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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 REV 04478

Ingram Micro, Inc., Petitioner, v. N.C. Department of Revenue, Respondent.	**FINAL DECISION ON SUMMARY JUDGMENT**

THIS MATTER comes before Administrative Law Judge Linda F. Nelson on Respondent's Motion for Partial Summary Judgment, filed June 23, 2023. Petitioner filed a Response Brief on July 14, 2023. A hearing on this matter was held on August 28, 2023. The Undersigned, having considered the entire record, finds that the motion is now ripe for disposition.

ISSUE

Whether Respondent lost the authority to adjust Petitioner's net income tax under N.C. Gen. Stat. § 105-130.5A for years 2012, 2013 and 2014, because Respondent failed to issue a required written statement within the period prescribed in the statute?

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c).

UNDISPUTED FACTS

1. Respondent North Carolina Department of Revenue (the "Department") is a state agency in North Carolina responsible for administering the taxes imposed by Subchapter I of Chapter 105 of the North Carolina General Statutes.[1]

[1] All references to the "Secretary" herein are to the Secretary of the Department.

2. Petitioner Ingram Micro, Inc., a Delaware corporation ("Ingram"), is headquartered in California, and qualified to do business in North Carolina. Ingram is a Fortune 100 company and a part of an affiliated group of entities.

3. In 2015, the Department, under the authority of N.C. Gen. Stat. § 105-130.5A(a), began an audit of Ingram to determine if Ingram was conducting its business in such a manner as to fail to accurately report its North Carolina net income properly attributable to its business carried on in the State.

4. Eventually, the audit encompassed Ingram's tax years 2012, 2013 and 2014 (the "Period at Issue.")

5. On September 27, 2017, the Department issued a notice of proposed assessment to Ingram (the "Proposed Assessment") as required by N.C. Gen. Stat. § 105-130.5A(k).

6. On November 27, 2017, Ingram requested a review of the Proposed Assessment in compliance with N.C. Gen. Stat. §§ 105-130.5A(k) and 105-241.11 (review must be requested within 45 days of proposed assessment).

7. Section 105-130.5A(e) requires the Department to provide "a written statement containing details of the facts, circumstances, and reasons for which the Secretary has found, as a fact, that the corporation did not report its State net income properly attributable to its business carried on in the State and the Secretary's proposed method for computation of the corporation's State net income" within 90 days of the issuance of the Proposed Assessment (the "90-day Deadline.")

8. The Department did not provide a written statement to Ingram until almost five years after the Proposed Assessment.[2]

9. The Department did not request that Ingram agree to an extension of the 90-day Deadline, as it was permitted to do by N.C. Gen. Stat. § 105-130.5A(n). Ingram did not complain of the Department's failure to meet the 90-day Deadline until the filing of the Petition to commence this contested case.

10. The Department was required to issue a notice of final determination on or before June 17, 2018, unless the parties agreed to an extension. N.C. Gen. Stat. §§ 105-130.5A(k) and 105-241.14(b) and (c) (final determination due within nine months of request for review of proposed assessment.)

[2] At hearing, the Department asserted that the notice of final determination issued with respect to this matter included detailed objections and a method for determining net income as required by N.C. Gen. Stat. § 105-130.5A(e), albeit not within the required time period. (Hearing Transcript 08-28-2023, pp. 7-8). Ingram disputed this and maintained that the Department still had not settled on the Department's position on several material matters as late as depositions for this contested case. (T. pp. 20, 45). Thus, whether the notice of final determination contained the information required by N.C. Gen. Stat. § 105-130.5A(e) is a disputed fact, however, it is not material to the resolution of the Motion.

11. The Department prepared several written agreements extending the period for issuing a notice of final determination prescribed by N.C. Gen. Stat. § 105-241.14(c). Pursuant to the Department's request, Ingram executed each extension agreement.

12. On September 30, 2022, the Department issued the Notice of Final Determination ("NOFD") to Ingram, in compliance with N.C. Gen. Stat. §§ 105-130.5A(k) and 105-241.15.

13. On November 28, 2022, Ingram timely-filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings objecting to the Department's failure to meet the 90-day Deadline, among other matters.

14. The Petition seeks to invalidate the portion of the assessment related to the Department's adjustment of Ingram's net income under N.C. Gen. Stat. § 105-130.5A. Ingram asserts that this portion is invalid because the Department failed to comply with its obligations under N.C. Gen. Stat. § 105-130.5A. Specifically, Ingram argues that the Department's failure to explain its actions within the 90-day Deadline imposed by N.C. Gen. Stat. § 105-130.5A(e) left the Department without authority to adjust Ingram's net income for the Period at Issue.

15. The Department's Motion argues that its failure to comply with its obligations under N.C. Gen. Stat. § 105-130.5A(e) had no effect on the validity of the NOFD.

16. The parties agree that there are no material facts in dispute with respect to the legal effect of the Department's failure to meet the 90-day Deadline.

DISCUSSION

A. The Governing Law

North Carolina is a separate entity state. This means that corporations are required to file separate returns to report net income to North Carolina, even if they are a part of an affiliated group of corporations and even if they file a federal consolidated return. N.C. Gen. Stat. § 105-130.14. Each corporation calculates its own tax liability and intercompany transactions are respected. However, to prevent abuse, the General Assembly has authorized the Department to adjust a corporation's net income as reported on its separate return under certain circumstances provided in N.C. Gen. Stat. § 105-130.5A.

Section § 105-130.5A(a) permits the Department to adjust the net income of any corporation that fails "to accurately report its State net income properly attributable to its business carried on in the State through the use of transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities." The General Assembly has enacted the following unique and detailed procedure for making such an adjustment:

1. Step 1: The Department must have "reason to believe that [the] corporation so conducts its trade or business in such a manner as to fail to accurately report its State net income properly attributable to its business carried on in the State through the use of transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities." N.C. Gen. Stat. § 105-130.5A(a).

2. Step 2: The Department must provide written notice to the corporation that it requires additional information "reasonably necessary to determine whether the corporation's intercompany transactions have economic substance and are not at fair market value between member of an affiliated group of entities." *Id*.

3. Step 3: The corporation must provide the requested information within 90 days of the request. *Id*.

4. Step 4: "If upon the review of the information provided, the Secretary finds as a fact that the corporation's intercompany transactions lack economic substance or are not at fair market value, the Secretary may redetermine the State net income properly attributable to its business carried on in the State…", N.C. Gen. Stat. § 105-130.5A(b). The Department must then issue a proposed assessment reflecting that adjustment. N.C. Gen. Stat. § 105-130.5A(k).

5. Step 5: "[T]he Secretary shall provide the corporation with a written statement containing detail of the facts, circumstances, and reasons for which the Secretary has found as a fact" that the corporation's intercompany transactions lack economic substance or are not at fair market value and "the Secretary's proposed method for computation of the corporation's State net income no later than 90 days following the issuance of a proposed assessment. N.C. Gen. Stat. § 105-130.5A(e).

Once the Department complies with these unique obligations, the normal statutory procedures apply to any appeal of the proposed assessments. N.C. Gen. Stat. § 105-130.5A(k).

In the case at hand, the Department did not comply with Step 5. That is, it did not explain the facts, circumstances, and reasons the Department objected to Ingram's intercompany transactions and the method it proposed to determine the correct net income within 90 days of the Proposed Assessment.[3] The Department seeks to explain away this failure by treating Step 5 as a mere suggestion. Specifically, the Department characterizes the 90-day Deadline as "precatory" and "directory, rather than mandatory" and thus asserts that the Department did not "fail to act as required by law or rule." (Res. Brief in Support of Motion to Bifurcate Proceedings at 3; Res. Brief in Support of Motion for Partial Summary Judgment at 5-6; N.C. Gen. Stat. § 150B-23(a)). The Department asserts that since the requirement is not mandatory, this Tribunal has the authority to conclude that Petitioner was not "so prejudiced by the Department's omission as to require invalidation of the assessment…." (Res. Brief in Support of Motion to Bifurcate Proceedings at 3).

[3] The parties dispute whether the NOFD, issued 5 years later after the 90-day Deadline, contained the information required by the 90-day Deadline.

Ingram maintains that the 90-day Deadline is mandatory and that the Department's failure to adhere to it invalidates the NOFD to the extent that it includes an adjustment to net income.

B. The 90-day Deadline is Mandatory

Section 105-130.5A(e) provides, in its entirety, as follows:

> If the Secretary makes an adjustment or requires a combined return under this section, the Secretary **shall provide the corporation with a written statement** containing detail of the facts, circumstances, and reasons for which the Secretary has found as a fact that the corporation did not accurately report its State net income properly attributable to its business carried on in the State and the Secretary's proposed method for computation of the corporation's State net income **no later than 90 days following the issuance of a proposed assessmen**t as provided in this section. (Emphasis added)

The General Assembly's word choice demonstrates that this step of the procedure is mandatory. "It is well established 'that the word "shall" is generally imperative or mandatory' when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren County*, 368 N.C. 360, 365-6, 777 S.E.2d 733, 737 (2015) (quoting *Multiple Claimants v. N.C. Dep't of Health & Human Serv.,* 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979). These authorities require this Tribunal give effect to the plain and ordinary meaning of the word "shall."

This conclusion is reinforced by the statute's imposition of a deadline for the action required of the Department. "There are some circumstances under which a requirement that a certain act shall be done on a date named may be treated as directory, but ***that is not possible*** when the statute conferring the power provides that it shall be performed 'not later than' the time specified." *Williams v. Comm'rs of Franklin County*, 182 N.C. 135, 108 S.E. 503, 505 (1921). (Emphasis added.)

Our Supreme Court has held that where a statute grants a power to, or imposes a duty on, a government agency ***and*** states specified time for the performance by the governmental authority granted the following the words "not later than," the failure of the authority to comply with the deadline invalidates the authority's subsequent action. In *Spiers v. Davenport*, 263 N.C. 56, 59, 138 S.E.2d 762, 764 (1964), the Court, following *Williams*, held that where a statute provided that the board of equalization "shall complete its duties not later than the third Monday following its first meeting," the failure of board to complete those duties within the prescribed time voided the valuation and subsequent property tax assessment. *In re McLean Trucking Co.*, 281 N.C. 242, 251, 188 S.E.2d 452, 457 (1972) (citing *Spiers* for holding that a time limitation on fulfilment of board's duties is mandatory). In each of these cases, the Court concluded that

once the statutory time period for a board of equalization to determine valuations for property tax purposes lapsed, any determinations made by the board were void as ultra vires.

Section 105-130.5A, like the statute at issue in *Williams, Spiers, and McLean,* confers a power (the Department's power to adjust net income) and imposes duties (to follow the steps described in Section A, above). The statute also uses, with respect to step 5, a phrase almost identical to "not later than" ("no later than") followed by a specified time (90 days). Accordingly, this Tribunal must conclude that the Department's failure to provide the required written statement within the required time period renders the Department's subsequent issuance of the NOFD ultra vires, and the NOFD is therefore void.

This Tribunal notes that when the General Assembly does not intend for the Department's untimeliness to invalidate its actions, it states this expressly. For example, N.C. Gen. Stat. § 105-241.14(c), which applies to all final determinations, including those making adjusts to net income, provides that the process of determining an assessment

> must conclude, and a final determination must be issued within nine months after the taxpayer files a request for review. The Department and the taxpayer may extend this time limit by mutual agreement. Failure to issue a notice of final determination within the required time does not affect the validity of a proposed denial of a refund or proposed assessment.

C. The 90-Day Deadline is not Directory

The Department cites two cases for the proposition that its failure to adhere to the statutory scheme, by not meeting the 90-day Deadline, should not invalidate the NOFD because the steps in that scheme are merely directory, *State ex rel. Utilities Comm. V. Empire Power Co.*, 112 N.C. App. 265, 435 S.E.2d 553 (1993), *disc. rev. den*. 335 N.C. 564, 441 S.E.2d 125 (1994) and *Com'r of Labor v. House of Raeford Farms, Inc.*, 124 N.C. App 349, 477 S.E.2d 230 (1996), *disc. rev. improv. allowed* 347 N.C. 347, 492 S.E.2d 230 (1996). The Tribunal does not agree.

Empire Power was an appeal from the Utilities Commission's dismissal of a power company's application for a certificate of need ("CON"). The commission did not commence a timely hearing, and the company argued that the CON must be issued. The applicable statute provided that the commission must issue the CON if (1) the commission did not commence the hearing within a specified time period ***and*** (2) a complaint was ***not*** received within a specified time period. The commission's failure did not vitiate its power to deny the CON, because the statutory constraint on that power required the failure of both two conditions. *Empire Power* at 277, 435 S.E.2d at 559-60. Although the commission failed to hold a timely hearing, it did receive a timely complaint. In other words, the statute provided the commission with two alternative paths for the exercise of its power to deny a CON: fulfil its duty to hold a hearing within the required time period or receive a complaint within a specified time period. One path was blocked by the commission's failure, the other remained open by the receipt of a complaint.

Unlike the statute in *Empire Power*, N.C. Gen. Stat. § 105-130.5A requires the Department to proceed down a single path traversed by a series of gates representing the five

steps described above. Failure to satisfy any of those steps would close the gate and impede any further progress down the path. Therefore, *Empire Power* does not apply to the present case.[4]

The other case cited by the Department, *Commissioner of Labor v. House of Raeford Farms, Inc.*, 124 N.C. App 349, 477 S.E.2d 230 (1996), involved a statute requiring the Labor Commissioner to determine the merit of a worker's complaint against an employer within a specified time period before the worker could file a case against the employer. The Court of Appeals held that the Commissioner's failure to meet this deadline did not defeat the court's jurisdiction over a complaint filed by a worker against her former employer.

The court appeared to distinguish *Spiers* because of the importance of the timely completion of the board of equalization's duties to the overall property tax scheme. *Raeford Farms* at 355, 477 S.E.2d at 233. While recognizing the "prejudice" to the employer by the Labor Commissioner's tardy action, the court concluded that timeliness was not as important in the case before it as it was in property tax cases. The court was "particularly persuaded in this case by the legislative history and circumstances surrounding the adoption of the statute." *Raeford Farms* at 356, 477 S.E.2d at 234. Recounting that the General Assembly enacted the act containing the statute at issue in response to a workplace fire, the court found that "the General Assembly sought to remedy unsafe and unlawful workplace conditions, by providing employees with a mechanism to report these violations without being punished for doing so." *Id*. The court concluded from this history, that the time limitation "was intended to spur the Commissioner to action, not limit the scope of his authority." *Id*.

Years after *Raeford* Farms was decided, the North Carolina Supreme Court provided the following general guidance for when a court can find a statute merely directory:

> In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory. [Citations omitted]

Catawba Cty. v. Loggins, 370 N.C. 83, 95, 804 S.E.2d 474, 482 (2017). The Court elaborated further with a quote from a decision older than *Williams*:

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[4] This Tribunal notes further that the *Empire Power* Court's holding is not dependent on its observation that "[m]any courts have observed that statutory time limitations are generally considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply with the time period." *Empire Power* at 277, 435 S.E.2d at 558. The cite for this statement does not include an opinion by a single North Carolina case, but rather two federal courts, the 5th and the D.C. Circuits. Even assuming that this is a correct statement of North Carolina law, it is a statement of a "general" rule. The general rule does not trump the holdings of the three North Carolina cases discussed above that when conferring powers and duties on agencies, the General Assembly's use of a phrase meaning "no later than" followed by a specific time period cannot be deemed to be directory rather than mandatory.

> The meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other." *Spruill v. Davenport*, 178 N.C. 364, 368-69, 100 S.E. 527, 530 (1919).

This Tribunal finds that it is not at liberty to conclude that the requirement at issue here is sufficiently unimportant within N.C. 105-130.5A's carefully articulated scheme to warrant its disregard.

D. The History of N.C. Gen. Stat. § 105-130.5A

This Tribunal is reluctant to examine extraneous materials such as legislative history in any case, but particularly in the present case where both the plain language (the use of the word "shall") and the longstanding North Carolina Supreme Court precedents (*Williams*, *Spiers*, and *McLean*) indicate that the 90-day Deadline is mandatory. However, *Raeford Farms* and *Spruill* suggest such an examination can be appropriate in certain circumstances. Upon review of the history of N.C. Gen. Stat. § 105-130.5A, this Tribunal finds further support for its conclusion that the 90-day Deadline is mandatory.

The unique, detailed, and orderly statutory requirements imposed on the Department by N.C. Gen. Stat. § 105-130.5A can only be understood in the context of the extraordinary power the statute grants to the Department, i.e., the power to ignore or rewrite agreements between separate taxpayers and even to disregard their separate existences. The unique and detailed procedural scheme of N.C. Gen. Stat. § 105-130.5A was the result of the General Assembly's lengthy and determined effort to put guardrails around the exercise of this extraordinary power and to insist that the Department exercise this power in an open and transparent manner.

The predecessor to N.C. Gen. Stat. § 105-130.5A, N.C. Gen. Stat. § 105-130.6, was on the statute books almost unchanged for 65 years. Adam Patrick McInnis Tarleton, *North Carolina's New Forced Combination Statute,* Tax Assessments, N.C. Bar Association, October 5, 2011. However, in 2006, the then Secretary of Revenue announced a new program to apply the statute aggressively. *Delhaize America, Inc. v. Lay*, 2011 NCBC 2, ¶ 48, 06 CVS 08416, (Super. Ct Jan. 12, 2011), *aff'd in part, rev'd in part,* 222 N.C. App. 336, 731 S.E.2d 486 (2012), . However, the Department specifically refused to provide guidance to its own auditors on applying the statute for fear the guidance would reach taxpayers and that, in the words of a then Department official "would be like handing a gun to the guy that is about to rob us." 2011 NCBC at ¶ 53. It would provide taxpayers "a roadmap to tax avoidance." *See,* Amy Hamilton, *Transparency in N.C.: Portrait of a State in Flux*, State Tax Notes, July 16, 2012, p. 149 (quoting the then Secretary of Revenue). Noting that the Department made changes to guidance published in an existing bulletin, the Superior Court decision in *Delhaize* found as follows:

> Not only did the Department not give taxpayers notice of these policy changes; it also worked actively to conceal the standards its decision makers were using when exercising their authority to combine returns [under former N.C. Gen. Stat.

§ 105-130.6]. The Department forced taxpayers to guess whether they would be subjected to compelled combination and resulting penalties.

Delhaize at ¶ 58.

By 2010, the Department's expansive reading of its power under N.C. Gen. Stat. § 105-130.5A and its victory in *Wal-Mart Stores East, Inc. v. Hinton,* 197 N.C. App. 30, 676 S.E.2d 634 (2009), prompted the General Assembly to amendment Chapter 105. In addition to a rewrite of N.C. Gen. Stat. § 105-130.6, the 2010 amendments authorized the Department to adopt rules to give the public notice of the facts and circumstances under which the Department would use its power to rewrite or disregard transactions between separate taxpayers. N.C. Sess. Laws 2010-31, § 31.10(d) and (f).

The 2010 amendments also added a special requirement for public notice of the proposed rules and a public comment period before adoption.[5] *Id*., § 31.10(f). Finally, the 2010 amendments prohibited the Department from assessing a negligence penalty on amounts determined due pursuant to N.C. Gen. Stat. § 105-130.5A until permanent rules were adopted or the individual taxpayer had sought and obtained written advice from the Department that a combined return is required. *Id*., § 31.10(b).

The Department did not pursue rulemaking as authorized under the 2010 law. The Department, instead, issued Directive CD-11-01, on November 16, 2011, pursuant to the authority of the Secretary to interpret tax statutes provided in N.C. Gen. Stat. § 105-264(a). This directive was replaced, on April 17, 2012, by Directives CD-12-01(applicable to pre-2012 tax years) and CD-12-02 (applicable to post-2012 tax years). The Department thus bypassed the enhanced rulemaking procedure added by the 2010 amendments, as well as the rulemaking requirements of the NCAPA. By not adopting rules, the Department gave up the power to impose negligence penalties per N.C. Sess. Laws 2010- 31, § 31.10(b).

The 2012 directives were issued after more changes to the law governing the Department's power to adjust net income passed in 2011, following more national public concern about the 2011 decision of the Superior Court, later affirmed in major part, by the Court of Appeals in *Delhaize America, Inc. v. Lay*, 222 N.C. App. 336, 731 S.E.2d 486 (2012). The 2011 legislation repealed N.C. Gen. § 105-130.6 in full and two other statutes in part, replacing them with N.C. Gen. Stat. § 105-130.5A. N.C. Sess. Laws 2011-390, §§ 1 and 2. These amendments also removed the discretion of the Department to adjust deductions taken by the taxpayer, as the Department deemed proper, and instead, provided that the adjustment would conform to federal practice. *Id.*, § 3.

For the third consecutive year, in 2012, the General Assembly amended the law governing the Department's power to adjust net income by passing N.C. Sess. Laws 2012-43. Technical amendments followed in N.C. Sess. Laws 2012-79. Among many changes, this legislation included an unusual prohibition. The Secretary was prohibited from interpreting N.C.

[5] Although this is and was a requirement for rules proposed by other government agencies, rules promulgated by the Department are exempt from notice and comment under the North Carolina Administrative Procedure Act, Chapter 150B (NCAPA).

Gen. Stat. § 105-130.5A in the form of a directive or bulletin issued pursuant to the Secretary's power under N.C. Gen. Stat. § 105-264. N.C. Sess. Laws 2012-43, § 2 (codified in N.C. Gen. Stat. § 105-262.1(a)). The law rendered Directive CD-12-02 ineffective except as a protection for taxpayers who relied on it and then only for the 2012 tax year. *Id*., § 5. The law ***required*** the Department to adopt rules to provide guidelines for the implementation of N.C Gen. Stat. § 105-130.5A, while forbidding the Department to implement N.C. Gen. Stat. § 105-130.5A until permanent rules were adopted. *Id*., § 6.

The General Assembly's iterative amendments to the law governing the adjustment of net income over a three-year period successively tightened the restrictions on the Department in the exercise of its power under N.C. Gen. Stat. § 105-130.5A and its predecessor. The resulting statute circumscribes the Department's power to apply N.C. Gen. Stat. § 105-130.5A in a manner that is uniquely protective of the rights of taxpayers. The 90-day Deadline is but one of the unusual requirements of the uniquely restrictive process.

For example, the Department must have "a reason to believe" that a taxpayer is using "transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities." N.C. Gen. Stat. § 105-130.5A(a). In other words, there must be some evidentiary predicate before the adjustment procedure can begin. It also shows that the General Assembly intended that the Department be prepared and focused before its first request for information.

Also, the statute instructs the Department to give ***written*** notice to the taxpayer if the Department requires "reasonably necessary" information from the taxpayer, and this notice must give the taxpayer no more than 90 days to respond with the information requested. *Id*. For audits other than those under N.C. Gen. Stat. § 105-130.5A, the Department is free to decide how to request information and what deadline to give for taxpayer response. The Department also is not instructed specifically to be reasonable in requests for information, rather, reasonableness is assumed.

N.C. Gen. Stat. § 105-130.5A(b) provides that before issuing a proposed assessment, the Department must "***find as a fact*** that the corporation's intercompany transactions lack economic substance or are not at fair market value." In contrast, proposed assessments under other tax statutes require only that the proposed assessment be based "on the best information available." N.C. Gen. Stat. § 105-241.9(a).

The 90-day Deadline is the last of the unique steps required of the Department before the issuance of the Department's final determination. This requirement, which was added as an amendment during the crafting of what became N.C. Session Laws 2012-43, in the instant case required the Department to act more deliberately than it did in its audit of Ingram. The Department should have prepared a definite and detailed explanation of its objections to Ingram's transactions with its affiliate and a method for computing the proposed assessment within 90 days of issuing the Proposed Assessment.[6]

[6] The Department stated at hearing that requiring a detailed statement regarding the proposed assessment 90 days after it is issued is inconsistent with the requirement that the taxpayer file a request for review within 45 days of the issuance of the proposed assessment might "demonstrate a lack of concern" about the written statement. (T. p. 24)

This Tribunal finds the intent by the General Assembly to require the Department to act quickly and deliberately from before its first request for information from Ingram through the period ending not more than 90-days following the issuance of the Proposed Assessment in November of 2015.

Being mindful of "the consequences which would follow from construing it in the one way or the other" as the North Carolina Supreme Court required in *Cabarrus County* at 95, 804 S.E.2d at 482, this Tribunal concludes that the failure of the Department to meet the 90-day Deadline could explain why this matter, involving only $180,000 in disputed taxes, is still not resolved more than eight years after the audit began.

At the hearing, the attorney for the Department stated:

> It would be great to give as much notice as the Department can to the taxpayer, but it may not be possible in every case. This case illustrates to me that things went on as usual, making the requirement [the 90-day Deadline] almost in the facts of this case – it's superfluous.

T. p. 44. (Brackets added). This indifference to transparency and taxpayer protections is exactly what the General Assembly's amendments to N.C. Gen. Stat. §105-130.5A were intended to prevent.

This Tribunal is cognizant that this decision granting summary judgement is based on what could be perceived as a procedural issue. However, this Tribunal is equally cognizant that the General Assembly has not only vested tremendous power in the Department, but it also purposely drafted N.C. Gen. 105-130.5A such that the 90-day Deadline is a mandatory requirement designed to protect taxpayer rights and avoid the years long delay evidenced in this matter. Failure to follow this statutory requirement renders the Department's subsequent actions ultra vires.

FINAL DECISION

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds that the Department of Revenue failed to act as required by law by failing to fulfill a mandatory requirement for the exercise of its authority under N.C. Gen. Stat. § 105-130A.5A. This failure left the Department without authority to assess tax against Ingram Micro, Inc. pursuant to N.C. Gen. Stat. § 105-130A.5A. It is hereby ORDERED that the assessment against Ingram Micro, Inc., to the extent that it is based on the Department's adjustment of net income under N.C. Gen. Stat. § 105-130A.5A, is without effect.

This Tribunal disagrees. Leaving aside the question of whether the 45-day overlap resulted from a drafting error or the General Assembly intended to relieve the Department from having to produce the detailed statement where the taxpayer agreed with the proposed assessment, this Tribunal finds that the procedure insures that the Department bears the burden of justifying its actions early in the administration review process and that the taxpayer is not left tilting at vapors for years.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the Administrative Procedure Act of North Carolina, N.C. Gen. Stat. § 150B-1 *et. seq*., and N.C. Gen Stat. § 105-241.16, any party aggrieved by the Final Decision may seek judicial review by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f). **Before filing a petition for judicial review, a taxpayer must pay the amount stated in the Notice of Final Determination, plus applicable interest, which continues to accrue until the tax is paid.** N.C. Gen. Stat. § 105-241.21.

The party seeking review must file the petition within 30 days after being served with a written copy of the Final Decision. In conformity with 26 N.C.A.C. 3 .0102, which incorporates the provisions of electronic service as defined in 26 N.C.A.C. 3 .0501, **the Certificate of Service attached to this Final Decision shows the date of service on the parties.**

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review and requires service of the petition on all parties. Because the Office of Administrative Hearings is required to file the official record in the contested case under review, **the party seeking judicial review must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when the judicial review is initiated.**

This the 27th day of October, 2023.

Linda F. Nelson
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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