

Ohio Supreme Court Reverses The Ohio Board of Tax Appeals Regarding When the Three Year Statute of Limitations Period Begins to Run for Filing a Corporation Franchise Tax Application for Refund

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On April 30, 2009, the Ohio Supreme Court issued a decision styled *Nestle R&D Center, Inc. v. Levin*, Case No. 2009-Ohio-1929. This case involved the Ohio corporation franchise tax statute of limitations for filing an application for refund to claim a refundable jobs creation tax credit. In a 7-0 decision the Court reversed the Ohio Board of Tax Appeals decision holding that such statute of limitations period expired prior to Nestle filing its application for refund. See, *Nestle R&D Center, Inc. v. Wilkins*, Ohio B.T.A. Case No. 2006-M-1365 (June 3, 2008).

Nestle timely filed its tax year 2001 estimated corporation franchise tax reports that were due on January 31, 2001, March 31, 2001, and May 31, 2001. Nestle also timely filed its original 2001 corporation franchise tax report on October 9, 2001, six days before the extended due date of October 15, 2001. Nestle did not claim a refundable jobs creation tax credit on its original report. As of October 9, 2001, Nestle had not received a credit certificate issued by the Ohio Department of Development (“ODOD”) authorizing Nestle to claim such credit. ODOD issued Nestle its certificate on December 6, 2004. The certificate entitled Nestle to claim a \$43,696.80 refundable jobs creation tax credit on its original report. In accordance with R.C. 5733.12(B) Nestle filed both an application for refund and a corresponding amended tax year 2001 corporation franchise tax report on January 6, 2005. Nestle’s sole purpose in filing its refund application

and amended report was to claim the \$43,696.80 jobs creation tax credit and receive the corresponding tax and interest benefits.

Relying on the statutory requirements within R.C. 5733.12(B) and 5733.0610 Nestle argued that the three year statute of limitations period to file an application for refund to claim its refundable jobs creation tax credit began to run on December 6, 2004, the day the Ohio Department of Development issued Nestle its certificate. Conversely, the Commissioner argued the three year statute of limitations period within R.C. 5733.12(B) began to run on October 15, 2001, the extended due date of Nestle’s corporation franchise tax report.

The Court observed that pursuant to R.C. 5733.12(B) an application for refund shall be filed “within three years from the date of the illegal, erroneous, or excessive payment of the tax” and that any payment made before the franchise tax return is due “shall be deemed to have been made on the due date or extended due date.” The Court then stated that entitlement to a refund is predicated on two elements: first, that a payment was made; second, that the payment was illegal, erroneous, or excessive. Because the taxpayer must prove the illegal, erroneous, or excessive character of a payment in order to qualify for a refund, a refund claim does not accrue until all circumstances are present that cause the payment to be illegal, erroneous or excessive. Accordingly the court said it

must determine when the payments at issue became illegal and excessive.

The Court concluded that the issuance of the certificate on December 6, 2004 retroactively established the illegal and excessive character of the payments that Nestle made with respect to its original tax return. It was significant to the Court that the jobs creation tax credit was a refundable tax credit as opposed to a nonrefundable tax credit (i.e., the taxpayer receives the full benefit of the tax credit even if the taxpayer's tax liability is less than the value of the credit). In this regard, there has been no "payment" to the extent such credit exceeds the amount of actual payments that have been made. As a result, there is no absolute point of reference to tell the taxpayer when to file its refund claim. The court stated that receiving a certificate was an essential element to

receiving the tax credit. Accordingly, Nestle's refund claim accrued, for purposes of the statute of limitations period, on December 6, 2004, the day ODOT issued Nestle its certificate.

Aside from benefiting taxpayers similarly situated to Nestle, this case may prove to be important for several additional reasons. First, the Ohio corporation franchise tax remains in effect for financial institutions. Second, individual taxpayers can claim a refundable jobs creation tax credit on their personal income tax return. Third, taxpayers can claim such credit against the Ohio commercial activity tax. Fourth, other states offer refundable tax credits and the Court's decision may influence how the statute of limitations is interpreted and applied in those states.

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