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2017 IL App (3d) 150709-U

Order filed November 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE ROCK ISLAND BOATWORKS, INC.,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellant/Cross-Appellee,	)	Rock Island, Illinois,
	)	
v.	)	Appeal No. 3-15-0709
	)	Circuit No. 13-MR-458
	)	
RIB HOLDING COMPANY,	)	Honorable
	)	Mark A. VandeWiele,
Defendant-Appellee/Cross-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: The trial court properly found Purchaser breached the unambiguous language of the asset purchase agreement resulting in Seller's contractual damages. The trial court's decision granting cross-motions for summary judgment in favor of Seller is affirmed.

¶ 2 The plaintiff, The Rock Island Boatworks, Inc. (Purchaser), appeals from the trial court's March 6, 2015, April 28, 2015, and September 10, 2015, orders granting summary judgment in favor of the defendant, RIB Holding Company (Seller) on counts I and II of Purchaser's second

amended complaint and counts I and II of Seller's counterclaim. On appeal, Purchaser contests the trial court's decision finding section 11.2(c) of the asset purchase agreement (the APA) was unambiguous and required an appeal to the Illinois Gaming Board (the Board) together with litigation as necessary to challenge the 2011 postclosing gaming taxes. Next, Purchaser asserts the trial court erroneously concluded Purchaser breached section 11.2(c) of the APA as a matter of law after finding it is always commercially reasonable for a business owner to attempt to reduce taxes. Finally, Purchaser requests this court to reverse the trial court's determination that the Illinois Riverboat Gambling Act (the Act) (230 ILCS 10/1 *et seq*. (West 2010)) and related regulations made it likely that the Board would have refunded gaming taxes previously collected from Purchaser if Purchaser had not breached the APA by failing to request a refund.

¶ 3 Thus, Purchaser requests that this court reverse the trial court's orders granting summary judgment in favor of Seller and against Purchaser pertaining to counts I and II of Purchaser's second amended complaint and counts I and II of Seller's counterclaim. In addition, Purchaser asks this court to reverse the trial court's denial of Purchaser's motion for summary judgment.

¶ 4 Seller filed a cross-appeal challenging the trial court's determination of Seller's damages for purposes of indemnification due to Purchaser's breach of contract. Seller asserts on appeal the trial court erroneously failed to order Purchaser to pay interest on Seller's portion of the tax savings equal to the amount of interest the State of Illinois would have been required to pay Purchaser on a refund pursuant to the Uniform Penalty and Interest Act (35 ILCS 735/3-2 (West 2010)).

¶ 5 FACTS

¶ 6 I. The Asset Purchase Agreement

¶ 7 This appeal arises from a declaratory action seeking to clarify the contractual language involving the sale of the assets of Jumer's Casino and Hotel in Rock Island, Illinois (the Casino). For a purchase price of $180 million, Purchaser obtained the assets of the Casino, including the Illinois gaming license Seller used to operate the Casino, from Seller pursuant to the terms of the APA dated August 31, 2010.

¶ 8 Although the APA was executed on August 31, 2010, the closing did not occur until April 27, 2011. The delay resulted from the time required for the Board to approve the asset-based transaction involving the first transfer of a gaming license for a Casino in the State of Illinois.

¶ 9 During the time between the execution of the APA and the date of closing, Seller remained the holder of the gaming license and conducted the gaming operations of the Casino. After the April 2011 closing, the gaming license then transferred from Seller to Purchaser, and Purchaser assumed the gaming operations of the Casino until year end.

¶ 10 The Act (230 ILCS 10/1 *et seq*. (West 2010)) provides for 10 gaming licenses to be issued by the State of Illinois. Section 13(a-4) of the Act requires that persons engaged in the business of conducting riverboat gambling operations pay a privilege tax based on the annual "adjusted gross receipts" received from gambling games on a graduated rate structure, beginning with a rate of 15% of the annual adjusted gross receipts up to and including $25 million and ending with a rate of 50% of the annual adjusted gross receipts in excess of $200 million. See 230 ILCS 10/13(a-4) (West Supp. 2011).

¶ 11 The APA contains several provisions related to the 2011 gaming tax issue. Section 2.3 of the APA provides, that after the closing, there would be a purchase price adjustment and an adjustment payment from Seller to Purchaser (or vice versa), based on the assumption that the working capital as of the closing date would equal zero. Further, section 2.3(d)(ii) of the APA provides a procedure for submitting accounting disputes to binding arbitration by a neutral accountant. Next, section 2.3(g) of the APA addressed the possibility that the Board might decide to ignore Seller's preclosing gaming revenue when determining Purchaser's postclosing tax rates. Section 2.3(g) of the APA states as follows:

> "(g) Gaming Taxes. Notwithstanding anything to the contrary set forth in this Agreement, to the extent that (i) the Closing does not occur on December 31, 2010, (ii) the amount of accrued wagering tax imposed on a *licensed owner* under Section 13 of the Illinois Riverboat Gaming Act (230 ILCS § 10/13) (the "Gaming Taxes") included in Current Liabilities for purposes of calculating the Adjustment Payment described in Section 2.3(c) above is greater than zero (0), and (iii) the Gaming Authority finally determines that Purchaser will pay Gaming Taxes based solely on gaming revenues generated by Purchaser after the Closing Date without taking into account any gaming revenues generated by Seller prior to the Closing Date (the "Determination"), then:
>
> (A) if the Determination is made before calculation of the Adjustment Payment has been completed, the amount of accrued Gaming Taxes to be included in Current Liabilities for purposes of calculating the Adjustment Payment in Section 2.3(c) shall be equal to zero (0); or
>
> (B) if the Determination is made after calculation of the Adjustment Payment is completed, Purchaser shall pay to Seller an amount equal to the accrued

Gaming Taxes included in Current Liabilities for purpose of calculating the Adjustment Payment in Section 2.3(c) within ten (10) days after the final determination thereof."

Later in the APA, section 11.2(c) provides:

> "Purchaser and Seller will, upon request from the other, use their reasonable commercial efforts to obtain any certificate or other document from any Governmental Agency or any other Person that may be necessary to mitigate, reduce or eliminate any Tax that could be imposed (including, but not limited to, with respect to the transactions contemplated hereby)."

The parties defined "Governmental Agency" in Article 12 of the APA as:

> "the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government, including, without limitation, any Gaming Authority and Liquor Authority."

Further, Article 12 of the APA defined "Tax" to include "Gaming *** Taxes."

¶ 12 II. Events After Execution of the APA and Prior to the Closing

¶ 13 About a month prior to the closing, Purchaser's counsel spoke with the Board's acting general counsel, Erin Murphy, and the Board's head auditor, Doug Bybee, by telephone. During this telephone call, Purchaser's counsel informed the Board's acting general counsel and the Board's head auditor that Purchaser believed "the aggregation of the adjusted gross revenues should start anew as of the date of closing rather than January 1." In response, the Board's head

auditor disagreed and stated that gaming taxes are imposed on the owner based on "[e]ach calendar year's aggregated AGR." The auditor directed Purchaser's counsel to consider the repeated "references to the brackets [contained in 86 Ill. Admin. Code 3000.1071] which talk about the taxes being imposed by calendar year." On March 22, 2011, Purchaser informed Seller by email that the Board's acting general counsel and the Board's head auditor confirmed Michael Friese's (the Board's then general counsel) prior interpretation of the Act.

¶ 14 On April 12, 2011, Seller's counsel, John Elias, sent by email to Purchaser's in-house counsel, Terry Burton, a letter requesting that Purchaser legally challenge the 2011 gaming taxes. Elias's letter contained enclosures providing Purchaser with procedures for contesting the 2011 gaming taxes and providing Purchaser with a sample letter to submit to the Board to contest such taxes. On that same date, Burton sent Elias an email denying Seller's request that Purchaser initiate a legal challenge with the Board. Burton explained Purchaser was trying to establish a good working relationship with the Board and had concerns that raising this challenge could only create a negative impact on Purchaser's ongoing business relationship with the Board. Further, Purchaser stated that legal action might have an adverse effect on Purchaser's pending gaming license application or could otherwise impair Purchaser's ability to proceed with the closing of the APA.

¶ 15 Purchaser did not expect the Board would zero out the Casino's prior gaming revenue for 2011 that was attributable to Seller's preclosing gaming operations. Purchaser's pessimistic view resulted from the statement of Friese, advising Purchaser before the April closing, that it was the Board's position that the calculation was annual vis-à-vis the license. Before the closing took place on April 27, 2011, Purchaser advised Seller's counsel that Purchaser did not intend to contest the position expressed by Friese.

¶ 16 III. Events After the Closing Date

¶ 17 After the closing on April 27, 2011, as expected, the Board did not zero out the revenue or reset the gaming tax rates once Purchaser obtained the gaming license. Instead, the Board's computer software taxed Purchaser at rates that took into account all previous gaming revenues generated by Seller from January 1, 2011, through April 27, 2011.[1]

¶ 18 On August 5, 2011, Purchaser sent Seller an adjustment schedule and closing date balance sheet pursuant to section 2.3(c) of the APA. This proposed adjustment schedule included Seller's current liability for "State wagering flat tax payable" in the amount of $1,964,911.22 for 2011 gaming taxes. In response, on September 28, 2011, pursuant to section 2.3(d) of the APA, Seller sent Purchaser a dispute schedule contesting the adjustment schedule and closing date balance sheet sent by Purchaser.

¶ 19 In Seller's dispute schedule, Seller objected to Purchaser's inclusion of a current liability for "State wagering flat tax payable" in the amount of $1,964,911.22 for 2011 gaming taxes. Seller claimed that this alleged current liability was based upon Purchaser's erroneous legal assumption that the tax rate schedule should not be reset by the Board.[2]

¶ 20 IV. Seller's Abandoned Declaratory Action

¶ 21 To help resolve issues arising from Seller's dispute schedule, Seller initiated a declaratory action naming both Purchaser and the Board as defendants on March 2, 2012. In the complaint, in Rock Island County case No. 12-MR-224, Seller sought a declaratory ruling from

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[1]The Board's computer software requires each casino to submit its tax schedule and tax payment electronically within two business days. The software takes into account the graduated tax rate schedule and automatically calculates when a casino's gaming revenue reaches an amount that triggers an increased tax rate.

[2]Subsequently, the parties commenced the purchase price adjustment process set forth in section 2.3 of the APA and mutually selected an arbitrator. However, the purchase price adjustment process was stayed when Purchaser filed the instant declaratory judgment action.

the circuit court regarding the proper calculation of Purchaser's 2011 gaming taxes pursuant to section 10/13(a-4) of the Act (230 ILCS 10/13(a-4) (West Supp. 2011)). See *RIB Holding Company v. Rock Island Boatworks, Inc. and the Illinois Gaming Board*, Fourteenth Judicial Circuit of Illinois, Rock Island County, case No. 12-MR-224 ("2012 case"). Seller alleged that the circuit court's declaration regarding the proper interpretation of the Act would resolve the contractual dispute between the parties related to the proper calculation of the closing date balance sheet and the adjustment schedule.

¶ 22 The Board, through its attorney, the Illinois Attorney General, moved to dismiss the 2012 case, arguing, among other things, that Seller lacked standing to contest the 2011 postclosing gaming taxes Purchaser actually paid. In response, Seller voluntarily dismissed the 2012 case without prejudice. After the voluntary dismissal, Seller has not taken any action in Rock Island County case No. 12-MR-224.

¶ 23 Following the voluntary dismissal of Seller's declaratory complaint on October 29, 2012, Seller's counsel sent a letter to Purchaser on November 30, 2012. As authorized by section 11.2(c) of the APA, Seller's letter formally requested Purchaser to begin the process of mitigating annual gaming taxes. According to Seller's letter, the procedures outlined in the letter were based, in part, on the Illinois Attorney General's and the Board's recommendations in the 2012 case regarding the actions required for Purchaser to exhaust its administrative remedies. The letter requested Purchaser to act as follows:

1. "[F]ile a claim for a credit (or refund) for wagering taxes paid in 2011 pursuant to 35 ILCS §120/6a.***"

2. “If the Illinois Gaming Board denies Purchaser’s claim in whole or in part, Purchaser [shall] then file a protest of that decision within sixty (60) days. ***”

3. “Purchaser [shall] participate in any administrative hearing on this matter. ***”

4. “If Purchaser does not prevail in whole or in part after the administrative hearing, Purchaser [shall] seek judicial review of the administrative decision pursuant to the Administrative Law Review. ***”

¶ 24 In December 2012, in response to Seller’s November 2012 correspondence, Purchaser’s counsel contacted the Board’s administrator, Mark Ostrowski, and the Board’s assistant attorney general, Joshua Grant, and requested the Board’s opinion regarding how the Board determined the gaming tax rates for the Casino in 2011.

¶ 25 On December 12, 2012, Ostrowski, in his capacity as the Board’s administrator, sent Purchaser’s counsel a letter that stated:

> “[I]t is the [Illinois Gaming Board’s] position that Purchaser would be required to take into account the gaming revenues generated by Seller during the period from January 1, 2011 through April 27, 2011 in calculating the wagering tax payable by Purchaser as a licensed casino owner for the period from April 27, 2011 to the end of the 2011 calendar year. Accordingly, as the gaming regulatory body in Illinois, it is the [Illinois Gaming Board’s] position that the wagering tax has been properly calculated by Purchaser and collected by the [Illinois Gaming Board] for gaming revenues generated by Seller during the period from January 1, 2011 through April 27, 2011.”

Ostrowski's letter also advised:

> "Please note that in the event that any party before the Board takes issue with any position adopted by the Board, including the Board's position as previously set forth, such party must exhaust their administrative remedies. This letter in no way constitutes exhaustion of any administrative remedies the parties may pursue before the Board."

¶ 26 On January 3, 2013, Purchaser sent a letter to Seller disputing that section 11.2(c) of the APA required Purchaser to undertake any of the actions recited in Seller's November 30, 2012, letter. Further, Purchaser argued that the requested actions would not be commercially reasonable.

¶ 27 Next, in a letter dated January 11, 2013, Seller made a direct claim for indemnification pursuant to section 9.3(b) of the APA on the basis that Purchaser breached section 11.2(c) by refusing to comply with Seller's requests contained in its November 30, 2012, letter. Accordingly, Seller demanded that Purchaser pay Seller $1,964,911.22 within 60 days after delivery of the notice to Purchaser. On March 8, 2013, Purchaser sent a letter to Seller denying Seller's direct claim for indemnification.

¶ 28 V. Purchaser's Declaratory Action

¶ 29 On May 23, 2013, Purchaser filed a complaint for declaratory relief, and amended the complaint on June 5, 2013, and again on June 25, 2014. Purchaser's second amended complaint for declaratory judgment sought declarations that (1) section 2.3(g) of the APA does not require, Purchaser to challenge the postclosing 2011 gaming tax rates (count I); (2) section 11.2(c) of the APA does not require Purchaser to challenge the postclosing 2011 gaming tax rates (count II); and (3) the arbitration provision contained in section 2.3(d)(ii) of the APA applies only to the

calculation of the purchase price adjustment pursuant to generally accepted accounting principles (GAAP) and does not apply to the legal issue of whether Purchaser had an obligation under the APA to challenge the postclosing 2011 gaming tax rates (count III). Finally, Purchaser brought a claim seeking indemnification from Seller pursuant to the APA (count IV).[3]

¶ 30 On July 26, 2013, Seller filed a two-count counterclaim against Purchaser in the 2013 declaratory action. Seller's counterclaim in the 2013 declaratory action once again asked the circuit court to declare that the Act required the Board to treat Purchaser "as a new and separate person and owner licensee in applying the graduated wagering tax rates set forth in [the Act] in calendar year 2011 with none of Seller's adjusted gross receipts for calendar 2011 attributed to Purchaser." Further, Seller sought a declaration that Purchaser should be treated as (i) a new "holder" of an owner's license within the meaning of section 3000.1071(a) of the Illinois Gaming Board Regulations; and (ii) an owner licensee (separate and distinct from Seller) within the meaning of section 3000.1071(e) of the Illinois Gaming Board Regulations (count I). See 86 Ill. Admin. Code 3000.1071(a), 3000.1071(e). In count I of Seller's counterclaim in the 2013 declaratory action, Seller sought an injunction from the trial court, directing the accountant to credit Seller with a purchase price adjustment in the amount of $1,964,911.22.

¶ 31 In count II of Seller's counterclaim in the 2013 declaratory action, Seller brought a claim for indemnification pursuant to section 9.2 of the APA seeking an award of $1,964,911.22 in damages, plus expenses and fees, as a result of Purchaser's breach of section 11.2(c) of the APA. Seller's counterclaim in the 2013 declaratory action was consistent with the declaratory relief Seller previously requested in the 2012 declaratory action, Rock Island County case No. 12-MR-

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[3]On December 5, 2014, count IV of Purchaser's second amended complaint was dismissed with prejudice pursuant to a partial settlement between the parties.

224. Seller abandoned the 2012 declaratory action after a challenge to Seller's standing to request the circuit court to construe the Act.

¶ 32 On August 13, 2013, Purchaser answered the Seller's counterclaim and filed the affirmative defenses of promissory estoppel, waiver, and unclean hands.

¶ 33 VI. First Set of Summary Judgment Motions

¶ 34 On October 27, 2014, the parties filed cross-motions for summary judgment on the Purchaser's second amended complaint in the 2013 declaratory action and Seller's counterclaim in that case. Purchaser argued, among other things, that section 11.2(c) of the APA does not require Purchaser to first contest or then exhaust all administrative remedies concerning the 2011 postclosing gaming tax rates. Purchaser also argued that section 2.3(g) "should be properly understood to mean that, if the Board 'eventually' determines that the 2011 Gaming Taxes should be calculated without taking into account revenues generated by Seller prior to the Closing Date, then Seller is entitled to receive its pro rata share of the tax savings." Thus, Purchaser argued that the "[t]he triggering condition in Section 2.3(g)(iii) ***" is "whether the Board 'finally determines' the Gaming Tax issue to the benefit of Seller." Purchaser asserts that "[g]iven that the Board never 'finally determined' that the Gaming Taxes should be calculated as described in Section 2.3(g)(iii), the conditions of Section 2.3(g) have not been met, and Seller is not entitled to receive any monies pursuant to Section 2.3(g)."

¶ 35 In contrast, Seller argued that section 11.2(c) of the APA contemplated that Purchaser could be requested to initiate and then exhaust administrative remedies. In support of this argument, Seller pointed to the provision's use of the language "to obtain any certificate or other document" and "Government Agency," which the APA defined to include procedures in the courts and before the "Gaming Authority."

¶ 36 On March 6, 2015, the trial court issued an opinion on the parties' cross-motions for summary judgment on Purchaser's second amended complaint and Seller's counterclaim in the 2013 declaratory action. In its opinion, the trial court declared the language of section 11.2(c) of the APA was unambiguous and could require a party to exhaust administrative remedies when necessary to challenge the 2011 gaming taxes rates, as long as those efforts were commercially reasonable.

¶ 37 Next, the trial court concluded that it was *per se* commercially reasonable for a business entity to legally minimize its tax liability. Therefore, the trial court declared that Purchaser breached section 11.2(c) of the APA by failing to make any attempt to legally challenge the 2011 postclosing gaming tax rates when requested by Seller to do so. Accordingly, the trial court granted summary judgment in favor of Seller and against Purchaser on counts I and II of Purchaser's second amended complaint.

¶ 38 The trial court reserved judgment on count III of Purchaser's second amended complaint pertaining to arbitration issues.[4] The court concluded Count IV of Purchaser's second amended complaint was moot based on the trial court's rulings as to counts I and II. Later, on December 5, 2014, count IV of Purchaser's second amended complaint was dismissed with prejudice pursuant to a partial settlement between the parties.

¶ 39 The trial court also granted summary judgment in favor of Seller and against Purchaser on a portion of count II of Seller's counterclaim, after finding Purchaser breached section 11.2(c) of the APA. However, the trial court reserved judgment on the issue of the amount of damages. The trial court also reserved judgment on count I of Seller's counterclaim. The court concluded, "Seller must still show Seller's gaming tax interpretation would have ultimately prevailed at the

[4]On September 10, 2015, the court held that Purchaser's count III was moot and, therefore, was dismissed.

conclusion of the appeal process." The court observed that "the record before this court does not establish damages as a matter of law precluding full summary judgment from entering for Seller." Consequently, the court concluded "[t]he issue of Seller's damages [was] not ripe for summary judgment on the present record."

¶ 40 Finally, the trial court rejected Purchaser's affirmative defenses to Seller's counterclaim based on promissory estoppel, waiver, and unclean hands. The court concluded that Seller's decision to go forward with the closing did not waive Seller's rights and found Seller was entitled to close on the $180 million transaction without giving up the option of pursuing a $1.9 million postclosing contractual remedy by indemnification.

¶ 41 On April 28, 2015, the trial court issued a written order memorializing the court's rulings the parties' cross-summary judgment motions in the declaratory action. Further, the trial court invited additional dispositive motions on the issue of Seller's damages, if any, and any other remaining issues.[5]

¶ 42 VII. Second Set of Summary Judgment Motions

¶ 43 As allowed by the trial court's ruling on April 28, 2015, the parties filed a second set of dispositive motions beginning on May 29, 2015, addressing the court's concerns regarding whether Seller's interpretation of the Act would have ultimately prevailed at the conclusion of a tax appeal. In the second summary judgment proceeding, Seller claimed the Board would have ultimately reduced Purchaser's gaming tax rates if Purchaser had contested the rates applied by the Board to Purchaser's gaming revenue. On this basis, Seller urged the trial court to conclude Seller suffered damages in the amount of $1,964,911.22, plus interest and costs. In contrast,

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[5]For the first time on May 19, 2015, Purchaser filed a refund claim with the Board for $55,461.18 in overpaid gaming taxes. The parties agree that amount is arguably within the statute of limitations for refund claims. That claim remains pending before the Board.

Purchaser argued that the Act and regulations are unambiguous and require the Board to consider Seller's preclosing revenue when determining Purchaser's postclosing gaming tax rates.

¶ 44 On August 18, 2015, the trial court held a hearing on the parties' second set of summary judgment motions on damages. At the hearing, Seller's counsel, when addressing whether it was proper for the trial court to construe the Act, stated as follows:

> "Now, the standard of review. We think, no matter how you look at it, Your Honor, we're really looking at a pure legal analysis by the Court here. Whether you treat this as a clear question of law, that's for the courts anyway, not an administrative agency, or if you just assume, well, there wasn't – there is no decision to defer to anyway here. A staff position informal is not a position of the board, so there's nothing to defer to anyway. We think it's something you wouldn't defer to anyway.
>
> And the other way of looking at it is something that you had raised in our summary judgment hearing about this being like a case within a case, and the malpractice case tribunal, in this case, this case here, would objectively determine how the tribunals in the underlying case would have dealt with it, and that's the objective analysis. So no matter how you look at this, whether it's a pure question of law, whether there was nothing to defer to, however you approach it from, this case-within-a-case analysis, it comes to that this Court would be determining what the right result in the statute. In fact, it's even more interesting, because this court would have been part of the case within the case because under the – under the administrative

rules applicable here, this is the court that would have taken the appeal from the administrative law judge.

So our view is that it's the court here reading the words of the statute and determining what it says and what the result under is, without regard to the clutter of what the – what Mark Ostrowski thought or what a person on the gaming board might have thought about it or various other factors, whether the State is trying to maximize revenue, which I – I wrote in our brief what I think of that. But, I mean, there's a lot of other factors you could throw in there.

It comes down to, what are the words of the statute, what do they say, and nobody has any obligation to pay any more taxes than what the statute requires people to pay."

¶ 45 On September 10, 2015, the trial court issued an order addressing the parties' second set of motions for summary judgment pertaining to the issue of Seller's damages, if any. The court concluded that the gaming tax is a privilege tax imposed on the licensed owner, not on the gaming license itself. Accordingly, the court declared, as a matter of law, the Act dictates that the graduated gaming tax rate schedule should have been reset to zero after the license transferred from Seller to Purchaser by contract in 2011. Thus, the court granted summary judgment on count I and the remaining portion of count II of Seller's counterclaim. Based on the agreement of the parties with respect to the amount of damages, the court entered a monetary judgment for Seller and against Purchaser in the amount of $1,964,011.22, plus costs.

¶ 46 However, the trial court rejected Seller's request for mandatory statutory tax refund interest as a direct component of Seller's damages. In addition, the trial court denied Seller's

request for prejudgment interest. The trial court also held that count III of Purchaser's counterclaim, related to the APA's arbitration clause contained in section 2.3(d)(ii) of the APA, was moot, and therefore was dismissed. Purchaser does not challenge the dismissal of Count III.

¶ 47 Following the trial court's rulings on the second set of dispositive motions, Purchaser filed a timely notice of appeal. Seller also filed a timely cross-appeal contesting the trial court's refusal to allow mandatory tax refund interest as a component of Seller's damages.

¶ 48 ANALYSIS

¶ 49 This case involves a declaratory action initiated by Purchaser in 2013 and a corresponding counterclaim filed by Seller. The parties requested declaratory relief from the circuit court to resolve an ongoing contractual dispute. Seller disputed whether Purchaser correctly included a current liability for "State wagering flat tax payable" in the amount of $1,964,011.22 for the 2011 gaming taxes as one of Seller's liabilities in Purchaser's proposed adjustment schedule submitted to Seller.

¶ 50 The trial court's 2015 decision on the first set of dispositive motions ruled in favor of Seller, with one exception. The court did not grant summary judgment on the issue of indemnification raised in Seller's counterclaim after observing the issue was not "ripe" and could not be resolved by summary judgment at that time. Rather than denying Seller's request for summary judgment on the issue of damages, the court allowed the parties to file additional dispositive motions on Seller's damages. Ultimately, the trial court resolved the second set of dispositive motions in Seller's favor and ordered Purchaser to indemnify Seller for damages in the amount of $1,964,911.22.

¶ 51 On appeal, Purchaser challenges the trial court's resolution of the first set of cross-motions for summary judgment in Seller's favor.[6] In addition, Purchaser challenges the trial court's resolution of the additional dispositive motions filed in May 2015 awarding damages to Seller.

¶ 52 The matter before this court also includes Seller's cross-appeal. Seller asks this court to reverse the trial court's decision declaring Seller was not entitled to receive a *pro rata* portion of the mandatory tax refund interest the State should have been compelled to pay, if the State had refunded a portion of the gaming taxes collected from Purchaser. On appeal, Seller concedes that the trial court correctly determined that Seller is not entitled to prejudgment interest.

¶ 53 Further, for purposes of this appeal, both sides agree that if the trial court correctly determined Seller was entitled to damages, the amount of damages would be $1,964,911.22, representing Seller's share of the purportedly excess gaming taxes paid by Purchaser in 2011. With this complex procedural history in mind, we turn to the applicable standard of review.

¶ 54 The standard of review on an appeal from a trial court's ruling on a motion for summary judgment is *de novo*. See *DeSaga v. West Bend Mutual Insurance Co*., 391 Ill. App. 3d 1062, 1066 (2009). "The purpose of summary judgment is not to try a question of fact, but to determine if one exists." *Id*. Summary judgment is proper where the pleadings, depositions, admissions, affidavits, and other relevant evidence on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Manchester,* 228 Ill. 2d 404, 417 (2008). "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 15.

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[6]In its appeal, Purchaser does not directly challenge the trial court's ruling rejecting Purchaser's affirmative defenses.

¶ 55 I. Purchaser's Appeal

¶ 56 A. Contract Construction

¶ 57 In this appeal, Purchaser first contends that the trial court erred by concluding that section 11.2(c) of the APA unambiguously required Purchaser to appeal the 2011 gaming tax issue to the Board and then pursue litigation in the courts. Conversely, Seller maintains that the trial court correctly interpreted section 11.2(c) of the APA.

¶ 58 The construction or legal effect of a contract presents a question of law that is subject to *de novo* review on appeal. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). The primary objective in construing a contract is to give effect to the intention of the parties at the time the contract was made. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). Illinois law provides that where the language of a contract is clear and unambiguous, a court must determine the intent of the parties based solely on the plain language of the contract document itself and may not consider extrinsic evidence outside the "four corners" of the agreement. *Id*. Moreover, the terms used in the contract must be given their "plain and ordinary meaning" and the contract must be interpreted as a whole, not focusing on isolated portions of the document. *Richard W. McCarthy Trust Dated September 2, 2004 v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 535 (2011). Rather, effect should be given to every provision, if possible, because "it must be assumed that every provision was intended to serve a purpose." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004).

¶ 59 It is well settled that a contract provision is not rendered ambiguous simply because the parties disagree as to its meaning. *Rich v. Principal Life Insurance Co*., 226 Ill. 2d 359, 372 (2007). A contract term will only be found ambiguous if "it is reasonably or fairly susceptible of different constructions ***." *Whiting Stoker Co. v. Chicago Stoker Corp.*, 171 F.2d 248, 250 (7th

Cir. 1948), *cert. denied*, 337 U.S. 915 (1949). However, "[a] possibility of doubt is not sufficient, for it is out of such possibilities that controversies arise." *Id.* at 251.

¶ 60 We begin with the language at issue in this case in order to determine whether the trial court correctly concluded the terms of section 11.2(c) of the APA were not ambiguous. Section 11.2(c) provides:

> "Purchaser and Seller will, upon request from the other, use their reasonable commercial efforts to obtain any certificate or other document from any Governmental Agency or any other Person that may be necessary to mitigate, reduce or eliminate any Tax that could be imposed (including, but not limited to, with respect to the transactions contemplated hereby)."

¶ 61 In addition to the language set forth above in section 11.2(c) of the APA, the parties adopted a definition for "Governmental Agency" in Article 12 of the APA that included the courts, any regulatory body, and the "Gaming Authority." Article 12 of the APA also defines "Tax" to include "Gaming *** Taxes."

¶ 62 Yet, the APA does not provide a similar definition of "certificate." For purposes of this agreement, Purchaser submits that a certificate would only include those documents that reflect the status of actions that have already occurred.

¶ 63 Under Illinois law, "[a] contract term is not ambiguous merely because it is undefined in the contract, nor does an ambiguity arise because the parties can suggest creative possibilities for its meaning." *Hunt v. Farmers Insurance Exchange,* 357 Ill. App. 3d 1076, 1078 (2005) (Internal quotations omitted.) Although not defined in the APA, the trial court relied on the definition of "certificate" contained in Black's Law Dictionary:

> "A written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality been complied with. Particularly, such written assurance made or issuing from some court, and designed as a notice of things done therein, or as a warrant or authority, to some other court, judge or officer."

Black's Law Dictionary 225 (6th ed. 1991).

¶ 64 For purposes of this appeal, Purchaser contends that the term "certificate" limits Purchaser's contractual duty by requiring Purchaser to secure a writing memorializing the current status of events. Purchaser asserts the undisputed contract language does not impose an additional duty on Purchaser to try to change the *status quo*.

¶ 65 However, Purchaser's theory ignores the inclusion of the words "other document" in section 11.2(c) of the APA. The APA requires Purchaser to obtain a certificate or "other document" from a "Governmental Agency" that might be "necessary to mitigate, reduce or eliminate any Tax." Therefore, we conclude the language of section 11.2(c) is not ambiguous and contemplates Purchaser had a contractual duty to take some affirmative action before the Gaming Authority, any regulatory body, or the courts, that was necessary to "mitigate, reduce, or eliminate" the gaming taxes. The only existing contractual limitation on Purchaser's duty to take an affirmative action was the commercial reasonableness of Seller's demand for action.

¶ 66 Purchaser argues the trial court's flawed logic in interpreting section 11.2(c) of the APA imposes no limitations on the nature of Seller's demands of Purchaser concerning efforts to reduce tax liability. With creative flair, Purchaser suggests section 11.2(c) of the APA could require Purchaser, if asked, to engage in lobbying efforts or pursue frivolous judicial appeals to the highest court in Illinois at an unlimited cost to Purchaser. We disagree.

¶ 67 The language incorporated into this particular agreement was deliberately fluid, but not ambiguous. Neither side could know how much pressure would be required to persuade the Board to voluntarily modify the Board's position on gaming taxes as stated before the closing date. Neither side could know whether litigation would be required to attempt to compel the Board to reset the gaming tax schedule if the Board could not be persuaded to do so without litigation. Finally, neither side could predict the timing of a request for the other party to take some affirmative action to mitigate gaming taxes.

¶ 68 Further, the level of resistance from the Board once mitigation of taxes became an issue remained an unknown contingency that the parties addressed in section 11.2(c) of the APA. Section 11.2(c) provides the efforts mandated by one party must be commercially reasonable for the other party to undertake. The Illinois Supreme Court, relying on a definition provided by a California appellate court, has stated the term "commercial reasonableness" "include[s] commonly accepted commercial practices of responsible businesses which afford all parties fair treatment." *General Motors Corp. v. State Motor Vehicle Review Board*, 224 Ill. 2d 1, 16 (2007) (quoting *Gifford v. J & A Holdings*, 54 Cal. App. 4th 996, 1005-06 (1997)). In light of this definable terminology, we conclude Purchaser's argument that the trial court's interpretation of section 11.2(c) of the APA leads to absurd results is without merit. The trial court's logic finding the agreement to be unambiguous is entirely sound.

¶ 69 Therefore, we conclude the trial court correctly determined section 11.2(c) of the APA is clear and unambiguous. The words as defined by the parties in the APA contemplate an appeal to a regulatory body and potentially litigation to mitigate annual gaming taxes, provided that it is commercially reasonable to do so at the time of the request. Having determined section 11.2(c)

of the APA is unambiguous and enforceable as written, we next consider whether the trial court correctly found Purchaser breached this provision of the agreement.

¶ 70 B. Whether Purchaser Breached Section 11.2(c) of the APA

¶ 71 In this case, the trial court determined it was "*per se* commercially reasonable for a business entity to legally minimize its tax liability" as a matter of law. Based on this legal conclusion, the court granted summary judgment in favor of Seller on the issue of whether Purchaser's undisputed conduct actually breached the contractual obligation to minimize the amount of gaming taxes collected by the State for 2011 gaming revenue. Purchaser submits the trial court's decision to award summary judgment in favor of the Seller on the issue of Purchaser's breach should be reversed because the issue of commercial reasonableness involves a question of fact that cannot be properly resolved by summary judgment.

¶ 72 For the convenience of the reader, a brief recitation of the facts of this case may be helpful. The APA represented the conditions these sophisticated parties selected for the first asset sale of an operational licensed casino in the state of Illinois. For example, Seller and Purchaser had agreed that each would pay gaming taxes based on the same average tax rate for the 2011 calendar year as applied to their proportionate share of revenue. However, mindful that the gaming taxes are based on a graduated tax rate schedule that increases based on the amount of revenue generated by the holder of the gaming license during a calendar year, the mid-year transfer of the gaming license created unique issues related to the sharing of tax obligations for 2011. Seller had concerns that Seller's pre-closing 2011 revenue would not be considered by the Board when determining Purchaser's post-closing tax rates. If this contingency occurred, Purchaser could realize a windfall of approximately $3.8 million in tax savings.

¶ 73 Accordingly, the parties incorporated section 2.3(g) into the APA to address this possibility. As a safeguard to the Seller, the APA provided that *if* the Board issued a final determination to ignore Seller's gaming revenue, Purchaser could not retain the full amount of the tax savings. However, the APA did not impose a contractual obligation on the Purchaser, in this case, to obtain a final determination from the Board if the process became commercially unreasonable at some point in time.

¶ 74 Significantly, the parties also incorporated section 11.2(c) into the APA to allow one party to request or compel the other party to take actions that may be "necessary" to mitigate the party's gaming tax liability at any point in time, provided such requested actions were commercially reasonable when requested. Although Purchaser consistently advised Seller before closing that Purchaser would not challenge a gaming tax rate that included Seller's gaming revenue, Purchaser did not compel the removal of this language from the APA. Similarly, aware that Purchaser was unlikely to take any action to mitigate gaming taxes, Seller did not insist on a liquidated damages provision that would have greatly simplified the process of calculating damages arising from a breach of section 11.2 of the APA.

¶ 75 Importantly, by the time Seller demanded Purchaser to act in 2012, the State had already collected gaming taxes for 2011 after the closing, based on a rate that included Seller's revenue. This request for Purchaser to contest the gaming tax rate arose shortly after Seller abandoned Seller's 2012 declaratory action. See *RIB Holding Company v. Rock Island Boatworks, Inc. and the Illinois Gaming Board*, Fourteenth Judicial Circuit of Illinois, Rock Island County, case No. 12-MR-224.

¶ 76 Under the circumstances of this case, when Seller issued the demand letter to Purchaser in November 2012, a request for a refund was the first and only possible action "necessary" to

mitigate the gaming taxes. See 35 ILCS 120/6a (West 2012). Purchaser does not argue the first step was commercially unreasonable, but asserts the Board was unlikely to voluntarily return approximately four million dollars at this first stage. The APA did not allow Purchaser to avoid the first step since there was no existing precedent that made the outcome of a request for refund a futile endeavor. Thus, we conclude it was commercially reasonable for Seller to ask Purchaser to begin the process of forcing the Board to revisit the issue of the proper rate to be applied to Purchaser's gaming revenue. Further, Seller's request was also consistent with the case law recognizing that generally a party may not successfully obtain any judicial relief addressing an administrative action before all avenues of administrative review have taken place. See *Emerald Casino, Inc. v. Illinois Gaming Board*, 366 Ill. App. 3d 622, 625 (2006).

¶ 77 In this case, Purchaser defended against summary judgment on the issue of breach by claiming the informal letter Purchaser obtained from the Board was a sufficient act to fulfill Purchaser's contractual duty to attempt to mitigate taxes pursuant to section 11.2 of the APA. We reject Purchaser's contention because it is undisputed that at the time Seller requested Purchaser to mitigate taxes in 2012, an informal letter from the Board did nothing towards achieving the goal of reducing or mitigating gaming taxes by the remaining avenue for mitigation in the form of a refund of previously paid gaming taxes without objection.

¶ 78 Based on the undisputed facts of record, as stated above, Seller's request for Purchaser to request a refund was commercially reasonable. Following this commercially reasonable request, Purchaser did nothing that was necessary to generate a refund. Therefore, we conclude the undisputed facts in this case did not create a question of fact for the trial court to resolve regarding whether Purchaser fulfilled its contractual duty to do something "necessary" to mitigate taxes.

¶ 79 Next, we turn to the question of damages. Section 11.2(c) of the APA compelled cooperation if one party to the agreement decided the mitigation of taxes was a bad idea. As stated above, we agree Purchaser's undisputed inaction resulted in a breach of this provision. However, damages did not automatically arise from the breach because the parties did not include a liquidated damages clause corresponding to a breach of either section 2.3(g) or section 11.2(c) of the APA that would be equal to the excess taxes voluntarily paid by either side.

¶ 80 Understandably, the trial court had strong concerns that the issue of damages and indemnification was not "ripe" for summary judgment. The case law provides that when "the harm that a [party] claims is merely speculative or contingent," then "the claim is unripe and a court should not decide it." *Smart Growth Sugar Grove, LLC v. Village of Sugar Grove*, 375 Ill. App. 3d 780, 789 (2007). Consequently, although the parties felt the undisputed facts would allow the trial court to decide the damage issue, the trial court disagreed and found damages could not be resolved by summary judgment without further guidance from the parties.

¶ 81 We agree with the trial court's approach. Contractual damages would be automatic if Seller could establish it was reasonable to believe Seller's interpretation of the Act would have prevailed at some point during the four step process outlined in the 2012 demand letter. We emphasize that the difficult task of predicting the outcome of a hearing or proceeding before another tribunal involved a question of fact to be resolved by the trial court in this case. See *Glass v. Pitler,* 276 Ill. App. 3d 344, 354-55 (1995).

¶ 82 When discussing damages during the second round of summary judgment hearings, Seller's counsel urged the trial court to objectively determine the outcome of the case within the case by declaring how a reviewing court would have decided the gaming tax issue. Seller's counsel observed, "[T]his court would have been part of the case within the case because under

the – under the administrative rules applicable here, this is the court that would have taken the appeal from the administrative law judge." This assertion appears to be incorrect based on 230 ILCS 10/17.1 (West 2014), but does not impact the propriety of the trial court's ruling on count I of Seller's counterclaim. We quickly point out this unintentional error in the interest of maintaining a uniform body of law. See *Halpin v. Schultz*, 234 Ill. 2d 381, 390 (2009).

¶ 83 Returning to the trial court's damage analysis, it is clear to this court that Purchaser's refusal to request a refund not only constituted a breach of section 11.2 of the APA, but was directly responsible for the absence of precedent from the Board that could have greatly impacted the trial court's decision when deciding the most likely outcome of judicial review. Even with the benefit of 20/20 vision in hindsight, this court is not any better equipped than the trial court to predict the outcome of an administrative process and judicial review that did not take place due to Purchaser's intentional inaction. The trial court's ruling on this question of fact should not be lightly set aside by a court of review.

¶ 84 We also agree with the trial court's conclusion that since the State is not a party to this litigation, the circuit court lacked jurisdiction to substantively address the ultimate tax assessment question or issue binding judicial precedent. Similarly, the same judicial restraint applies to this court. Our holding is limited to the unique contractual dispute in this case and does not merit an alarming call for future legislative action.

¶ 85 We affirm the trial court's decision compelling Purchaser to indemnify Seller for the lost opportunity to obtain a favorable ruling from the Board and/or a reviewing court that reasonably could have reduced or eliminated Seller's contractual obligation to pay a portion of Purchaser's gaming taxes based in part on Seller's gaming revenue that accrued during the same calendar year, 2011.

¶ 86 II. Seller's Cross-Appeal

¶ 87 In its cross-appeal, Seller argues that the trial court erred by failing to include as part of its damages, a *pro rata* share of the mandatory tax refund interest that the state of Illinois would have paid Purchaser on the refund of the excess 2011 gaming taxes if Purchaser had properly challenged the Board's tax determination. See 35 ILCS 735/3-2 (West Supp. 2011). Since the Board was not compelled by order of the court to grant a refund, we conclude the request for mandatory tax refund interest as part of Seller's damages was properly denied by the circuit court.

¶ 88 CONCLUSION

¶ 89 The judgment of the circuit court of Rock Island County is affirmed.

¶ 90 Affirmed.

¶ 91 JUSTICE SCHMIDT, specially concurring.

¶ 92 I concur in the judgment, but not most of the majority's analysis. I will point out a few of what seem to be the more important differences.

¶ 93 In a nutshell, we have before us a contract dispute. The parties agreed at the time of the APA that the value of the Casino would be increased by one-half of any tax savings enjoyed in the event Seller was correct that section 13(a-4) of the Act (230 ILCS 10/13(1-4) (West 2010)) required a reset of the graduated gaming tax meter at closing. Resolution of this matter required construction of the APA and section 13(a-4) of the Act. *Id.*

¶ 94 The majority spends some ink talking about questions of fact getting in the way of resolution of this case. There are several reasons why we need not concern ourselves with purported questions of fact. This case was filed as a declaratory judgment action and ultimately had counterclaims. There was never going to be a jury. No one filed a jury demand. The parties

filed cross-motions for summary judgment and insisted that the trial court decide the issues. Both parties clearly agreed that there were no genuine issues of material fact. They also agreed that all the relevant evidence was before the trial court. At one point the trial court asked whether it had all of the necessary evidence. Purchaser's attorney responded that the court "had more evidence than it needed." On appeal, Purchaser argues that questions of material fact prevented summary judgment. This it cannot do. The law is clear that a party cannot take one position in the trial court and an opposite position in the reviewing court. *Veazey v. Board of Education of Rich Township High School District 227*, 2016 IL App (1st) 151795. Likewise, but with a few inapplicable exceptions, the filing of cross-motions for summary judgment concedes the absence of genuine issues of material fact. *Bremer v. City of Rockford*, 2016 IL 119889, ¶¶ 20, 35. Even though the hearings were postured as hearings on motions for summary judgment, what occurred below was, in reality, a bench trial.

¶ 95 The majority also spends time talking about the absence of a liquidated damages clause and the effect thereof. Any liquidated damages clause that might have been inserted in this APA would have most likely been invalid. Liquidated damages provisions are appropriate when actual damages are difficult or nearly impossible to calculate. See *People v. ex rel. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 227 (2006); *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 424 (2011). A liquidated damages provision is normally construed as an impermissible penalty if actual damages are not difficult to compute. *Hickox v. Bell*, 195 Ill. App. 3d 976, 987-88 (1990). In the case before us, the actual damages could be calculated to the penny quite easily. This is done by simply looking at the tax rates that would have applied to the actual revenues had the tax rate meter been reset at closing. In fact, the parties both agreed that the damages, if recoverable, are $1,964,911.22.

¶ 96 In paragraphs 81 *et seq.*, the majority talks about what it deems to be a metaphysical aspect of figuring or predicting the outcome of a tax challenge and related litigation. Purchaser never made that argument. This is undoubtedly true as resolution of this case does not require us to predict anything. It requires us to construe a statute. Both parties below argued that the Seller's entitlement to damages in this case turns on the construction of section 13(a-4) of the Act. This is clearly a question of law. *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008) ("Issues of statutory construction present questions of law that we review *de novo*."). While the majority is no doubt correct that "this court is not any better equipped than the trial court to predict the outcome of an administrative process and judicial review" (*supra* ¶ 83), that is irrelevant and does not change the fact that we must do the best we can to decide the case before us. No need to get out our Ouija boards or hold a séance to try to predict what others might have done. The resolution of this contract dispute requires construction of the relevant portion of the Act. Both parties agreed on this below. The Seller argued that section 13(a-4) required a reset of the tax rate meter. Purchaser argued that it did not. The trial court ruled that, on its face, the Act imposes a privilege tax on the licensee and not on the gaming operation itself. Section 13(a-4) of the Act provides, *inter alia*: "a privilege tax is *imposed on persons engaged in the business* of conducting riverboat gambling operations *** based on the adjusted *gross receipts received by a licensed owner* from gambling games authorized under this Act." (Emphasis added.) 230 ILCS 10/13(a-4) (West 2010). That is, it is a privilege tax imposed upon those who were given the privilege of a gaming license. It is a tax on the licensee, not the business. The Board's own regulations at 1071(a) provide: "Each holder of an Owner's license ('owner licensee') and licensed manager ('manager') is subject to tax and fee liability assessment for each Gaming Day for the applicable Admission Tax or Admission Fee and the Wagering Tax

as imposed under the Act." 86 Ill. Adm. Code 3000.1071(a), amended at 32 Ill. Reg. 7357 (eff. April 28, 2008). The new licensee would pay the privilege tax only on those receipts it received and not those received by a prior licensee. Either we agree with the trial court's construction or we do not. Then, the supreme court, should it take the case, will tell us that we were either right or wrong.

¶ 97 The majority refers to the Purchaser receiving a "windfall" in the event of a tax rate meter reset. *Supra* ¶ 72. Without a reset, the new licensee paid an elevated tax rate on the first dollar it received and every dollar thereafter. I fail to see how a reset of the tax rate meter at closing would constitute a windfall to the new licensee.

¶ 98 It is worth noting again that this is the first time in Illinois history that a casino has changed hands through an APA. Previously all transfers of ownership in casinos involved stock transfers. The licensed owners (the corporate licensee) remained the same. I am guessing the General Assembly did not see this one coming. It can now, should it choose to do so, rewrite the statute to make sure there is no tax rate meter reset in similar situations. Purchaser argues that resetting the tax meter would deny the State millions of dollars in tax revenue. No! Taxes have been paid and can no longer be challenged because of the Purchaser's breach. No one need worry that some Rock Island County school child is not going to get milk at lunch if we affirm the trial court.

¶ 99 This takes me to paragraph 84 of the majority's analysis. We have before us a case that requires us to determine whether the trial court correctly decided that the relevant statute required a reset of the tax rate meter at closing. Were this an improperly perfected tax appeal, the trial court would have lacked jurisdiction to decide the issue. This is not a tax appeal. This is a contract dispute that involves construction of a statute. The trial court had full jurisdiction to

decide the issues before it. No one has briefed or otherwise argued what effect our construction of this Act might have on either future courts or future tax tribunals. That is not an issue before us. I neither know nor care; neither should the majority. Again, the majority dwells on the inability to predict the outcome of an administrative process and judicial review and refers to the trial court's ruling as one on a question of fact. *Supra* ¶ 83. I submit that issue turns on construction of the Act and, therefore, involves a question of law: Does the Act require a reset of the tax rate meter when a new licensee takes over? For reasons stated above, I agree with the trial court that the Act, on its face, so requires. For that reason, I affirm.

¶ 100 I. Seller's Cross-Appeal

¶ 101 I also agree that the trial court did not err in denying the Seller's counterclaim for State refund interest. However, I do this because I have no idea how that would be calculated and believe that any amount awarded would be speculative. Keep in mind that in Illinois, Seller could not recover prejudgment interest. Since we have no way of knowing at what point the State would have refunded the taxes, we have no way of calculating the amount due. If we give the Seller this tax rate interest through the conclusion of this litigation, we would, in effect, be giving prejudgment interest. For that reason, I concur in the trial court's decision not to award the same.

¶ 102 I also object to the majority's disposition of this case in a Rule 23(b) order. Ill. S. Ct. R. 23(b) (eff. July 1, 2011). This is the first time this section of the Act has been construed. Even though the majority improperly refuses to address that issue, the trial court construed the statute (on the urging of both parties); I agree with the trial court's construction. This case qualifies as an opinion under Illinois Supreme Court Rule 23(a)(1) (eff. July 1, 2011). Additionally, the majority's conclusion (*supra* ¶ 84) that the *only* time a court has jurisdiction to construe a taxing

statute is in a properly perfected tax appeal (judicial review) establishes a new rule of law and qualifies as an opinion under the same rule. *Id.*