

## ***Zimmer: A Wake-Up Call for Waiver Reform in Tennessee***

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## Zimmer: A Wake-Up Call for Waiver Reform in Tennessee

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In this article, Lurie and Dolan argue that in response to the Tennessee Court of Appeals' holding in *Zimmer U.S. Inc. v. Gerregano*, the Department of Revenue should revise its waiver agreements to ensure that affected taxpayers understand when a waiver agreement does not extend the statute of limitations for filing suit.

In *Zimmer U.S. Inc. v. Gerregano*, the Tennessee Court of Appeals held that a waiver agreement that extends the time for a taxpayer to receive a refund does not extend the statute of limitations to file a suit challenging a denial or deemed denial of a refund.<sup>1</sup> This means that a taxpayer may need to file a suit challenging a deemed denial of a refund while “in ongoing conversations with the department” regarding a

refund claim.<sup>2</sup> Experts on Tennessee tax procedure understand this unusual “nuance of Tennessee statutes,” but this rule creates a procedural trap for taxpayers who are less familiar with Tennessee law.<sup>3</sup> In the interest of fair tax administration, the DOR should revise its waiver agreements to ensure that every affected taxpayer understands when a waiver agreement does not extend the statute of limitations for filing suit. If the DOR does not revise its waiver agreements, the Tennessee Taxpayer Bill of Rights may provide relief to a taxpayer that is misled by the waiver and files suit after the statute for filing suit closes.

*Zimmer* provides a perfect illustration of the procedural trap. In *Zimmer*, the taxpayer filed a claim for a refund of sales and use tax in December 2015, which was within the statute of limitations for a refund claim.<sup>4</sup> In September 2016, the taxpayer and the DOR executed a waiver agreement that provided that:

This agreement of mutual consent for an extension of the statutory period of limitations otherwise applicable by law upon the assessment of taxes payable to the state of Tennessee or the refund of taxes due the taxpayer named herein, of the kind and for the taxable period stated above, is made by and between the taxpayer, and the Commissioner of Revenue pursuant to the provisions of Tenn. Code Ann. §§67-1-1501, 67-1-1802 and all other applicable state laws.

<sup>2</sup> Andrea Muse, “Tennessee Court Says Refund Suit Was Untimely,” *Tax Notes Today State*, July 22, 2021.

<sup>3</sup> See *id.*

<sup>4</sup> *Zimmer*, 2021 Tenn. App. LEXIS at \*2.

<sup>1</sup> No. M2020-00171-COA-R3-CV, 2021 Tenn. App. LEXIS 285 (Tenn. Ct. App. July 19, 2021).

It is mutually agreed and consented by the parties that any tax liability, including penalty or interest which accrues thereon, may be assessed at any time on or before the new expiration date, in the manner provided by law.

It is further mutually agreed and consented by the parties that any overpayment, including interest which accrues thereon, may be refunded if, by the new expiration date, the Commissioner is in possession of proper proof and facts showing a refund is due.<sup>5</sup>

The taxpayer and the DOR tried to negotiate a resolution to the refund claim for another two years after executing this initial waiver, but to no avail.<sup>6</sup> After refund negotiations fell through, which was a bit more than three years after the taxpayer had filed its refund claim, the taxpayer filed a suit in chancery court.<sup>7</sup>

Despite the fact that the taxpayer and the DOR had entered into a waiver agreement, the court found that the taxpayer's suit was untimely.<sup>8</sup> The court first observed that a statute, Tenn. Code Ann. section 67-1-1802(c)(1), requires a taxpayer to file a suit challenging the denial or deemed denial of a refund claim within one year of the date that the claim was filed, and the taxpayer had indisputably filed suit more than a year after the refund claim had been filed.<sup>9</sup> Thus, the only question before the court was whether the statute of limitations for filing suit had been extended by the waiver agreement. Although the waiver agreement cited section 67-1-1802, the court noted that while it extended the statute of limitations for a refund of taxes, it did not expressly extend the statute of limitations for filing suit challenging the tax refund

denial.<sup>10</sup> The court found that the waiver agreement was not ambiguous, and so declined to construe it against the DOR as the drafter.<sup>11</sup>

We hope the DOR views *Zimmer* as a bittersweet win rather than an outright victory. The taxpayer's conduct in the case seems consistent with a good-faith belief that the statute of limitations for filing a suit had been tolled. The DOR may have had a duty to preserve the public fisc by enforcing the statute's jurisdictional limitation on suits,<sup>12</sup> but that does not mean that the DOR should act as if the result in *Zimmer* is fair.

To instill confidence in tax administration, the DOR should ensure that other taxpayers do not fall into the same procedural trap as the taxpayer in *Zimmer*. This is especially important in this context, because a taxpayer is not required to be represented by counsel — who presumably would be familiar with this pitfall — to file a refund claim or execute a waiver agreement.

One way for the DOR to ensure that other taxpayers are aware of the limited scope of a waiver would be to include a notice whenever a waiver agreement does not extend the statute of limitations for filing suit.<sup>13</sup> Another approach would be to administratively modify the standard waiver language to extend the statute of limitations for filing a suit challenging the denial or deemed denial of a refund claim. A third approach would be to amend section 67-1-1802(c)(1) to automatically extend the statute of limitations for filing a suit when the parties enter a waiver agreement for a refund.

Of course, removing this procedural trap could cost the state revenue because taxpayers who would otherwise miss the statute of

<sup>10</sup> *Id.* at \*8.

<sup>11</sup> *Id.* at \*9.

<sup>12</sup> See *AT&T Corp. v. Johnson*, 2002 Tenn. App. LEXIS 709 at \*6 (Ct. App. 2002) (“Suits for tax refunds are suits against the State and can be maintained only in the manner and upon the conditions consented to by the State.”).

<sup>13</sup> For example, this notice could read: “A suit challenging the denial or deemed denial of the claim for refund must be ‘filed in the appropriate chancery court of this state within one (1) year from the date that the claim for refund was filed with the commissioner.’ Tenn. Code Ann. section 67-1-1802(c)(1). This agreement does not extend the date on which the taxpayer can file a suit challenging the denial or deemed denial of a claim for refund. See *Zimmer U.S. Inc. v. Gerregano*, 2021 Tenn. App. LEXIS 285 (Ct. App. 2021).”

<sup>5</sup> *Id.* at \*2-3.

<sup>6</sup> *Id.* at \*3-4.

<sup>7</sup> *Id.* at \*4.

<sup>8</sup> *Id.* at \*11-12.

<sup>9</sup> *Id.* at \*7.

limitations will be more likely to file suit timely or insist that the DOR agree to extend the statute of limitations for filing suit. However, this is a small cost to ensure that taxpayers are treated fairly, especially considering the DOR's mission is to "fund public services through tax compliance" by the "fair enforcement" of the tax laws.<sup>14</sup> This mission means that the DOR should not put the goal of maximizing revenue collection above fair enforcement.

Furthermore, the state's TABOR mandates that the DOR add a warning to its waiver agreements. It provides Tennessee taxpayers the right to receive "a clear set of rules and procedures to resolve tax problems that arise from the interpretation and administration of Tennessee's tax laws,"<sup>15</sup> and requires that the DOR "shall promulgate rules, regulations and adopt policies which would inform and advise taxpayers of their rights."<sup>16</sup> Now that the DOR is on notice that its waiver agreement language has the potential to mislead taxpayers, the TABOR seems to require it to take corrective action.

If the DOR does not reform its waiver process, other taxpayers who erroneously rely on a waiver agreement may be able to assert that the TABOR extends the statute of limitations for filing suit.<sup>17</sup> While *Zimmer* holds that the DOR waiver agreement on its own terms does not extend the statute of limitations for filing suit, there may still be fact patterns in which a taxpayer can show that extension would nevertheless be appropriate. For example, if a taxpayer can show that the DOR misled the taxpayer regarding the statute of limitations to "achieve or preserve any kind of bargaining or litigational advantage," there

would be a strong case for extending the statute of limitations in the interest of fairness.<sup>18</sup> The taxpayer in *Zimmer* asserted this type of argument, but the court declined to address it because, according to the court, the taxpayer made "no legal argument in this regard and cite[d] no legal authority" for relief.<sup>19</sup> As a result, *Zimmer* does not prevent a court from extending the statute of limitations in appropriate circumstances in accordance with the TABOR. ■

<sup>14</sup>Tennessee DOR, "Get to Know Revenue" (undated); see also *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1909 (2020) (noting that "the Government should turn square corners in dealing with the people") (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

<sup>15</sup>Tenn. Code Ann. section 67-1-110(c)(8).

<sup>16</sup>Tenn. Code Ann. section 67-1-110(b) (emphasis added).

<sup>17</sup>See Alice G. Abreu and Richard K. Greenstein, "Listen to Peter: Embrace the TBORs," *State Tax Notes*, Jan. 29, 2018, p. 491.

<sup>18</sup>See *New Concepts for Living Inc. v. City of Hackensack*, 870 A.2d 697, 701 (N.J. App. Div. 2005).

<sup>19</sup>*Zimmer*, 2021 Tenn. App. LEXIS at \*9-10.