No. 121293

IN THE
SUPREME COURT OF ILLINOIS

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD,	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District No. 4-15-0522
Plaintiffs-Appellees,	)	There on Appeal from the Circuit Court, Seventh Judicial Circuit, Sangamon County, Illinois No. 15 MR 16
v.	)	
ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,	)	The Honorable JOHN MADONIA, Judge Presiding.
Defendant-Appellant.	)	

BRIEF OF DEFENDANT-APPELLANT
ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY

LISA MADIGAN
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-5376

Attorneys for Defendant-Appellant

POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiffs are a group of Illinois taxpayers seeking to challenge a regulation issued by the Illinois Department of Commerce and Economic Opportunity ("the Department") and decisions made pursuant to that regulation. Plaintiffs' sole claim is that the regulation, 14 Ill. Admin. Code § 527.20, authorizes tax credits for amounts larger than provided for by statute, 35 ILCS 10–5/1, *et seq*. (2016). Plaintiffs assert that they have standing as taxpayers. The circuit court disagreed and dismissed the case for lack of standing pursuant to 735 ILCS 5/2–619 (2016). The appellate court reversed, and this Court allowed leave to appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether taxpayers lack standing to challenge government action that does not involve the disbursement of treasury funds in which the plaintiffs have an equitable ownership interest and which they will be liable to replenish.

2. Whether the appellate court erred in expanding taxpayer standing to allow challenges to any government action that costs money to administer.

STATUTES AND REGULATIONS INVOLVED

This case involves the Economic Development for a Growing Economy Tax Credit Act, 35 ILCS 10–5/1, *et seq*. (2016) ("the Act"), and a regulation adopted by the Department as part of the implementation of the Act, 14 Ill. Admin. Code § 527.20. Both the statute and the regulation are set forth in defendant-appellant's separate appendix.

STATEMENT OF FACTS

Statutory Background

In 1999, the Illinois General Assembly enacted, and the Governor signed, the Act, P.A. 91-476; 35 ILCS 10/5–1, *et seq*. (2016). The Act is designed to allow Illinois to compete with "other states and nations that have major financial incentive programs for medium-sized and large firm relocations." 35 ILCS 10/5–3 (2016). More specifically, the Act asserts that "[t]he State must not only continue to work with firms to help them locate their new plants and facilities in Illinois but also must provide competitive investment location tax credits in support of the location and expansion of medium-sized and large operations of commerce and industry." *Id.*

To fulfill its purpose, the Act establishes a tax credit for which eligible employers may apply, and it specifies eligibility criteria. 35 ILCS 10/5–20, 5–25 (2016). The Department oversees the application process and is directed to

"make Credit awards under this Act to foster job creation and retention in Illinois." 35 ILCS 10/5–15(a)(2016); *see also* 35 ILCS 10/5–40 (2016) (amount of tax credit to be determined by taking into consideration, *inter alia*, "[t]he number and locations of jobs created and retained in relation to the economy of the county where the projected investment is to occur"). The Department also has the authority to "adopt rules necessary to implement this Act." 35 ILCS 10/5–80 (2016); *see also* 35 ILCS 10/5–10(a) (2016) (Department has authority to "[p]romulgate procedures, rules, or regulations deemed necessary and appropriate for the administration of the programs. . .").

Procedural History

Plaintiffs filed a complaint alleging that aspects of one of the Department's regulations, 14 Ill. Admin. Code § 527.20, allow employers to seek and obtain larger tax credits than the Act itself provides. C.3-14. The complaint sought a declaration that the Department had exceeded its statutory authority, an injunction prohibiting the Department from awarding tax credits pursuant to the regulation, and reasonable costs and attorneys' fees. C.13. In particular, they alleged that the regulation allows a business to receive a tax credit up to the amount of income tax withheld from new and retained employees who work on approved projects, while the Act authorizes tax credits only up to the amount of income tax withheld from new employees. C.10. To establish standing, plaintiffs relied on their status as Illinois taxpayers. C.9.

On March 16, 2015, the Department moved to dismiss, arguing that plaintiffs did not have standing. C.66, 69.

The circuit court dismissed plaintiffs' complaint with prejudice due to lack of standing. C.120-21. The circuit court explained that for taxpayers to have standing, they must allege that public funds have been "depleted by misappropriation," and that they will have to replenish them. R.38. The court concluded that the award of a tax credit does not qualify as the kind of expenditure or misappropriation that supports taxpayer standing. *Id.*

The court also addressed a different argument—that the Department's expenditure of resources in administering the regulation was a misappropriation of funds sufficient to confer taxpayer standing. R.39. The court rejected that view as well, holding that this form of taxpayer standing is limited to challenges to statutes as unconstitutional or otherwise illegal, and does not permit a taxpayer to go to court to "question the judgment of policy, expenditures or allocations of funds." *Id.* Finally, the court held that the Department's interpretation of the Act "can still be challenged by Department of Revenue, by other members of the State of Illinois, which leads to the last conclusion that the State of Illinois is the real party in interest here." R.40.

The appellate court reversed. 2016 IL App (4th) 150522. That court held that there are two distinct rationales underlying the doctrine of taxpayer standing in Illinois. *Id.* at ¶ 18. First, the court stated that tax revenues upon

their collection are public funds of which the taxpayers are equitable owners, and taxpayers have the right to restrain the illegal use or misappropriation of such funds. *Id*. Second, the court stated that if public funds are misused, taxpayers may be called upon to make up the deficiency. *Id*. The court then "push[ed] off to one side" the second argument, acknowledging that such a claim "might be too speculative and simplistic." *Id*. As the court asked, "Can one *really* predict the legislature will probably raise taxes because of the excessively generous tax credits that defendant will grant?" *Id*. (emphasis in original).

The court then turned to the "alternative argument, the argument of equitable ownership." *Id*. It rejected the argument that this Court's decision in *Lyons v. Ryan*, 201 Ill. 2d 529 (2002), stands for the proposition that if no public salaries are paid or public equipment is used that otherwise would not have been paid or used but for administering an illegal statute, there has been no misapplication of public funds sufficient to confer standing. *Jenner*, 2016 IL App (4th) 150522, ¶ 21. Instead, the court stated that "[i]mplementing any policy costs some amount of money, including the policy to impose an illegal tax." *Id*. at ¶ 24 (discussing *Snow v. Dixon*, 66 Ill. 2d 443 (1977)). The court continued that, "a taxpayer can be injured when public funds, in which the taxpayer has a beneficial interest, are misused by implementing an invalid statute or regulation." *Id*. at ¶ 26. Because the Department will expend public

funds in determining whether to grant the tax credits, there is an alleged misuse of public funds for taxpayer standing purposes. *Id*. at ¶ 28.

The court also rejected the argument, founded upon *People ex rel. Morse v. Chambliss*, 399 Ill. 151 (1948), that taxpayers lack standing to compel the collection of additional taxes. *Jenner*, 2016 IL App (4th) 150522, ¶¶ 34-35. Instead, the court found that plaintiffs here sought to prevent the future acceptance of an unlawfully low tax. *Id*. at ¶ 35 (citing *Snow*, 66 Ill. 2d at 452). Returning briefly to the argument that taxpayers must be liable to replenish the treasury for the public funds that were misapplied, the court found that "such liability is not the *sine qua non* of taxpayer standing." *Id*. at ¶ 50 (citing *Krebs v. Thompson*, 387 Ill. 471, 475 (1944).

The court concluded that a taxpayer has standing to enjoin the administration of an agency regulation that exceeds the agency's legal authority. *Id*. at ¶ 54. It held that while a taxpayer need not show that he is liable to replenish the public treasury to make up for the public funds allegedly misused, *id*. at ¶ 18, public funds will always be at issue because administering a regulation will never be cost-free, *id*. at ¶ 52.

ARGUMENT

I. The standard of review is *de novo*.

Under Illinois law, the defendant has the burden to plead and prove lack of standing. *Lebron v. Gottlieb Mem'l Hosp*., 237 Ill. 2d 217, 252 (2010). When standing is challenged in a motion to dismiss, the court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *Int'l Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Dep't of Employment Sec.*, 215 Ill. 2d 37, 45 (2005). A court's disposition of a section 2–619 motion to dismiss for lack of standing presents a question of law which this Court reviews *de novo*. *Id*.

II. A taxpayer has standing to seek an injunction against an official action that results in a disbursement of general treasury funds which the taxpayer is liable to replenish.

This Court has long insisted that every plaintiff demonstrate standing to sue, so that courts can "preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision." *Greer v. Illinois Housing Dev. Auth.*, 122 Ill. 2d 462, 488 (1988). *See also*, *e.g.*, *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 36 ("The purpose of the standing doctrine is to ensure that courts are deciding actual, specific controversies and are not deciding abstract questions or moot issues."); *Lebron*, 237 Ill. 2d at 252 (the "related doctrines of standing and ripeness seek to insure that courts

decide actual controversies and not abstract questions.") (citation omitted); *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004) (purpose of "doctrine of standing is to insure that issues are raised only by those parties with a real interest in the outcome of the controversy").

To ensure that courts are limited to resolving actual, concrete controversies, this Court requires that every plaintiff assert an injury in fact to a "legally cognizable legal interest" that is "fairly traceable to the defendant's actions" and "substantially likely to be prevented or redressed by the grant of the requested relief." *Greer*, 122 Ill. 2d at 492-93 (citations omitted). Moreover, the injury must be "distinct and palpable, rather than a generalized grievance common to all members of the public." *Id*. at 494 (internal quotation marks omitted). A "party cannot gain standing merely through a self-proclaimed interest or concern about an issue, no matter how sincere." *Glisson v. City of Marion*, 188 Ill. 2d 211, 231 (1999). *See also*, *e.g.*, *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 280 (1989) ("In deciding whether a party has standing, a court must look at the party to see if he or she will be benefitted by the relief granted."). The elements that entitle the plaintiff to standing must be determined on a case-by-case basis. *In re M.I.*, 2013 IL 113776, ¶ 32.

In view of the standing requirement's vital function of confining courts to their proper role of deciding concrete disputes in which the litigants have a

real stake, Illinois courts have generally been careful to ensure that taxpayer standing remains a "narrow doctrine permitting a taxpayer the ability to challenge the misappropriation of public funds." *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 29 (citing *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 494 (2005) (quoting *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956))). In particular, this Court has confined taxpayer standing to cases in which plaintiffs sue "to prevent the misapplication of public funds, . . . based upon the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency." *Fergus v. Russel*, 270 Ill. 304, 314 (1915). The plaintiff's complaint "must establish this situation, otherwise it is fatally defective." *Golden v. City of Flora*, 408 Ill. 129, 131 (1951). The "mere possibility" that taxpayers may someday be required to "make up a deficiency in public funds" caused by alleged illegal expenditures "is not sufficient" to support a taxpayer suit. *Dudick v. Baumann*, 349 Ill. 46, 50-51 (1932).

In short, to assert taxpayer standing, a plaintiff must establish that (1) the plaintiff has equitable ownership of the public funds at issue; (2) those funds are being or will be illegally disbursed; and (3) the plaintiff is liable to replenish the treasury for the resulting deficiency. *Scachitti*, 215 Ill. 2d at 494; *Barco Mfg.*, 10 Ill. 2d at 160; *Golden*, 408 Ill. at 131; *Fergus*, 270 Ill. at 314. The plaintiffs here meet none of these requirements and therefore lack

standing to sue as taxpayers.

III. Plaintiffs meet none of the requirements for taxpayer standing.

A. Plaintiffs have no equitable interest in taxes allegedly owed but not collected.

Taxpayer standing under Illinois law is based on the principle that taxpayers have an equitable ownership interest in general treasury funds and are injured when those funds are disbursed because they may be called upon to replenish the treasury in the future. *See Barco Mfg. Co.*, 10 Ill. 2d at 161; *Jones v. O'Connell*, 266 Ill. 443, 447-48 (1914); *Stermer*, 2014 IL App. (4th) 130079, ¶¶ 29-30. Illinois courts have long emphasized that this concept of equitable ownership is critical to taxpayer standing; if the funds at issue are not part of general treasury funds, taxpayers have no equitable interest in them and hence no taxpayer standing.

In *Barco Mfg.*, for example, the plaintiffs were employers who contributed to the Illinois Unemployment Compensation Fund and sought to enjoin what they considered illegal payments from the Fund. 10 Ill. 2d at 159. This Court rejected the plaintiffs' claim of taxpayer standing because, it explained, although taxpayers have an equitable interest in general revenue funds, they have no equitable interest in money that has been paid into a specific fund for a specific purpose. That was true even though the plaintiff-employers in *Barco* themselves paid into the fund; this Court held that any

potential increase in their required contributions as a result of the allegedly unlawful disbursements was speculative. *Id.* at 161-65.

Plaintiffs' theory of equitable ownership here is even more attenuated than the one rejected by this Court in *Barco*. Here, the funds of which plaintiffs complain have never been paid into the treasury in the first place, let alone disbursed or misappropriated. The plaintiffs' claims instead focus on unidentified sums of money, held by unidentified private parties, that plaintiffs believe *should* have been paid in taxes. But this Court has never permitted taxpayers to assert standing based on taxes that have not been collected, and for good reason: such moneys are not part of general treasury funds, and taxpayers therefore have acquired no interest in them, equitable or otherwise.

This Court's decision in *Jones v. O'Connell*, 266 Ill. 443 (1914), relied upon by plaintiffs below, *see*, *e.g.*, Pl. Repl. Br. at 10-11, is not to the contrary. In that case, a taxpayer sued the Cook County Treasurer, who had transferred most of the collected inheritance taxes to the state treasury but, pursuant to state law, kept 2% of those funds as compensation. *Id.* at 444-45. This Court held that the taxpayer in *Jones* had an equitable interest in the retained 2% of the collected taxes and therefore had standing. *Id.* at 450-51. *Jones* is inapplicable here because, unlike here, the plaintiff sued the person who actually had possession of the disputed money, and because *Jones* involved

taxes that had actually been paid, rather than taxes the plaintiffs believe other (unidentified) private parties *should* have paid.

The comparison to *Jones* illuminates the dangerous implications of allowing taxpayer standing in cases like this one, in which the relevant funds have not entered the treasury. In *Jones*, taxpayers sued to enjoin a public official from misappropriating taxes he had collected. Here, plaintiffs concede that the taxes in question have *not* been collected by the State, and have asked for an injunction directing that they be collected. In practical effect, then, this is a suit brought by private parties for the collection of tax. If this Court were to affirm the appellate court's judgment, plaintiffs and other taxpayers would effectively become roving tax collectors, able to sue the government whenever they believed someone was paying too little in tax. This Court's cases conclusively refute that notion. *See, e.g., People ex rel. Morse v. Chambliss*, 399 Ill. 151, 157 (1948) (holding that only taxing body can bring suit to collect taxes).

Indeed, the case law is clear that for litigation seeking the collection of funds to which the State might have some claim, the State is the real party in interest, and taxpayers cannot step into its shoes. In *Lyons v. Ryan*, for example, taxpayers attempted to impose a constructive trust on funds illegally received by Secretary of State officials who were engaged in "a scheme to issue commercial drivers' licenses to unqualified drivers in exchange for political

contributions." 201 Ill. 2d 529, 532 (2002). This Court rejected that attempt, explaining that "[s]tanding to bring an action cannot be based on the creation of 'public' funds through the imposition of a constructive trust." *Id.* at 538 (citing *Fuchs v. Bidwill*, 65 Ill. 2d 503, 509 (1976)). See also *Scachitti*, 215 Ill. 2d at 501 (taxpayers lack standing to sue private defendants who allegedly overcharged the State in bond transactions). Plaintiffs in this case may not have explicitly requested a constructive trust, as the plaintiffs did in *Lyons,* or compensatory damages and restitution, as in *Scachitti*, but functionally they are asking the court to declare certain funds in the hands of private parties to be owed to the State. *Scachitti* and *Lyons* firmly establish that such claims belong to the State, and so plaintiffs cannot bring them. While it is true, as the appellate court noted, that those cases were "taxpayer derivative actions" rather than actions ostensibly brought on the taxpayers' own behalf, *Jenner*, 2016 IL App (4th) 150522, ¶¶ 38-39, for present purposes the distinction is immaterial. Regardless of the plaintiff's theory of standing, those precedents hold that the State, acting through the Attorney General, has the sole power to sue to recover funds alleged to be owed to it. *Scachitti*, 215 Ill. 2d at 500; *Lyons*, 201 Ill. 2d at 540.[1]

[1] Additionally, the General Assembly may by statute confer standing on private informants or relators to bring *qui tam* actions to recover a penalty in the name of the government. *Scachitti*, 215 Ill. 2d at 494-95. "[B]y definition, *qui tam* rights have never existed without statutory authorization." *Scachitti*, 215 Ill. 2d at 495 (citation omitted). In such cases, the relator's standing is

Permitting taxpayer standing to bring actions like this one, which do not involve allegations of illegal payments from the treasury but instead seek an injunction commanding the collection of additional tax, would perform an end-run around cases like *Scachitti* and *Lyons* and disrupt the State's exclusive control over matters in which it is the real party in interest. Such a dramatic and unprecedented expansion of taxpayer standing would enmesh the courts in the full sweep of ordinary revenue-related decisions that Illinois law entrusts to the discretion of the executive branch.

B. Plaintiffs cannot show that any funds are being illegally disbursed.

Plaintiffs' assertion of standing cannot be squared with the longstanding requirement that the taxpayer plaintiff identify an allegedly unlawful disbursement of treasury funds. This requirement, which is codified in the language of the Public Monies Act, *see* 735 ILCS 5/11–301 (2016) (authorizing actions "to restrain and enjoin the disbursement of public funds by any officer or officers of the State government"),[2] has long played a central

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based on the prospect of recovering a concrete penalty, or on the government's assignment of its claim, *see Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000), rather than on the relator's status as a taxpayer. Plaintiffs do not assert *qui tam* standing here.

[2] Plaintiffs never asserted reliance on the Public Monies Act, and they failed to follow the procedural requirement of obtaining leave to file such a complaint, 735 ILCS 5/11–303 (2016). The appellate court ruled that the Department had forfeited this affirmative defense, *Jenner*, 2016 IL App (4th) 150522, ¶ 32, and the Department does not challenge that ruling in this appeal. In any event, as this Court has explained, the Public Monies Act did not "enlarge the right of

role in this Court's taxpayer standing decisions. *Scachitti*, 215 Ill. 2d at 494; *Barco Mfg*., 10 Ill. 2d at 160; *Golden*, 408 Ill. at 131; *Fergus*, 270 Ill. at 314. Because plaintiffs do not seek to enjoin unlawful payments by the government, but instead seek to require collection of additional taxes allegedly owed, they cannot meet this requirement.

As explained above, the award of a tax credit is not a payment of funds from the treasury, because the relevant funds never became part of the treasury in the first place. From a doctrinal perspective, then, such an award can never form the basis for a claim of taxpayer standing—and, indeed, the Department is aware of no case in which this Court has upheld taxpayer standing by treating a tax credit as if it were a misappropriation of public funds. But even from a purely economic perspective, a tax credit does not always have the same fiscal effects as a payment by the government of an equivalent amount of money. Many tax credits, including the one at issue here, leave money in the hands of private parties to spend as they choose, whereas the government can spend money only as legally authorized. In fact, the very point of the tax credit plaintiffs challenge here is to stimulate economic activity in the State, 35 ILCS 5/10–1 (2016) (noting purpose of

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citizens and taxpayers nor … extend the jurisdiction of courts of equity." *Daly v. Madison Cnty.*, 378 Ill. 357, 376 (1941) (citing Ill. Rev. Stat. 1941, ch. 102, ¶ 11). As a result, the cases generally do not distinguish between standing pursuant to the Public Monies Act and common-law taxpayer standing. *See, e.g., Barco Mfg. Co.*, 10 Ill. 2d at 158.

statute), which, if successful, would lead to *greater* tax receipts than the amount of the credit. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (noting that "it is unclear that" tax credits and exemptions "do in fact deplete the treasury" because "[t]he very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues") (emphasis in original). Regardless of whether the tax credits that plaintiffs here challenge in fact result in increased revenues, the differences in economic structure and effects between tax credits and direct subsidies preclude any suggestion that they ought to be treated as legally identical.

Even if a particular tax credit could be shown to be economically comparable to a disbursement of treasury funds, it does not follow that the two should be treated the same for purposes of standing. As the United States Supreme Court recognized in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 141-42 (2011), although "tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit," they need not have the same implications for a taxpayer's standing. It is true, of course, that federal law differs from Illinois law on the issue of taxpayer standing, with federal courts rejecting the concept in all but a narrow range of cases. *Id*. at 134. But the plaintiffs in *Winn* attempted to avail themselves of an Article III principle that parallels taxpayer standing in Illinois: the *Flast*

exception, which allows taxpayers to challenge legislative appropriations alleged to violate the First Amendment's Establishment Clause. *See Flast v. Cohen*, 392 U.S. 83, 105–06 (1968). The Court rejected that attempt on the ground that the plaintiffs "assume[d] that income should be treated as if it were government property even if it has not come into the tax collector's hands." *Winn*, 563 U.S. at 144. This Court should reject plaintiffs' standing for the same reason here. At the very least, the Supreme Court's refusal to treat tax credits as legally identical to government spending illustrates that there is no logical reason why tax credits and disbursements must be treated the same.

Although the appellate court did not separately discuss the element of taxpayer standing that requires a showing of misappropriation of public funds, it apparently concluded that it was met here because the challenged regulation would cost some money to implement. *Jenner*, 2016 IL App (4th) 150522, ¶¶ 26, 27. At the same time, however, the appellate court acknowledged that "it always will cost *something* to administer a regulation," and that the "machinery of the State never runs cost-free." *Id.* at ¶ 39 (emphasis in original). If sustained, then, its theory would effectively sweep away all of the traditional limitations on taxpayer standing embodied in this Court's longstanding precedent, because it would allow taxpayers to go to court to shut down any government action they viewed as illegal, on any subject, from tax

policy to investigation to public safety to the provision of public information. Taxpayer standing cannot and should not be stretched so far.

The cases cited by the appellate court to justify this extravagant expansion of taxpayer standing should not be read to support it. The court relied on cases in which taxpayers were granted standing to challenge the use of public funds to administer a statute they alleged to be facially invalid. *Jenner*, 2016 IL App (4th) 150522, ¶¶ 50-51. In *Krebs v. Thompson*, for example, the plaintiff sought to prevent various public officials from "expending any funds of the State for the administration of an act" regulating professional engineering, which the plaintiff claimed, and the court ultimately held, was unconstitutional on its face for excessive vagueness. 387 Ill. at 472. Likewise, in *Crusius v. Illinois Gaming Board*, 348 Ill. App. 3d 44 (1st Dist. 2004), *aff'd on other grounds*, 216 Ill. 2d 315 (2005), the taxpayer plaintiff sued to enjoin the use of state resources in administering a statute that he claimed was facially unconstitutional special legislation. And the plaintiff in *Snow v. Dixon* alleged that a favorable "charter tax" rate granted to one railroad company by statute became a nullity when that railroad went out of business and sold its assets to a second railroad. 66 Ill. 2d 443, 449 (1977). This Court agreed, holding that the favorable rate had been applied to the original railroad by virtue of an 1851 charter granted by the General Assembly but was "otherwise invalid." *Id*. at 465.

These cases are in considerable tension with this Court's overall jurisprudence on taxpayer standing, which is designed to permit challenges by taxpayers to government spending programs, not to any government action that happens to entail ancillary administrative costs (as all of them do). The Court need not reconsider those cases here, however, as it can keep them within meaningful bounds by making clear that their holdings do not extend beyond claims asserting statutes to be facially invalid. The resulting doctrine would be practically manageable, as the legislature generally appropriates money for the implementation of new statutes, and courts can presume that such implementation will cost an identifiable sum. And it would have some logic: if a plaintiff's claim is that the statute is invalid on its face, then every expenditure associated with its implementation could in some sense be described as unlawful. Such a claim in effect raises the question of *whether* the government can lawfully undertake a statutorily authorized program at all.

The assertion of taxpayer standing in this case, by contrast, goes far beyond what cases like *Krebs* and *Snow* allow. Plaintiffs do not allege that the Act itself, or the tax credits it authorizes, are unconstitutional or invalid. Rather, as the circuit court recognized, R.39, plaintiffs complain about *how* defendant is implementing the Act. Their theory of standing would permit taxpayers to go to court whenever they believe a public officer is unlawfully

interpreting, implementing, or applying a concededly valid statute.[3] The appellate court agreed, holding that "unless the administration of an illegal regulation is cost-free (*and it is difficult to see how it ever would be*), the taxpayer has standing to seek an injunction, regardless of whether the regulation would bring a net profit to the state and regardless of whether the cost of administration is small." *Jenner*, 2016 IL App (4th) 150522, ¶ 52 (emphasis added). This reasoning lacks any limiting principle: under it, every government action—not just an allegedly illegal regulation—can become the subject of litigation at the behest of any taxpayer. Practically speaking, such an approach would be difficult for courts to manage, for in many cases it will be unclear, as it was in *Lyons*, whether a portion of the salaries of state employees or expenses for equipment or other costs was in fact devoted to the allegedly unlawful government action. 201 Ill. 2d at 538. More fundamentally, the very possibility of such cases being brought, even if most were ultimately dismissed as meritless, would undermine the efficiency of public decision-making and threaten to convert the courts into perpetual monitors of all manner of official actions.

The appellate court's holding not only eviscerates this Court's longstanding taxpayer standing doctrine and threatens to disrupt the orderly

[3] The complaint does not assert standing based on the cost of administering the regulation, C.3-12, but plaintiffs raised this theory in briefing and

administration of public policy—it is also unnecessary. The Attorney General may pursue litigation to protect public funds pursuant to her constitutional common-law powers, which include the authority "to protect the public purse." *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 483 (1992). Similar authority is established by Section 4 of the Attorney General Act, which gives the Attorney General the duty "[t]o enforce the proper application of funds appropriated to the public institutions of the State [and] prosecute breaches of trust in the administration of such funds. . ." 15 ILCS 205/4, par. Ninth (2016). Sections 11–301 and 11–302 of the Code of Civil Procedure specifically authorize the Attorney General to bring an action "to restrain and enjoin the disbursement of public funds by any officer or officers of the State government." 735 ILCS 5/11–301, 11–302 (2016). Additionally, taxpayers and other citizens have opportunities to be heard with respect to the validity of regulations. When regulations are proposed, they are subject to notice and comment and a public hearing by the Joint Committee on Administrative Review. *See* 5 ILCS 100/5-40 (2016). And once the regulations are enacted, citizens can lobby their legislators and other public officials to repeal, or exercise oversight with respect to, regulations that are alleged to be improper, or even just unwise. Finally, any person adversely affected by application of the regulation to that person in a specific matter may contest its validity in the

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argument on the motion to dismiss, C.93-95; R.18-19, and asked for leave to

courts, either directly or on administrative review. *See* 735 ILCS 5–3/102 (2016). In short, there is no reason to throw the courthouse doors open to every Illinois taxpayer who believes that a government action is unlawful, in contravention of this Court's traditional test for taxpayer standing.

C. Plaintiffs are not liable to replenish funds that have never been paid into the treasury.

Finally, for plaintiffs to have standing as a taxpayers, they must show, in addition to an equitable interest in the funds at issue and an illegal disbursement or misappropriation of those funds, that they will be left with an obligation to replenish the treasury. *Stermer*, 2014 IL App (4th) 130079, ¶ 29 (citing cases). Here, as described above, there has been no disbursement—the funds at issue never went into the treasury, much less back out of it again—so there is nothing to replenish. *See* Oxford Dictionary of English 1493 (2d ed., rev. 2005) (defining "replenish" as to "fill (something) up *again*" or to "*restore* (a stock or supply) to a *former level* or condition") (emphasis added).

Rather than address the plaintiffs' inability to show their liability to replenish the treasury, the appellate court chose to "push" this requirement "off to one side." *Jenner*, 2016 IL App (4th) 150522 at ¶ 18. It later returned to the issue just long enough to conclude that "such liability is not the *sine qua non* of taxpayer standing." *Id*. at ¶ 50. That conclusion was wrong.

This Court has made clear that taxpayer standing to enjoin the

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amend if necessary, C.95 n.1.

misappropriation of treasury funds "is based upon the taxpayers' ownership of such funds *and* their liability to replenish the public treasury for the deficiency caused by such misappropriation," *Barco Mfg*., 10 Ill. 2d at 160 (emphasis added), and that a complaint that fails to allege both of these elements of taxpayer standing is "fatally defective." *Golden*, 408 Ill. at 131. The appellate court has frequently enforced this limitation on taxpayer standing. *See*, *e.g.*, *Marshall v. Cty. of Cook*, 2016 IL App (1st) 142864, ¶ 16 ("taxpayer standing requires a specific showing that the plaintiff will be liable to replenish public revenues depleted by the misuse of those funds"); *Schacht v. Brown*, 2015 IL App (1st) 133035, ¶ 20 ("our case law on taxpayer standing requires a specific showing that the plaintiffs will be liable to replenish public revenues" depleted by misuse of public funds); *Stermer*, 2014 IL App (4th) 130079, ¶ 29 (plaintiff in taxpayer standing case must allege equitable ownership of funds depleted by misappropriation and liability to replenish them or complaint is fatally defective); *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1102 (4th Dist. 2011) (holding that the "key to taxpayer standing is the plaintiff's liability to replenish public revenues depleted by an allegedly unlawful governmental action"); *but see Crusius*, 348 Ill. App. 3d at 49-51 (permitting taxpayer standing based on public resources allegedly being used to administer illegal legislative act).[4]

[4] The appellate court here depicted the liability-to-replenish requirement as an

The appellate court's rejection of the requirement of liability to replenish the treasury overlooks the basic function of standing doctrine, which is to ensure that the plaintiff has a real and concrete stake in the controversy. *Lebron*, 237 Ill. 2d at 252; *Wexler*, 211 Ill. 2d at 23; *In re Marriage of Rodriguez*, 131 Ill. 2d at 280. Unless the challenged government action authorizes outlays of treasury funds that the plaintiff will be asked to make up for as a taxpayer, the plaintiff's interest in the dispute is merely abstract or hypothetical, and that is not enough to support standing. *Powell*, 2012 IL 111714, ¶ 36. A sufficient allegation of liability to replenish connects the allegations of a complaint to the plaintiff's status as a taxpayer; without it, the complaint states only a "generalized grievance common to all members of the public." *Greer*, 122 Ill. 2d at 492-93. Permitting such generalized claims to go forward would improperly involve the courts in a broad range of disputes over government action based on nothing more than the plaintiff's disagreement with the challenged action rather than its concrete, adverse effect on the plaintiff. *See In re M.I.*, 2013 IL 113776, ¶ 32.

"alternative argument" for taxpayer standing, *Jenner*, 2016 IL App (4th) 150522, ¶ 18, but as explained above, the two requirements go hand in hand: the right to enjoin misapplication of public funds is "based upon the taxpayers' equitable ownership of such funds *and* their liability to replenish the public treasury for the deficiency." *Scachitti*, 215 Ill. 2d at 494 (emphasis added and citations omitted).

CONCLUSION

For these reasons, the judgment of the appellate court should be reversed and the judgment of the circuit court should be affirmed.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

/s/ David L. Franklin
DAVID L. FRANKLIN
Solicitor General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-5376

Attorneys for Defendant-Appellee

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2016 IL App (4th) 150522

NO. 4-15-0522

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD, Plaintiffs-Appellants, v. THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY, Defendant-Appellee.	)))))))))))	Appeal from Circuit Court of Sangamon County No. 15MR16 Honorable John Madonia, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court, with opinion.
Justices Harris and Steigmann concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs are a group of Illinois taxpayers: Christopher Jenner, Laurel Jenner, Thomas Klingner, Adam Liebmann, Kelly Liebmann, Michelle Mathia, Kristina Rasmussen, Jeffrey Tucek, Mark Weyermuller, and Judi Willard. They brought this action in Sangamon County circuit court for declaratory and injunctive relief against defendant, the Illinois Department of Commerce and Economic Opportunity, alleging that defendant had promulgated a regulation allowing tax credits greater than those allowed by statute. Defendant moved for the dismissal of the complaint on the ground that plaintiffs lacked standing (735 ILCS 5/2-619(a)(9) (West 2014)), and the trial court granted the motion, dismissing the complaint with prejudice. Plaintiffs appeal. We reverse the trial court's judgment and remand this case for further

proceedings, because taxpayers have standing to seek an injunction against the use of public funds to administer an allegedly illegal tax regulation.

¶ 2 I. BACKGROUND

¶ 3 The Economic Development for a Growing Economy Tax Credit Act (Act) (35 ILCS 10/5-1 to 999-1 (West 2014)) authorizes defendant to award a tax credit to "[a] person that proposes a project to create new jobs in Illinois" and that "enter[s] into an Agreement with [defendant] for the Credit under this Act" (35 ILCS 10/5-15(b) (West 2014)). The "Agreement" must include, among other things, "[a] specific method for determining the number of New Employees employed during a taxable year" (35 ILCS 10/5-50(5) (West 2014)) as well as a requirement that the taxpayer "annually report to [defendant] the number of New Employees, the Incremental Income Tax withheld in connection with the New Employees, and any other information [defendant] needs to perform the Director's duties under this Act" (35 ILCS 10/5-50(6) (West 2014)).

¶ 4 The amount of tax credit under the Act "shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement." 35 ILCS 10/5-15(d) (West 2014). The Act defines the " 'Incremental Income Tax' " as "the total amount withheld during the taxable year from the compensation of New Employees[,] under Article 7 of the Illinois Income Tax Act [(35 ILCS 5/701 *et seq.* (West 2014)),] arising from employment at a project that is the subject of an Agreement." 35 ILCS 10/5-5 (West 2014). The Act defines " 'New Employee' " as "[a] Full-time Employee first employed by a Taxpayer in the project that is the subject of an Agreement and who is hired *after* the Taxpayer enters into the tax credit Agreement." (Emphasis added.) 35 ILCS 10/5-5(b) (West 2014).

¶ 5 The Illinois General Assembly empowered defendant to promulgate regulations implementing the Act (35 ILCS 10/5-10(a) (West 2014)), and, according to the complaint, defendant has promulgated regulations allowing tax credits greater than those the Act allows. Under defendant's regulations, it can award a tax credit no greater than "the incremental payroll attributable to the applicant's project." 14 Ill. Adm. Code 527.20 (2008) (definition of " 'Credit' "). So far, so good, but further down in section 527.20, defendant defines " 'Incremental payroll' " as " the total amount withheld by the taxpayer during the taxable year from the compensation of new employees *and retained employees* under Article 7 of the Illinois Income Tax Act [citation] arising from such employees' employment at a project that is the subject of an Agreement." (Emphasis added.) *Id.* Defendant in turn defines " 'Retained employee' " as follows: " 'Retained employee' means a full-time employee employed by a taxpayer during the term of the agreement whose job duties are directly and substantially-related to the project. For purposes of this definition, 'directly and substantially-related to the project' means at least two-thirds of the employee's job duties must be directly related to the project and the employee must devote at least two-thirds of his or her time to the project." *Id.*

¶ 6 Those regulatory definitions are, in plaintiffs' view, unlawful because they allow businesses to receive a larger tax credit than the Act permits. Instead of limiting the tax credit to the amount of the income tax withheld from *new employees'* paychecks, as section 5-15(d) of the Act requires, defendant's regulations would award businesses a tax credit up to the amount of the income tax withheld from paychecks of *both new and retained employees* who work on a project that is the subject of an "Agreement." Plaintiffs allege that these excessive tax credits, unauthorized by statute, deplete public funds and that taxpayers such as themselves could end up having to replenish the deficiency. Also, apart from their liability to replenish a deficiency in the

general revenues, plaintiffs argue that defendant's use of their tax dollars to administer illegal regulations is, in and of itself, an injury to them, the taxpayers, just as a trustee's illegal use of the trust corpus is, in itself, an injury to the beneficial owners of the corpus.

¶ 7 This two-pronged argument was unsuccessful below. The trial court regarded the State as the only real party in interest and was unconvinced that by granting tax credits pursuant to its regulations, defendant would cause any injury to plaintiffs as taxpayers. In the court's view, taxpayers had standing only when they challenged tax statutes as unconstitutional or otherwise illegal; they did not have standing when challenging how a statute "[got] interpreted" or "the judgment of policy, expenditures[,] or allocations of funds." Consequently, the court granted defendant's motion, dismissing the complaint with prejudice.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Defendant's Motion To Strike a Portion of Plaintiffs' Brief

¶ 11 Before addressing the merits of this appeal, we note that defendant urges us to strike part III of the statement of facts in plaintiffs' brief on the ground that part III contains argumentative matter. See Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013) ("Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment ***."). Part III could come across as argumentative in that it says, for example: "[Defendant's] regulations allow a business to receive a larger tax credit than [the] Act permits." But judging from the accompanying citations to the complaint, we infer that, in part III of their statement of facts, plaintiffs mean to summarize their complaint rather than to make an argument. Thus, we decline to strike part III.

¶ 12 B. The Concept of Standing

¶ 13 The doctrine of standing saves the courts from becoming "mired in abstract questions, moot issues, or cases brought on behalf of parties who do not desire judicial aid." *In re Estate of Zivin*, 2015 IL App (1st) 150606, ¶ 14. The doctrine weeds out academic disputes brought by the "merely curious or concerned." *Id.* It does so by asking whether the plaintiff has suffered an injury to a legally cognizable interest or, if the plaintiff has not yet suffered such an injury, whether the plaintiff is in real danger of such an injury (*Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492-93 (1988)). This actual or threatened injury must be "(1) distinct and palpable [citation]; (2) fairly traceable to the defendant's actions [citation]; and (3) substantially likely to be prevented or redressed by the grant of the requested relief [citation]." (Internal quotation marks omitted.) *Id.*

¶ 14 C. The Lack of Standing as an Affirmative Defense

¶ 15 Under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)), the defendant "may, within the time for pleading, file a motion for dismissal of the action" on the ground that "the claim asserted against defendant is barred by *** affirmative matter avoiding the legal effect of or defeating the claim." A motion for dismissal under this section admits the legal sufficiency of the complaint but raises "a defense outside the complaint," an "affirmative matter," that defeats the action. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Lack of standing is one such affirmative matter. *Estate of Zivin*, 2015 IL App (1st) 150606, ¶ 13.

¶ 16 When moving for the dismissal of the action on the ground of the plaintiff's lack of standing, the defendant may argue that the plaintiff's lack of standing is apparent from the

face of the complaint, or, alternatively, the defendant may file an affidavit proving the plaintiff's lack of standing. "If the grounds do not appear on the face of the pleading attacked[,] the motion shall be supported by affidavit," as section 2-619 says. 735 ILCS 5/2-619 (West 2014); see also *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). In the present case, defendant submitted no affidavit in support of its motion for dismissal, and therefore we will decide whether it is apparent, from the face of the complaint, that plaintiffs lack standing. We will make that decision *de novo*, taking the well-pleaded facts of the complaint to be true and drawing from those facts all reasonable inferences in plaintiffs' favor. See *Chicago Teachers Union, Local 1 v. Board of Education*, 189 Ill. 2d 200, 206 (2000).

¶ 17 D. A Taxpayer's Standing To Seek an Injunction
Against an Administrative Regulation
That Effectively Would Assess an Illegal Tax

¶ 18 The supreme court has held that tax revenues, upon their collection, become public funds, of which the taxpayers are the equitable owners, and that a taxpayer has the "equitable right to restrain the illegal use or misappropriation of public funds in which he, in common with other tax-payers, ha[s] an interest." *Jones v. O'Connell*, 266 Ill. 443, 447-48 (1914). In addition to this rationale of equitable ownership, the supreme court sometimes gives another rationale for taxpayer standing: if public funds are misused, taxpayers are liable to make up the resulting deficiency. *Fergus v. Russel*, 270 Ill. 304, 314 (1915). Let us push off to one side plaintiffs' argument that statutorily unauthorized tax credits will cause a deficiency in general revenues and that they will be called upon to make up the deficiency. We can understand how that argument might be too speculative and simplistic (can one *really* predict the legislature will probably raise taxes because of the excessively generous tax credits that defendant will grant?). Let us concentrate, instead, on plaintiffs' alternative argument, the argument of equitable

ownership. Plaintiffs argue that by administering a regulation which, in violation of statute, would award a tax credit up to the amount of the income tax withheld from the paychecks of not only new employees but also retained employees, defendant has misappropriated or put to an illegal use the public funds that finance defendant's operation and that plaintiffs, as taxpayers, have an equitable right to restrain the misappropriation.

¶ 19 The plaintiffs in *Lyons v. Ryan*, 201 Ill. 2d 529, 537 (2002), made a similar argument in support of their standing, and the supreme court was unconvinced. But *Lyons* is distinguishable in that the plaintiffs in that case were seeking to impose a constructive trust on the fruits of official misconduct instead of seeking to restrain the misuse of public funds. The plaintiffs in *Lyons* were Illinois taxpayers, and they alleged that some officers and employees of the Secretary of State had conspired with a political action committee, Citizens for Ryan, to issue commercial driver's licenses to unqualified applicants in return for campaign contributions. (At the time of the lawsuit, George Ryan was the Governor of Illinois. Before holding that office, he was the Secretary of State. *Id.* at 531.) The plaintiffs sought the imposition of "a constructive trust on allegedly illegal campaign contributions, salaries of officers and employees involved in the alleged scheme, and the cost of equipment used in the alleged scheme." *Id.* at 537-38.

¶ 20 The supreme court noted, however, that the campaign contributions themselves "had no impact on the treasury." *Id.* at 538. And apparently, the scheme entailed no expenditure of public funds that, in the legitimate course of government business, would not have been spent anyway. The supreme court said: "Plaintiffs offer no basis for this court to conclude that the salaries of state employees *** would not have been paid in the absence of the alleged scheme, or that the equipment used in the alleged scheme was not used for any other legitimate purpose." *Id.*

¶ 21 The argument could be made that, unless a salary was paid that otherwise would not have been paid or unless equipment was used that otherwise would not have been used, *Lyons* forecloses the argument that the administration of a statutorily unauthorized regulation entails a misapplication of public funds, a misapplication that gives standing to a taxpayer. But the appellate court has not interpreted *Lyons* that way. In *Crusius v. Illinois Gaming Board*, 348 Ill. App. 3d 44, 47 (2004), the plaintiff, a taxpayer, sought a declaratory judgment that section 11.2(a) of the Riverboat Gambling Act (230 ILCS 10/11.2(a) (West 2000)) violated the constitutional ban on special legislation (Ill. Const. 1970, art. IV, § 13). The appellate court held that the plaintiff "had the right to enforce his interest as a taxpayer in public resources that were allegedly being used in administering an illegal legislative act." *Crusius*, 348 Ill. App. 3d at 50. *Lyons*, the appellate court said, was distinguishable for the following reason:

> "[The plaintiff in *Crusius*] did not seek a constructive trust over private donations generated through criminal activity and held by someone other than the State Treasurer, in addition to past salary and equipment expenditures. [Rather, the plaintiff] sought a declaration of unconstitutionality and to enjoin subsequent misuse of state resources in administering the allegedly unconstitutional statute." *Id.* at 51.

The appellate court cited, among other authorities, *Snow v. Dixon*, 66 Ill. 2d 443, 450 (1977), which held that "[a] taxpayer [might] bring suit to enjoin misuse of public funds in administering an illegal legislative act." *Crusius*, 348 Ill. App. 3d at 49.

¶ 22 In *Snow*, the plaintiff was an Illinois taxpayer who brought an action for an injunction pursuant to what is commonly known as the Public Moneys Act (Ill. Rev. Stat. 1975, ch. 102, ¶ 11 *et seq.*). *Snow*, 66 Ill. 2d at 450; see also *Droste v. Kerner*, 34 Ill. 2d 495, 497

(1966). (The plaintiff in *Crusius* likewise sued under the Public Moneys Act (735 ILCS 5/11-301 to 11-304 (West 2000)). *Crusius*, 348 Ill. App. 3d at 49.) The plaintiff in *Snow* complained that "State funds [were] being disbursed to effect the collection from [Illinois Central Gulf Railroad Company (Gulf Railroad)] of [an] illegal 7% Tax on charter properties." *Snow*, 66 Ill. 2d at 449.

¶ 23 What was the 7% tax on charter properties? In 1851, in the statute incorporating the Illinois Central Railroad Company (Illinois Central), the General Assembly provided that Illinois Central, in lieu of ordinary taxes, would pay a 7% gross revenue tax on its charter line, the line running from Cairo to Chicago. *Id.* at 448-49. In 1972, however, Illinois Central dissolved after selling all its assets to Gulf Railroad. *Id.* at 448. Thereafter, from 1972 to 1975, Gulf Railroad paid the 7% tax on the charter properties, in lieu of other taxes, just as Illinois Central had done—and, apparently, no official of the State of Illinois challenged Gulf Railroad. *Id.* at 449. But the plaintiff, Robert H. Snow, did so in his capacity as an Illinois taxpayer. *Id.* He argued that the statutory right to pay the 7% tax belonged exclusively to Illinois Central, not to Gulf Railroad, and he sought an injunction requiring the State of Illinois to tax Gulf Railroad the same way it taxed other railroads. *Id.*

¶ 24 The State challenged the plaintiff's standing (*id.* at 450), but the supreme court concluded he had standing and that his action for an injunction could proceed under the Public Moneys Act (*id.* at 453). Under the Public Moneys Act, a taxpayer might bring an action to restrain the misuse of public funds, and assessing the illegally low 7% tax against Gulf Railroad and collecting it amounted to a misuse of public funds: "the time of literally hundreds of State employees [was] devoted in some part to the assessment and collection of this tax." *Id.* at 450. The total dollar value of this time devoted to the assessment and collection of the 7% tax was unclear, but in any event, the amount of state funds misused was irrelevant: "[u]nder the settled

rule in this State, every taxpayer [was] injured by the misapplication of public funds, [regardless of] whether the amount [was] great or small." (Internal quotation marks omitted.) *Id.* Implementing any policy costs some amount of money, including a policy to impose an illegal tax. And long before the enactment of the Public Moneys Act, "equity ha[d] jurisdiction to enjoin the collection of an unauthorized tax"—meaning a tax that was either illegally high or, as in *Snow*, illegally low. (Internal quotation marks omitted.) *Id.* at 452.

¶ 25 Taxpayers such as Snow paid the salaries of Illinois tax officials, and when those officials implemented an illegal tax policy, their taxpayer-funded salaries were, to that extent, being put to an illegal use. See *id.* at 453. The taxpayers of the state had standing to seek an injunction against such misuses of public funds. *Id.* at 451. In fact, "a taxpayer [might] bring suit to enjoin the misuse of public funds in administering an illegal legislative act even though the taxpayer is not subject to the provisions of that act." *Id.*

¶ 26 That is because incurring an illegally high tax is not the only way a taxpayer can be injured; a taxpayer can also be injured when public funds, in which the taxpayer has a beneficial interest, are misused by implementing an invalid statute or regulation. A party has standing to challenge a statute if the party has "sustained, or [is] in immediate danger of sustaining, a direct injury as a result of enforcement of the challenged statute." (Internal quotation marks omitted.) *Pre-School Owners Ass'n of Illinois, Inc. v. Department of Children & Family Services*, 119 Ill. 2d 268, 287 (1988). The same holding applies to an administrative regulation. *Id.* "[By] asserting a misuse of public funds and resources"—regardless of whether the misuse is pursuant to an invalid statute or regulation or even, as in *Martini v. Netsch*, 272 Ill. App. 3d 693, 696 (1995), an unlawful executive order—the taxpaying plaintiff "allege[s] a distinct and palpable injury to a legally cognizable interest." *Martini*, 272 Ill. App. 3d at 696. It

must follow that, by asserting a threatened misuse of public funds—a threat embodied in an administrative regulation—the taxpaying plaintiff alleges a threatened distinct and palpable injury to a legally cognizable interest. Because defendant presumably will follow its own regulations on the allowance of tax credits, the threat is imminent. See *Pre-School Owners*, 119 Ill. 2d at 287.

¶ 27 We doubt that the supreme court intended to overturn these longstanding principles when, in *Lyons*, it required proof that salaries otherwise would not have been paid or that equipment otherwise would not have been used (*Lyons*, 201 Ill. 2d at 538). Surely *Crusius* is correct in regarding that requirement as applicable only to a case in which the plaintiff seeks to impose a constructive trust on bribes and similar ill-gotten gains. *Crusius*, 348 Ill. App. 3d at 51. In *Lyons*, the supreme court repeated what it had said in *Fuchs v. Bidwell*, 65 Ill. 2d 503, 509 (1976): "there was no authority conferring taxpayer standing on the basis that the funds at issue would become 'public' only upon the imposition of a constructive trust." *Lyons*, 201 Ill. 2d at 537. In the present case, by contrast, the funds will be public at the time of their misuse. Equity will restrain a governmental policy of collecting an illegal tax, because the very act of collecting it will be a misuse of taxpayer-funded salaries and offices and, as such, a misuse of public funds. *Snow*, 66 Ill. 2d at 452-53.

¶ 28 E. Defendant's Forfeiture of the Affirmative Defense That Plaintiffs Failed To Follow the Procedures of the Public Moneys Act

¶ 29 In a footnote of its brief, defendant says: "[P]laintiffs have never asserted reliance on the Public Monies Act [(735 ILCS 5/11-301 to 11-304 (West 2014))], and they failed to follow the procedural requirement of obtaining leave to file such a complaint, 735 ILCS 5/11-303 (2014)."

¶ 30 A couple of times in our discussion thus far, we have mentioned the Public Moneys Act. In response to defendant's footnote, we now will discuss the statute more fully. Section 11-301 of the Public Moneys Act provides: "An action to restrain and enjoin the disbursement of public funds by any officer or officers of the State government may be maintained either by the Attorney General or by any citizen and taxpayer of the State." 735 ILCS 5/11-301 (West 2014). If the plaintiff is an Illinois taxpayer, the plaintiff must petition the circuit court for permission to bring the action, and the plaintiff must give notice to the Attorney General. Section 11-303 provides:

> "§ 11-303. Action by private citizen. Such action, when prosecuted by a citizen and taxpayer of the State, shall be commenced by petition for leave to file an action to restrain and enjoin the defendant or defendants from disbursing the public funds of the State. Such petition shall have attached thereto a copy of the complaint, leave to file which is petitioned for. Upon the filing of such petition, it shall be presented to the court, and the court shall enter an order stating the date of the presentation of the petition and fixing a day, which shall not be less than 5 nor more than 10 days thereafter, when such petition for leave to file the action will be heard. The court shall also order the petitioner to give notice in writing to each defendant named therein and to the Attorney General, specifying in such notice the fact of the presentation of such petition and the date and time when the same will be heard. Such notice shall be served upon the defendants and upon the Attorney General, as the case may be, at least 5 days before the hearing of such petition.

> Upon such hearing, if the court is satisfied that there is reasonable ground for the filing of such action, the court may grant the petition and order the complaint to be filed and process to issue. The court may, in its discretion, grant leave to file the complaint as to certain items, parts[,] or portions of any appropriation Act sought to be enjoined and mentioned in such complaint, and may deny leave as to the rest." 735 ILCS 5/11-303 (West 2014).

¶ 31 Defendant observes that, in the proceedings below, plaintiffs (1) never asserted reliance on the Public Moneys Act and (2) never fulfilled the procedural requirements in section 11-303. As to defendant's first point, it is unclear that plaintiffs were required to specifically invoke the Public Moneys Act, considering that, instead of creating a new cause of action, the Public Moneys Act acknowledged a preexisting common-law right of taxpayers to seek an injunction against an illegal tax. See *Snow*, 66 Ill. 2d at 450-51 ("Long before the enactment of the Public Monies Act, the citizens and taxpayers of this State have been permitted to sue to enjoin the misuse of public funds."). Besides, in so many words, plaintiffs did invoke the Public Moneys Act. In their memorandum in opposition to defendant's motion for dismissal, they argued that taxpayers had "standing to challenge and enjoin the misappropriation of public funds through a public body's *administration* of an unlawful statute or regulation," and in support of that argument, they cited *Snow* and *Crusius*, in which, as we have discussed, the plaintiffs sued under the Public Moneys Act. (Emphasis in original.) In fact, plaintiffs explicitly compared themselves to the plaintiff in *Crusius*. They argued to the trial court: "Plaintiffs have standing for the same reason that the *** *Crusius* taxpayer *** had standing: because the state applies public funds in administering the regulation they challenge."

¶ 32 As for defendant's second point, that plaintiffs never fulfilled the procedures in section 11-303 of the Public Moneys Act, this would have been an affirmative defense, "a defense outside the complaint," and if only defendant had raised this affirmative defense in the proceedings below, plaintiffs could have obtained leave to amend their complaint and could have cured the defect by attaching a section 11-303 petition to their amended complaint. *Patrick Engineering*, 2012 IL 113148, ¶ 31. As it is, defendant has forfeited the affirmative defense of noncompliance with section 11-303 by failing to raise that affirmative defense in the trial court. See *Greer*, 122 Ill. 2d at 508; *Fillmore v. Walker*, 2013 IL App (4th) 120533, ¶ 28; *Fox v. Heimann*, 375 Ill. App. 3d 35, 45 (2007); *Wehde v. Regional Transportation Authority*, 284 Ill. App. 3d 297, 311 (1996); *Carlson v. City Construction Co.*, 239 Ill. App. 3d 211, 243 (1992).

¶ 33 F. The Inapplicability of Case Law Holding That Taxpayers Lack Standing To Sue for the Collection of Back Taxes

¶ 34 Defendant argues this case is basically an attempt to compel the collection of additional taxes and that, in *People ex rel. Morse v. Chambliss*, 399 Ill. 151 (1948), the supreme court held that taxpayers lack standing to sue for the collection of unpaid taxes. The plaintiff in that case brought an action "in the name of The People on relation of himself as a taxpayer and on behalf of all other taxpayers similarly situated, and pray[ed] for an accounting of the taxes, interest, penalties[,] and costs due upon the property of [Hugo] Chambliss." *Chambliss*, 399 Ill. at 151. The plaintiff did not sue the state; rather—in the manner of the Attorney General—he sued the property owner, Chambliss, to enforce a tax lien of approximately $13,500 against his property, a lien the plaintiff claimed had arisen as a result of taxing officials' unauthorized acceptance of $14,500 from Chambliss as full satisfaction for back taxes of $28,000. *Id.* at 152. The supreme court held: "In our opinion there is no right in an individual taxpayer to bring a suit

for the collection of taxes, but a suit having for its purpose such collection must be brought by the person or agency designated by statute for that purpose." *Id.* at 158.

¶ 35 In *Snow*, however, the supreme court distinguished *Chambliss*. The supreme court reasoned that, unlike the plaintiff in *Chambliss*, the plaintiff in *Snow* sued to restrain the *future* collection of an illegal tax. *Snow*, 66 Ill. 2d at 452. The supreme court said: "The case *sub judice* is clearly distinguishable [from *Chambliss*]. It is designed to prevent the continued acceptance of an allegedly unlawful tax in lieu of all other taxes, when the appropriate taxing authorities have declined, and still decline, to follow applicable statutory procedures requiring them to assess all of [Gulf Railroad's] property in the same manner as other railroad properties assessed." *Snow*, 66 Ill. 2d at 452. Likewise, in the present case, plaintiffs sued to prevent the continued, future acceptance of an unlawful tax or, more precisely, the implementation of an administrative regulation that contemplates the future imposition of an illegal tax: illegal because it is in an amount less than required by statute. This case is closer to *Snow* than to *Chambliss*.

¶ 36 G. The Inapplicability of the Ban on Taxpayer Derivative Actions

¶ 37 The supreme court has drawn a distinction between a " 'taxpayer action' " and a " 'taxpayer derivative action.' " *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 494-95 (2005). A " 'taxpayer action,' " contemplated by section 11-301 of the Public Moneys Act (735 ILCS 5/11-301 (West 2014)), "is brought by private persons in their capacity as taxpayers." *Scachitti*, 215 Ill. 2d at 493. *Snow* and *Krebs v. Thompson*, 387 Ill. 471 (1944), are examples. Taxpayers bring such an action "on behalf of themselves and as representatives of a class of taxpayers similarly situated within a taxing district or area, upon a ground which is common to all members of the class, and for the purpose of seeking relief from illegal or unauthorized acts

of public bodies or public officials, which acts are injurious to their common interests as taxpayers." (Internal quotation marks omitted.) *Scachitti*, 215 Ill. 2d at 493. For more than a hundred years, the common law of Illinois has recognized the right of Illinois taxpayers to "enjoin the misuse of public funds," as we already have observed. (Internal quotation marks omitted.) *Id.* at 494.

¶ 38 By contrast, a " 'taxpayer derivative action' " is an action brought by a taxpayer on behalf of the government to enforce a right or remedy belonging to the government alone. *Id.* In a taxpayer derivative action, the only real party in interest is the government—thus the adjective "derivative"—the taxpayer brings the action derivatively, not in the taxpayer's own personal right. " 'The claimed injury [in a taxpayer derivative action] is not personal to the taxpayers, but rather impacts the government entity on whose behalf the action is brought.' " *Id.* (quoting *Lyons*, 201 Ill. 2d at 535). In both *Scachitti* and *Lyons*, the actions were taxpayer derivative actions, not taxpayer actions. *Scachitti*, 215 Ill. 2d at 496; *Lyons*, 201 Ill. 2d at 535. The plaintiffs in *Scachitti* sued a lead underwriter and an accounting firm, seeking to recover, for the State of Illinois, the amounts by which the lead underwriter had allegedly overcharged the State in connection with bond transactions. *Scachitti*, 215 Ill. 2d at 489. The plaintiffs in *Lyons* "sue[d] for the recovery of illegally obtained funds by state officials." *Lyons*, 201 Ill. 2d at 533. The plaintiffs lacked standing in these two taxpayer derivative actions because the State was the only real party in interest and the Attorney General had the exclusive constitutional authority to represent the state. *Scachitti*, 215 Ill. 2d at 500; *Lyons*, 201 Ill. 2d at 540.

¶ 39 In this appeal, defendant relies heavily on *Scachitti* and *Lyons*, but those cases are distinguishable because the present case is a taxpayer action rather than a taxpayer derivative action. Like the plaintiffs in *Snow* and *Krebs*, plaintiffs in this case sue to restrain the

misapplication of public funds. The administration of an illegal policy, regulation, or statute is the misapplication of public funds because "the time of *** State employees"—a valuable public asset paid for out of the state treasury, with taxpayers' money—"is devoted in some part to" the administration of the illegal policy, regulation, or statute. *Snow*, 66 Ill. 2d at 450; see also *Krebs*, 387 Ill. at 475. Other assets purchased by tax revenues, such as paper and electricity, also would be used. It always will cost *something* to administer a regulation, including an illegal one. The machinery of the State never runs cost-free.

¶ 40 H. The Inapplicability of Case Law Regarding Special Funds

¶ 41 Defendant cites two cases in which the plaintiffs claimed to be challenging the misuse of public funds whereas, in reality, they were challenging the alleged misuse of a special fund.

¶ 42 In one of the cases, *Barco Manufacturing Co. v. Wright*, 10 Ill. 2d 157, 159 (1956), the plaintiffs sought to enjoin some allegedly "illegal disbursements" from the Illinois unemployment compensation fund. They argued that, as taxpayers, they were "entitled to enjoin the illegal distribution of public funds." *Id.* at 160. The supreme court held, however, that instead of being general revenue raised from taxation, the Illinois unemployment compensation fund was a special fund, a trust fund consisting of contributions of employers. *Id.* at 160-61. Thus, the case law holding that taxpayers could sue to enjoin the misuse of public funds was inapplicable. *Id.* at 161. "[T]he fund in question [was] not a general public fund; nor [was] it a part of the general State revenue; and the involuntary contributions thereto [were] not general taxes." *Id.* Rather, it was "a trust fund composed of contributions made by employers." *Id.* Because "the expenditure

involved [was] from a trust fund," the plaintiffs had to "show a special injury not common to the public generally." *Id.* They had not done so. *Id.* at 166.

¶ 43 In the other case, *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 1, the plaintiff complained of the transfer of monies from the real estate license administration fund into the state's general revenue fund. We held that because the real estate license administration fund was a special fund, the plaintiff had no "taxpayer standing" (*id.* ¶ 30); that is, the plaintiff could not rely on the "narrow doctrine permitting a taxpayer the ability to challenge the misappropriation of public funds" (*id.* ¶ 29). As in *Barco*, the plaintiff had to "show a special injury" (*id.* ¶ 30), and the plaintiff failed to make this showing (*id.* ¶ 38).

¶ 44 *Barco* and *Stermer* are distinguishable for two reasons. First, neither case involved an unauthorized tax. "[E]quity has jurisdiction to enjoin the collection of an unauthorized tax," and when defendant grants tax credits unauthorized by statute, defendant effectively causes the imposition of an unauthorized tax. (Internal quotation marks omitted.) *Snow*, 66 Ill. 2d at 452. Second, the wages of defendant's officers and employees and the cost of defendant's office supplies and utilities are paid out of the state's general revenues, not out of a special fund (see *Krebs*, 387 Ill. at 475), and "a taxpayer may bring suit to enjoin the misuse of public funds in administering an illegal legislative act" (*Snow*, 66 Ill. 2d at 451; see also *Crusius*, 348 Ill. App. 3d at 51) or an illegal administrative regulation (*Pre-School Owners*, 119 Ill. 2d at 287).

¶ 45 I. The Irrelevance of the Possibility of a Net Economic Benefit to the State

¶ 46 Defendant cites *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), in support of its argument that any injury to taxpayers resulting from the application

of its regulation would be speculative. *Winn* likewise involved a tax credit. An Arizona statute (Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2010)) allowed Arizona taxpayers a dollar-for-dollar tax credit for their contributions to school tuition organizations. *Winn*, 563 U.S. at 130. These school tuition organizations used the contributions to provide scholarships to students attending private schools, many of which were religious. *Id.* at 129. Because the beneficiaries of the contributions included religious schools, a group of Arizona taxpayers "challenge[d] the *** tax credit as a violation of Establishment Clause principles under the First and Fourteenth Amendments" (U.S. Const., amends. I, XIV). *Winn,* 563 U.S. at 129. The Supreme Court of the United States concluded that the taxpayers lacked standing under article III of the federal constitution. *Id.* at 130. In reliance on the Supreme Court's reasoning in *Winn*, defendant argues the record is devoid of any showing that its tax-credit regulation will inflict a distinct and palpable injury on plaintiffs as taxpayers.

¶ 47 The Supreme Court reasoned in *Winn*: "When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. On the contrary, the purpose of many governmental expenditures and tax benefits is to spur economic activity, which in turn *increases* government revenues." (Emphasis in original and internal quotation marks omitted.) *Winn*, 563 U.S. at 136. And besides, the Supreme Court reasoned, "even if one assume[d] that an expenditure or tax benefit deplete[d] the government's coffers," one could only speculate whether "elected officials [would] increase a taxpayer-plaintiff's tax bill to make up the deficit." (Internal quotation marks omitted.) *Id.*

¶ 48 By this reasoning, though, the plaintiff in *Snow* would have lacked standing, and the judgment should have been for the State. After all, Gulf Railroad was being given a tax break—just like the contributors to school tuition organizations in *Winn*—and the plaintiff sued

to stop the tax break as contrary to Illinois law. *Snow*, 66 Ill. 2d at 449. A "tax credit" is nothing but a euphemism for a tax break. Year after year, from 1972 through 1975, the state had been giving Gulf Railroad a break on its taxes, allowing it to pay only a 7% tax on charter properties, whereas, under statute, only Illinois Central was entitled to that low rate. *Id.* at 448-49. Obviously, by providing in the first place that Illinois Central would have to pay only a 7% gross revenue tax, the Illinois General Assembly intended to stimulate economic activity and thereby increase public revenues. It would have been easy, in the manner of *Winn*, to carry over that justification to Gulf Railroad. There would have been the same potential for greater economic activity and increased public revenues if Gulf Railroad likewise had paid only a 7% tax, as Illinois Central had been doing for the past hundred years. Thus, by the logic of *Winn*, the injury to taxpayers would have been merely speculative, and they would have lacked standing. But the Supreme Court of Illinois did not see it that way. *Id.* at 453. Illinois courts "are not *** required to follow the Federal law on issues of justiciability and standing." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 491 (1988). "[T]o the extent that the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality ***." *Id.*

¶ 49 When it comes to taxpayer standing, Illinois courts are more generous in two ways. First, although the Supreme Court of the United States "has rejected the general proposition that an individual who has paid taxes has a continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution" (emphasis in original and internal quotation marks omitted) (*Winn*, 563 U.S. at 134), the rule in Illinois is precisely the opposite: "a taxpayer may bring suit to enjoin the misuse of public funds in administering an illegal legislative act even though the taxpayer is not subject to the provisions of that act" (*Snow*, 66 Ill. 2d at 451). Second, although the Supreme Court of the

United States denies standing to taxpayers because "[t]he effect upon future taxation, of any payment out of funds, [is] too remote, fluctuating[,] and uncertain to give rise to a case or controversy" (internal quotation marks omitted) (*Winn*, 563 U.S. at 134), Illinois courts find an injury to taxpayers the moment public funds are used illegally, regardless of the ultimate effect of such illegal use on the treasury or on rates of taxation (see *Krebs*, 387 Ill. at 475-76).

¶ 50 To be sure, when holding that taxpayers have standing to enjoin the misapplication of public funds, some Illinois cases have relied on the taxpayers' "liability to replenish the public treasury for the deficiency which would be caused by misapplication thereof." *Beardsworth v. Whiteside & Rock Island Special Drainage District*, 356 Ill. 158, 169 (1934); *Washburn v. Forest Preserve District of Cook County*, 313 Ill. 130, 132 (1924); *Malec v. City of Belleville*, 384 Ill. App. 3d 465, 468-69 (2008). But such liability is not the *sine qua non* of taxpayer standing. In *Krebs*, the supreme court held it did not matter that the administration of an illegal statute would result in a net profit to the state (and, hence, no deficiency for taxpayers to replenish). *Krebs*, 387 Ill. at 475.

¶ 51 The taxpayer in *Krebs* sought to enjoin state officials from expending any public funds for the administration of an act entitled " 'An Act to regulate the practice of professional engineering.' " *Id.* at 472 (challenging Ill. Rev. Stat. 1943, ch. 48½). He contended the statute was unconstitutionally vague. *Id.* at 476. The state officials argued the plaintiff lacked standing to make this constitutional challenge because, "from a financial standpoint, [the act would be] self-sustaining": "the fees paid in by registrants under the act [would] exceed the cost of administering the act." *Id.* at 473. The cost of administering the act would not exceed $11,000, and when the approximately 5000 registrants paid a fee of $20 apiece, the state would be well in the black. *Id.* The supreme court responded:

> "The showing of appellants by the affidavits attached to their motion to dismiss is that there will be an estimated administration expense of $11,000. This can be paid only out of the general funds of the State. The expenditure of this or any other amount from the general funds of the State for the purpose of administering an unconstitutional statute is such an injury to every taxpayer that he may bring a suit to enjoin such unlawful expenditure and misapplication of the funds of the State. The fact that an equal or greater amount than the amount expended for the administration of the act will be ultimately produced from fees paid under the act, and paid into the State Treasury, has nothing whatever to do with the right of a taxpayer to enjoin the misapplication of public funds for the administration of the act, if it is not a valid statute. Under the settled rule in this State, every taxpayer is injured by the misapplication of public funds, whether the amount be great or small. Such injury is not prevented by the fact that the State may thereafter receive fees under an unconstitutional statute in excess of the cost of its administration." *Id.* at 475-76.

¶ 52 Thus, unless the administration of an illegal regulation is cost-free (and it is difficult to see how it ever would be), the taxpayer has standing to seek an injunction, regardless of whether the regulation would bring a net profit to the state and regardless of whether the cost of administration is small. See *id.* That is because, as we noted earlier, the supreme court relies on an equitable-ownership rationale, not just the rationale that taxpayers are liable to replenish deficiencies in the general revenues.

¶ 53 III. CONCLUSION

¶ 54 In sum, a taxpayer has standing to enjoin the administration of a regulation that, in its terms, exceeds the agency's legal authority. This opinion should not be interpreted more freely. We do not mean to confer standing to challenge a regulation that, in the view of the taxpayer-plaintiff, is unwise, inefficient, improvident, or not the best means of accomplishing a statutory objective. Rather, the regulation has to be illegal, or in conflict with statutory or constitutional law, in which case a taxpayer has standing to seek an injunction against the use of public funds to administer the illegal regulation. Because plaintiffs allege that defendant's regulation allows a tax credit unauthorized by statutory law, we hold that they have standing, and we reverse the trial court's judgment and remand this case for further proceedings.

¶ 55 Reversed and remanded.

05/12/2015

In The Circuit Court
For The Seventh Judicial Circuit of Illinois
Sangamon County, Springfield, Illinois

FILED
MAY 2015
Clerk of the Circuit Court

CIVIL DOCKET ENTRY

CHRISTOPHER JENNER
(Petitioner)
LAUREL JENNER

Date: 05/12/2015

Case No.: 2015-MR-000016

vs.

ILLINOIS DEPARTMENT OF COMMERC
(Defendant)
ECONOMIC OPPORTUNITY

Judge: ~~RUDOLPH BRAUD~~ John Madonia

- ☐ Called on _____.
- ☒ Plaintiff in Court ☐ in person ☐ by rep ☒ by attorney Hiebert
- ☐ Plaintiff does not appear.
- ☒ Defendant in Court ☐ in person ☐ by rep ☒ by attorney Ratz
- ☐ Defendant(s) _____ do(es) not appear and is defaulted.
- ☐ Defendant(s) _____ acknowledge debt in open court.
- ☐ Case continued ☐ by agreement ☐ on motion of _____.
- ☐ Case set/reset for trial on _____.
- ☐ Parties notified in open court.
- ☐ Notice to be given by ☐ Clerk ☐ Plaintiff ☐ Defendant
- ☐ Arguments heard.
- ☐ Witness(es) sworn, evidence heard.
- ☐ Judgment for Plaintiff(s) _____
  - ☐ Against Defendant(s) _____
  - ☐ In the sum of $_____ plus costs.
- ☐ Judgment for Defendant(s) _____. Case closed and stricken.
- ☐ Case dismissed and stricken for want of prosecution.
  - ☐ With leave to reinstate upon good cause shown within 30 days.
- ☐ Complaint dismissed on motion of plaintiff. (Case closed and stricken.)

Arguments heard on Defendants Motion to Dismiss. For the reasons stated in court, and on the record, the Motion to Dismiss is granted with prejudice, pursuant to 735 ILCS 5/2-619(a)(9) as the D lacks standing to bring the suit

JUDGE

SCTICK clerk to send copy of Docket & Order to attorneys of record

(07/06/15) CCG120

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD,

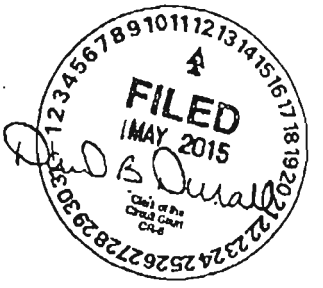
Plaintiffs,

vs.

ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,

Defendant.

No. 15-MR-16



ORDER

THIS CAUSE COMING ON FOR HEARING on Defendant's Motion to Dismiss, the Court having reviewed the submissions of the parties and heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED THAT Defendant's Motion is GRANTED on the basis of lack of standing for the reasons stated ~~in the motion. This case is dismissed with prejudice.~~ in the record. This case is dismissed with prejudice. This order is final and appealable.

5-12-15
DATE

JUDGE

1 of 1 – Case No. 15-MR-16

(07/06/15) CI 00121

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM, LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER and JUDI WILLARD,	)	
Plaintiffs,	)	
vs.	)	Case No. 15-MR-16
ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,	)	
Defendant.	)	

REPORT OF PROCEEDINGS of the hearing, before the HONORABLE JUDGE JOHN M. MADONIA, Judge of said court, on the 12th day of May, 2015.

APPEARANCES:

Mr. Jacob Huebert
Attorney at Law
on behalf of the Plaintiffs;

Mr. Joshua Ratz
Mr. Bilal Aziz
Assistant Attorney Generals
on behalf of the Defendant.

REPORTED BY:

Tammy S. Wagahoff, CSR #084-002841
Official Court Reporter
200 South 9th Street, Room 532
Springfield, Illinois 62701
(217) 753-6738

THE COURT: All right. We're back on the record. Court has reviewed some of the -- some cases reviewed and some of the cited cases here by counsel. Once the Court had determined that the issues of standing have been narrowed based on the arguments of counsel, Court does make certain findings based on the pleadings, complaint, motions, the arguments of counsel, that the traditional test of standing fails. I don't think that's disputed. And the Court does make that finding.

The Court further finds that Plaintiffs' argument with respect to standing in their pleading that Plaintiffs have standing to enjoin the DCEO's award of unlawful tax credits based on their definition of expenditure, that a tax credit is the equivalent of expenditure, that they're going to be forced to replenish the coffers, the Court finds that argument fails. The Court agrees that the issues here relate to expenditures. And that there is an ownership of funds and a liability to replenish that has to be established and funds depleted by misappropriation, those are all words used in the precedents set by the Court. And under

the theory espoused by Plaintiffs, the facts don't support it.

And the Court struggled a little bit with whether or not Plaintiffs' first argument has sufficient merit in that simply by administering this program, spending money to administer this program, the DCEO is doing so illegally based on their challenge. But in looking at the Krebs case, K-r-e-b-s, again, that talked about the unconstitutional act, an illegal legislative act, those seem to be the language. And what Plaintiffs are attempting to challenge is more of a policy. Uhm, and that was forbidden in the Stermer case where these types of challenges by taxpayers aren't meant to question the judgment of policy, expenditures or allocations of funds. And what the Plaintiffs are asking to do is different than finding an act unconstitutional or not subject to even implementation, no funds should be spent at all. These funds, as Defendants argue, are going to be spent on this program. How it gets interpreted, again, can still be challenged by Department of Revenue, by other members of the State of Illinois, which leads to the last

conclusion that the State of Illinois is the real party in interest here.

So, for all of these reasons, this Court is going to determine today that Plaintiffs' case is fatally flawed, that they did not have standing to bring this case. And even if they were to amend their complaint, it would still be fatally flawed in that there is no expenditures being administered here or being misappropriated or mis-allocated, whatever language you want to use, it's not happening in this case. The only thing happening is money being spent by DCEO to administer a program. And the Court is finding based on the pleadings, the arguments, that this is an attempt to interfere with policy determinations, not an unconstitutional or illegal legislative act, that money is going to be spent administering this act; and that the real party to challenge whether or not they're doing it right would be the State of Illinois. And I'm doing this orally here, but I should probably write this out. And I want to get this filed today so we can begin and be entered as a final and appealable Order. So, I don't know if you have a proposed Order or if you just want me to

write one up.

MR. RATZ: I do have a proposed Order, Your Honor, it just says that the Motion is granted for the reasons stated in the Motion.

THE COURT: All right. How about for the reasons stated as part of the record.

MR. RATZ: You know, I could type it up if that's preferable and send it over or I could hand write it out.

THE COURT: Hand write it out, I want to get this on file today, and they can begin doing whatever they want to do post decision here. He objects to everything about that just in case you're wondering. He doesn't want that in his hand. For the record, the Court was referring to counsel, Mr. Ratz, showing Mr. Huebert the Order that the Court is about to enter. Interesting stuff, counsel. I appreciate the arguments. And this file will be ready to do whatever you want done with it. It will go down shortly and the docket will be updated. This Order will be entered today. Court is in recess.

MR. HUEBERT: Thank you, Your Honor.

MR. RATZ: Thank you.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

CHRISTOPHER JENNER, *et al.*,	)	
	)	
Plaintiffs-Appellants,	)	Case No. 2015-MR-16
	)	
v.	)	Judge John M. Madonia
	)	
ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPORTUNITY,	)	
	)	
Defendant-Appellee.	)	
	)	

FILED
JUN - 1 2015 28
Clerk of the Circuit Court

NOTICE OF APPEAL

Notice is hereby given pursuant to Supreme Court Rule 301 that Plaintiffs Christopher Jenner, et al. appeal from the Circuit Court of Sangamon County's Order of May 12, 2015, which order dismissed Plaintiff's Complaint for Declaratory and Injunctive Relief in its entirety with prejudice. A true and correct copy of that order is attached hereto.

By this appeal, Plaintiffs ask the Appellate Court to reverse the order of May 12, 2015, and remand this cause with directions to reinstate all counts of the complaint for trial on the merits as to all claims, or for such other relief as the Appellate court may deem proper.

DATED: May 27, 2015

(07/06/15) C: 00126

Respectfully submitted,

CHRISTOPHER JENNER, LAUREL JENNER, THOMAS KLINGNER, ADAM LIEBMANN, KELLY LIEBMANN, MICHELLE MATHIA, KRISTINA RASMUSSEN, JEFFREY TUCEK, MARK WEYERMULLER, and JUDI WILLARD

By: _____
One of their attorneys

Jacob H. Huebert (#6305339)
Jeffrey M. Schwab (#6290710)

Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, IL 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

(87-85-15) D: 00129

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I.L.C.S. Ch. 35, ACT 10, Refs & Annos, IL ST Ch. 35, ACT 10, Refs & Annos
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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 35. Revenue (Refs & Annos)
Income Taxes
Act 10. Economic Development for a Growing Economy Tax Credit Act (Refs & Annos)

35 ILCS 10/5-1

10/5-1. Short title

Currentness

§ 5-1. Short title. This Article may be cited as the Economic Development for a Growing Economy Tax Credit Act.

Credits

P.A. 91-476, Art. 5, § 5-1, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-1, IL ST CH 35 § 10/5-1
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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 35. Revenue (Refs & Annos)
Income Taxes
Act 10. Economic Development for a Growing Economy Tax Credit Act (Refs & Annos)

35 ILCS 10/5-3

10/5-3. Purpose

Currentness

§ 5-3. Purpose. The General Assembly finds that the Illinois economy, although currently strong, is still highly vulnerable to other states and nations that have major financial incentive programs for medium-sized and large firm relocations. Because of the incentive programs of these competitor locations, Illinois must move aggressively with new business development investment tools so that Illinois is more competitive in site location decision-making. The State must not only continue to work with firms to help them locate their new plants and facilities in Illinois but also must provide competitive investment location tax credits in support of the location and expansion of medium-sized and large operations of commerce and industry. In an increasingly global economy, Illinois' long-term development would benefit from rational, strategic use of State resources in support of business development and growth.

Credits

P.A. 91-476, Art. 5, § 5-3, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-3, IL ST CH 35 § 10/5-3
Current through P.A. 100-42 of the 2017 Reg. Sess.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 35. Revenue (Refs & Annos)
Income Taxes
Act 10. Economic Development for a Growing Economy Tax Credit Act (Refs & Annos)

35 ILCS 10/5-5

10/5-5. Definitions
Effective: August 23, 2007
Currentness

§ 5-5. Definitions. As used in this Act:

"Agreement" means the Agreement between a Taxpayer and the Department under the provisions of Section 5-50 of this Act.

"Applicant" means a Taxpayer that is operating a business located or that the Taxpayer plans to locate within the State of Illinois and that is engaged in interstate or intrastate commerce for the purpose of manufacturing, processing, assembling, warehousing, or distributing products, conducting research and development, providing tourism services, or providing services in interstate commerce, office industries, or agricultural processing, but excluding retail, retail food, health, or professional services. "Applicant" does not include a Taxpayer who closes or substantially reduces an operation at one location in the State and relocates substantially the same operation to another location in the State. This does not prohibit a Taxpayer from expanding its operations at another location in the State, provided that existing operations of a similar nature located within the State are not closed or substantially reduced. This also does not prohibit a Taxpayer from moving its operations from one location in the State to another location in the State for the purpose of expanding the operation provided that the Department determines that expansion cannot reasonably be accommodated within the municipality in which the business is located, or in the case of a business located in an incorporated area of the county, within the county in which the business is located, after conferring with the chief elected official of the municipality or county and taking into consideration any evidence offered by the municipality or county regarding the ability to accommodate expansion within the municipality or county.

"Committee" means the Illinois Business Investment Committee created under Section 5-25 of this Act within the Illinois Economic Development Board.

"Credit" means the amount agreed to between the Department and Applicant under this Act, but not to exceed the Incremental Income Tax attributable to the Applicant's project.

"Department" means the Department of Commerce and Economic Opportunity.

"Director" means the Director of Commerce and Economic Opportunity.

"Full-time Employee" means an individual who is employed for consideration for at least 35 hours each week or who renders any other standard of service generally accepted by industry custom or practice as full-time employment. An individual for whom a W-2 is issued by a Professional Employer Organization (PEO) is a full-time employee if employed

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in the service of the Applicant for consideration for at least 35 hours each week or who renders any other standard of service generally accepted by industry custom or practice as full-time employment to Applicant.

"Incremental Income Tax" means the total amount withheld during the taxable year from the compensation of New Employees under Article 7 of the Illinois Income Tax Act [1] arising from employment at a project that is the subject of an Agreement.

"New Employee" means:

(a) A Full-time Employee first employed by a Taxpayer in the project that is the subject of an Agreement and who is hired after the Taxpayer enters into the tax credit Agreement.

(b) The term "New Employee" does not include:

(1) an employee of the Taxpayer who performs a job that was previously performed by another employee, if that job existed for at least 6 months before hiring the employee;

(2) an employee of the Taxpayer who was previously employed in Illinois by a Related Member of the Taxpayer and whose employment was shifted to the Taxpayer after the Taxpayer entered into the tax credit Agreement; or

(3) a child, grandchild, parent, or spouse, other than a spouse who is legally separated from the individual, of any individual who has a direct or an indirect ownership interest of at least 5% in the profits, capital, or value of the Taxpayer.

(c) Notwithstanding paragraph (1) of subsection (b), an employee may be considered a New Employee under the Agreement if the employee performs a job that was previously performed by an employee who was:

(1) treated under the Agreement as a New Employee; and

(2) promoted by the Taxpayer to another job.

(d) Notwithstanding subsection (a), the Department may award Credit to an Applicant with respect to an employee hired prior to the date of the Agreement if:

(1) the Applicant is in receipt of a letter from the Department stating an intent to enter into a credit Agreement;

(2) the letter described in paragraph (1) is issued by the Department not later than 15 days after the effective date of this Act; and

(3) the employee was hired after the date the letter described in paragraph (1) was issued.

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"Noncompliance Date" means, in the case of a Taxpayer that is not complying with the requirements of the Agreement or the provisions of this Act, the day following the last date upon which the Taxpayer was in compliance with the requirements of the Agreement and the provisions of this Act, as determined by the Director, pursuant to Section 5-65.

"Pass Through Entity" means an entity that is exempt from the tax under subsection (b) or (c) of Section 205 of the Illinois Income Tax Act. [2]

"Professional Employer Organization" (PEO) means an employee leasing company, as defined in Section 206.1(A)(2) of the Illinois Unemployment Insurance Act.

"Related Member" means a person that, with respect to the Taxpayer during any portion of the taxable year, is any one of the following:

(1) An individual stockholder, if the stockholder and the members of the stockholder's family (as defined in Section 318 of the Internal Revenue Code) [3] own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50% of the value of the Taxpayer's outstanding stock.

(2) A partnership, estate, or trust and any partner or beneficiary, if the partnership, estate, or trust, and its partners or beneficiaries own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50% of the profits, capital, stock, or value of the Taxpayer.

(3) A corporation, and any party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of Section 318 of the Internal Revenue Code, if the Taxpayer owns directly, indirectly, beneficially, or constructively at least 50% of the value of the corporation's outstanding stock.

(4) A corporation and any party related to that corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of Section 318 of the Internal Revenue Code, if the corporation and all such related parties own in the aggregate at least 50% of the profits, capital, stock, or value of the Taxpayer.

(5) A person to or from whom there is attribution of stock ownership in accordance with Section 1563(e) of the Internal Revenue Code, [4] except, for purposes of determining whether a person is a Related Member under this paragraph, 20% shall be substituted for 5% wherever 5% appears in Section 1563(e) of the Internal Revenue Code.

"Taxpayer" means an individual, corporation, partnership, or other entity that has any Illinois Income Tax liability.

Credits

P.A. 91-476, Art. 5, § 5-5, eff. Aug. 11, 1999. Amended by P.A. 92-651, § 24, eff. July 11, 2002; P.A. 94-793, § 465, eff. May 19, 2006; P.A. 95-375, § 5, eff. Aug. 23, 2007.

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Footnotes

1 35 ILCS 5/701 et seq.

2 35 ILCS 5/205.

3 26 U.S.C.A. § 318.

4 26 U.S.C.A. § 1563.

35 I.L.C.S. 10/5-5, IL ST CH 35 § 10/5-5

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35 ILCS 10/5-10

10/5-10. Powers of the Department

Currentness

§ 5-10. Powers of the Department. The Department, in addition to those powers granted under the Civil Administrative Code of Illinois, is granted and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act, including, but not limited to, power and authority to:

(a) Promulgate procedures, rules, or regulations deemed necessary and appropriate for the administration of the programs; establish forms for applications, notifications, contracts, or any other agreements; and accept applications at any time during the year.

(b) Provide and assist Taxpayers pursuant to the provisions of this Act, and cooperate with Taxpayers that are parties to Agreements to promote, foster, and support economic development, capital investment, and job creation or retention within the State.

(c) Enter into agreements and memoranda of understanding for participation of and engage in cooperation with agencies of the federal government, local units of government, universities, research foundations or institutions, regional economic development corporations, or other organizations for the purposes of this Act.

(d) Gather information and conduct inquiries, in the manner and by the methods as it deems desirable, including without limitation, gathering information with respect to Applicants for the purpose of making any designations or certifications necessary or desirable or to gather information to assist the Committee with any recommendation or guidance in the furtherance of the purposes of this Act.

(e) Establish, negotiate and effectuate any term, agreement or other document with any person, necessary or appropriate to accomplish the purposes of this Act; and to consent, subject to the provisions of any Agreement with another party, to the modification or restructuring of any Agreement to which the Department is a party.

(f) Fix, determine, charge, and collect any premiums, fees, charges, costs, and expenses from Applicants, including, without limitation, any application fees, commitment fees, program fees, financing charges, or publication fees as deemed appropriate to pay expenses necessary or incident to the administration, staffing, or operation in connection with the Department's or Committee's activities under this Act, or for preparation, implementation, and enforcement of the terms

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of the Agreement, or for consultation, advisory and legal fees, and other costs; however, all fees and expenses incident thereto shall be the responsibility of the Applicant.

(g) Provide for sufficient personnel to permit administration, staffing, operation, and related support required to adequately discharge its duties and responsibilities described in this Act from funds made available through charges to Applicants or from funds as may be appropriated by the General Assembly for the administration of this Act.

(h) Require Applicants, upon written request, to issue any necessary authorization to the appropriate federal, state, or local authority for the release of information concerning a project being considered under the provisions of this Act, with the information requested to include, but not be limited to, financial reports, returns, or records relating to the Taxpayers' or its project.

(i) Require that a Taxpayer shall at all times keep proper books of record and account in accordance with generally accepted accounting principles consistently applied, with the books, records, or papers related to the Agreement in the custody or control of the Taxpayer open for reasonable Department inspection and audits, and including, without limitation, the making of copies of the books, records, or papers, and the inspection or appraisal of any of the Taxpayer or project assets.

(j) Take whatever actions are necessary or appropriate to protect the State's interest in the event of bankruptcy, default, foreclosure, or noncompliance with the terms and conditions of financial assistance or participation required under this Act, including the power to sell, dispose, lease, or rent, upon terms and conditions determined by the Director to be appropriate, real or personal property that the Department may receive as a result of these actions.

Credits

P.A. 91-476, Art. 5, § 5-10, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-10, IL ST CH 35 § 10/5-10
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35 ILCS 10/5-15

10/5-15. Tax Credit Awards

Effective: June 1, 2012
Currentness

§ 5-15. Tax Credit Awards. Subject to the conditions set forth in this Act, a Taxpayer is entitled to a Credit against or, as described in subsection (g) of this Section, a payment towards taxes imposed pursuant to subsections (a) and (b) of Section 201 of the Illinois Income Tax Act [1] that may be imposed on the Taxpayer for a taxable year beginning on or after January 1, 1999, if the Taxpayer is awarded a Credit by the Department under this Act for that taxable year.

(a) The Department shall make Credit awards under this Act to foster job creation and retention in Illinois.

(b) A person that proposes a project to create new jobs in Illinois must enter into an Agreement with the Department for the Credit under this Act.
(c) The Credit shall be claimed for the taxable years specified in the Agreement.

(d) The Credit shall not exceed the Incremental Income Tax attributable to the project that is the subject of the Agreement.

(e) Nothing herein shall prohibit a Tax Credit Award to an Applicant that uses a PEO if all other award criteria are satisfied.

(f) In lieu of the Credit allowed under this Act against the taxes imposed pursuant to subsections (a) and (b) of Section 201 of the Illinois Income Tax Act for any taxable year ending on or after December 31, 2009, the Taxpayer may elect to claim the Credit against its obligation to pay over withholding under Section 704A of the Illinois Income Tax Act.

(1) The election under this subsection (f) may be made only by a Taxpayer that (i) is primarily engaged in one of the following business activities: water purification and treatment, motor vehicle metal stamping, automobile manufacturing, automobile and light duty motor vehicle manufacturing, motor vehicle manufacturing, light truck and utility vehicle manufacturing, heavy duty truck manufacturing, motor vehicle body manufacturing, cable television infrastructure design or manufacturing, or wireless telecommunication or computing terminal device design or manufacturing for use on public networks and (ii) meets the following criteria:

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(A) the Taxpayer (i) had an Illinois net loss or an Illinois net loss deduction under Section 207 of the Illinois Income Tax Act for the taxable year in which the Credit is awarded, (ii) employed a minimum of 1,000 full-time employees in this State during the taxable year in which the Credit is awarded, (iii) has an Agreement under this Act on December 14, 2009 (the effective date of Public Act 96-834), and (iv) is in compliance with all provisions of that Agreement;
(B) the Taxpayer (i) had an Illinois net loss or an Illinois net loss deduction under Section 207 of the Illinois Income Tax Act for the taxable year in which the Credit is awarded, (ii) employed a minimum of 1,000 full-time employees in this State during the taxable year in which the Credit is awarded, and (iii) has applied for an Agreement within 365 days after December 14, 2009 (the effective date of Public Act 96-834);

(C) the Taxpayer (i) had an Illinois net operating loss carryforward under Section 207 of the Illinois Income Tax Act in a taxable year ending during calendar year 2008, (ii) has applied for an Agreement within 150 days after the effective date of this amendatory Act of the 96th General Assembly, (iii) creates at least 400 new jobs in Illinois, (iv) retains at least 2,000 jobs in Illinois that would have been at risk of relocation out of Illinois over a 10-year period, and (v) makes a capital investment of at least $75,000,000;

(D) the Taxpayer (i) had an Illinois net operating loss carryforward under Section 207 of the Illinois Income Tax Act in a taxable year ending during calendar year 2009, (ii) has applied for an Agreement within 150 days after the effective date of this amendatory Act of the 96th General Assembly, (iii) creates at least 150 new jobs, (iv) retains at least 1,000 jobs in Illinois that would have been at risk of relocation out of Illinois over a 10-year period, and (v) makes a capital investment of at least $57,000,000; or

(E) the Taxpayer (i) employed at least 2,500 full-time employees in the State during the year in which the Credit is awarded, (ii) commits to make at least $500,000,000 in combined capital improvements and project costs under the Agreement, (iii) applies for an Agreement between January 1, 2011 and June 30, 2011, (iv) executes an Agreement for the Credit during calendar year 2011, and (v) was incorporated no more than 5 years before the filing of an application for an Agreement.

(1.5) The election under this subsection (f) may also be made by a Taxpayer for any Credit awarded pursuant to an agreement that was executed between January 1, 2011 and June 30, 2011, if the Taxpayer (i) is primarily engaged in the manufacture of inner tubes or tires, or both, from natural and synthetic rubber, (ii) employs a minimum of 2,400 full-time employees in Illinois at the time of application, (iii) creates at least 350 full-time jobs and retains at least 250 full-time jobs in Illinois that would have been at risk of being created or retained outside of Illinois, and (iv) makes a capital investment of at least $200,000,000 at the project location.

(1.6) The election under this subsection (f) may also be made by a Taxpayer for any Credit awarded pursuant to an agreement that was executed within 150 days after the effective date of this amendatory Act of the 97th General Assembly, if the Taxpayer (i) is primarily engaged in the operation of a discount department store, (ii) maintains its corporate headquarters in Illinois, (iii) employs a minimum of 4,250 full-time employees at its corporate headquarters in Illinois at the time of application, (iv) retains at least 4,250 full-time jobs in Illinois that would have been at risk of being relocated outside of Illinois, (v) had a minimum of $40,000,000,000 in total revenue in 2010, and (vi) makes a capital investment of at least $300,000,000 at the project location.

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(1.7) Notwithstanding any other provision of law, the election under this subsection (f) may also be made by a Taxpayer for any Credit awarded pursuant to an agreement that was executed or applied for on or after July 1, 2011 and on or before March 31, 2012, if the Taxpayer is primarily engaged in the manufacture of original and aftermarket filtration parts and products for automobiles, motor vehicles, light duty motor vehicles, light trucks and utility vehicles, and heavy duty trucks, (ii) employs a minimum of 1,000 full-time employees in Illinois at the time of application, (iii) creates at least 250 full-time jobs in Illinois, (iv) relocates its corporate headquarters to Illinois from another state, and (v) makes a capital investment of at least $4,000,000 at the project location.

(2) An election under this subsection shall allow the credit to be taken against payments otherwise due under Section 704A of the Illinois Income Tax Act during the first calendar year beginning after the end of the taxable year in which the credit is awarded under this Act.

(3) The election shall be made in the form and manner required by the Illinois Department of Revenue and, once made, shall be irrevocable.

(4) If a Taxpayer who meets the requirements of subparagraph (A) of paragraph (1) of this subsection (f) elects to claim the Credit against its withholdings as provided in this subsection (f), then, on and after the date of the election, the terms of the Agreement between the Taxpayer and the Department may not be further amended during the term of the Agreement.

(g) A pass-through entity that has been awarded a credit under this Act, its shareholders, or its partners may treat some or all of the credit awarded pursuant to this Act as a tax payment for purposes of the Illinois Income Tax Act. The term "tax payment" means a payment as described in Article 6 or Article 8 of the Illinois Income Tax Act or a composite payment made by a pass-through entity on behalf of any of its shareholders or partners to satisfy such shareholders' or partners' taxes imposed pursuant to subsections (a) and (b) of Section 201 of the Illinois Income Tax Act. In no event shall the amount of the award credited pursuant to this Act exceed the Illinois income tax liability of the pass-through entity or its shareholders or partners for the taxable year.

Credits

P.A. 91-476, Art. 5, § 5-15, eff. Aug. 11, 1999. Amended by P.A. 95-375, § 5, eff. Aug. 23, 2007; P.A. 96-834, § 10, eff. Dec. 14, 2009; P.A. 96-836, § 10, eff. Dec. 16, 2009; P.A. 96-905, § 10, eff. June 4, 2010; P.A. 96-1000, § 190, eff. July 2, 2010; P.A. 96-1534, § 5, eff. March 4, 2011; P.A. 97-2, § 15, eff. May 6, 2011; P.A. 97-636, § 15-15, eff. June 1, 2012.

Notes of Decisions (1)

Footnotes

1 35 ILCS 5/201.

35 I.L.C.S. 10/5-15, IL ST CH 35 § 10/5-15

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35 ILCS 10/5-20

10/5-20. Application for a project to create and retain new jobs

Effective: January 1, 2005
Currentness

§ 5-20. Application for a project to create and retain new jobs.

(a) Any Taxpayer proposing a project located or planned to be located in Illinois may request consideration for designation of its project, by formal written letter of request or by formal application to the Department, in which the Applicant states its intent to make at least a specified level of investment and intends to hire or retain a specified number of full-time employees at a designated location in Illinois. As circumstances require, the Department may require a formal application from an Applicant and a formal letter of request for assistance.

(b) In order to qualify for Credits under this Act, an Applicant's project must:

(1) involve an investment of at least $5,000,000 in capital improvements to be placed in service and to employ at least 25 New Employees within the State as a direct result of the project;

(2) involve an investment of at least an amount (to be expressly specified by the Department and the Committee) in capital improvements to be placed in service and will employ at least an amount (to be expressly specified by the Department and the Committee) of New Employees within the State, provided that the Department and the Committee have determined that the project will provide a substantial economic benefit to the State; or

(3) if the applicant has 100 or fewer employees, involve an investment of at least $1,000,000 in capital improvements to be placed in service and to employ at least 5 New Employees within the State as a direct result of the project.

(c) After receipt of an application, the Department may enter into an Agreement with the Applicant if the application is accepted in accordance with Section 5-25.

Credits
P.A. 91-476, Art. 5, § 5-20, eff. Aug. 11, 1999. Amended by P.A. 93-882, § 5, eff. Jan. 1, 2005.

35 I.L.C.S. 10/5-20, IL ST CH 35 § 10/5-20

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35 ILCS 10/5-25

10/5-25. Review of Application

Effective: May 19, 2006
Currentness

§ 5-25. Review of Application.

(a) In addition to those duties granted under the Illinois Economic Development Board Act,[1] the Illinois Economic Development Board shall form a Business Investment Committee for the purpose of making recommendations for applications. At the request of the Board, the Director of Commerce and Economic Opportunity or his or her designee, the Director of the Governor's Office of Management and Budget or his or her designee, the Director of Revenue or his or her designee, the Director of Employment Security or his or her designee, and an elected official of the affected locality, such as the chair of the county board or the mayor, may serve as members of the Committee to assist with its analysis and deliberations.

(b) At the Department's request, the Committee shall convene, make inquiries, and conduct studies in the manner and by the methods as it deems desirable, review information with respect to Applicants, and make recommendations for projects to benefit the State. In making its recommendation that an Applicant's application for Credit should or should not be accepted, which shall occur within a reasonable time frame as determined by the nature of the application, the Committee shall determine that all the following conditions exist:

(1) The Applicant's project intends, as required by subsection (b) of Section 5-20 to make the required investment in the State and intends to hire the required number of New Employees in Illinois as a result of that project.

(2) The Applicant's project is economically sound and will benefit the people of the State of Illinois by increasing opportunities for employment and strengthen the economy of Illinois.

(3) That, if not for the Credit, the project would not occur in Illinois, which may be demonstrated by any means including, but not limited to, evidence the Applicant has multi-state location options and could reasonably and efficiently locate outside of the State, or demonstration that at least one other state is being considered for the project, or evidence the receipt of the Credit is a major factor in the Applicant's decision and that without the Credit, the Applicant likely would not create new jobs in Illinois, or demonstration that receiving the Credit is essential to the Applicant's decision to create or retain new jobs in the State.

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(4) A cost differential is identified, using best available data, in the projected costs for the Applicant's project compared to the costs in the competing state, including the impact of the competing state's incentive programs. The competing state's incentive programs shall include state, local, private, and federal funds available.

(5) The political subdivisions affected by the project have committed local incentives with respect to the project, considering local ability to assist.

(6) Awarding the Credit will result in an overall positive fiscal impact to the State, as certified by the Committee using the best available data.

(7) The Credit is not prohibited by Section 5-35 of this Act.

Credits

P.A. 91-476, Art. 5, § 5-25, eff. Aug. 11, 1999. Amended by P.A. 94-793, § 465, eff. May 19, 2006.

Footnotes

1 20 ILCS 3965/0.01 et seq.

35 I.L.C.S. 10/5-25, IL ST CH 35 § 10/5-25

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35 ILCS 10/5-30

10/5-30. Limitation to amount of costs of specified items

Currentness

§ 5-30. Limitation to amount of costs of specified items. The total amount of the Credit allowed during all tax years may not exceed the aggregate amount of costs incurred by the Taxpayer during all prior tax years for the following items, to the extent provided in the Agreement:

(1) capital investment, including, but not limited to, equipment, buildings, or land;

(2) infrastructure development;

(3) debt service, except refinancing of current debt;

(4) research and development;

(5) job training and education;

(6) lease costs; or

(7) relocation costs.

Credits
P.A. 91-476, Art. 5, § 5-30, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-30, IL ST CH 35 § 10/5-30
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35 ILCS 10/5-35

10/5-35. Relocation of jobs in Illinois

Effective: August 1, 2001
Currentness

§ 5-35. Relocation of jobs in Illinois. A taxpayer is not entitled to claim the credit provided by this Act with respect to any jobs that the taxpayer relocates from one site in Illinois to another site in Illinois. A taxpayer with respect to a qualifying project certified under the Corporate Headquarters Relocation Act,[1] however, is not subject to the requirements of this Section but is nevertheless considered an applicant for purposes of this Act. Moreover, any full-time employee of an eligible business relocated to Illinois in connection with that qualifying project is deemed to be a new employee for purposes of this Act. Determinations under this Section shall be made by the Department.

Credits

P.A. 91-476, Art. 5, § 5-35, eff. Aug. 11, 1999. Amended by P.A. 92-207, § 915, eff. Aug. 1, 2001.

Footnotes

1 20 ILCS 611/1 et seq.

35 I.L.C.S. 10/5-35, IL ST CH 35 § 10/5-35
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35 ILCS 10/5-40

10/5-40. Determination of Amount of the Credit

Currentness

§ 5-40. Determination of Amount of the Credit. In determining the amount of the Credit that should be awarded, the Committee shall provide guidance on, and the Department shall take into consideration, the following factors:

(1) The number and location of jobs created and retained in relation to the economy of the county where the projected investment is to occur.

(2) The potential impact on the economy of Illinois.

(3) The magnitude of the cost differential between Illinois and the competing state.

(4) The incremental payroll attributable to the project.

(5) The capital investment attributable to the project.

(6) The amount of the average wage and benefits paid by the Applicant in relation to the wage and benefits of the area of the project.

(7) The costs to Illinois and the affected political subdivisions with respect to the project.

(8) The financial assistance that is otherwise provided by Illinois and the affected political subdivisions.

Credits

P.A. 91-476, Art. 5, § 5-40, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-40, IL ST CH 35 § 10/5-40
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35 ILCS 10/5-45

10/5-45. Amount and duration of the credit

Effective: May 19, 2006
Currentness

§ 5-45. Amount and duration of the credit.

(a) The Department shall determine the amount and duration of the credit awarded under this Act. The duration of the credit may not exceed 10 taxable years. The credit may be stated as a percentage of the Incremental Income Tax attributable to the applicant's project and may include a fixed dollar limitation.

(b) Notwithstanding subsection (a), and except as the credit may be applied in a carryover year pursuant to Section 211(4) of the Illinois Income Tax Act, [1] the credit may be applied against the State income tax liability in more than 10 taxable years but not in more than 15 taxable years for an eligible business that (i) qualifies under this Act and the Corporate Headquarters Relocation Act [2] and has in fact undertaken a qualifying project within the time frame specified by the Department of Commerce and Economic Opportunity under that Act, and (ii) applies against its State income tax liability, during the entire 15-year period, no more than 60% of the maximum credit per year that would otherwise be available under this Act.

Credits

P.A. 91-476, Art. 5, § 5-45, eff. Aug. 11, 1999. Amended by P.A. 92-207, § 915, eff. Aug. 1, 2001; P.A. 94-793, § 465, eff. May 19, 2006.

Footnotes

1 35 ILCS 5/211.

2 20 ILCS 611/1 et seq.

35 I.L.C.S. 10/5-45, IL ST CH 35 § 10/5-45
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35 ILCS 10/5-50

10/5-50. Contents of Agreements with Applicants

Effective: July 6, 2012
Currentness

§ 5-50. Contents of Agreements with Applicants. The Department shall enter into an Agreement with an Applicant that is awarded a Credit under this Act. The Agreement must include all of the following:

(1) A detailed description of the project that is the subject of the Agreement, including the location and amount of the investment and jobs created or retained.

(2) The duration of the Credit and the first taxable year for which the Credit may be claimed.

(3) The Credit amount that will be allowed for each taxable year.

(4) A requirement that the Taxpayer shall maintain operations at the project location that shall be stated as a minimum number of years not to exceed 10.

(5) A specific method for determining the number of New Employees employed during a taxable year.

(6) A requirement that the Taxpayer shall annually report to the Department the number of New Employees, the Incremental Income Tax withheld in connection with the New Employees, and any other information the Director needs to perform the Director's duties under this Act.
(7) A requirement that the Director is authorized to verify with the appropriate State agencies the amounts reported under paragraph (6), and after doing so shall issue a certificate to the Taxpayer stating that the amounts have been verified.
(8) A requirement that the Taxpayer shall provide written notification to the Director not more than 30 days after the Taxpayer makes or receives a proposal that would transfer the Taxpayer's State tax liability obligations to a successor Taxpayer.

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(9) A detailed description of the number of New Employees to be hired, and the occupation and payroll of the full-time jobs to be created or retained as a result of the project.

(10) The minimum investment the business enterprise will make in capital improvements, the time period for placing the property in service, and the designated location in Illinois for the investment.

(11) A requirement that the Taxpayer shall provide written notification to the Director and the Committee not more than 30 days after the Taxpayer determines that the minimum job creation or retention, employment payroll, or investment no longer is being or will be achieved or maintained as set forth in the terms and conditions of the Agreement.

(12) A provision that, if the total number of New Employees falls below a specified level, the allowance of Credit shall be suspended until the number of New Employees equals or exceeds the Agreement amount.

(13) A detailed description of the items for which the costs incurred by the Taxpayer will be included in the limitation on the Credit provided in Section 5-30.

(13.5) A provision that, if the Taxpayer never meets either the investment or job creation and retention requirements specified in the Agreement during the entire 5-year period beginning on the first day of the first taxable year in which the Agreement is executed and ending on the last day of the fifth taxable year after the Agreement is executed, then the Agreement is automatically terminated on the last day of the fifth taxable year after the Agreement is executed and the Taxpayer is not entitled to the award of any credits for any of that 5-year period.

(14) Any other performance conditions or contract provisions as the Department determines are appropriate.

The Department shall post on its website the terms of each Agreement entered into under this Act on or after the effective date of this amendatory Act of the 97th General Assembly.

Credits

P.A. 91-476, Art. 5, § 5-50, eff. Aug. 11, 1999. Amended by P.A. 97-2, § 15, eff. May 6, 2011; P.A. 97-749, § 5, eff. July 6, 2012.

35 I.L.C.S. 10/5-50, IL ST CH 35 § 10/5-50
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35 ILCS 10/5-55

10/5-55. Certificate of verification; submission to the Department of Revenue

Currentness

§ 5-55. Certificate of verification; submission to the Department of Revenue. A Taxpayer claiming a Credit under this Act shall submit to the Department of Revenue a copy of the Director's certificate of verification under this Act for the taxable year. However, failure to submit a copy of the certificate with the Taxpayer's tax return shall not invalidate a claim for a Credit.

For a Taxpayer to be eligible for a certificate of verification, the Taxpayer shall provide proof as required by the Department prior to the end of each calendar year, including, but not limited to, attestation by the Taxpayer that:

(1) The project has substantially achieved the level of new full-time jobs specified in its Agreement.

(2) The project has substantially achieved the level of annual payroll in Illinois specified in its Agreement.

(3) The project has substantially achieved the level of capital investment in Illinois specified in its Agreement.

Credits

P.A. 91-476, Art. 5, § 5-55, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-55, IL ST CH 35 § 10/5-55
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Chapter 35. Revenue (Refs & Annos)
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35 ILCS 10/5-60

10/5-60. Pass through entity

Currentness

§ 5-60. Pass through entity.

(a) The shareholders or partners of a Taxpayer that is a Pass Through Entity shall be entitled to the Credit allowed under the Agreement.

(b) The Credit provided under subsection (a) is in addition to any Credit to which a shareholder or partner is otherwise entitled under a separate Agreement under this Act. A Pass Through Entity and a shareholder or partner of the Pass Through Entity may not claim more than one Credit under the same Agreement.

Credits

P.A. 91-476, Art. 5, § 5-60, eff. Aug. 11, 1999.
35 I.L.C.S. 10/5-60, IL ST CH 35 § 10/5-60
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Proposed Legislation

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Chapter 35. Revenue (Refs & Annos)
Income Taxes
Act 10. Economic Development for a Growing Economy Tax Credit Act (Refs & Annos)

35 ILCS 10/5-65

10/5-65. Noncompliance; notice; assessment

Currentness

§ 5-65. Noncompliance; notice; assessment. If the Director determines that a Taxpayer who has received a Credit under this Act is not complying with the requirements of the Agreement or all of the provisions of this Act, the Director shall provide notice to the Taxpayer of the alleged noncompliance, and allow the Taxpayer a hearing under the provisions of the Illinois Administrative Procedure Act. [1] If, after such notice and any hearing, the Director determines that a noncompliance exists, the Director shall issue to the Department of Revenue notice to that effect, stating the Noncompliance Date.

Credits

P.A. 91-476, Art. 5, § 5-65, eff. Aug. 11, 1999.

Footnotes

1 5 ILCS 100/1-1 et seq.

35 I.L.C.S. 10/5-65, IL ST CH 35 § 10/5-65

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35 ILCS 10/5-70

10/5-70. Annual report

Currentness

§ 5-70. Annual report. On or before July 1 each year, the Committee shall submit a report to the Department on the tax credit program under this Act to the Governor and the General Assembly. The report shall include information on the number of Agreements that were entered into under this Act during the preceding calendar year, a description of the project that is the subject of each Agreement, an update on the status of projects under Agreements entered into before the preceding calendar year, and the sum of the Credits awarded under this Act. A copy of the report shall be delivered to the Governor and to each member of the General Assembly.

Credits

P.A. 91-476, Art. 5, § 5-70, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-70, IL ST CH 35 § 10/5-70
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35 ILCS 10/5-75

10/5-75. Evaluation of tax credit program

Currentness

§ 5-75. Evaluation of tax credit program. On a biennial basis, the Department shall evaluate the tax credit program. The evaluation shall include an assessment of the effectiveness of the program in creating new jobs in Illinois and of the revenue impact of the program, and may include a review of the practices and experiences of other states with similar programs. The Director shall submit a report on the evaluation to the Governor and the General Assembly after June 30 and before November 1 in each odd-numbered year.

Credits

P.A. 91-476, Art. 5, § 5-75, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-75, IL ST CH 35 § 10/5-75
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35 ILCS 10/5-77

10/5-77. Sunset of new Agreements

Effective: January 20, 2017
Currentness

§ 5-77. Sunset of new Agreements. The Department shall not enter into any new Agreements under the provisions of Section 5-50 of this Act after April 30, 2017.

Credits

P.A. 91-476, Art. 5, § 5-77, added by P.A. 97-2, § 15, eff. May 6, 2011. Amended by P.A. 99-925, § 5, eff. Jan. 20, 2017.

35 I.L.C.S. 10/5-77, IL ST CH 35 § 10/5-77
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35 ILCS 10/5-80

10/5-80. Adoption of rules

Currentness

§ 5-80. Adoption of rules. The Department may adopt rules necessary to implement this Act. The rules may provide for recipients of Credits under this Act to be charged fees to cover administrative costs of the tax credit program. Fees collected shall be deposited into the Economic Development for a Growing Economy Fund.

Credits

P.A. 91-476, Art. 5, § 5-80, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-80, IL ST CH 35 § 10/5-80
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35 ILCS 10/5-85

10/5-85. Economic Development for a Growing Economy Fund

Currentness

§ 5-85. The Economic Development for a Growing Economy Fund.

(a) The Economic Development for a Growing Economy Fund is established to be used exclusively for the purposes of this Act, including paying for the costs of administering this Act. The Fund shall be administered by the Department.

(b) The Fund consists of collected fees, appropriations from the General Assembly, and gifts and grants to the Fund.

(c) The State Treasurer shall invest the money in the Fund not currently needed to meet the obligations of the Fund in the same manner as other public funds may be invested. Interest that accrues from these investments shall be deposited into the Fund.

(d) The money in the Fund at the end of a State fiscal year remains in the Fund to be used exclusively for the purposes of this Act. Expenditures from the Fund are subject to appropriation by the General Assembly.

Credits
P.A. 91-476, Art. 5, § 5-85, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-85, IL ST CH 35 § 10/5-85
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Act 10. Economic Development for a Growing Economy Tax Credit Act (Refs & Annos)

35 ILCS 10/5-90

10/5-90. Program Terms and Conditions

Currentness

§ 5-90. Program Terms and Conditions.

(a) Any documentary materials or data made available or received by any member of a Committee or any agent or employee of the Department shall be deemed confidential and shall not be deemed public records to the extent that the materials or data consists of trade secrets, commercial or financial information regarding the operation of the business conducted by the Applicant for or recipient of any tax credit under this Act, or any information regarding the competitive position of a business in a particular field of endeavor.

(b) Nothing in this Act shall be construed as creating any rights in any Applicant to enter into an Agreement or in any person to challenge the terms of any Agreement.

Credits
P.A. 91-476, Art. 5, § 5-90, eff. Aug. 11, 1999.

35 I.L.C.S. 10/5-90, IL ST CH 35 § 10/5-90
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35 ILCS 10/999-1

10/999-1. Effective date

Currentness

§ 999-1. Effective date. This Act takes effect upon becoming law.

Credits

P.A. 91-476, Art. 999, § 999-1, eff. Aug. 11, 1999.

35 I.L.C.S. 10/999-1, IL ST CH 35 § 10/999-1
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West's Illinois Administrative Code
Title 14. Commerce
Subtitle C. Economic Development
Chapter I. Department of Commerce and Economic Opportunity
Part 527. Economic Development for a Growing Economy Program (Edge) (Refs & Annos)

14 Ill. Adm. Code 527.20

527.20. Definitions

Currentness

The following definitions are applicable to this Part.

"Accessible and affordable mass transit" means access to transit stops with regular and frequent service within one mile from the project site and pedestrian access to transit stops.

"Act" means the Economic Development for a Growing Economy Tax Credit Act. [35 ILCS 10]

"Affordable workforce housing" means owner-occupied or rental housing that costs, based on current census data for the municipality where the project is located or any municipality within 3 miles of the municipality where the project is located, no more than 35% of the median salary at the project site, exclusive of the highest 10% of the site's salaries. If the project is located in an unincorporated area, "affordable workforce housing" means no more than 35% of the median salary at the project site, excluding the highest 10% of the site's salaries, based on the median cost of rental or of owner-occupied housing in the county where the unincorporated area is located.

"Agreement" means the Tax Credit Agreement created pursuant to 35 ILCS 10/5-50.

"Business Location Efficiency Incentive" means the incentive created by the Business Location Efficiency Incentive Act [35 ILCS 11].

"Capital improvements" shall include the purchase, renovation, rehabilitation, or construction of permanent tangible land, buildings, structures, equipment and furnishings in an approved project sited in Illinois and in expenditures for goods or services that are normally capitalized, including organizational costs and research and development costs incurred in Illinois. For land, buildings, structures and equipment that are leased, the lease must equal or exceed the term of the Tax Credit Agreement and the cost of the property shall be determined from the present value, using the corporate interest rate prevailing at the time of the application, of the lease payments.

"Credit" means the amount agreed to between the Department and applicant under the Act, but not to exceed the incremental payroll *attributable to the applicant's project.* [35 ILCS 10/5-15]

"Department" means the Illinois Department of Commerce and Economic Opportunity, formerly known as the Illinois Department of Commerce and Community Affairs.

"Director" means the Director of the Illinois Department of Commerce and Economic Opportunity, formerly known as the Illinois Department of Commerce and Community Affairs.

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"Employee housing or transportation remediation plan" means a plan to increase affordable housing or transportation options, or both, for employees earning up to the median annual salary of the workforce at the project. The plan may include, but is not limited to, an employer-financed assisted housing program that can be supplemented by State or federal grants or shuttle services between the place of employment and existing transit stops or other reasonably accessible places.

"Existence of infrastructure" means the existence, within 1,500 feet of the proposed site, of roads, sewers, sidewalks, and other utilities and a description of the investments or improvements, if any, that an applicant expects State or local government to make to that infrastructure.

"Full-time employee" means an individual who is employed for consideration for at least 35 hours each week or who renders any other standard of service generally accepted by industry custom or practice as full-time employment. [35 ILCS 10/5-5] Annually scheduled periods for inventory or repairs, vacations, holidays and paid time for sick leave, vacation or other leave shall be included in this computation of full time employment. *An individual for whom a W-2 is issued by a Professional Employer Organization (PEO) is a full-time employee if employed in the service of the Applicant for consideration for at least 35 hours each week or who renders any other standard of service generally accepted by industry custom or practice as full-time employment to the Applicant.* [35 ILCS 10/5-5] For example, an employee who works 25 hours per week is considered the industry standard for full-time in the package delivery industry and an employee who is employed for a least 35 hours per week during the historical seasonal production is considered the industry standard for full-time in the candy manufacturing industry.

"Incremental Income Tax" means the incremental payroll attributable to a project that is the subject of an Agreement.

"Incremental payroll" means the total amount withheld by the taxpayer during the taxable year from the compensation of new employees and retained employees under Article 7 of the Illinois Income Tax Act [35 ILCS 5/Art. 7] arising from such employees' employment at a project that is the subject of an Agreement.

"Labor Surplus Area" or "LSA" must have an average unemployment rate at least 20 percent above the average rate for all states (plus the District of Columbia and Puerto Rico) during the previous two calendar years. However, the 20 percent ratio is disregarded:

when this 2-year average for all states is 8.3 percent or above, an average unemployment rate of 10 percent or more will qualify an area, and

when the all-states' average is 5.0 percent or less, an area will qualify with a 6.0 percent average.

The U.S. Department of Labor issues the labor surplus area listing on a fiscal year basis. The listing becomes effective each October 1 and remains in effect through the following September 30, but may be updated at any time during the fiscal year based on exceptional circumstance petitions. LSAs are classified on the basis of civil jurisdictions (cities with a population of at least 25,000 and all counties). LSAs are authorized by Public Law 96-302 and 20 CFR 654.

"Location efficient" means a project that maximizes the use of existing investments in infrastructure, avoids or minimizes additional government expenditures for new infrastructure, and has nearby housing affordable to the permanent workforce of the project or has accessible and affordable mass transit or its equivalent or some combination of both.

"Location efficiency report" means a report that is prepared by an applicant for increased State economic development assistance, under Section 10 of the Business Location Efficiency Incentive Act [35 ILCS 11/10] *and follows that Act, and*

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that describes the existence of affordable workforce housing or accessible and affordable mass transit or its equivalent. [35 ILCS 11/5]

"New employee" means a full-time employee first employed by a taxpayer in the project that is the subject of an Agreement and who is hired after the taxpayer enters into the Tax Credit Agreement.

The term "new employee" does not include:

an employee of the taxpayer who performs a job that was previously performed by another employee, if that job existed for at least 6 months before hiring the employee;

an employee of the taxpayer who was previously employed in Illinois by a related member of the taxpayer and whose employment was shifted to the taxpayer after the taxpayer entered into the Tax Credit Agreement;

an employee of the taxpayer who was previously employed in Illinois by the taxpayer and whose employment was shifted to the taxpayer project after the taxpayer entered into the Tax Credit Agreement; or

a child, grandchild, parent, or spouse, other than a spouse who is legally separated from the individual, of any individual who has a direct or an indirect ownership interest of at least 5% in the profits, capital, or value of the taxpayer.

An employee may be considered a new employee under the Agreement if the employee performs a job that was previously performed by an employee who was treated under the Agreement as a new employee and promoted by the taxpayer to another job. [35 ILCS 10/5-5]

An employee shall be considered a new employee under the Agreement if the employee fills a job vacancy that had been continuously vacant for the 184 day period immediately preceding the date of the Agreement. A job vacancy whose incumbent is on approved leave, is locked out or is on strike is not a vacancy.

"Placed in service" means the state or condition of readiness and availability for a specifically assigned function.

"Professional Employer Organization" or "PEO" means an employee leasing company that is an individual or entity contracting with a client to supply or assume responsibility for personnel management of one or more workers to perform services for the client on an on-going basis rather than under a temporary help arrangement, *as defined in Section 206.1(A)(2) of the Illinois Unemployment Insurance Act* [820 ILCS 405]. [35 ILCS 10/5-5]

"Professional services" means a taxpayer engaged in the practice of law or medicine.

"Project" means a for-profit economic development activity or activities at a single site, or of one or more taxpayers at multiple sites if the economic activities are vertically integrated.

"Project costs" includes cost of the project incurred or to be incurred by the taxpayer including: *capital investment, including, but not limited to, equipment, buildings, or land; infrastructure development; debt service, except refinancing of current debt; research and development; job training and education; lease costs or relocation costs,* but excludes the value of State incentives, including discretionary tax credits, discretionary job training grants, or the interest savings of below market rate loans. [35 ILCS 10/5-30]

"Retained employee" means a full-time employee employed by a taxpayer during the term of the agreement whose job duties are directly and substantially-related to the project. For purposes of this definition, "directly and substantially-

related to the project" means at least two-thirds of the employee's job duties must be directly related to the project and the employee must devote at least two-thirds of his or her time to the project. The term "retained employee" does not include a child, grandchild, parent, or spouse, other than a spouse who is legally separated from the individual, of any individual who has direct or indirect ownership interest of at least 5% in the profits, capital, or value of the taxpayer.

"Taxpayer" means an individual, corporation, partnership, or other entity that has any Illinois Income Tax liability. [35 ILCS 10/5-5]

Credits

(Source: Amended at 32 Ill. Reg. 8916, effective June 3, 2008)

Current through rules published in the Illinois Register Volume 41, Issue 31, August 4, 2017.

14 ILAC § 527.20, 14 IL ADC 527.20

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and the material contained in the appendix, is 25 pages.

/s/ David L. Franklin
DAVID L. FRANKLIN
Solicitor General

PROOF OF FILING AND SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 (2016) that on August 16, 2017, the foregoing **Brief and Appendix of Defendant-Appellant Illinois Department of Commerce and Economic Opportunity** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

Jacob H. Huebert
Jeffrey M. Schwab
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail an original and thirteen file-stamped copies of the brief to the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ David L. Franklin
DAVID L. FRANKLIN
Solicitor General
Office of the Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5376
Primary e-mail service:
CivilAppeals@atg.state.il.us
Secondary e-mail service:
dfranklin@atg.state.il.us