.

Respectfully submitted,

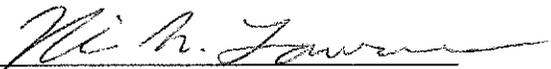


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief was served upon Barton A. Hubbard and Sophia Hussain, Taxation Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, and Columbus, Ohio 43215 by certified mail this 23rd day of November, 2009.



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Annual Certified Interest Rates

By Oct. 15 of each year, the Ohio Tax Commissioner certifies the interest rates that will apply to overdue taxes during the next calendar year. For most taxes, the interest rate is calculated by adding three percentage points to the federal short-term rate (rounded to the nearest percentage point) that was in effect during July of the current year.

Based on this formula, the Tax Commissioner has certified that the interest rate that will apply to most overdue taxes during 2010 will be 4 percent. A table of interest rates that apply to previous years may be found below.

Since July 1, 2005, a different rate of interest has applied to overdue estate taxes and tangible personal property taxes. This rate is calculated by simply rounding the federal short term rate to the nearest percentage point. Accordingly, the 2010 interest rate on overdue tangible personal property and estate taxes will be 1 percent. See Table 2 for the rate in effect in previous years.

An example of how to calculate interest using these tables is also listed below, as well as copies of recent journal entries certifying these rates.

Calendar Year	Annual Rate	Monthly Accrual
2010*	4.0%	0.33%
2009*	5.0%	0.42%
2008*	8.0%	0.67%
2007*	8.0%	0.67%
2006*	6.0%	0.50%
2005*	5.0%	0.42%
2004	4.0%	0.33%
2003	6.0%	0.50%
2002	7.0%	0.58%
2001	9.0%	0.75%
2000	8.0%	0.67%
1999	8.0%	0.67%
1998	9.0%	0.75%

1997	9.0%	0.75%
1996	9.0%	0.75%
1995	9.0%	0.75%
1994	7.0%	0.58%
1993	7.0%	0.58%
1992	10.0%	0.83%
1991	11.0%	0.92%
1990	11.0%	0.92%
1989	11.0%	0.92%
1988	10.0%	0.83%
1987	6.0%	0.50%
1986	8.0%	0.67%
1985	9.0%	0.75%
1984	9.0%	0.75%
1983	10.0%	0.83%
*See Table 2 for estate tax and tangible personal property tax interest rates.		

Table 2: Interest rate for estate tax and tangible personal property tax		
	Annual Rate	Monthly Accrual
Calendar Year 2010	1.0%	0.08%
Calendar Year 2009	2.0%	0.17%
Calendar Year 2008	5.0%	0.42%
Calendar Year 2007	5.0%	0.42%
Calendar Year 2006	3.0%	0.25%
July - December 2005	2.0%	0.17%
January - June 2005	5.0%	0.42%

Journal Entries:

- Interest Rate Certification for Calendar Year 2010 (PDF)

- [Interest Rate Certification for Calendar Year 2009 \(PDF\)](#)
- [Interest Rate Certification for Calendar Year 2008 \(PDF\)](#)
- [Interest Rate Certification for Calendar Year 2007 \(PDF\)](#)
- [Interest Rate Certification for Calendar Year 2006 \(PDF\)](#)
- [Interest Rate Certification for Calendar Year 2005 \(PDF\)](#)
- [Interest Rate Certification for Calendar Year 2004 \(PDF\)](#)

Interest Rate Formula

Tax due x interest rate x number of days late ÷ number of days in year = Interest

Example: 2007 IT-1040 filed June 21, 2009 with a tax due of \$60.00 (return was due April 15, 2008)

$$\$60.00 \times 8\% \times 260 \text{ days} \div 366 = \$3.41$$

$$\$60.00 \times 5\% \times 172 \text{ days} \div 365 = \$1.41$$

Total Interest = \$4.82

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Present Value

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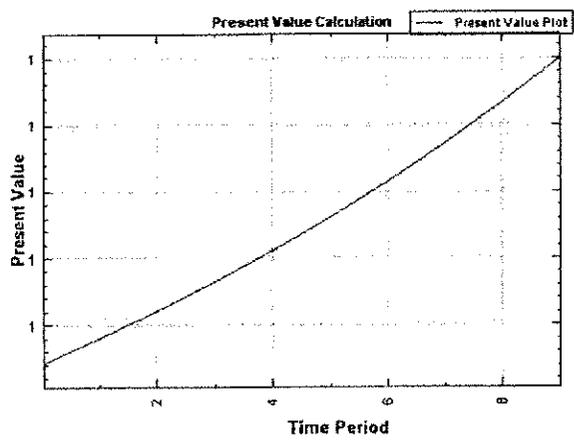
Interest Rate Per Time Period: %
 Number of Time Periods:
 Future Value:

 Present Value: **\$0.54**

Interpretation:

If you were to receive \$1.00 in 9 time periods (e.g. weeks, months, or years) from now, that \$1.00 would be worth only \$0.54 today. So, if today you were to invest the \$0.54 at a rate of 7%, you would have \$1.00 at the end of 9 time periods.

What does this mean to you? Well, if you had a choice between taking an amount higher than the \$0.54 today and taking the \$1.00 at the end of 9 time periods, you should take the money today. By doing so, you would be able to invest the higher amount at 7% for 9 equal time periods, which would end up being more than the \$1.00.



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- Is it wise to consolidate credit card debt? [\(view answer\)](#)

- Should computer software be classified as an intangible asset or part of property, plant and equipment? [\(view answer\)](#)

- In a corporate liquidation, why are unpaid taxes and wages paid before general creditors but after secured bondholders? [\(view answer\)](#)

- The interest rate used to define the effective rate of return is the: [\(view answer\)](#)

- The interest rate used to define the effective rate of return is the: [\(view answer\)](#)