IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 26933

Citibank, N.A.,

Petitioner and Appellant,

v..

South Dakota Department of Revenue,

Respondent and Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Susan M. Sabers

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant Citibank, N.A., ("Citibank")[1] appeals a judgment affirming the dismissal of a contested case proceeding for lack of jurisdiction. Citibank filed a bank franchise tax refund claim for tax years 1999 through 2002, which was denied by the Department of Revenue ("Department"). Citibank then requested a hearing. The Office of Hearing Examiners (the "Office") dismissed the contested case proceeding for lack of jurisdiction ("the Decision"). App. 12.[2] By order of the Secretary of the Department ("the Secretary"), the Decision was a final decision. Citibank timely appealed to the Circuit Court through a notice of appeal filed on April 15, 2013.

The Circuit Court entered a judgment dated December 6, 2013 (the "Judgment"), affirming the Decision. App. 1. Notice of entry of the judgment was served via mail on December 12, 2013. Citibank timely appealed to this Court by filing a notice of appeal on January 9, 2014. This Court has jurisdiction pursuant to SDCL 1-26-37 and 15-26A-3.

STATEMENT OF ISSUES

I. Whether the Office lacked subject matter jurisdiction to adjudicate Citibank's appeal of the denial of the refund of excess bank franchise taxes because application for the tax refund was untimely under SDCL 10-59-19?

The Circuit Court affirmed the Office's decision.

SDCL 10-43-42.1
SDCL 10-43-55
SDCL 10-59-19
ARSD 64:26:02:06
Pourier v. S.D. Dep't of Revenue, 2004 SD 3, 674 N.W.2d 314
Tracfone Wireless, Inc. v. S.D. Dep't of Revenue, 2010 SD 6, 778 N.W.2d 130

[1] Citibank is proceeding in this action as successor to and on behalf of Citibank (South Dakota), National Association ("CBSD"). CBSD is a national banking association that was part of the same group of affiliated corporations as Citibank.

[2] Citations to Citibank's Appendix are cited as "App." with reference to the appropriate page. Citations to the Stipulation of Facts and Evidence before the Office is cited as "Stipulation" with reference to the appropriate paragraph and can be found at App. 22 to 36. Citations to the Administrative Record before the Office are cited as "AR" with reference to the appropriate page. Citations to Exhibits refer to the Exhibits attached to the Stipulation, which are found at AR 132 to 710. Citations to the Certified Record of the Clerk of Courts are cited as "CR" with appropriate page to the record.

II. Whether the Circuit Court erred as a matter of law in rejecting Citibank's equitable tolling argument in the event SDCL 10-59-19 applies to Citibank's bank franchise tax refund request.

The Circuit Court rejected Citibank's equitable tolling argument on the grounds that Citibank had not argued for equitable tolling before the Office, and because it concluded that Citibank had not satisfied the elements of equitable tolling.

Dakota Truck Underwriters v. S.D. Subsequent Injury Fund, 2004 SD 120, 689 N.W.2d 196

III. Whether the Circuit Court erred as a matter of law in affirming the denial of Citibank's motion for summary judgment when the undisputed facts established Citibank's entitlement to the requested bank franchise tax refund if the limitations period imposed by SDCL 10-59-19 does not apply.

The Circuit Court affirmed the Office's denial of Citibank's motion for summary judgment.

SDCL 10-43-55
ARSD 64:26:02:06

STATEMENT OF THE CASE

This appeal presents the question whether Citibank is entitled to a refund of undisputedly overpaid South Dakota bank franchise taxes when the Internal Revenue Service ("IRS") adjusted Citibank's federal taxable income for the years 1999 through 2002, which in turn lowered the amount of taxes due to the State of South Dakota. The Department denied Citibank's bank franchise tax refund as being filed outside the three-year limitations period under SDCL 10-59-19.

In 2012, the IRS adjusted Citibank's taxable income for the years 1999 through 2002 to eliminate double counting of income due to a change in accounting method. Based on the federal adjustments, Citibank undisputedly overpaid bank franchise taxes by $29,945,132. To recover that overpayment, Citibank submitted a supplemental return to the Department and requested a refund ("Refund Claim"). The Department denied the Refund Claim as untimely under the general three-year limitations period imposed by SDCL 10-59-19.

Citibank commenced a contested case proceeding appealing the denial of the Refund Claim pursuant to SDCL Ch. 1-26. Citibank and the Department stipulated to all material facts in the Stipulation and filed cross-motions for summary judgment. The Secretary recused himself and determined the Office's decision would be a final decision. The Office held that the Refund Claim was untimely and dismissed the appeal for lack of subject matter jurisdiction. The Circuit Court, Honorable Susan Sabers presiding, affirmed. Citibank appeals because the Office, and the Circuit Court, erroneously concluded that the Refund Claim was barred by the three-year limitations period imposed by SDCL 10-59-19.

STATEMENT OF FACTS[3]

This appeal relates to the denial of the Refund Claim for admittedly overpaid South Dakota bank franchise tax. Bank franchise tax is the commonly used term for the taxes paid by banks and other financial institutions doing business in South Dakota pursuant to SDCL Ch. 10-43. The bank franchise tax is unique in South Dakota because the bank's taxable income for bank franchise tax purposes equals its taxable income for U.S. federal income tax purposes, subject to certain adjustments. Stipulation ¶¶ 13-15; *see* SDCL 10-43-10.1. The South Dakota Legislature authorized the Secretary to adopt regulations relating to bank franchise taxes. Pursuant to that authority, the Department adopted regulations requiring taxpayers to file amended returns within sixty days when a final IRS adjustment **increases** bank franchise taxes. ARSD 64:26:02:05. Similarly, the Legislature specifically directed the Secretary to promulgate regulations regarding refunds of bank franchise taxes. SDCL 10-43-55. Following that directive, the Department adopted a regulation authorizing taxpayers to file an amended return and seek a refund when the IRS final adjustment decreases bank franchise taxes. ARSD 64:26:02:06.

[3] The facts are undisputed because the parties stipulated to all material facts in the Stipulation. App. 22-36.

A. The Department Requires Citibank to File Amended Returns When A Federal Adjustment Increases Taxable Income Without Regard to the Three-Year Limitations Period.

Complying with the Department's regulations, Citibank filed an amended bank franchise tax return in 2007 and paid **additional** taxes. Specifically, in February of 2007, the IRS adjusted Citibank's federal taxable income upward for the tax years 1993 to 1998. Stipulation ¶¶ 39-43. As a result, Citibank owed an additional $4.29 million in bank franchise taxes for tax years 1993 to 1998. *Id.* As required by the Department's regulations, Citibank filed amended bank franchise tax returns in June of 2007 and paid the additional $4.29 million due. *Id.* The Department examined the amended returns and accepted the additional tax. Stipulation ¶ 42, App. 62. The Department raised no objection to the payment tended as being outside the required reporting periods.

B. When A Refund is Owed, the Department Invokes the Three-Year Limitations Period.

Citigroup Inc. ("Citigroup")[4] timely filed U.S. federal income tax returns (the "Federal Tax Returns") on behalf of itself and its consolidated group for each of the taxable years ended December 31, 1999 through December 31, 2002. Stipulation ¶ 8. Citibank timely filed bank franchise tax returns (the "Franchise Tax Returns") for the same years. Stipulation ¶ 12. The IRS subsequently examined the Federal Tax Returns for a number of years. During the examination, the IRS requested, and Citigroup agreed, to extend the federal statutory limitations period, ultimately extending it to June 30, 2012. Stipulation ¶ 9 and Ex. 2.

[4] Citigroup is the common parent of the consolidated group that included Citibank and CBSD. The "consolidated group" refers to the group of corporations affiliated with Citigroup Inc. within the meaning of Section 1504 of the Internal Revenue Code of 1986, as amended (the "Code").

During the IRS examination, Citigroup asked the IRS to reduce Citibank's taxable income for 1999 and 2000 to correct for the inclusion of "interchange fees" that, as a result of a change in Citibank's method of accounting, had been included in income in subsequent years. Stipulation ¶¶ 20-24. Interchange fees are fees earned by a credit card issuer for lending money to credit card holders. Stipulation ¶¶ 16-18. Absent a reduction of the fee amounts from Citibank's income for 1999 and 2000, the same fee income would have been counted in different years, and thus, taxed twice. Stipulation ¶¶ 22-24 & Ex. 11. The IRS eventually agreed, as part of a settlement, to reduce Citibank's federal taxable income for 1999 and 2000 to eliminate the inclusion of the same interchange fees in different years' income. Stipulation ¶ 30. The settlement included other minor adjustments to Citibank's taxable income for the years at issue in this appeal. Stipulation ¶ 31. The settlement resulting in the final IRS adjustments was dated January 18, 2012. Stipulation ¶ 29.

Like its Federal Tax Returns for 1999 and 2000, Citibank's initial Franchise Tax Returns for those years overstated Citibank's taxable income for bank franchise tax purposes. Stipulation ¶¶ 13-15, 20-21, 25-26. Consequently, on March 16, 2012 (within 60 days of the final IRS adjustment), Citibank filed amended returns with the Department (the "Amended Franchise Tax Returns") reflecting the federal adjustments and requested a refund. Stipulation ¶ 33. The parties agree Citibank has overpaid bank franchise taxes in the amount of $29,495,132, exclusive of interest. Stipulation ¶ 37.

The Department denied Citibank's Refund Claim on April 9, 2012. Stipulation ¶ 35. Citibank requested a contested case hearing. The Department referred Citibank's request for a contested case hearing to the Office on November 1, 2012. Stipulation ¶ 36; *see* SDCL 10-59-22.1. On the same date, the Secretary recused himself pursuant to an order. *See* AR 109-110; SDCL 1-26D-7.

After stipulating in writing to all material facts, the parties filed cross-motions for summary judgment. AR 712, 726. The Department also moved to dismiss Citibank's contested case proceeding for lack of subject matter jurisdiction because Citibank did not file the Refund Claim within the three-year limitations period allegedly required by SDCL 10-59-19. AR 712. The Office granted the Department's motion to dismiss and never decided the motion for summary judgment. App. 12-20. Citibank appealed to the Circuit Court. CR 2.

C. During this Appeal, the Department Refused to Process Citibank's Claim for Refund for 2008 Tax Year without a Final Adjustment by the IRS.

During the appeal of this case to the Circuit Court, on September 28, 2012, Citibank filed an amended bank franchise tax return for the 2008 taxable year for anticipated adjustments to its federal taxable income that would entitle Citibank to a refund of $910,348 for excess bank franchise taxes paid (the "2008 Refund Request"). App. 46. At the time Citibank made the 2008 Refund Request, its federal tax return for 2008 was still under audit by the IRS. Citibank nevertheless filed the 2008 Refund Request because of the Department's position in this appeal and because SDCL 10-59-19's three-year limitations period was approaching. On April 12, 2013, the Department refused to consider the 2008 Refund Request on the basis that Citibank had not supplied documentation of a final IRS adjustment. App. 40. The Department's refusal to process the 2008 Refund Request confirms Citibank's dilemma—there can be no refund claim without a final adjustment by the IRS but in nearly all cases involving large financial institutions (the returns of which are often under IRS audit for more than three years) a refund claim brought after a final federal adjustment will be untimely.

After the Department denied the 2008 Refund Request, Citibank filed a motion to supplement the administrative record with the evidence of the 2008 Refund Request pursuant to SDCL 1-26-34. CR 18. The Circuit Court held a hearing and granted the motion to supplement

the administrative record. CR 59-60. Citibank waived its right to remand to the Office to consider the supplemental evidence. (7-22-13 Hearing Transcript at pp.20-21). The Department acknowledged that the only party benefited by a remand to the Office was Citibank, and the Department opposed remand in light of the new evidence. (*Id.* at pp.14-15). After supplementing the record, the Circuit Court held oral argument and affirmed the Decision. App. 1-11. Citibank appeals to this Court.

STANDARD OF REVIEW

Because all material facts have been stipulated, the only issues are: (i) whether the Refund Claim was timely, a question of statutory construction, (ii) if the Court were to find that Citibank's claim was untimely, whether the doctrine of equitable tolling applies; and (iii) if the refund claim was timely, whether Citibank is entitled to summary judgment based on the undisputed facts. All three issues are reviewed *de novo*. *See, e.g.*, *Pourier v. S.D. Dep't of Revenue*, 2010 SD 10, ¶ 8, 778 N.W.2d 602, 604 ("[s]tatutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review"); *Dakota Truck Underwriters v. S.D. Subsequent Injury Fund,* 2004 SD 120, ¶ 16, 689 N.W. 196, 201 (holding that "when the facts are undisputed . . . [the Court] will apply a *de novo* standard of review to the applicability of equitable tolling"); *AMCO Ins. Co. v. Employers Mut. Cas. Co.*, 2014 SD 20, ¶ 7 n.2 (stating the standard of review is *de novo* on review of a motion for summary judgment). When all questions on appeal are issues of law, this Court reviews the decision of the administrative agency *de novo* without any deference to the Circuit Court. *See* SDCL 1-26-36, 1-26-37; *In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Center*, 2013 SD 10, ¶ 16, 826 N.W.2d 649, 654; *Burke v. Butte County*, 2002 SD 17, ¶ 8, 640 N.W.2d 473, 476.

ARGUMENT

Citibank's prompt Refund Claim filed within sixty days of receiving an adjustment to its federal taxable income was timely under the South Dakota statutes and regulations governing refunds of excess bank franchise taxes. Because the measure of bank franchise tax due depends on a taxpayer's taxable income for federal income tax purposes, South Dakota law expressly requires the taxpayer to file an amended bank franchise tax return following a final federal adjustment that increases its taxable income. SDCL 10-43-42.1; ARSD 64:26:02:05. The law similarly permits a taxpayer to file an amended return following a federal adjustment that reduces its income. SDCL 10-43-55; ARSD 64:26:02:06. The Refund Claim complied with these specific statutes and regulations, and thus, was timely filed.

In denying the Refund Claim, the Department invoked the three-year limitations period in SDCL 10-59-19,[5] which the Office determined rendered the Refund Claim untimely. SDCL 10-59-19 does not, however, apply to the Refund Claim. Instead, the Refund Claim is governed by the specific statutes and regulations governing the bank franchise tax. Alternatively, even if SDCL 10-59-19 does apply to bank franchise taxes, equitable tolling prohibits the Department from applying SDCL 10-59-19 to the Refund Claim here. Therefore, the Refund Claim is timely, and Citibank is entitled to summary judgment awarding the Refund Claim, plus interest.

Citibank's Refund Claim Was Timely Because SDCL 10-59-19 Does Not Apply to Bank Franchise Tax Refunds Based Upon IRS Adjustments to Federal Taxable Income.

The statutes and regulations governing the bank franchise tax – which effectuate a plain legislative policy to assess bank franchise taxes based on federal taxable income – permit claims

[5] SDCL 10-59-19 states: "A taxpayer seeking recovery of an allegedly overpaid tax, penalty, or interest shall file a claim for recovery with the secretary, within three years from the date the tax, penalty, or interest was paid or within three years from the date the return was due, whichever date is earlier. A claim for recovery not filed within three years of the date the tax was paid or within three years of the date the return was due, whichever date is earlier, is barred." Because the Office decided the Refund Claim was untimely, it dismissed the contested case hearing for lack of subject matter jurisdiction under SDCL 10-59-17, which states: "A taxpayer seeking recovery of tax, penalty, or interest imposed by the chapters set out in §10-59-1 shall follow the procedure established in this chapter. No court has jurisdiction of a suit to recover such taxes, penalty, or interest unless the taxpayer seeking the recovery of tax complies with the provisions of this chapter."

for refunds based on IRS adjustments of federal taxable income without regard to the three-year limitations period that generally governs refund claims under SDCL 10-59-19. This conclusion is reinforced by the Department's rejection of the 2008 Refund Request, which confirmed that refunds cannot be claimed absent a final IRS adjustment. Additionally, as indicated by the Department's conduct in 2007, the Department will collect additional bank franchise taxes whenever IRS adjustments increase federal taxable income regardless of when those adjustments are made. Thus, SDCL 10-59-19 does not apply, and Citibank's Refund Claim was timely.

Citibank's Refund Claim Was Timely Under The Statutes and Regulations Governing Bank Franchise Taxes.

Banks doing business in South Dakota are liable to South Dakota for taxes measured by their "net income" for the taxable year, which is defined as "the taxable income of the financial institution under the Internal Revenue Code, as amended," subject to certain enumerated modifications. SDCL 10-43-2.1; SDCL 10-43-10.1. The rules provide that a taxpayer shall file the bank franchise tax return within fifteen days after the taxpayer's federal income tax return is due and include a copy of its federal return. SDCL 10-43-30; ARSD 64:26:02:04. The bank franchise tax is the **only** tax levied by the State of South Dakota that is calculated based upon the taxpayer's federal taxable income. SDCL 10-43-10.1.

In SDCL Ch. 10-43, the Legislature adopted statutes specifically relating to the bank franchise tax. In one of those statutes, the Legislature directs the Secretary to promulgate regulations regarding requests for refunds of bank franchise taxes. Specifically, SDCL 10-43-55 provides that if the amount of tax paid exceeds the amount due, the excess shall be refunded with interest at a rate of six percent per annum "*pursuant to the procedure established by the secretary of revenue by rule* promulgated pursuant to chapter 1-26." (emphasis added). Pursuant to that directive – and in recognition of the fact that the IRS may adjust the federal taxable income that is the basis for the bank franchise tax – the Secretary provided in ARSD 64:26:02:06

that a financial institution that has filed a bank franchise tax return may file a supplemental return following a final IRS adjustment of federal taxable income:

> *Supplementary return permitted upon subsequent decrease in income -- Exception if decrease results from departmental adjustment.*
>
> When the taxpayer has filed a return with the department for the tax year and a subsequent decrease occurs in the taxpayer's net income or taxable income for that tax year, whether because of *audit and adjustment by the United States* or otherwise, the taxpayer may file a supplementary return with the department for the tax year in which the decrease occurred. A supplementary return need not be filed if the decrease is the result of an adjustment in the original return by the department.

ARSD 64:26:02:06 (emphasis added).

A similar regulation **requires** the filing of an amended return within 60 days of any IRS adjustment that **increases** taxable income, without regard to the timing of the adjustment. ARSD 64:26:02:05.[6] These regulations, taken together, preclude the pursuit of a refund claim or deficiency assessment prior to the conclusion of the federal audit, and allow for such actions when the federal adjustment is finalized outside the general three-year limitations period. Additionally, these regulations, which specifically authorize the Refund Claim, bind the Department. *See, e.g., Feltrop v. S.D. Dep't of Soc. Servs.*, 1997 SD 13, ¶ 5, 559 N.W.2d 883, 884 (citing SDCL 1-26-6.8 and stating that courts enforce administrative rules once adopted); *Duffy v. Mortenson*, 497 N.W.2d 437, 439 (S.D. 1993) (administrative rules "are binding and have the force of law"); *Matter of Sales and Use Tax Refund Request of Media One, Inc.*, 1997 SD 17, ¶ 11, 559 N.W.2d 875, 878. Furthermore, SDCL 10-59-27 provides that a taxpayer who received written advice from the Department concerning the taxability of a transaction is allowed

[6] 64:26:02:05 provides: "Supplementary return required upon subsequent increase in income -- Exception if increase results from departmental adjustment. When the taxpayer has filed a return with the department for the tax year and a subsequent increase occurs in the taxpayer's net income or taxable income for that tax year, whether because of audit and adjustment by the United States or otherwise, the taxpayer **shall** file a supplementary return with the department for the tax year in which the income was earned. The return must be filed within 60 days after the final determination of the increase in income. A supplementary return need not be filed if the increase in the taxpayer's income is the result of an adjustment in the original return by the department." (emphasis added)

to rely on such written advice.[7] This statute was enacted so that the Department could not retract written advice it provided to a taxpayer. If a taxpayer may rely on the Department's written advice, the same applies to the regulations, which have the force of law, and which were promulgated by the Department more than two decades ago.

ARSD 64:26:02:06 permits a taxpayer to seek a refund of bank franchise taxes (and ARSD 64:26:02:05 mandates payment of additional tax) after an IRS adjustment to federal taxable income irrespective of the timing of the federal adjustment for good reason. The regulation's deviation from the general three-year limitations period imposed by SDCL 10-59-19 makes sense because neither the State nor the taxpayer can ensure that IRS adjustments to income are made within three years.[8] Audits of large financial institutions commonly take more than three years to conclude. Indeed, in 2003, the Commissioner of the IRS testified before Congress that audits of corporations took an average of five years.[9] It is perfectly logical that claims for refunds of bank franchise taxes based on decreases in federal taxable income "because of audit and adjustment" by the IRS are governed by specific rules that take into account the often lengthy federal audit process and uncertain timing of federal adjustments.

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[7] SDCL 10-59-27 provides: "Reliance on written advice--Inconsistent position by department. Any taxpayer who has received written advice from the Department of Revenue concerning the taxability of transactions shall be allowed to rely on such advice when filing tax returns. However, the taxpayer shall maintain a copy of the advice in the taxpayer's business records. The department may not maintain a position against a taxpayer which is inconsistent with a prior written opinion issued to the same taxpayer unless rescinded by the department, by a change in statutory law or reported case law, by a change in federal interpretation in cases if the department's written advice was predicated upon a federal interpretation or by a change in material facts or circumstances relating to the taxpayer. For the purposes of this section, written advice includes municipal boundary information, and zip codes and addresses located within municipalities provided by the department."

[8] Under federal law, the IRS has three years to complete its audit, *see* I.R.C. § 6501, and taxpayers frequently accede to IRS requests for tolling agreements that extend the audit period.

[9] "It is unacceptable that a corporate audit takes 5 years on average from the date of filing to complete." Joint Review of the Strategic Plans and Budget of the Internal Revenue Service: Hearings Before the Comm. on Ways and Means, Comm. on Appropriations, Comm. on Gov. Reform, Comm. on Finance, Comm. on Governmental Affairs, Statement of Mark W. Everson, Commissioner, Internal Revenue Service, 108th Congress 1 (2003), *available at* http://www.gpo.gov/fdsys/pkg/CPRT-108JPRT21115/ html/CPRT-108JPRT21115.htm. *See also* the Government Accountability Office ("GAO"), Compliance Measures and Audits of Large Corporations Need Improvement, GAO/GGD—94-70, at page 18 (Sept. 1994), *available at* http://www.gao.gov/assets/160/154687.pdf (The IRS "audit teams [that examine large corporations] usually remain on-site at the corporation's headquarters for extended periods. The team generally examines two or three annual tax returns in a single audit cycle; each audit cycle takes an average of 2 to 3 years to complete. Although the time lag varies, teams generally begin auditing … returns 5 to 6 years after they are filed. IRS is attempting to reduce the time lag by auditing more … returns over the same audit cycle.").

According to the Department, because ARSD 64:24:02:06 contains no time limitation, the three-year limitation period in SDCL 10-59-19 necessarily applies. But that contention would make a nullity of the right to refunds based on IRS adjustments, given that IRS adjustments are rarely if ever made within three years. In this case, the federal adjustments at issue took twelve years to finalize. Citibank could not have filed for a refund prior to the adjustment because it is the adjustment that allows Citibank to claim the refund under ARSD 64:24:02:06. Indeed, when Citibank filed a supplemental return for the 2008 tax year in advance of obtaining an anticipated adjustment by the IRS, the Department denied the request on the grounds that the IRS's audit for that year was still ongoing. App. 40. The Department's letter that rejected the refund claim explained: "[i]n order to verify the federal adjustment for the year at issue, this office requires copies of closing documents from the federal audit." *Id.*

The Department's invocation of the three-year limitations period in SDCL 10-59-19 creates a classic "Catch-22." As shown by the Department's conduct regarding the 2008 Refund Request, there can be no refund claim absent a final federal adjustment, but in virtually every case involving large banks, any refund claim brought after a final federal adjustment will be untimely. That result is not only unfair, but would effectively mean that a financial institution's bank franchise tax will *not* be based on its *actual* federal taxable income, which is contrary to the requirements of SDCL 10-43-10.1. To alleviate that issue, the Department adopted regulations permitting bank franchise tax refunds to be filed upon the occurrence of an adjustment by the IRS that decreases federal income, whenever that adjustment occurs. *See* ARSD 64:26:02:06.

The Department has argued that ARSDL 64:25:02:06 creates a mechanism to file an "anticipatory filing" before expiration of the three-year limitations period. This argument conflicts with the plain language of the regulation. *See Westmed Rehab, Inc. v. Dep't of Social Services*, 2004 SD 104, ¶8, 687 N.W.2d 516, 518 (stating that regulations should be interpreted based on their plain meaning when clear and unambiguous). ARSD 64:26:02:06 does not

provide that a taxpayer can claim a refund based on an *anticipated* federal adjustment; to the contrary, it expressly states that a taxpayer may file a supplemental return if a decrease in income "occurs," including "because of audit and adjustment by the United States." No decrease in income "occurs" until there is an adjustment. Indeed, the regulation goes on to state that a return may be filed "for the tax year in which the decrease *occurred*." *Id.* (emphasis added). There is no suggestion in the rule that a supplemental return claiming a refund may be filed *prior* to adjustment, where a decrease is *anticipated*. And of course, if the final adjustment turned out to be different from the claimed adjustment, the taxpayer would have to file another supplemental return, which under the Department's position would be untimely if more than three years had passed.

In short, the Refund Claim, which was filed within 60 days of the receipt of the IRS's adjustment, was timely under the statutes and regulations governing the bank franchise tax. As a result, the Office erred as a matter of law in concluding the Refund Claim was untimely and dismissing the contested case hearing.

The Judgment Finding the Refund Claim Untimely Under SDCL 10-59-19 Is Inconsistent with Basic Statutory Construction Principles.

The Specific Statutes and Regulations Governing Bank Franchise Taxes Adjustment Claims, Including ARSD 64:26:02:06, Take Precedence over the General Limitations Provisions contained in SDCL Ch. 10-59.

The Judgment should also be reversed because the specific statutes and rules governing the bank franchise tax apply rather than the general three-year limitations period. A basic rule of statutory construction is that specific statutes and regulations take precedence over general statutes and regulations. *Schafer v. Deuel County Bd. of Comm'rs*, 2006 SD 106, ¶ 10, 725 N.W.2d 241, 245 (quoting *Coop. Agronomy Services v. S.D. Dep't of Revenue*, 2003 SD 104, ¶ 15, 668 N.W.2d 718, 723); *see also Tracfone Wireless*, 2010 SD 6, ¶ 14, 778 N.W.2d 130, 134; *Moore v. Michelin Tire Co.*, 1999 SD 152, ¶ 10, 603 N.W.2d 513, 518.

The Legislature adopted specific statutes governing the bank franchise tax in SDCL Ch. 10-43. Additionally, as noted above, the Legislature directed the Secretary to adopt specific regulations regarding refunds for bank franchise taxes, *see* SDCL 10-43-55, and the Refund Claim is timely under those regulations. The statutory grant of authority to promulgate special procedures governing bank franchise tax refunds necessarily included the authority to determine the *timing* for such claims. *See Charles A. Beard Classroom Teachers Ass'n v. Bd. Of Sch. Trustees of the Charles A. Beard Memorial Sch. Corp.*, 668 N.E.2d 1222, 1225-26 (Ind. 1996).

Despite the specific statutory and regulatory scheme governing the bank franchise tax, the Department relies on SDCL Ch. 10-59 to deny the Refund Claim. SDCL 10-59 is a chapter entitled "Uniform Administration of Certain State Taxes," which sets forth provisions generally applicable to over twenty different types of taxes, including the bank franchise tax.[10] SDCL 10-43's specific statutory and regulatory scheme should control over the general chapter. *See* SDCL Ch. 10-59. Among other things, the Legislature expressly instructed the Secretary to adopt regulations establishing procedures for seeking refunds of bank franchise taxes. *See* SDCL 10-43-55.

The Secretary exercised that statutory authority and adopted ARSD 64:26:02:06, which permits refunds of such taxes upon a decrease in taxable income that occurs because of audit and

[10] SDCL 10-59-1 provides that, in addition to its application to Chapter 10-43, Chapter 10-59 applies to the taxes and other types of fees addressed in the following chapters: 10-33A, Telecommunications Companies (based on gross receipts); 10-39, Mineral Severance (based on gross receipts); 10-39A, Energy Minerals Severance (based on taxable value); 10-39B, Conservation Tax on Severance of Energy Minerals (based on taxable value); 10-45, Retail Sales and Service Tax (based on gross receipts); 10-45D, Tax on Visitor Related Business (based on gross receipts); 10-46, Use Tax (based on value of taxable property); 10-46A, Realty Improvement Contractor's Excise Tax (based on gross receipts); 10-46B, Alternate Realty Improvement Contractor's Excise Tax (based on gross receipts); 10-46C, Contractor's Excise Tax On New or Expanded Power Production Facilities (based on gross receipts); 10-46E, Excise Tax on Farm Machinery (based on gross receipts); 10-47B, Fuel Tax (fixed rate tax); 10-52, Uniform Municipal Non-Ad Valorem Tax (general tax administration); 10-52A, Municipal Gross Receipts Tax (based on gross receipts); 32-3, Auto Registration Fee (flat fee); 32-3A, Boat Registration Fee (flat fee); 32-5, Annual Registration and License Plates (flat fee); 32-5B, Excise Tax on Motor Vehicles (fixed rate); 32-6B, Regulation of Vehicle Dealers (flat fee); 32-9, Commercial Motor Vehicle Certificates (flat fee); 32-10, Interstate Reciprocity and Proportional Registration of Fleets (flat fee); 34-45, Emergency Reporting System (surcharge); 34A-13, Petroleum Inspection and Release Compensation (not a tax); 22-25-48, Tax Imposed on Distributors (based on gross receipts on lottery); 49-31-51, Access Fee Imposed on Local Exchange Service Lines, Cellular Telephones and Radio Pager Devices (fixed amount); and 50-4-13 to 50-4-17 (inclusive), Aircraft Fuel Tax (does not address levying of taxes).

adjustment by the IRS. Unlike the statutory and regulatory framework for bank franchise taxes, SDCL Ch. 10-59 says nothing about refunds of state taxes as a result of IRS adjustments to federal income. This should be expected; only bank franchise taxes are affected by IRS adjustments to income. The general provisions of SDCL Chapter 10-59 necessarily must give way to the specific statutes and regulations governing bank franchise tax refund requests, including SDCL 10-43-55 and ARSD 64:26:02:06.

This Court has recognized that the general provisions of SDCL Chapter 10-59 are inapplicable where more specific rules pertaining to particular taxes apply. In *Pourier v. S.D. Dep't of Revenue*, 2004 SD 3, 674 N.W.2d 314, a taxpayer argued that claims for refunds of motor fuel taxes that were not filed within the 15-month limitation period provided in the statutes specifically governing the motor fuel tax (SDCL 10-47B-141) were nevertheless timely under the three-year limitation period of SDCL 10-59-19. Even though SDCL Ch. 10-59 applies to motor fuel taxes, this Court held that the specific rule contained in the motor fuel tax chapter prevailed over the more general three-year limitations period in SDCL 10-59-19. *Id.*

Similarly, in *Tracfone Wireless*, this Court held that specific statutes governing appeals of refunds of particular taxes controlled over the more general appeal provisions of SDCL Chapter 10-59. 2010 SD 6, 778 N.W.2d 130. In *Tracfone*, the taxpayer appealed a denial of a claim for a refund of certain telecommunications gross receipt taxes. SDCL Ch. 10-59 generally provides for appeals from denials of refunds, *see* SDCL 10-59-9, but it contains no reference to the telecommunications gross receipts tax, and the Department argued that the Office and the Secretary therefore lacked jurisdiction to hear any appeal. This Court disagreed and held that the taxpayer was entitled to an appeal under the specific statute granting administrative review regarding the telecommunications gross receipts tax. SDCL 10-33A-12. That specific statute controlled over the general provisions in SDCL Ch. 10-59. *Tracfone*, at ¶¶ 14, 19. Like *Tracfone* and *Pourier*, the specific statutes governing the bank franchise tax (and the regulations

implemented pursuant to those statues) apply to the Refund Claim rather than the general requirements stated in SDCL Ch. 10-59.

Citibank's argument that the more specific bank franchise tax statutes should control was rejected by the Office and the Circuit Court based on a misreading of *Ernst & Young v. South Dakota Dep't of Revenue*, 2004 SD 122, 689 N.W. 2d 449. App. 7-8, 17-18. In *Ernst & Young*, the taxpayer Ernst & Young paid sales taxes on fees received from clients for the tax years 1994 to 1996. In 1999 (more than three years later), Ernst & Young refunded a portion of those fees. It then claimed a sales tax credit on its November 2000 sales tax return, but the Department denied the credit as untimely under SDCL 10-59-19. Ernst & Young argued, based on *Pourier*, that SDCL 10-59-19 did not control, and that its refund claim was timely under specific statutes that permitted retailers to claim deductions for taxes paid on fees that were later refunded. *Ernst & Young*, at ¶ 16.

The statute invoked by Ernst & Young permitted a deduction for refunds made "during the reporting period." *See* SDCL 10-45-29. Ernst & Young refunded the fees in 1999 but never sought a deduction. Instead, it sought a refund in the next reporting period – 2000. This Court held that Ernst & Young could not rely upon the specific provision it sought to invoke, because its procedures only authorized taking a deduction for refunds paid, whereas Ernst & Young had not taken a deduction but instead had sued for recovery of overpaid tax. *Ernst & Young*, 2004 SD 122, ¶ 15, 689 N.W. 2d at 453. The sales tax provision invoked by Ernst & Young permitted a deduction only for refunds paid "during the reporting period," whereas Ernst and Young had paid its refund in a prior period. The sales tax provision was inapplicable because it did not provide for any limitation period during which Ernst & Young could seek recoupment "beyond the reporting period." *Id.* at ¶ 16. Since the specific sales tax provision was unavailable, Ernst & Young's refund claim was accordingly governed by the general rules applicable to refunds under

SDCL 10-59-17 and 10-59-19, and was therefore time-barred, since it was seeking a refund for taxes paid more than three years earlier.

Unlike the taxpayer in *Ernst & Young*, the Refund Claim was timely under the applicable specific statute and regulations governing the bank franchise tax. Conversely, the Office lacked jurisdiction in *Ernst & Young* because the refund request was untimely under **both** the specific sales tax statute and under SDCL 10-59-19. Nothing in *Ernst & Young* suggests that a taxpayer that had complied with the specific sales tax provision would also need to satisfy SDCL 10-59-19.

Here, the Refund Claim complied with the specific statutes and regulations that authorized the refund request, namely SDCL 10-43-55 and ARSD 64:26:02:06. Because these specific statutes and regulations control over the general three-year limitations period stated in SDCL 10-59-19, Citibank's Refund Claim was timely. Additionally, SDCL 10-59-17 does **not** divest the Office (or the Circuit Court) of jurisdiction over the Refund Claim because the Refund Claim did **not** violate SDCL Ch. 10-59. This Court thus should reverse the Judgment.

Application of SDCL 10-59-19 Renders ARSD 64:26:02:06 Ineffective and Meaningless.

"[T]here is a presumption against construction of a statute which would render it ineffective or meaningless." *Tracfone Wireless, Inc. v. S.D. Dep't of Revenue*, 2010 SD 6, ¶ 17, 778 N.W.2d 130, 136 n.7 (quoting *Appeal of Real Estate Tax Exemption for Black Hills Legal Services, Inc.*, 1997 SD 64, ¶ 9, 563 N.W.2d 429, 432). Effect should be given to all statutory provisions to the extent possible. *City of Sioux Falls v. Ewoldt*, 1997 SD 106, ¶ 13, 568 N.W.2d 764, 767; *see also Hot Springs Independent Sch. Dist. No. 10 v. Fall River Landowners Ass'n*, 262 N.W.2d 33, 36 (S.D. 1978); *Farmers & Merchants Bank & Trust of Watertown v. Ksenych*, 252 N.W.2d 220, 222 (S.D. 1977). The same rules of statutory construction apply to regulations. *Westmed Rehab., Inc. v. Dep't of Soc. Servs.*, 2004 SD 104, ¶ 8, 687 N.W.2d 516, 518; *Schroeder v. Dep't of Soc. Servs.*, 1996 SD 34, ¶ 9, 545 N.W.2d 223, 227-28.

ARSD 64:26:02:06 authorizes a refund arising from an adjustment to federal income taxes irrespective of the three-year limitation imposed by SDCL 10-59-19. Any contrary interpretation would render ARSD 64:26:02:06 meaningless.

Taxpayers generally have a right to seek a refund of excess taxes within three years under SDCL 10-59-19, which states that "[a] taxpayer seeking recovery of an allegedly overpaid tax, penalty, or interest shall file a claim for recovery with the secretary, within three years from the date the tax, penalty, or interest was paid or within three years from the date the return was due, whichever date is earlier." If ARSD 64:26:02:06 does not mean that a taxpayer can seek a refund after an IRS adjustment that decreases federal income – whenever it occurs – it adds *nothing* to the otherwise existing statutes and rules. Instead, the only construction that gives ARSD 64:26:02:06 effect is to recognize that a refund arising due to an adjustment to federal taxable income is an exception to the general rule that refund requests must be submitted within three years.[11]

[11] Other states apply their laws relating to assessing deficiencies and claiming refunds based on federal adjustments in a similar fashion to the interpretation advanced by Citibank. Laws in nine other states allow for extending, tolling or reopening the period of limitations as a result of a federal adjustment for the purpose of assessing deficiencies. Each of those states also allows a taxpayer to file a refund claim based on a federal adjustment, regardless of whether the general period of limitations has lapsed. *See* Arkansas: A.C.A. § 26-18-306(b)(2), (3) (providing that, notwithstanding the statute of limitations, if the taxpayer's federal tax liability changes as a result of a correction by the IRS, "any additional state tax . . . must be assessed . . . within (1) year of the filing of the amended Arkansas income tax return by the taxpayer" and "if the correction by the [IRS] results in an overpayment of state income tax . . . the taxpayer may receive a refund . . ."); Indiana: I.C. 6-8.1-9-1(a), (f) (extending due date for taxpayer to file claim for refund from three years after the latter of the due date of the return or the date of payment to 180 days after the date taxpayer is notified of modification of taxpayer's federal income tax liability by the IRS); Michigan: M.C.L.A. § 206.325(2) (requiring the taxpayer to pay any additional taxes and the state tax department to refund any overpaid taxes resulting from changes by the IRS in taxpayer's federal income tax return), M.C.L.A. § 205.27a(3)(a) (tolling the statute of limitations for "[t]he period pending a final determination of tax, including audit . . . for federal income tax . . . and for 1 year after that period"); Minnesota: M.S.A. § 289A.38 Subd. 7, 9 (providing that if the taxpayer reports changes in taxable income by the IRS, the state tax commissioner "may recompute and reassess the tax, including a refund . . . within one year after the report or amended return is filed with the commissioner, notwithstanding any period of limitations to the contrary"); New Jersey: N.J.S.A. 54:10A-13 ("The periods of limitation to make deficiency assessments . . . and to file claims for refund . . . shall commence to run for additional four year periods from the date that taxable income is finally changed or corrected by the [IRS] . . . ."); New Mexico: N.M.S.A. 1978 § 7-1-26(F) ("If, as a result of an audit by the [IRS] . . . any adjustment of federal tax is made with the result that there would have been an overpayment of tax," the taxpayer can claim a refund "within one year of the date of the [IRS] audit adjustment."), N.M.S.A. § 7-1-18(E) (2012) ("If any adjustment in the basis for computation of any federal tax is made that results in liability for any tax, the amount thereof may be assessed at any time but not after three years from the end of the calendar year in which filing of an amended return is required . . . ."); New York: N.Y. Tax Law §§ 1083(c)(3), 1087(c) (McKinney 2011) (providing that if there are changes in a taxpayer's federal taxable income by the IRS, the taxpayer must file any claim for refund and the state must make

Regulations Concerning the Same Subject Matter Must Be Interpreted in Conjunction with Each Other.

In 2007, eight to thirteen years after the original returns were filed, the Department collected a deficiency based on an adjustment to Citibank's taxable income for taxable years 1993 to 1998 under a parallel provision of the bank franchise tax regulations governing deficiencies. Stipulation ¶¶ 38-43. That regulation, ARSD 64:26:02:05, mandates that when an increase in federal taxable income leads to a deficiency in bank franchise taxes due, the taxpayer is required to file a supplementary return within sixty days of the final federal determination. SDCL 10-43-42.1; ARSD 64:26:02:05. Complying with this regulation, Citibank filed an amended return along with payment of the deficiency, which the Department examined and accepted without change. Stipulation at ¶¶ 41-42.

The regulation concerning the assessment of deficiencies of bank franchise taxes based on federal adjustments, ARSD 64:26:02:05, is nearly identical to the corollary rule relating to refunds, ARSD 64:26:02:06. Both regulations were adopted at the same time, touch on the same subject matter, and use nearly identical language. They must, therefore, be read consistently. *See Loesch v. City of Huron*, 2006 SD 93, ¶ 8, 723 N.W.2d 694, 697 (2006); *see also Iversen's Will*, 80 SD 20, 118 N.W.2d 17, 19 (1962) ("[w]e agree the statutes being all enacted at the same time and relating to the same general subject should be considered and construed in *pari materia* ….") (emphasis added). When read consistently, both permit an adjustment to bank franchise tax liability in the event of an "adjustment by the United States," regardless of when that adjustment occurs.[12]

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any tax assessment within two years from the time taxpayer is required to file an amended return with the state tax commissioner); *see also*, Connecticut: C.G.S.A. §§ 12-732(b), 12-733(e)(1); Texas: V.T.C.A. Tax Code § 111.206(c), (d).

[12] In addressing Citibank's argument that ARSD 64:26:02:05 and ARSD 64:26:02:06 should be read consistently, the Circuit Court misconstrued Citibank's position as seeking a construction of ARSD 64:26:02:06 that would read into the rule the same 60-day window for the taxpayer to file a supplemental return as appears in ARSD 64:26:02:05. App. 80. Citibank has never argued that the 60-day rule applies ARSD 64:26:02:06. Rather, Citibank points to the plain meaning, as well as the Department's prior application of ARSD 64:26:02:05, to show that the deficiency rule does not limit the Department's ability to pursue a deficiency arising from a federal adjustment

The Bank Franchise Tax Refund Rule Should Be Interpreted to Allow Citibank's Refund Claim in Order to Avoid a Serious Constitutional Question.

This Court has held that in cases where a state statute raised constitutional questions under the United States Constitution or the South Dakota Constitution, the statute should be construed so as not to violate the constitution. *Benson v. State*, 2006 SD 8, ¶ 40, 710 N.W.2d 131, 145 (quoting *Wegleitner v. Sattler*, 1998 S.D. 88, ¶ 4, 582 N.W.2d 688, 689)). Similarly, the U.S. Supreme Court has held that a court should avoid an interpretation of a federal statute that gives rise to a serious constitutional question if a reasonable alternative interpretation poses no constitutional question. *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 2241 (1989); *see also Reynolds v. United States*, 132 S. Ct. 975, 987 (2012).

Here, the Department's interpretation that the procedure for seeking a refund based on an adjustment to federal taxable income under ARSD 64:26:02:06 is subject to the general three-year limitations period is unconstitutional or, at the very least, raises significant constitutional questions under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article VI of the South Dakota Constitution, because it would allow the Department to collect tax twice on the same income without affording any remedy to the taxpayer. U.S. Const. Amend. XIV; S.D. Const. Art. VI, § 2 ("No person shall be deprived of life, liberty, or property without due process of law.").

The U.S. Supreme Court has held that a state must provide procedural safeguards against an unlawful or erroneous tax collection because such a collection constitutes a deprivation of property under the Due Process Clause. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S. Ct. 2238 (1990). In *McKesson,* the Supreme Court of Florida denied the taxpayer an opportunity to seek a refund of a Florida excise tax that was determined to be unconstitutional after the taxpayer had remitted payment. *Id.* The Supreme Court reversed

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outside the general three-year period, and therefore, the refund rule similarly permits claims based on adjustments made after the three-year period .

and held that if a State penalizes taxpayers who do not remit their taxes in a timely fashion—and thus requires them to pay first and obtain review of the tax's validity later in a refund action—then "the Due Process Clause *requires* the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid." *Id.* at 22. *Cf. State v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (stating that the South Dakota constitution, as interpreted by the South Dakota Supreme Court, can provide greater individual protections than the U.S. Constitution).

In this case, based on a change in accounting methodology, Citibank's income reported in earlier accounting periods for federal income tax purposes was also reported in later periods. Despite previously reporting the income for bank franchise tax purposes, Citibank was required to include the income for later years because the income was contained on its federal income tax returns. SDCL 10-43-10.1. Having already paid bank franchise taxes on the income reported in earlier years, Citibank sought a refund to recover the income taxed twice. Taxing the same income twice, without providing a meaningful procedure for correction, is unconstitutional and unlawful under *McKesson*.

According to the Department's interpretation, the law provides no means for securing post-payment relief when a federal adjustment eliminates double taxation if that adjustment occurs more than three years after the date of payment or filing. If the taxpayer seeks a refund within the three-year period while a federal audit is ongoing, the Department refuses to process the request because it is premature. Conversely, if the taxpayer files for a refund once the federal audit has concluded and after the three-year period has lapsed, the Department's position is that the claim is not timely. Further, as discussed above, federal audits of large taxpayers are often not concluded within three years. Therefore, under *McKesson*, the Department's interpretation could render SDCL 10-59-19 and ARSD 64:26:02:06 unconstitutional or, at the very least, raise serious constitutional questions. Instead, the proper statutory construction is that ARSD

64:26:02:06 authorizes a refund after an adjustment to federal income tax irrespective of the three-year limitations period imposed by SDCL 10-59-19.

Citibank's Refund Claim Should Be Permitted Under the Doctrine of Equitable Tolling.

As set forth above, Citibank's claim was timely under the statues and regulations governing bank franchise tax refund claims. Even if the rules were construed to bar Citibank's claim as untimely, the claim should nonetheless proceed under the doctrine of equitable tolling.

Citibank Is Not Precluded from Raising the Equitable Tolling Doctrine in This Appeal.

The Circuit Court erred in holding that it could not consider the application of the equitable tolling doctrine due to Citibank's failure to raise the issue in the proceedings before the Office. App. 10. Under the facts and circumstances of this case, an exception to the general rule precluding new arguments on appeal should apply.

This Court may consider arguments not raised below where injustice might otherwise result and the opposing party would not be disadvantaged by having lost the opportunity to present additional evidence on the issue to the initial tribunal. *See, e.g.*, *Beavers v. Lockhart*, 755 F.2d 657, 662 (8th Cir. 1985). Consideration of Citibank's equitable tolling argument is appropriate here, because the alternative would result in injustice, and the Department is not disadvantaged by virtue of the issue not being presented below.

Application of the equitable tolling doctrine would be necessary to avoid the injustice of the Department's position that it may tax the same income twice without affording Citibank any practical means of obtaining a refund. Evidence critical to demonstrating the appropriateness of equitable tolling – the Department's April 12, 2013 letter that rejected Citibank's claim for a refund of its 2008 taxes – *did not exist* at the time of the proceeding below. App. 40. One of the elements of the equitable tolling doctrine is proving diligent and good faith conduct. The April 12, 2013 letter from the Department demonstrates that Citibank acted reasonably by waiting to

receive a final federal adjustment before seeking its refund under ARSD 64:26:02:06. The letter makes clear that it would have been futile for Citibank to seek a refund without a final federal adjustment. App. 40. Citibank therefore acted diligently, and it would be unjust to refuse to consider an argument that Citibank was incapable of advancing at an earlier point of the proceeding.

Nor is the Department disadvantaged by Citibank's raising the issue now. *See Hall v. State ex. Rel. S.D. Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26-27 (explaining that new arguments are presumptively disallowed upon appeal because "[h]ad the issue been raised below, the parties would have had an opportunity to consider whether additional evidence was needed . . . and . . . to brief the issue for the [lower] court's consideration"). The facts in this case are undisputed, and the issues before the Court are all questions of law. Where a new issue presents "purely legal" questions, there can be no prejudice to the opposing party from its being first raised on appeal. *Cf. Atlantic Mut. Ins. Co. v. Truck Ins. Exchange*, 797 F.2d 1288, 1293 (5th Cir. 1986) (new issue would have been considered on appeal if it involved "a purely legal question," but the need to develop additional facts disadvantaged opposing party). The failure to raise the argument to the administrative agency is of no moment because this Court reviews the Office's decision on legal issues *de novo* with no deference to the Circuit Court. *Burke*, 2002 SD at ¶ 8. There was no point in remanding to the Office for consideration of the equitable tolling argument, and in fact, the Department resisted remand to the Office. (7-22-13 Hearing Transcript at p.14-15). This Court thus should consider Citibank's equitable tolling argument.

Citibank Satisfies the Elements of the Equitable Tolling Doctrine.

Under the Department's interpretation of the relevant statutes and regulations, there is no mechanism available to Citibank to rectify the double taxation to which it was subjected during the years at issue. This quandary is precisely the type of "arcane procedural snare" that the

equitable tolling doctrine seeks to address. *Dakota Truck Underwriters,* 2004 SD 120, ¶ 20, 689 N.W. 196, 202 (citing *Warren v. Dep't of Army*, 867 F.2d 1156, 1160 (8th Cir. 1989)).

When a plaintiff has been prevented from suing within the statutory time period due to inequitable circumstances, a suit may go forward after the statutory time period has expired if three elements are satisfied: "(1) timely notice, (2) lack of prejudice to the defendant, and (3) reasonable and good-faith conduct on the part of the plaintiff." *Dakota Truck Underwriters*, 2004 SD 120, ¶ 24.

1. The Department Had Timely Notice

In *Dakota Truck Underwriters*, the Supreme Court of South Dakota held that the plaintiff, Dakota Truck Underwriters, gave timely notice following the enactment of certain statutory amendments that did not extend or revive the limitations period for their claims, but reversed prior law that disallowed the payment of such claims (and thus had discouraged the plaintiff underwriters from filing the claims within the 90 days required). *Dakota Truck Underwriters,* 2004 SD 120. Notice was timely because it was made promptly following the amendments that were necessary to support the claims. *Id. ¶* 25.

Here, notice was timely because Citibank filed its refund claim promptly after the federal adjustments that were necessary to support the claimed refund. Stipulation ¶¶ 30-33. The Department's regulations only permit a refund in the event of a final federal adjustment. ARSD 64:26:02:06. The Department's refusal to pay the 2008 Refund Claim confirms the requirement of a final adjustment. Citibank, who filed the Refund Request within 60 days of receiving the final IRS adjustment, provided prompt notice to the Department of its bank franchise tax refund claim. It took action in a timely manner following the accrual of all events necessary to pursue its claim, and thus the element of timeliness is satisfied. *Dakota Truck Underwriters*, 2004 SD 120, *¶* 25.

2. The Department Would Not Be Prejudiced by Tolling the Statute

The second element of the equitable tolling doctrine, lack of prejudice, serves to protect a defendant whose ability to adequately defend a claim would be impaired because the relevant evidence is stale or no longer exists (*e.g.*, the witnesses have disappeared or their memories have faded). *Dakota Truck Underwriters*, 2004 SD 120; *Baye v. Diocese of Rapid City*, 630 F.3d 757 (2011) (finding prejudice to a church defending a claim arising out of its employment of an alleged rapist, who died before the claim was filed, thereby depriving the church of its primary witness). No such evidentiary concerns are present here. Indeed, the evidence the Department needed to evaluate Citibank's refund claim did not exist until the IRS audit was completed, and thus was fresh and readily accessible to the Department when the claim was filed. In fact, the Department has stipulated to the excess taxes paid by Citibank and the refund that would be due if the claim were timely. Stipulation ¶ 37.

The Circuit Court concluded that the Department would be prejudiced by the tolling of the statute of limitations as a result of being faced with approximately $21 million in interest due to Citibank. App. 100. However, as discussed above, the question of prejudice revolves around the concern of damaged or inaccessible evidence, not financial burden. Moreover, the assertion that the State would be financially prejudiced ignores the fact that the State has had the benefit of Citibank's excess tax payments for more than ten years. Nor can the Department be heard to complain about the passage of time when, as the record in this case makes clear, the Department would have refused to process a refund claim made at any earlier point in time without the provision of a final federal adjustment.

3. Citibank Acted Diligently and in Good Faith

Citibank acted diligently and in good faith in filing its refund claim promptly following the resolution of its IRS audit. It has not "slept on [its] rights." *Dakota Truck Underwriters*, 2004 SD 120, ¶ 31. In its discussion of the reasonable conduct prong, the South Dakota Supreme Court in *Dakota Truck Underwriters* emphasized that "the law does not require a

useless act," and filing a claim that was vested but unripe would have constituted such a futile act. *Id.*, at ¶ 27. The Department's actions with the respect to the 2008 Refund Request prove that an earlier refund claim in this case would not have been ripe. Further, the plain language of ARSD 64:26:02:06 reasonably signaled that the filing of a refund claim within the general three-year limitations period without a final determination letter from the IRS was unnecessary to comply with the law and would have been a useless act.

As noted previously, bank franchise taxes in South Dakota are tied to federal taxable income; accordingly, given the unpredictable timetable for the conclusion of a federal audit, the rules for deficiency collections and refund claims based on federal adjustments are appropriately detached from time. Here, the timing of an IRS audit over which Citibank lacked control frustrated its ability to seek a refund permitted by state law, resulting in the unfairness of taxation of the same income twice. A rigid application of the statute of limitations on these facts is inappropriate and equity dictates that Citibank's refund claim be permitted.

III. Citibank Is Entitled to Summary Judgment on its Refund Request Because the Undisputed Facts Establish Citibank Overpaid Bank Franchise Taxes and the Only Legal Issue—Timeliness of the Refund Request—Should Be Ruled in Citibank's Favor.

Before the Office, Citibank moved for summary judgment on its Refund Claim. The parties have stipulated to all material facts, including that Citibank has overpaid bank franchise taxes in the amount of $29,945,132, exclusive of interest. The only legal issue before this Court is whether SDL 10-59-19 bars the refund. In fact, the Department stipulated that if the Refund Claim is timely, Citibank is entitled to the Refund Claim. Stipulation ¶ 37. As discussed above, Citibank's Refund Claim is timely. As a result, Citibank is entitled to summary judgment on its Refund Claim, plus interest.

CONCLUSION

For all the reasons stated herein, Citibank respectfully requests that the Court reverse the Judgment and enter an order granting Citibank's motion for summary judgment.

Dated April 30, 2014

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents and Table of Authorities, jurisdictional statement, statement of legal issues, and certificate of counsel, this brief contains 9,357 words as counted by Microsoft Word.

/s *Jason R. Sutton*
Jason R. Sutton

CERTIFICATE OF SERVICE

I, Jason R. Sutton, hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P. and that on the 30th day of April 2014, a true and correct copy of the foregoing was served was served electronically upon;

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26933

CITIBANK, N.A.,

Petitioner and Appellant,

v.

SOUTH DAKOTA DEPARTMENT OF REVENUE,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE SUSAN M. SABERS

BRIEF OF APPELLEE, SOUTH DAKOTA DEPARTMENT OF REVENUE

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Notice of Appeal Filed January 9, 2014

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OTHER REFERENCES CITED:

PRELIMINARY STATEMENT

For the convenience of the Court, the South Dakota Department of Revenue will be referred to as "the Department." The taxpayer, Citibank, N.A., will be referred to as "Citibank."[1] The Office of Hearing Examiners will be referred to as "OHE." The Administrative Record will be cited as "AR. ___." The settled record of the Circuit Court, Second Judicial Circuit will be cited as "R. ___." The Department's Appendix will be cited as "APP. ___, p. ___." The Stipulation of Facts, as found in Department's Appendix A, will be cited as "SF ¶ __." Appellant Citibank's Brief for this appeal will be cited as "Appellant Brief at __."

JURISDICTIONAL STATEMENT

On March 15, 2013, OHE entered Findings of Fact, Conclusions of Law, and Final Order. AR. 838-46. In its decision, OHE granted the Department's motion to dismiss. AR. 846. By an Order that had previously been executed by the Secretary of Revenue on November 1, 2012, OHE's proposed decision became final. AR. 109-10. Notice of Entry of OHE's decision was served on March 25, 2013. AR. 849-50. Citibank filed a Notice of Appeal with the Circuit Court, Second Judicial Circuit on April 15, 2013. R. 1-2.

The circuit court entered its Judgment on December 6, 2013, which affirmed OHE's decision and incorporated by reference its Memorandum Decision dated

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1. Citibank is a national banking association with its principal office in New York. AR. 117 (SF ¶ 1). Citibank (South Dakota) National Association ("CBSD") was a national banking association. AR. 118 (SF ¶ 2). On July 1, 2011, CBSD was merged with and into Citibank. AR. 118 (SF ¶ 6). Citibank is the successor in interest to CBSD. AR. 118 (SF ¶ 7). For the convenience of the Court, we will refer to Citibank and CBSD collectively as "Citibank."

November 22, 2013. R. 86-87; *see also* R. 65-73. Notice of Entry of Judgment was served on December 12, 2013. R. 88-89. Citibank filed a Notice of Appeal with this Court on January 9, 2014. R. 90.

STATEMENT OF LEGAL ISSUES

ISSUE ONE: WHETHER THE OFFICE OF HEARING EXAMINERS CORRECTLY GRANTED THE DEPARTMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION BECAUSE CITIBANK FAILED TO COMPLY WITH PROCEDURAL REQUIREMENTS IN SDCL CHAPTER 10-59 WHEN FILING ITS CLAIM FOR REFUND.

The circuit court affirmed OHE's decision granting the Department's Motion to Dismiss.

Relevant Case:

- *Ernst & Young v. S.D. Dep't of Revenue & Regulation*, 2004 S.D. 122, 689 N.W.2d 449

Relevant Statutes:

- SDCL 10-59-1
- SDCL 10-59-17
- SDCL 10-59-19

ISSUE TWO: WHETHER THE CIRCUIT COURT CORRECTLY DECLINED TO CONSIDER AND, IN AN ALTERNATIVE RULING, CORRECTLY REJECTED CITIBANK'S EQUITABLE TOLLING ARGUMENT ON ITS MERITS.

The circuit court ruled that Citibank had waived an equitable tolling argument. In an alternative ruling, the circuit court rejected Citibank's equitable tolling argument on its merits.

Relevant Cases:

- *Hall v. State ex rel. S.D. Dep't of Transp.*, 2006 S.D. 24, 712 N.W.2d 22
- *Dakota Truck Underwriters v. S. D. Subsequent Injury Fund,* 2004 S.D. 120, 689 N.W.2d 196

STATEMENT OF THE CASE AND FACTS

This dispute involves Citibank's bank franchise taxes for the 1999, 2000, 2001, and 2002 taxable years ending each December of those years. During those taxable years, Citibank had made quarterly bank franchise tax payments. AR. 247-86; *see also* AR 128-29 (SF ¶¶ 7-10). Also, for those years, Citibank timely filed its bank franchise tax returns with the Department on September 18, 2000, October 3, 2001, October 2, 2002, and October 3, 2003, respectively. AR. 119 (SF ¶ 12).

At some point, the United States Department of Treasury – Internal Revenue Service ("IRS") examined Citibank's federal income tax returns for the 1999 through 2002 taxable years. AR. 122 (SF ¶ 22), 124-25 (SF ¶¶ 30-32). During the review, Citibank requested that the IRS reduce Citibank's taxable federal income for the years 1999 and 2000. AR. 122 (SF ¶ 22). Citibank's request was based on the fact that Citibank had changed its accounting method starting with its 2001 tax return which resulted in Citibank double reporting fees that had previously been reported on its 1999 and 2000 returns.[2] AR. 122-23 (SF ¶¶ 20-26), 290. Also during the review, Citibank

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2. The fees at issue in this case are "interchange fees." AR. 121-26 (SF ¶¶ 16-37). Interchange fees compensate credit card-issuing banks for lending money to card-holding consumers. AR. 121 (SF ¶¶ 16-18). When the consumer pays for merchandise using his or her credit card, the credit card-issuing bank pays the merchant an agreed upon percentage of the purchase price. *Id.* Then, when the consumer pays the bank the entire purchase price, the bank retains all of the funds. *Id.* The portion of the funds that exceeds what the bank paid to the merchant is known as an "interchange fee." *Id.*

   Starting with its 2001 tax return, Citibank changed its accounting method for interchange fees from the immediate recognition method to the deferral method. AR. 122-23 (SF ¶¶ 20-26 & n.14), 290. This change resulted in some income initially recognized in the tax years 1999 and 2000 also being recognized in the tax years 2001 and 2002. *Id.*

submitted to the IRS a total of ten signed consent forms to extend the federal statute of limitations governing taxpayers' refund claims for federal income tax.[3] AR. 118-19 (SF ¶ 9), 161-80. Those consent forms extending the federal limitations period were signed in the years 2002, 2004, 2006, 2007, 2008, 2009, 2010, and 2011.[4] AR. 161-80. The consent forms ultimately extended the federal statute of limitations to December 31, 2012 for federal refund claims regarding the 1999 through 2002 tax years. AR. 118-19 (SF ¶ 9). After its review of Citibank's federal income tax returns, the IRS reduced Citibank's federal income for the years 1999, 2000, 2001, and 2002 by $789,426,457; $120,873,512; $10,357,119; and $14,054,954, respectively. AR. 125 (SF ¶ 32).

Although the IRS and Citibank had been involved in communications regarding income adjustments and extensions of the federal statute of limitations since at least 2002, Citibank did not notify the Department of the IRS's review until March 2012. *See* Appellant Brief at 5; *see also* AR. 118-19 (SF ¶¶ 9-11), 122 (SF ¶ 22), 123 (SF ¶ 27), 161, 290. On March 20, 2012, the Department received a bank franchise tax refund claim from Citibank requesting a portion of the taxes paid on Citibank's state bank franchise tax returns for the 1999 through 2002 tax years. AR. 513; *see also* AR. 125 (SF ¶ 33). The claim for refund totaled $29,945,132 (not including interest) and consisted of the following:

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3. Generally, the federal statute of limitations for federal tax refund claims is three years from the date the return was filed or two years from the date the tax was paid, whichever date is later. *See* 26 U.S.C.A.§ 6511(a). *Cf.* SDCL 10-59-19 (providing that the state statute of limitations for certain tax refund claims is three years from the date the return was due or three years from the date the tax was paid, whichever date is earlier).

4. Citibank signed two consent forms in 2006 and two consent forms in 2009. AR. 165-68, 173-76.

1. A letter dated March 16, 2012, indicating adjustments made to the federal taxable income of Citibank for the 1999-2002 tax years;

2. Amended South Dakota Franchise Tax on Financial Institutions return for tax year 1999 requesting a refund of $29,002,648;

3. Amended South Dakota Franchise Tax on Financial Institutions return for tax year 2000 requesting a refund of $897,255;

4. Amended South Dakota Franchise Tax on Financial Institutions return for tax year 2001 requesting a refund of $25,544; and

5. Amended South Dakota Franchise Tax on Financial Institutions return for tax year 2002 requesting a refund of $19,685.

AR. 125 (SF ¶¶ 33-34), 513.

On April 9, 2012, the Department denied Citibank's claim for refund because Citibank's claim was outside the three-year statute of limitations prescribed by SDCL 10-59-19. AR. 125 (SF ¶ 35), 513. After receiving the Department's denial, Citibank requested an administrative hearing before OHE. AR. 112, 126 (SF ¶ 36). At this time, the Secretary of the Department filed an Order pursuant to SDCL 1-26D-7, which would ultimately make OHE's proposed decision the Department's final decision. AR. 109-10.

Citibank and the Department entered into a Stipulation of Facts and Evidence, which was filed with OHE on December 12, 2012. AR. 117-710. The parties then filed cross motions for summary judgment with OHE and the Department also filed a motion to dismiss for lack of jurisdiction. AR. 712, 727.

In a March 15, 2013 decision, OHE, Chief Hearing Examiner Hillary Brady presiding, granted the Department's motion to dismiss. AR. 838-46. OHE concluded that it does not have jurisdiction because Citibank failed to file its refund claim within the three-year statute of limitations provided in SDCL 10-59-19. AR. 845 (COL IV, V). OHE rejected Citibank's argument that ARSD 64:26:02:06, which sets forth the

procedure for filing a bank franchise tax refund claim upon a decrease in income, eliminates the three-year statute of limitations when there has been a decrease in income due to a federal adjustment. AR. 842-43.

Citibank appealed OHE's decision to circuit court. R. 1-2. During the appeal, Citibank moved to supplement the record with the following additional evidence: (1) a September 2012 refund request consisting of an amended 2008 South Dakota bank franchise tax return with supporting documents; and (2) an April 12, 2013 letter sent by Michael Houdyshell, Director of Property and Special Taxes Division, to Ocean Mizerik. R. 17-18, 21-40. After a hearing, the circuit court, Judge Susan Sabers presiding, granted Citibank's motion to supplement the record on July 30, 2013. R. 58-59.

On November 22, 2013, the circuit court issued a Memorandum Decision addressing the merits of the case. R. 65-73. The court affirmed OHE's decision, ultimately concluding that OHE correctly ruled it does not have jurisdiction to hear Citibank's appeal. *Id.* The court subsequently entered its Judgment incorporating its Memorandum Decision. R. 86-87. Citibank appeals.

ARGUMENT

ISSUE ONE: WHETHER THE OFFICE OF HEARING EXAMINERS CORRECTLY GRANTED THE DEPARTMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION BECAUSE CITIBANK FAILED TO COMPLY WITH PROCEDURAL REQUIREMENTS IN SDCL CHAPTER 10-59 WHEN FILING ITS CLAIM FOR REFUND.

This case is about whether OHE and all other courts lack jurisdiction pursuant to SDCL chapter 10-59 to consider Citibank's refund claim. "Jurisdictional issues are questions of law and are reviewed de novo." *Knapp v. Hamm & Phillips Serv. Co.*, 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788. Also, "[q]uestions of statutory interpretation are

reviewed de novo." *Ernst & Young v. S.D. Dep't of Revenue & Regulation*, 2004 S.D. 122, ¶ 4, 689 N.W.2d 449, 450.

A. No court has jurisdiction to hear Citibank's appeal because Citibank's claim for refund is barred by the statute of limitations in SDCL 10-59-19.

The first issue is whether Citibank failed to comply with the three-year statute of limitations in SDCL 10-59-19 when filing its refund claim, which would therefore deprive all courts of jurisdiction to hear Citibank's appeal. When filing a claim for refund of bank franchise taxes, a taxpayer is required to comply with SDCL chapter 10-59. *See* SDCL 10-59-1 (providing that the provisions in SDCL chapter 10-59 apply to bank franchise tax imposed under SDCL chapter 10-43). Pursuant to SDCL 10-59-17, all courts are deprived of jurisdiction if the taxpayer fails to comply with chapter 10-59.

> SDCL 10-59-17. *A taxpayer seeking recovery of tax, penalty or interest* imposed by the chapters set out in § 10-59-1 *shall* follow the procedure established in this chapter. *No court has jurisdiction* of a suit to recover such taxes, penalty, or interest unless the taxpayer seeking the recovery of tax complies with the provisions of this chapter.

(Emphasis added.)

One such provision in chapter 10-59 is SDCL 10-59-19, which requires any taxpayer seeking a refund of allegedly overpaid tax, penalty, or interest to file its claim for refund within three years of the date the tax was paid or within three years of the date the return was due, whichever is earlier. Any claim not timely filed is barred.

> SDCL 10-59-19. A taxpayer seeking recovery of an allegedly overpaid tax, penalty, or interest *shall* file a claim for recovery with the secretary, within three years from the date the tax, penalty, or interest was paid or within three years from the date the return was due, whichever date is earlier. *A claim for recovery not filed within three years of the date the tax was paid or within three years of the date the return was due, whichever date is earlier, is barred.*

(Emphasis added.) This statute of limitations must be strictly construed in favor of the Department because "[i]t is a 'well established principle that statutes of limitation applicable to suits [or claims] against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed.'" *See Dakota Truck Underwriters v. S. D. Subsequent Injury Fund,* 2004 S.D. 120, ¶ 42, 689 N.W.2d 196, 205 (Gilbertson, C.J., dissenting) (second alteration in original) (quoting *Kreiger v. United States,* 539 F.2d 317, 320-21 (3d Cir. 1976) (citing *Soriano v. United States,* 352 U.S. 270, 276, 77 S. Ct. 269, 273 (1957))); *see also Tosello v. United States*, 210 F.3d 1125, 1127 (9th Cir. 2000) (stating that a federal statute permitting refunds for tax overpayments "represents a limited waiver of the government's sovereign immunity. As such, that provision must be construed narrowly, and the applicable [two-year] statute of limitations . . . likewise must be construed strictly in favor of the government."); *Sumner v. United States*, 71 Fed. Cl. 627, 629 (Fed. Cl. 2006) (discussing a time-barred claim for a federal refund and quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) when stating that "[t]he . . . statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed.") (second alteration in original).

OHE, and the circuit court, correctly determined that the three-year statute of limitations in SDCL 10-59-19 bars Citibank's refund claim. *See* AR. 838-46 (APP. B, 16-24); R. 65-73 (APP. C, 25-33); R. 86-87 (APP. D, 34-35). As stated above, Citibank filed its bank franchise tax returns with the Department reporting its taxable income for the 1999 through 2002 tax years on September 18, 2000, October 3, 2001, October 2,

2002, and October 3, 2003, respectively. AR. 119 (SF ¶ 12). Thus, because of the three-year statute of limitations, all potential refund claims were time barred as of October 3, 2006.[5] But, Citibank did not file its refund claim until March 2012. *See* AR. 125 (SF ¶ 33), 405, 513. Therefore, pursuant to SDCL 10-59-19 and its strict construction in favor of the Department, Citibank's 2012 refund claim is time barred. Because Citibank did not file its refund claim within the three-year statute of limitations in SDCL 10-59-19, OHE and all other courts lack jurisdiction to hear Citibank's appeal. *See* SDCL 10-59-17; *see also In re Estate of Erdmann*, 447 N.W.2d 356, 358 (S.D. 1989) ("When the government is sued, a timeliness requirement is not procedural or remedial, but jurisdictional.")

B. The reasoning behind the three-year statute of limitations supports denying Citibank's untimely claim for refund.

Permitting a refund claim in 2012 for Citibank's 1999 through 2002 tax returns would frustrate the reasoning behind the three-year statute of limitations in SDCL 10-59-19. Generally, statutes of limitations are important to "ensure a 'speedy and fair adjudication of the rights of the parties[.]'" *Murray v. Mansheim*, 2010 S.D. 18, ¶ 21, 779 N.W.2d 379, 389 (alteration in original) (quoting *Moore v. Michelin Tire Co.*, 1999 S.D. 152, ¶ 25, 603 N.W.2d 513, 521). The statute of limitations for tax refund claims is especially crucial because of essential fiscal planning by state governments. *See Ernst & Young*, 2004 S.D. 122, ¶ 17, 689 N.W.2d at 454. As stated by the South Dakota Supreme

5. Specifically, claims arising from the 1999 return were barred as of September 18, 2003; claims arising from the 2000 return were barred as of October 3, 2004; claims arising from the 2001 return were barred as of October 2, 2005; and claims arising from the 2002 return were barred as of October 3, 2006. For simplicity, the Department summarily states that all claims were barred as of October 3, 2006.

Court in *Ernst & Young v. South Dakota Department of Revenue & Regulation*, "the United States Supreme Court has recognized, and this Court has embraced, the need to protect the government's strong interest in financial stability and the State's ability to engage in sound fiscal planning as the strong underlying justification for limitations periods for tax refunds." *Id.* (internal quotation marks omitted); *see also Pourier v. S.D. Dep't of Revenue*, 2003 S.D. 21, ¶ 54, 658 N.W.2d 395, 410 (Konenkamp, J., concurring in part and dissenting in part) ("[S]tatutes of limitations always cut off what may otherwise be just claims. They balance the right to redress against the specter of endless liability. In tax refund cases, to deny such limitations would devastate the State's budgetary planning process), *vacated in part on reh'g*, *Pourier*, 2004 S.D. 3, 674 N.W.2d 314. *Cf. Sumner*, 71 Fed. Cl. at 629 ("The three-year window for filing [federal] tax refund claims allows the federal government to rely on calculations of revenue generated by income taxes, ensuring the stability of the United States Treasury."); *Davis v. Commonwealth*, 719 A.2d 1121, 1122 (Pa. Commw. Ct. 1998) (stating that the Pennsylvania Supreme Court "has noted that [tax refund] limitation periods are absolute conditions to the right to obtain relief and are necessary to avoid great uncertainty in the budgetary planning and fiscal affairs of the Commonwealth."); *Jordan v. Dep't of Motor Vehicles*, 89 Cal. Rptr. 2d 333, 345 (Cal. Ct. App. 1999) (stating that "strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues"). Thus, permitting a stale refund claim would eradicate a state's ability to engage in sound fiscal planning and create uncertainty in its fiscal affairs.

This case illustrates the disruptive effects on a state's fiscal planning if a taxpayer is permitted to file a stale refund claim. Here, Citibank's 2012 refund claim was approximately ten years after Citibank and the IRS began communicating about adjusting Citibank's 1999 through 2002 federal income. *See supra* p. 4. Until Citibank's 2012 claim, the State of South Dakota had no notice or personal knowledge of the IRS's review of Citibank's 1999 through 2002 federal income, Citibank's request to reduce its 1999 and 2000 federal income, or Citibank's numerous extensions of the federal statute of limitations. *See* AR. 118-19 (SF ¶¶ 9-11), 122 (SF ¶ 22), 123 (SF ¶ 27). Because of the lack of notice, the State did not and could not account for Citibank's potential refund claim when engaging in its fiscal planning. *Cf. Sundquist Homes, Inc. v. Snohomish Cnty.*, 276 F. Supp. 2d 1123, 1125 (W.D. Wash. 2003) (indicating that notice of refund claims aids governmental entities in "fiscal planning and in making decisions concerning potential refund lawsuits. . . . It is important that they be aware of possible reductions in allocations of tax funds due to potential refunds." (quoting *Longview Fibre Co. v. Cowlitz Cnty.*, 790 P.2d 149 (Wash. 1990))).

Permitting a stale refund claim would also frustrate another purpose of the statute of limitations: to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 30, 689 N.W.2d at 203-04 (quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 1054 (1965)). The Supreme Court of the United States has acknowledged that statutes of limitations in tax cases serve such purpose:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under

> which there would never come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

Webb v. United States, 66 F.3d 691, 694-95 (4th Cir. 1995) (quoting *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 301, 67 S. Ct. 271, 273 (1946)).

In this case, the Department's records retention policy permits the Department, in most circumstances, to destroy records more than six years old. State of S.D., Bureau of Admin., Records Mgmt. Program, South Dakota Revenue Records Retention and Destruction Schedule 67 (2012) (APP. H, 39-40). *Cf.* SDCL 10-43-43.1. Thus, under the policy, the Department's evidence to dispute tax refund claims is typically purged after six years from the date the tax return was filed. It would be unreasonable to require the Department to retain records indefinitely in order to dispute potential claims relating to any return ever filed. Therefore, it is not in the interest of justice to allow a taxpayer to pursue a stale refund claim.

C. Citibank's argument that its refund claim is timely must be rejected.

Citibank acknowledges the three-year statute of limitations in SDCL 10-59-19 and does not dispute that its refund claim fell outside that limitations period. *See generally* Appellant Brief. Citibank argues, however, that the limitations period in SDCL 10-59-19 does not apply to claims for bank franchise tax refunds when a federal adjustment results in a decrease in income. Appellant Brief at 10-25. Citibank contends that ARSD 64:26:02:06, which sets forth the procedure for filing a bank franchise tax refund claim upon a decrease in income, eliminates the three-year statute of limitations in

SDCL 10-59-19 if there has been such adjustment. *Id.* Citibank's argument must be rejected for the following reasons:

1. **SDCL 10-59-19 is reconcilable with ARSD 64:26:02:06.**

First, ARSD 64:26:02:06 does not eliminate the statute of limitations in SDCL 10-59-19 when a federal adjustment results in a decrease in income because ARSD 64:26:02:06 does not conflict with SDCL 10-59-19. Thus, both the rule and the statute must be given effect. ARSD 64:26:02:06, a procedural rule, provides *how* a taxpayer may file a bank franchise tax refund claim; ie. by filing a supplementary return with the Department:

> When the taxpayer has filed a return with the department for the tax year and a subsequent decrease occurs in the taxpayer's net income or taxable income for that tax year, whether because of audit and adjustment by the United States or otherwise, the taxpayer may file a supplementary return with the department for the tax year in which the decrease occurred. A supplementary return need not be filed if the decrease is the result of an adjustment in the original return by the department.

On the other hand, SDCL 10-59-19 provides the statute of limitations for *when* a taxpayer may file a refund claim for bank franchise taxes. Therefore, the statute and the rule govern different facets and can be given effect simultaneously.

Also, "it is the duty of the court to reconcile [the rule and the statute] and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable." *See State v. Clements*, 2013 S.D. 43, ¶ 8, 832 N.W.2d 485, 487. The harmonious relationship between ARSD 64:26:02:06 and SDCL 10-59-19 is clear because ARSD 64:26:02:06 "implement[s]" SDCL 10-59-19. *See* ARSD 64:26:02:06 ("Law Implemented: . . . SDCL 10-59-19"). "Implement" means "carry out" or "accomplish." *Merriam-Webster Online Dictionary*, http://www.merriam-

webster.com/dictionary/implement; *see also* South Dakota Legislative Research Council, Guide to Form and Style for Administrative Rules of South Dakota 7 (rev. 2014) ("The law implemented is the statute that the rule administers."). Thus, ARSD 64:26:02:06 purports to "carry out" the three-year statute of limitations of SDCL 10-59-19, rather than nullify it in certain circumstances.

Further, it is well established that an administrative regulation, promulgated pursuant to a delegation of legislative power, must be interpreted within the scope of the statute that it purports to implement and must in no way expand upon the statute. *State Div. of Human Rights v. Prudential Ins.*, 273 N.W.2d 111, 114 (S.D. 1978). Thus, ARSD 64:26:02:06 must be interpreted within the confines of the three-year statute of limitations in SDCL 10-59-19 rather than expand it when a federal adjustment results in a decrease in income. For these reasons, ARSD 64:26:02:06 is a procedural rule only and is reconcilable with the statute of limitations in SDCL 10-59-19.

2. Even if SDCL 10-59-19 and ARSD 64:26:02:06 conflicted, SDCL 10-59-19 must prevail.

Even if we were to assume SDCL 10-59-19 and ARSD 64:26:02:06 could not be reconciled, Citibank's contention that the administrative rule takes precedence over the statute must be rejected. This contention is contrary to the fundamental principles of administrative law. "[I]f an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid." 73 C.J.S. *Pub. Admin. Law & Proc.* § 172 (2014). Therefore, even if the Department had intended to eliminate the limitation period in SDCL 10-59-19 by promulgating ARSD 64:26:02:06 to govern situations involving a federal adjustment to income, it could not do so because "rules adopted in contravention of statutes are invalid." *See Paul Nelson Farm v. S.D. Dep't of*

Revenue, 2014 S.D. 31, ¶ 24, ___ N.W.2d. ___ (*quoting In re Yanni*, 2005 S.D. 59, ¶ 16, 697 N.W.2d 394, 400); *see also Seider v. O'Connell*, 612 N.W.2d 659, 667 (Wis. 2000) ("An administrative rule that conflicts with an unambiguous statute exceeds the authority of the agency that promulgated it."). Thus, Citibank's argument that ARSD 64:26:02:06 takes precedence over SDCL 10-59-19 must be rejected.

3. SDCL 10-43-55 does not provide the Department with authority to enact a rule to eliminate the three-year statute of limitations in SDCL 10-59-19 when a federal adjustment results in a decrease in income.

Citibank contends that the Department exercised its rulemaking authority under SDCL 10-43-55 to promulgate ARSD 64:26:02:06, and therefore eliminated the statute of limitations in SDCL 10-59-19 upon a federal adjustment of bank franchise taxes. *See* Appellant Brief at 11-12, 16-17. However, SDCL 10-43-55 supports that ARSD 64:26:02:06 is, in fact, only a procedural rule for filing bank franchise tax refund claims. SDCL 10-43-55 provides that overpayments must be refunded "pursuant to the *procedure* established by the secretary of revenue by rule promulgated pursuant to chapter 1-26." (Emphasis added.) Thus, SDCL 10-43-55 only provides the Department with authority to enact rules relating to the procedure for filing a bank franchise refund claim. *Cf. In re Estate of Erdmann*, 447 N.W.2d at 358 ("When the government is sued, a timeliness requirement is not procedural or remedial[.]"). Because SDCL 10-43-55 only permits the Department to enact procedural rules, any rule creating an exception to the statute of limitations would be in contravention of the Legislature's delegation of authority and therefore invalid. *See Dixon v. United States,* 381 U.S. 68, 74, 85 S. Ct. 1301, 1305 (1965) (stating that the power of an agency to administer statutes "and to prescribe rules and regulations to that end is not the power to make law [. . .] but the power to adopt

regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.") (quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue,* 297 U.S. 129, 134, 56 S. Ct. 397, 400 (1936)); *HGS Health Maint. Org., Inc. v. United States*, 76 Fed. Cl. 339 (Fed. Cl. 2007) ("[L]egislative regulations are given controlling weight *unless they are* arbitrary, capricious, or manifestly *contrary to the statute*.") (emphasis added) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984)); *Caldo Oil Co. v. State Water Res. Control Bd.*, 52 Cal. Rptr. 2d 609, 611-12 (Cal. Ct. App. 1996) ("A regulation interprets or makes specific an agency's administration of a statutory duty. A regulation cannot be used to impair the implementing statute[.]") (internal citation omitted).

4. A rule of statutory construction does not allow ARSD 64:26:02:06 to eliminate the statute of limitations in SDCL 10-59-19 upon a federal adjustment of bank franchise tax.

Citibank next argues the rule of statutory construction that "specific statutes and regulations take precedence over general statutes and regulations" applies in this case. *See* Appellant Brief at 15. Citibank contends that ARSD 64:26:02:06 is specific to bank franchise tax while SDCL 10-59-19 is a general statute governing numerous types of tax and therefore, ARSD 64:26:02:06 takes precedence over SDCL 10-59-19 when there has been a federal adjustment of bank franchise tax. *See* Appellant Brief at 15-20. This argument is without merit.

In this case, the rule of statutory construction is irrelevant because the language in SDCL 10-59-19 has "plain meaning and effect, [and therefore the Court] should simply declare [its] meaning and not resort to statutory construction." *See State v. Moss*, 2008

S.D. 64 ¶ 15, 754 N.W.2d 626, 631; *see also Paul Nelson Farm*, 2014 S.D. 31, ¶ 10, ___ N.W.2d ___ ("When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and [a court's] only function is to declare the meaning of the statute as clearly expressed."). Moreover, Citibank overgeneralizes the rule of statutory construction. Citibank's cited authority only states that specific statutes prevail over general statutes, but this case involves an administrative *rule* and one of the *statutes* it implements. *See* Appellant Brief at 15-18. *Cf. Tracfone Wireless, Inc. v. S.D. Dep't of Revenue & Regulation*, 2010 S.D. 6, ¶ 14, 778 N.W.2d 130, 134 ("a *statute* relating to a particular subject will prevail over the general terms of another *statute*") (emphasis added); *Schafer v. Deuel Cnty. Bd. Of Comm'rs*, 2006 S.D. 106, ¶ 10, 725 N.W.2d 241, 245 ("*statutes* of specific application take precedence over *statutes* of general application") (emphasis added); *Pourier*, 2004 S.D. 3, ¶ 4, 674 N.W.2d at 316 ("In cases where more than one statute arguably touches upon the same subject matter, we presume that the *statute* with the more specific language 'relating to a particular subject will prevail over the general terms of another *statute*'") (emphasis added) (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611); *Moore*, 1999 S.D. 152, ¶ 16, 603 N.W.2d at 518 ("terms of a *statute* relating to a particular subject will prevail over general terms of another *statute*") (emphasis added). Citibank cites no authority supporting its proposition that an administrative rule can prevail over a statute it implements. *See* Appellant Brief at 15-20. Therefore, the rule of statutory construction highlighted by Citibank is irrelevant and inapplicable.

Even if we assumed that the rule of statutory construction applied, ARSD 64:26:02:06 does not contain a limitation period and thus, it is not more specific than the

three-year statute of limitations in SDCL 10-59-19. In *Ernst & Young*, the South Dakota Supreme Court unanimously rejected a similar proposition involving two statutes. *See* 2004 S.D. 122, ¶¶ 6-10, 689 N.W.2d at 451-52. In that case, a taxpayer argued that SDCL 10-59-17 (a statute without a limitation period) applied instead of SDCL 10-59-19 (the three-year limitation period at issue here) and created an unlimited period to recover taxes. *Id.* ¶ 9. In rejecting the taxpayer's argument, the Court stated:

> SDCL 10-59-17 and SDCL 10-59-19 touch upon the same subject matter, the recovery of taxes, and are presumed to have been intended to coexist. Since SDCL 10-59-19 is more specific as to the applicable limitations period, its terms prevail over the more general terms contained in SDCL 10-59-17. SDCL 10-59-17 establishes the right and the procedure for the recovery of tax but provides no limitations period, other than requiring compliance with SDCL ch. 10-59. SDCL 10-59-19 details the period within which a claim must be made for recovery of tax. Construing the two statutes together, they reflect the legislature's presumed intention of avoiding an "absurd and unreasonable result."

Id. ¶ 9 (internal citations and footnote omitted).

Adhering to the rationale of *Ernst & Young*, Citibank's argument that ARSD 64:26:02:06 indefinitely extends the statute of limitations for certain bank franchise tax refund claims must be rejected. *Ernst & Young* establishes that an applicable statute of limitations cannot be nullified by a statute that fails to specify a limitation period. *See* 2004 S.D. 122, ¶ 9, 689 N.W.2d at 452; *see also id.* ¶ 16 ("[S]ince SDCL 10-45-29 does not specify a limitations period other than the reporting period, it is subject to the three year limitation for overpaid taxes contained in SDCL 10-59-19."). Therefore, ARSD 64:26:02:06, a rule without a statute of limitations, is not more specific than SDCL 10-59-19, a statute with a statute of limitations.

5. ARSD 64:26:02:05, a rule concerning the filing of a supplementary return upon an increase in the taxpayer's federal income, does not eliminate the applicable statute of limitations when a federal adjustment results in an increase of reportable income.

Next, Citibank argues that ARSD 64:26:02:05, which is a rule similar to ARSD 64:26:02:06, requires a taxpayer to remit deficiencies caused by a federal adjustment regardless of any statute of limitations. *See, e.g.,* SDCL 10-59-16; *see also* Appellant Brief at 22-23. Citibank points out that in 2007, the Department accepted amended bank franchise tax returns from Citibank for the tax years 1993 through 1998. *See* Appellant Brief at 4. Those returns noted an increase in Citibank's federal taxable income based on federal adjustments, and Citibank submitted additional bank franchise taxes of approximately $4.29 million because of the increased income. *See id.*

Citibank argues the Department's acceptance of Citibank's amended returns, with additional bank franchise taxes, shows that ARSD 64:26:02:05 eliminates the statute of limitations if there has been a federal adjustment increasing a taxpayer's income. Citibank contends that because ARSD 64:26:02:05 and 64:26:02:06 are similar, they must be interpreted consistently. This argument, however, is without merit.

First, the interpretation of ARSD 64:26:02:05 is not at issue in this case and is therefore irrelevant. Second, much like ARSD 64:26:02:06, ARSD 64:26:02:05 is only a procedural rule requiring the taxpayer to file a supplementary return if the adjustment increased the taxpayer's income. Finally, the Department's action of accepting amended returns from Citibank does not prove that the Department required Citibank to pay the unsolicited additional tax regardless of any statute of limitations. Citibank, on its own volition, remitted additional tax. *See* AR 127 (SF ¶ 41). There is nothing in the record to indicate that the Department issued to Citibank a Notice of Intent to Audit for the tax

years 1993 through 1998 or that the Department issued a certificate of assessment for the tax remitted by Citibank with its amended returns. Rather, Citibank's motivation for doing so is unknown to the Department.

If Citibank remitted additional tax because it believed ARSD 64:26:02:05 required it even though an applicable statute of limitation may have shielded Citibank from liability, the most that can be said is that Citibank was mistaken as to the law. The Department had no obligation to discover a potential mistake of law and report it to Citibank. *See Sumner*, 71 Fed. Cl. at 629 (stating that "the IRS has no legal duty to discover overpayments and report them to taxpayers – despite its extensive databases and access to information"). And again, even if the Department intended to modify or create an exception to the applicable statute of limitations when promulgating ARSD 64:26:02:05, that rule would be invalid. *See Paul Nelson Farm*, 2014 S.D. 31, ¶ 24, ___ N.W.2d. ___.

6. Federal audits of large corporations do not justify ignoring the Legislature's enactment of the three-year statute of limitations.

Citibank argues that its right to obtain a refund should not be restricted by the three-year statute of limitations because audits of large corporations are often not concluded within three years. Appellant Brief at 13-14. However, because SDCL 10-59-19 unambiguously provides a three-year statute of limitations to claims for bank franchise tax refunds, the statute must be applied as expressed by the Legislature. *See supra* p. 7-9. Thus, Citibank's concern must be brought to the Legislature, rather than the courts.

> [A]s statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out. Thus, [i]f there are to be

> exceptions to the statute of limitations [in tax cases], it is for Congress rather than for the courts to create and limit them.

Webb v. United States, 66 F.3d 691, 695 (4th Cir. 1995) (quoting *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 302-03, 67 S. Ct. 271, 273-74 (1946) (internal quotation marks omitted) (second and third alteration in original). Footnote 11 in Citibank's brief, which highlights *statutes* of nine states that grant taxpayers additional time to file a refund claim upon a federal adjustment, confirms that state legislatures are the appropriate forum.[6] *See* Appellant Brief at 21-22 n.11.

Along those same lines, Citibank argues that because federal audits of large corporations take many years to complete, taxpayers will never be able to receive a refund based on a federal adjustment. *See* Appellant Brief at 14-15. Citibank points out that in 2012, within the three-year statute of limitations, it filed a refund claim and amended tax return for the 2008 tax year. *See* R. 34, 36 (APP. E, p.36). The refund claim indicated the amount of a federal income adjustment even though a federal audit was still ongoing. *See id.* Citibank asserts that the Department "denied" Citibank's

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6. By addressing concerns in the legislative forum, legislatures have the opportunity to enact comprehensive statutory schemes that remain consistent with the purpose of the statute of limitations in refund claim cases: to allow for state fiscal planning. For example, the legislatures of the states cited in Footnote 11 of Citibank's brief uphold that purpose by limiting the additional time granted to taxpayers. *See* Appellant Brief at 21-22 n.11; *see also* Ark. Code Ann. § 26-18-306(b)(3); Ind. Code § 6-8.1-9-1(f); Conn. Gen. Stat. Ann. §§ 12-727(b)(1), -732(b); Mich. Comp. Laws § 206.325(2); Minn. Stat. § 289A.38 Subd. 7-9; N.J. Stat. Ann. § 54:10A-13; N.M. Stat. §§ 7-1-13(C); N.Y. Tax Law § 1087(c); Tex. Tax Code Ann. § 111.206(d). On the other hand, Citibank's request for relief by the courts results in no limitation to the additional time that a taxpayer would have to file a refund claim based on a federal adjustment.

refund claim for the 2008 tax year because the Department required closing documents from the federal audit. *See* Appellant Brief at 7, 14.

Citibank misstates the Department's actions. The Department did not deny Citibank's claim. *See* R. 40 (APP.G, p. 38). Rather, the Department merely indicated in its April 12, 2013 letter that the claim would be processed upon the receipt of certain documents.[7] *See id.* Also, the Department points out that Citibank's refund claim indicating an estimate of the federal adjustment satisfied the purpose behind the statute of limitations by providing the State with notice to consider the potential refund in its fiscal planning. *Cf. supra* p. 9-12 (explaining the purposes of the statute of limitations for refund claims).

Furthermore, Citibank fails to recognize that it could have filed a supplementary return under ARSD 64:26:02:06 before the completion of the federal audit. ARSD 64:26:02:06 allows the filing of a supplementary return when a decrease occurs in the taxpayer's net income "because of audit and adjustment by the United States *or otherwise*." (Emphasis added.) Thus, because of the "or otherwise" language, the rule did not require completion of the federal audit in this case. *See id.* Here, Citibank changed its method of accounting, which resulted in it reporting and remitting tax twice on the same income. AR. 122-23 (SF ¶¶ 20-27 & n.14). At that time, Citibank was

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7. The Department notes that Citibank's September 28, 2012 refund claim for the 2008 tax year failed to indicate that the federal audit was not completed. *See* R. 36 (APP. E, p. 36). Additionally, a November 9, 2012 letter from Ocean Mizerik, Citibank's State Tax Director, implied that the federal audit was complete. *See* R. 50 (APP. F, p. 37) (indicating that Citibank "underwent a Federal audit" and "[t]he audit *resulted* in a reduction of federal taxable income[.]" (emphasis added)). Thus, the Department had no reason to believe that closing documents from the audit were not yet available to Citibank when the Department requested them in its April 12, 2013 letter. *See* R. 40 (APP. G, p. 38)

aware of the double reporting of certain fees and could have immediately filed a supplementary return pursuant to ARSD 64:26:02:06. Thus, Citibank's "Catch-22" argument must be rejected.

7. SDCL 10-59-19, and its application in this case, is constitutional.

Citibank contends that the Department's application of SDCL 10-59-19 is "unconstitutional, or, at the very least, raises significant constitutional questions[.]" *See* Appellant Brief at 23-25. Citibank specifically contends that the application of SDCL 10-59-19 violated Citibank's right to due process because it did not have a meaningful opportunity to obtain a refund for overpaid tax. *Id.* This argument is without merit.

First, the Supreme Court of the United States has verified the constitutionality of statutes of limitations for tax refund claims. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 44-45, 50, 110 S. Ct. 2238, 2254-55, 2257 (1990) (acknowledging that a state can "enforce relatively short statutes of limitations"); *see also Pourier*, 2003 S.D. 21, ¶ 54, 658 N.W.2d at 410 (Konenkamp, J., concurring in part and dissenting in part) ("[T]he United States Supreme Court has specifically authorized reasonable procedural limitations, including relatively short statutes of limitation applicable to tax refund claims.") (internal quotation marks omitted). *Cf. Jordan v. Dep't of Motor Vehicles*, 89 Cal. Rptr. 2d at 345 (stating that "[s]tates have a legitimate interest in sound fiscal planning and that interest is sufficient to allow states to use certain procedural safeguards against the disruptive effects of a tax scheme's invalidation when providing refunds, such as . . . enforcing a short statute of limitations"). Thus, the constitutionality of SDCL 10-59-19 has already been confirmed.

Further, as discussed above, ARSD 64:26:02:06 allowed Citibank to file a supplementary return upon knowing that it had paid tax twice on the same income. *See supra* p. 22-23. The Department's actions relating to Citibank's refund claim for the 2008 tax year confirm that in this case, Citibank could have filed a refund claim before completion of the federal audit. *See supra* p. 21-22. Therefore, the application of SDCL 10-59-19 does not violate Citibank's right to due process.

8. The three-year statute of limitations in SDCL 10-59-19 applies to bank franchise tax imposed by SDCL chapter 10-43 even though that tax is calculated using taxpayers' reported federal taxable income.

Citibank points out that SDCL chapter 10-43 imposing a bank franchise tax defines "taxable income" primarily by reference to a taxpayer's taxable income for federal income tax purposes.[8] *See* Appellant Brief at 3-4, 8-9; *see also* SDCL 10-43-2.1 (requiring that the tax be calculated using the taxpayer's "net income"), 10-43-10.1 ("Net income . . . is taxable income as defined in the Internal Revenue Code, as amended and in effect on January 1, 2013, and reportable for federal tax income purposes for the taxable year[.]"). Citibank argues that this incorporation of a taxpayer's federal taxable income justifies straying from the statute of limitations in SDCL 10-59-19 when there has been a federal adjustment to the taxpayer's federal taxable income. *See id*. However, even though SDCL chapter 10-43 imposes bank franchise tax based on taxpayers' reported federal taxable income, the Legislature clearly intended the statute of limitations in

8. Citibank's bank franchise tax for the tax years 1999 through 2002 was calculated in accordance with the "taxable income" definition in SDCL chapter 10-43 by using Citibank's reported federal taxable income for those years, with certain adjustments. AR. 119-20 (SF ¶¶ 12-13) (stating that Citibank timely filed its 1999 through 2002 state bank franchise income tax returns and its state taxable income "equaled its taxable income . . . as reported on the Federal Tax Returns, with certain adjustments.").

SDCL 10-59-19 to apply to SDCL chapter 10-43. *See* SDCL 10-59-1; 1986 S.D. Sess. Laws ch. 111, § 19. The Legislature created no exception to that statute of limitations if there is a federal adjustment to the taxpayer's federal taxable income outside of the limitation period. *See* SDCL 10-59-19. Therefore, the relationship between a taxpayer's federal taxable income and state bank franchise taxable income does not render the statute of limitations in SDCL 10-59-19 inapplicable.

9. Even if ARSD 64:26:02:06 is invalid, that rule does not constitute "written advice" under SDCL 10-59-27.

In its brief, Citibank contends that even if ARSD 64:26:02:06 is invalid, the invalid rule constitutes written advice by the Department and according to SDCL 10-59-27, Citibank is entitled to rely upon the Department's written advice. Appellant Brief at 12. The Department maintains that the rule is valid. Yet, Citibank's contention must fail even if the Court deems the rule invalid.

SDCL 10-59-27 only applies to the Department's written advice issued to a specific taxpayer. *See* SDCL 10-59-27 (providing that upon receipt of the Department's written advice, the taxpayer must retain a copy of the written advice in the taxpayer's business records). SDCL 10-59-27 has never been interpreted to permit taxpayers to rely upon rules deemed invalid. Additionally, SDCL 10-59-27 addresses written advice "concerning the taxability of transactions." Here, ARSD 64:26:02:06 only addresses the filing of a supplementary return and does not contain any advice relating to the taxability of any transaction. Therefore, the rule would not qualify as written advice that may be relied on by a taxpayer pursuant to SDCL 10-59-27.

10. Eliminating the statute of limitations for bank franchise tax refund claims when a federal adjustment results in a decrease in income would lead to an absurd result.

The Department finally highlights that under Citibank's proposition that the rule eliminates the statute of limitations for bank franchise tax refund claims involving federal adjustments, the Department would have no authority to require the taxpayer to bring its claim for overpaid taxes within a certain time period. However, under SDCL 10-43-55, any overpaid tax would continue to accrue interest at the rate of six percent per year since the date the tax was remitted. Thus, if Citibank's proposition is adopted, taxpayers could simply sit on downward income adjustments by the IRS indefinitely while the funds accrue interest at the six percent rate, and then, whenever they desire, make a withdrawal from the State's treasury.

This absurd result is evidenced by the substantial amount of interest potentially generated in this case. Here, Citibank's claim for refund sought the amount of $29,945,132 plus interest. Interest on Citibank's refund claim calculated at the statutorily prescribed six percent per year would add over $24.5 million in interest to date to Citibank's claim if it is not time barred. Therefore, it would be absurd to interpret ARSD 64:26:02:06 as permitting refund claims indefinitely.

ISSUE TWO: WHETHER THE CIRCUIT COURT CORRECTLY DECLINED TO CONSIDER AND, IN AN ALTERNATIVE RULING, CORRECTLY REJECTED CITIBANK'S EQUITABLE TOLLING ARGUMENT ON ITS MERITS.

Citibank argues that even if the three-year statute of limitations applies to its refund claim, the claim should be permitted because of equitable tolling. *See* Appellant Brief at 25-30. Citibank's argument must be rejected for three reasons.

A. Citibank waived an equitable tolling argument.

First, Citibank failed to raise equitable tolling at OHE and therefore, that argument is waived. It is crucial that all arguments are raised at the first instance rather than for the first time in an appellate court.

> To raise a legal argument on appeal in an answering brief without first addressing it below puts the adverse party at an extreme disadvantage. Had the issue been raised below, the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the [lower] court's consideration. Likewise, the [lower] court would have been made aware of the issue and given an opportunity to rule on it.

Hall v. State ex rel. S.D. Dep't of Transp., 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27. By failing to raise it at OHE, the Department was deprived of the opportunity to present evidence regarding the elements of equitable tolling, one of which is the factual inquiry of whether Citibank's conduct was reasonable and in good faith. *See infra* p. 29. Additionally, OHE was not given the opportunity to rule on the applicability of equitable tolling.[9] Therefore, the circuit court correctly ruled that Citibank's equitable tolling argument had been waived.

Citibank argues that it could not have raised equitable tolling at OHE because key evidence did not exist at that time. Citibank contends that the Department's April 2013 letter addressing Citibank's 2008 refund claim was critical in the equitable tolling issue

9. Citibank contends that "[t]here was no point in remanding to [OHE] for consideration of the equitable tolling argument" and contends that "in fact, the Department resisted remand" to OHE." *See* Appellant Brief at 27. However, neither the Department nor Citibank addressed whether the circuit court should remand for OHE to consider the applicability of equitable tolling. *See generally* July 22, 2013 motion hearing transcript (only discussing issue of remand in the context of the motion to supplement with additional evidence).

and that letter did not exist when the case was before OHE. *See* Appellant Brief at 26. However, nonexistent evidence at the time of the court proceeding is irrelevant in equitable tolling matters. Rather, any evidence supporting equitable tolling must have been present *before* the statute of limitations has expired. *See Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶ 15, 788 N.W.2d 822, 826 ("Equitable tolling permits a plaintiff to bring suit after the expiration of the statute of limitations when inequitable circumstances have prevented the plaintiff from timely initiating suit."); *Cf. Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814 (2005) (stating that an element of equitable tolling is that "some extraordinary circumstance stood in [a litigant's] way" of pursuing his or her rights).

Citibank's claim was time barred as of October 3, 2006. *See supra* p. 7-9. Citibank could not have relied on the Department's April 2013 letter regarding an unrelated refund claim when it failed to timely file its refund claim by October 3, 2006. Therefore, the unavailability of Department's letter when the proceeding was in front of OHE does not justify Citibank's delay in raising an equitable tolling argument.

B. Equitable tolling cannot restore a court's jurisdiction.

Second, Citibank's equitable tolling argument must be rejected because equitable tolling cannot resolve jurisdictional issues,[10] and SDCL 10-59-17 specifically makes compliance with the statute of limitations in SDCL 10-59-19 a prerequisite to a court's jurisdiction. The South Dakota Supreme Court has stated that "[w]here the making or

10. The Department notes that it is questionable whether the doctrine of equitable tolling can apply to civil actions. *See Anson v. Star Brite Inn Motel*, 2010 S.D. 73, ¶¶ 36-40, 788 N.W.2d 822, 831-32 (Konenkamp, J., concurring in result).

filing of a timely claim is jurisdictional it cannot be waived or avoided on equitable grounds such as by a waiver or an estoppel." *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 21, 689 N.W.2d at 202 (quoting *Klein v. Menke*, 83 S.D. 511, 517, 162 N.W.2d 219, 222 (1968)); *see also Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 500 (3d Cir. 1998) ("A limitation period is not subject to equitable tolling if it is jurisdictional in nature."). *Cf. Hill v. John Chezik Imps.*, 869 F.2d 1122, 1124 (8th Cir. 1989) (ruling that a limitation period was not jurisdictional and was "therefore[] subject to equitable tolling"). Thus, because Citibank did not file its claim before the statute of limitations expired, no court has jurisdiction and equitable tolling cannot apply.

C. Citibank does not satisfy the elements of equitable tolling.

The third and final reason that Citibank's equitable tolling argument must be rejected is because this case does not satisfy the requirements of equitable tolling. "[W]hen the facts are undisputed, . . . [the Court] will apply a de novo standard of review to the applicability of equitable tolling."[11] *Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 16, 689 N.W.2d at 201. For equitable tolling to apply, the plaintiff must prove "(a) a timely notice, (b) lack of prejudice to the defendant, and (c) reasonable and good-faith conduct on the part of the plaintiff." *See id.* ¶ 24, 689 N.W.2d at 202.

In this case, Citibank failed to satisfy any of the elements. First, there was no timely notice because Citibank did not notify the Department that it was seeking a refund

11. Facts relevant to equitable tolling were not completely developed before OHE because Citibank failed to present this argument at that stage. *See supra* p. 27-28. Citibank's failure to present this argument makes it impossible to determine the appropriate standard of review for the applicability of equitable tolling; ie. whether a de novo standard of review is appropriate because the relevant facts were undisputed. *See Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 16, 689 N.W.2d at 201.

for the 1999 through 2002 taxable years until March 2012 when Citibank submitted its refund claim. That March 2012 claim was Citibank's first notice to the Department that Citibank would be seeking such refund even though Citibank had known of its double inclusion of income since it had adjusted its accounting method in 2001. AR. 122-23 (SF ¶¶ 20-24 & n.14), 290.

Next, as evidenced by the accumulating interest totaling over $24.5 million to date that the Department would owe Citibank if Citibank's untimely claim were allowed, it prejudices the Department to allow Citibank to bring its refund claim over eight years after the returns were filed. Citibank argues that this financial burden should not be considered. *See* Appellant Brief at 29. However, South Dakota equitable tolling cases do not appear to bar this Court from considering the Department's financial burden. *See, e.g., Peterson v. Hohm*, 2000 S.D. 27, ¶¶ 16-18, 607 N.W.2d 8, 13-14; *Dakota Truck Underwriters,* 2004 S.D. 120, ¶¶ 19-31, 689 N.W.2d at 202-04*; Anson*, 2010 S.D. 73, ¶¶ 17-32, 788 N.W.2d at 826-30.

Finally, Citibank's failure to notify the Department of its double inclusion of income and the ongoing federal audit was not reasonable conduct, even if we assume it was in good faith. From 2002 through 2012, Citibank had signed ten consents to extend the federal statute of limitations during the federal audit process. AR. 118-19 (SF ¶ 9), 161-80. Yet, Citibank did nothing in regards to the state statute of limitations. AR. 119 (SF ¶¶ 10-11), Citibank failed to even inquire about the state statute of limitations or the course of conduct it should take to preserve its rights. Furthermore, Citibank was the party that changed its accounting method which resulted in the double inclusion of fees. *See* AR. 122-23 (SF ¶¶ 22, 24); *see also* Appellant Brief at 5 (indicating that the double

inclusion of income resulted because of Citibank's change in accounting method). Because of that change of accounting method, Citibank requested the IRS reduce its 1999 and 2000 income due to the double inclusion of certain fees. AR 122-23 (SF ¶¶ 20-26). Therefore, Citibank was not oblivious to the potential federal adjustments.[12] *See id.* Thus, Citibank failed to satisfy any of the elements of equitable tolling.

For all of these reasons, Citibank's argument that equitable tolling allows its refund claim must be rejected. This result is directly in line with *United States v. Brockamp*, 519 U.S. 347, 117 S. Ct. 849 (1997), in which the United States Supreme Court held that federal statute of limitations periods for federal tax refund claims cannot be equitably tolled. *Id.* at 354. Therefore, both state and federal law support the circuit court's decision that equitable tolling does not apply in this case.

CONCLUSION

Citibank's claim for refund lives or dies on whether the limitation period in SDCL 10-59-19 applies. In this case, SDCL 10-59-19 most certainly applies to Citibank's refund claim for bank franchise taxes and interest. Because Citibank's refund claim fails to comply with SDCL 10-59-19, the claim is time barred. Under SDCL 10-59-17, neither OHE nor any court has jurisdiction to hear Citibank's appeal. Therefore, OHE's grant of the Department's motion to dismiss should be upheld.

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12. As stated above, the IRS reduced Citibank's federal income for the years 1999, 2000, 2001, and 2002 by $789,426,457; $120,873,512; $10,357,119; and $14,054,954, respectively. AR. 125 (SF ¶ 32). Because the majority of the adjustments to Citibank's federal income were for the years 1999 and 2000, it appears that the issue of the double inclusion of certain fees was the main basis for the federal adjustment. *See supra* n.2 (stating that the change in accounting method shifted income initially recognized for the years 1999 and 2000 to the years 2001 and 2002).

Dated this 16th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements in SDCL 15-26A-66(b). This brief contains 9,311 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I have relied on the word count of Microsoft Word, which was used to prepare this brief.

Dated this 16th day of June, 2014.

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I, Andrew L. Fergel, hereby certify that on the 16th day of June, 2014, I electronically served a copy of the Department's Appellee Brief on the following:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 26933

Citibank, N.A.,

Petitioner and Appellant,

v..

South Dakota Department of Revenue,

Respondent and Appellee.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Susan M. Sabers

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Appellant Citibank, N.A., respectfully submits this reply brief in response to Appellee South Dakota Department of Revenue's (the "Department") brief.

ARGUMENT

Citibank's Refund Claim Was Timely Under the Statutorily Authorized Regulation Governing Refunds of Bank Franchise Taxes.

When Citibank's federal taxable income tax for taxable years 1999 through 2002 was decreased by the IRS in 2012, Citibank promptly filed supplemental bank franchise tax returns reflecting that decrease with the South Dakota Department of Revenue, as provided by ARSD 64:26:02:06. Stipulation ¶¶ 29, 33. Citibank also requested a refund in accordance with SDCL 10-43-55, which expressly provides for refunds of overpaid bank franchise tax under the procedure established by the Secretary. It is undisputed that, without a refund, Citibank would be subject to double tax on the same income in two different years.

The key issue in this appeal is whether ARSD 64:26:02:06 authorized the supplemental returns filed by Citibank in 2012. In order to provide a meaningful remedy to a taxpayer whose federal taxable income has been adjusted, ARSD 64:26:02:06—which is authorized by and implements SDCL 10-43-10.1, SDCL 10-43-42.1 and SDCL 10-43-55—carves out a limited exception to the three-year limitations period generally applicable to refund claims.

The Department's argument that ARSD 64:26:02:06 must be construed as subject to SDCL 10-59-19's general three-year limitations period is inconsistent with the plain language of ARSD 64:26:02:06 and disregards or misconstrues the specific bank franchise tax statutes that control this case.

ARSD 64:26:02:06 Gives Effect to the Legislative Mandate That Bank Franchise Tax Be Based on Federal Taxable Income.

ARSD 64:26:02:06 specifically implements the Legislative requirement that net income for bank franchise tax purposes be determined by reference to "the taxable income of the financial institution under the Internal Revenue Code." SDCL 10-43-10.1. When federal taxable income is adjusted, so is income for bank franchise tax purposes. The Department's attempt to cut off claims for refunds based on adjustments that occur after three years would result in bank franchise tax being assessed based on amounts *other than* the taxpayer's actual federal income, in contravention of SDCL 10-43-10.1.

Precisely to avoid that result, the Legislature in SDCL 10-43-55 directed the Secretary to promulgate rules providing for refunds based on adjustments to federal taxable income. By its plain terms, the rule promulgated by the Secretary pursuant to that delegation, ARSD 64:26:02:06, permits refunds of bank franchise taxes after an IRS adjustment regardless of whether the adjustment occurs—as it most commonly does—outside the general three-year limitations period of SDCL 10-59-19.

The corresponding rule that **requires** taxpayers to file supplemental returns based on upward adjustments of federal taxable income, ARSD 64:26:02:05, is similarly unrestricted by any timing limitation other than the occurrence of an adjustment. This reflects the reality that neither the State nor the taxpayer can control the timing of such adjustments. Both ARSD 64:26:02:06 and ARSD 64:26:02:05 identify SDCL 10-43-10.1 as an "implementing statute." The Secretary's specific reference to SDCL 10-43-10.1 in promulgating ARSD 64:26:02:06 makes clear that the regulation implements the statutory directive that bank franchise taxes be

based on federal taxable income, and provides a refund mechanism when that income is reduced, whenever it is reduced.

The Department mistakenly argues that ARSD 64:26:02:06 merely provides for the manner in which a taxpayer may seek a refund, not the timing for such a claim. (Department's Brief 13). As explained in Citibank's opening brief, this position would render ARSD 64:26:02:06 superfluous, because SDCL 10-59-17 and SDCL 10-59-19 already provide a mechanism for obtaining a refund for overpayment. (Citibank's Opening Brief 21). But more importantly, the Department's position that ARSD 64:26:02:06 has no bearing on when a claim may be brought is incorrect. The rule states that "*when* a the taxpayer has filed a return . . . *and* a subsequent decrease occurs . . . the taxpayer *may file* a supplementary return." ARSD 64:26:02:06 (emphasis added). The plain language conditions a refund claim upon the occurrence of the adjustment and, similarly, permits the refund claim ("the taxpayer may file") upon the occurrence of that adjustment. *Id.* The rule does not say that the taxpayer may seek a refund if the adjustment occurs within three years, or subject to the time limitations of SDCL 10-59-19. The procedure promulgated by the Secretary pursuant to the Legislature's delegation contains no such timing limitation – only the requirement that an adjustment that results in a change in tax under SDCL 10-43.10.1 must occur. The same is true for the obligation under ARSD 64:26:02:05 to file an amended return – and pay additional tax – based on an increase in federal taxable income as a result of an adjustment. That obligation is similarly not limited by any time restriction.[1]

[1] As Citibank has explained, in 2007, in accordance with ARSD 64:26:02:05, it filed a supplemental return based on an adjustment to taxable years 1993 to 1998 and paid additional tax. (Citibank's Opening Brief 22). The Department argues that ARSD 64:26:02:05 did not create any deficiency liability for Citibank, contending that the rule required only the supplemental return, and Citibank paid the additional taxes "on its own volition." (Department's Brief 19). But Citibank was not merely required to file the supplemental return; it was subject to *collection* as well. *See* SDCL 10-43-51.

Further, the Department's proposed construction of ARSD 64:26:02:06 would reduce the regulation to a largely empty gesture because adjustments to the federal taxable income of large banks are almost never made within three years. In virtually every case, the adjustment occurs more than three years after the returns are filed. The Legislature would not direct the Secretary to promulgate refund procedures that were essentially illusory.

In an apparent admission that some meaningful remedy is required, the Department argues that Citibank could have filed the supplemental return before completion of its federal audit. (Department's Brief 22). This argument is inconsistent with the plain language of the regulation, which authorizes a supplementary return "when" there is a decrease in income "because of audit and adjustment by the United States." ARSD 64:26:02:06. When, as here, a refund is claimed based on an adjustment by the United States, logically the adjustment must have "occurred." A prospective or requested adjustment, which might or might not be accepted by the IRS, is not a basis for a refund under the rule. (Citibank's Opening Brief 14-15).

The Department contends that Citibank could have sought a refund on an anticipatory basis because the rule recognizes reductions of income because of "adjustment by the United States *or otherwise.*" ARSD 64:26:02:06 (emphasis added). The fact that taxable income might "otherwise" be decreased – for example, because of a decrease in South Dakota-specific items on the tax return (*see* SDCL 10-43-10.2 and SDCL 10-43-10.3) – does not change the authorization to claim a refund "when" an "adjustment by the United States" occurs; nor does it mean that a taxpayer can claim a refund merely by asserting that its income has been reduced. The latter is evident from the Department's refusal to grant Citibank's claimed refund for 2008 on the basis that Citibank had not supplied documentation of a *final IRS adjustment*. App. 40. Simply put, a refund claim requires an adjustment by the United States.

SDCL 10-43-55 Specifically Authorized ARSD 64:26:02:06, Which Allows Bank Franchise Tax Refund Claims upon a Federal Adjustment.

The Department argues that the general statute of limitations in SDCL 10-59-19 severs the relationship established by SDCL 10-43-10.1 between the taxpayer's federal taxable income and the state bank franchise tax. (Department's Brief 24-25). This argument fails to account for the Legislature's delegation to the Secretary, in SDCL 10-43-55, of the authority to establish procedures for refunds when a taxpayer's federal taxable income is reduced as a result of adjustment by the IRS. Pursuant to that delegation, the Secretary validly promulgated ARSD 64:26:02:06, which permits taxpayers to claim a refund "when" an adjustment occurs, and even if – as is most commonly the case – more than three years have elapsed since the original return was filed.

The Department argues that, as an administrative rule, ARSD 64:26:02:06 cannot contravene the statutory limitations period of SDCL 10-59-19 (Department's Brief 17). The Department's position ignores, however, the specific *statutes* enacted by the Legislature that expressly delegated to the Secretary rulemaking authority with regard to bank franchise tax refunds. First, SDCL 10-43-42.1 broadly authorizes the Secretary to adopt rules pertaining to the bank franchise tax generally. Second, SDCL 10-43-55 specifically delegates to the Secretary the authority to promulgate the "procedure" governing claims for refunds of bank franchise taxes, which necessarily includes rules with respect to the timing of such claims.

The Department disputes that a delegation regarding "procedure" can affect the time for claiming a refund from the State, citing *In re Estate of Erdmann*, 447 N.W.2d 356 (S.D. 1989). But *Estate of Erdmann* merely held that, in suits against the State, satisfaction of the governing timeliness requirement is a jurisdictional requirement. At question in *Estate of Erdmann* was the construction of a limitations statute in SDCL Ch. 10-84 regarding claims for refunds of estate

taxes. The case says nothing about the interplay between a general statutory limitation period and a timely submitted claim under an administrative claims procedure, such as ARSD 64:26:02:06, established pursuant to statutory delegation of authority to provide specified relief.

The Department argues that, because SDCL 10-43-55 authorized the Secretary to promulgate "the procedure" for claiming refunds of bank franchise taxes, ARSD 64:26:02:06 cannot establish the time period for asserting a refund claim (Department's Brief 15). "Procedure," however, is certainly broad enough to encompass matters of timing. Indeed, the Department argues that the "procedure" with which a taxpayer must comply in seeking a refund under SDCL 10-59-17 includes *the timing requirements* of SDCL 10-59-19.[2] (Department's Brief 7). The Secretary did not exceed his authority delegated by SDCL 10-43-55 to promulgate the "procedure" for refund claims by delimiting "when" such a claim may be brought. *See supra* p. 5; *Charles A. Beard Classroom Teachers Ass'n v. Bd. of Sch. Trustees of the Charles A. Beard Memorial Sch. Corp.*, 668 N.E.2d 1222, 1225-26 (Ind. 1996) (holding that state agency's extension of statutory 15-day deadline that was a jurisdictional requirement for filing an unfair labor practice complaint was valid exercise of delegated authority where extension effectuated statutory purpose); *see also Pourier v. S.D. Dept. of Revenue*, 674 N.W.2d 314, 316 (S.D. 2004) (holding that statutes of limitations can be a reasonable "procedural" limitation so long as a "clear and certain" remedy is provided).[3]

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[2] SDCL 10-59-17 provides (emphasis added): "Compliance with *procedures* prerequisite to jurisdiction of courts. A taxpayer seeking recovery of tax, penalty, or interest imposed by the chapters set out in § 10-59-1 shall follow the *procedure* established in this chapter. No court has jurisdiction of a suit to recover such taxes, penalty, or interest unless the taxpayer seeking the recovery of tax complies with the provisions of this chapter."

[3] Insofar as the Department argues that 64:26:02:06 is invalid, its argument is improper under SDCL 10-59-27, which enables a taxpayer to rely on the Department's written advice. The Department argues that "SDCL 10-59-27 has never been interpreted to permit taxpayers to rely upon rules deemed invalid," but the right to rely is not qualified by a requirement that the written advice be consistent with the law. If it were, SDCL 10-59-27 would be unnecessary. Although by its terms SDCL 10-59-27 applies to advice regarding a transaction, it should apply with equal force here, where Citibank relied upon ARSD 64:26:02:06 in filing its supplemental return "when" its

The Department argues based on *Ernst & Young* that the general three-year limitations period of SDCL 10-59-19 necessarily applies here because ARSD 64:26:02:06 contains no limitations period. (Department's Brief 18). As discussed in Citibank's opening brief, however, the Department's argument is based on a misreading of this Court's decision in the case. (Citibank's Opening Brief 19). In *Ernst & Young*, the refund claim was untimely under *both* the sales tax statute invoked by the taxpayer and under SDCL 10-59-19. Nothing in *Ernst & Young* suggests that, even if the taxpayer's claim was authorized under the specific sales tax provision at issue (SDCL 10-45-29), the claim would also need to be timely under SDCL 10-59-19.

In the discussion from *Ernst & Young* selectively quoted by the Department's brief, the Court was rejecting the taxpayer's argument that SDCL 10-59-17 governed its claim instead of SDCL 10-59-19. The Court explained that the Legislature intended those statutes to function together, and therefore the absence of a limitations period in SDCL 10-59-17 should yield to SDCL 10-59-19's more specific provision as to the timing requirement generally applicable to refund claims. Here, Citibank acknowledges that SDCL 10-59-17 and SDCL 10-59-19 generally operate together to provide the framework for refund claims, but has argued that the statutes and regulations governing bank franchise tax refund claims more specifically provide that a refund claim based upon a federal adjustment may be filed *when that adjustment occurs*, even if outside the general three-year limitation period in SDCL 10-59-19.[4] In this context, the absence of a limitations period can hardly be a basis for ascribing one to it.

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income was decreased "because of audit and adjustment by the United States." Additionally, regulations have full effect of law. *See Feltrop v. S.D. Dep't of Soc. Servs.*, 1997 SD 13, ¶ 5, 559 N.W.2d 883, 884.

[4] Contrary to the Department's assertion, Citibank is not arguing "that an administrative rule can prevail over a statute" (Department's Brief 17); it is the specific set of bank franchise tax statutes and regulations (SDCL 10-43-10.1, 10-43-42.1, SDCL 10-43-55, and ARSD 64:26:02:06) that takes precedence. Accordingly, the cases cited by the Department on pages 15-16 of its brief are inapposite.

The Department argues that because ARSD 64:26:02:06 states that it "implements" SDCL 10-59-19, it should be construed as subject to the three-year limitations period (Department's Brief 13), but the Department disregards the other statutes implemented by the regulation which require conformity with federal taxable income (*see*, *supra*, at 1-3). The reference in ARSD 64:26:02:06 to SDCL 10-59-19 can only reflect the recognition that the regulation affects the applicability of the three-year limitations period when the federal adjustment occurs more than three years after the original return is filed.

The Department's argument that SDCL 10-59-19 is a limitation period on claims against the State that accordingly must be "strictly construed" is misplaced because the issue here is not whether to construe SDCL 10-59-19 liberally or strictly. Citibank's claim is timely because it meets all the requirements of the procedure promulgated by the Secretary in ARSD 64:26:02:06 pursuant to the statutory delegation by the Legislature in SDCL 10-43-55. None of the cases cited by the Department in support of its strict construction argument involved a situation where, as here, the administrative authority had promulgated rules permitting the claim asserted by the plaintiff.[5] Because Citibank complied with those rules, its refund claim did not violate the

[5] Department's Brief (8) citing the following cases: *Dakota Truck Underwriters v. S.D. Subsequent Injury Fund*, 2004 S.D. 120, 689 N.W. 196 (Department cites dissenting opinion for proposition that statutes of limitations for suits against the government are strictly construed, but majority held that plaintiffs complied with an amendment to the applicable law giving rise to their claim and doctrine of equitable tolling applied); *Krieger v. United States*, 539 F.2d 317 (3d Cir. 1976) (undisputed that the taxpayer filed for a refund of federal income taxes after the limitations period expired; no other statute or regulation at issue); *Soriano v. United States*, 352 U.S. 270 (1957) (plaintiff failed to timely file complaint in Court of Claims after denial of same claim by U.S. Army Claims Service, arguing that limitations period should have begun to run from exhaustion of administrative remedy; Supreme Court held that statute did not impose a requirement to exhaust administrative remedies and therefore claim was untimely); *Tosello v. United States*, 210 F.3d 1125 (9th Cir. 2000) (taxpayer filed claim in district court seeking refund for tax years 15-20 years prior to claim (additional payments were made with respect to those years, 1975-1977 and 1979, under agreement with IRS to extend limitations period for audit of another year, 1984); court held that statute providing for refund suits did not permit the claim with respect to 1975-77 and 1979); *Sumner v. United States*, 71 Fed. Cl. 627 (Fed. Cl. 2006) (taxpayer made same mistake on returns from 2000 to 2003, and sought refund for all years in 2005; undisputed that limitations period expired for 2000-2001, and "fairness" argument was unavailing); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988) (primary issue was when cause of action accrued to determine when limitations period began to run in suit by Indian tribe against federal government following termination of trust relationship; claim was time-barred).

procedures of SDCL Ch. 10-59, and thus, no court is deprived of jurisdiction under SDCL 10-59-17.

Finally, Citibank's position is supported by the principle that courts should avoid construing a rule in a manner that creates a constitutional question. Taxation of the same income twice without a mechanism to remedy that result raises a constitutional issue, and the provisions at issue here should be interpreted to avoid that result. The Department's response that "statutes of limitations for tax refund claims are Constitutional" (Department's Brief 23) is a non sequitur that fails to rebut Citibank's argument that the State must provide a meaningful remedy. *See* Citibank's Opening Brief 23-24 (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)). There is no meaningful remedy if, as the Department argues, Citibank has no remedy for the double-taxation of the same income in different years.

Giving Effect to ARSD 64:26:02:06 Would Not Frustrate the Rationale Behind Statutes of Limitations or Lead to Absurd Results.

The Department argues that statutes of limitation protect the State's ability to engage in sound fiscal planning, which justifies its interpretation of the rules.[6] (Department's Brief 9-11). As this Court has recognized, the State's budgetary concerns do not override the judiciary's obligation to enforce the law irrespective of the negative impact on the State's revenue. *See Tracfone Wireless, Inc. v. S.D. Dep't of Rev. & Reg.*, 2010 S.D. 6, ¶ 20, 778 N.W.2d 130, 136-37; *Poppen v. Walker*, 520 N.W.2d 238, 249 (1994). Moreover, as Citibank noted in its opening brief, many other states also provide for refunds based on federal adjustments outside the standard limitations period (Citibank's Opening Brief 21), without undue negative consequences

[6] The Department's concerns about the effect of the refund on the State's fiscal planning ability is illusory. Nowhere does the Department indicate how it would have planned for a $30 million refund when an unknown adjustment occurs within the three-year limitations period. There is no greater ability to plan for this refund three years later than there is ten years later because the State is not aware of the adjustment in federal income taxes that causes the corresponding adjustment in the bank franchise tax until it occurs.

to the State's fiscal planning. After all, a refund in these circumstances simply reverses a financial windfall under the bank franchise tax that the State never intended.

Here, under SDCL 10-43-55, the Legislature authorized a procedure for a refund not bounded by SDCL 10-59-19, and the Secretary promulgated procedures consistent with the Legislature's intent that net income for bank franchise tax purposes be based on taxable income for U.S. federal income tax purposes. The Legislature struck the balance between fiscal planning and refunding excess bank franchise tax in favor of refunds, and it is not for the courts to second guess that judgment.

The Department also argues that statutes of limitation prevent surprise claims after the relevant evidence has disappeared, memories have faded, or records have been purged, which it claims are generally purged six years after the original return is filed. (Department's Brief 11-12). The Department makes no claim, however, that any evidence was lost in this case. Nor could it make such a claim in any other case seeking a refund based on a federal adjustment, because the basis for the taxpayer's claim is simply the new federal adjustment, which by definition is a recent development. None of the "stale evidence" concerns cited by the Department are pertinent in the context of bank franchise tax refunds due to late federal adjustments. Indeed, here, the entire record is *stipulated*.

The Department next claims that SDCL 10-59-19's limitations period applies because allowing Citibank's claim to proceed would "lead to absurd results," because taxpayers could sit on downward adjustments, accruing interest indefinitely at the statutory rate. (Department's Brief 26). That concern is not implicated here, where Citibank promptly filed its supplemental return within 60 days of receiving notice of the IRS's final determination (Stipulation ¶¶ 29, 33) and the Department concedes that it would not have paid a refund until the final federal

adjustment, even if Citibank had made a claim within the general three-year limitations period. Nor is it a concern in other cases because laches limit a taxpayer's ability to delay its claim after a decrease in federal taxable income has been determined. *See, e.g., Wehrkamp v. Wehrkamp*, 2009 S.D. 84, ¶ 10, 773 N.W.2d 212, 216 (laches is an equitable remedy that applies when the claimant "(1) had full knowledge of the facts upon which the action was based, (2) regardless of this knowledge, . . . engaged in an unreasonable delay before seeking relief in court, and (3) . . . it would be prejudicial [to the defendant] to proceed").

The Equitable Tolling Doctrine Should Apply.

The Court May Consider the Equitable Tolling Doctrine.

As discussed in Citibank's Opening Brief, this Court may consider Citibank's equitable tolling argument because injustice would otherwise result and the Department is in no way disadvantaged as a result of the issue not being presented at the administrative level. (Citibank's Opening Brief 25-27). The Department does not dispute that an injustice would result from Citibank's being taxed on the same income twice without any mechanism to obtain a refund.

The Department nevertheless asserts that Citibank waived its equitable tolling argument by not seeking relief from the Office on that basis. But as Citibank explained in its opening brief, the application of the equitable tolling doctrine is a pure question of law which this Court is free to reach even though it was not argued before the Office. (Citibank's Opening Brief 25-27). Nor is the Department correct in arguing that the April 2013 letter is irrelevant because it did not exist until after the three-year limitations period had run. (Department's Brief 27-28). As Citibank has explained, that letter confirms Citibank's argument that, under SDCL 10-43-55 and ARSD 64:26:02:06, it would have been futile for Citibank to file a supplementary return before its final federal adjustment occurs – and, similarly, that it was reasonable of Citibank to file its supplementary return and seek a refund when its income was adjusted by the IRS – facts

relevant to its entitlement to equitable tolling. *See Dakota Truck Underwriters*, 2004 S.D. 120, ¶ 27 ("the law does not require a useless act").

Finally, the Department states that, because Citibank did not argue equitable tolling before the Office, the Department "was deprived of the opportunity to present evidence regarding the elements of equitable tolling, one of which is the factual inquiry of whether Citibank's conduct was reasonable and in good faith" (Department's Brief 27), but the Department describes no evidence that it would have sought to present before the Office.

There is No Jurisdictional Bar to Equitable Tolling.

The Department asserts that Citibank's equitable tolling argument should not be considered because "equitable tolling cannot resolve jurisdictional issues." (Department's Brief 28). None of the South Dakota cases cited by the Department, however, refused to consider equitable tolling claims on the grounds that the limitations periods at issue were jurisdictional. To the contrary, in *Dakota Truck Underwriters*, this Court noted that jurisdictional prerequisites "cannot be waived or avoided on equitable grounds such as *by a waiver or an estoppel*" but nevertheless applied *equitable tolling* principles to *permit* claims outside the relevant limitations period. 2004 S.D. 120, ¶ 21 (emphasis added). *See also Klein v. Menke*, 162 N.W.2d 219, 222 (S.D. 1968) (noting that limitations periods may be "jurisdictional" where essential to compensation, but nevertheless considering equitable tolling). Similarly, in *AEG Processing Center No. 58, Inc. v. S.D. Dep't of Revenue*, 2013 S.D. 75, this Court considered an equitable tolling argument asserted by a taxpayer that had sought to appeal from a decision by the Department without first meeting the jurisdictional requirement of paying the tax due or posting bond within thirty days before appealing. *Id.* ¶¶ 24-26. The Court thus may similarly entertain

Citibank's equitable tolling argument without regard to whether compliance with the limitations period is "jurisdictional."[7]

Citibank Satisfies the Elements of the Equitable Tolling Doctrine.

As Citibank demonstrated in its opening brief, all elements necessary to establish equitable tolling are present here. The Department argues that tolling should be disallowed because Citibank's refund request in March 2012 was untimely notice. It is, however, undisputed that Citibank's claim was filed within sixty days of its receipt of a final federal adjustment letter. This Court has treated similarly prompt notice once a claim is available as sufficiently timely to warrant equitable tolling. *Dakota Truck Underwriters*, 2004 S.D. 120.

In *Dakota Truck Underwriters*, the plaintiffs filed a claim promptly after the enactment of statutory amendments that revived their claims. They had not filed a protective claim within the prescribed statutory period or provided any other type of notice that they intended to pursue claims which, prior to the amendment, they had no vested right to assert. Like the claimant in *Dakota Truck Underwriters*, Citibank promptly filed its refund claim upon confirmation of the final federal adjustment that gave rise to its entitlement to a refund. The Department cites no contrary authority, nor does it offer any alternative interpretation of *Dakota Truck Underwriters*, under which Citibank's notice would not be timely.

Second, there is no prejudice to the Department from equitable tolling. The Department argues that it would be prejudiced by having to pay interest, but as noted in Citibank's Opening Brief, that ignores the fact that the State has had the benefit of Citibank's excess tax payments

[7] Insofar as the federal cases cited by the Department state that limitations periods that are jurisdictional are not subject to equitable tolling, they are inconsistent with the Supreme Court of South Dakota's holding in *Dakota Truck Underwriters*. The Department cites Justice Konenkamp's concurrence in *Anson v. Star Brite Inn Motel*, 2010 SD 73, to question whether equitable tolling applies to civil actions. If anything, that concurrence supports the application of equitable tolling here. The concurrence notes that the Court applied equitable tolling in *Dakota Truck Underwriters*, an action to recover payments made to the State; precisely the same rationale supports equitable tolling here. *Id.* at ¶ 39.

for the past decade. Moreover, regardless of the interest that has accrued, the primary amount at issue in this case is the approximately $30 million in overpaid taxes – the Department amounts no argument that it would be financially prejudiced by having to refund this amount years after the general limitations period has lapsed. Indeed, the State would face the same financial burden with respect to interest if the Department's own manufactured version of ARSD 64:26:02:06 applied, because even under that approach (allowing a claim in anticipation of a decrease to income), the Department concedes it would not have paid a refund until the final federal adjustment.

Finally, the Department fails to rebut Citibank's showing that it proceeded reasonably and in good faith. The Department's only argument that Citibank failed to meet this standard is that Citibank did not provide the Department with notice that it had agreed to extend the federal statute of limitations or had changed its method of accounting. Nothing in ARSD 64:26:02:06, however, requires any notice to the Department of extensions of the federal limitations period or the potential for a downward federal adjustment; indeed, any such notice would have been premature, as demonstrated by the Department's own conduct with respect to Citibank's 2008 refund claim. The Department does not concede that notice would suffice to toll the limitations period, and as this Court held in approving the tolling of claims in *Dakota Truck Underwriters*, "the law does not require a useless act." 2004 S.D. 120, ¶ 27.

Equitable tolling provides relief where a party is prevented from seeking a remedy in a timely fashion as a result of circumstances "truly beyond the control" of the party. *Id.* ¶ 20. Citibank had no ability to control the timing of the federal audit, or to require the Department to process a refund claim prior to the final federal adjustment required by ARSD 64:26:02:06. *Id.* (equitable tolling available where "a party acts diligently, 'only to find himself caught up in an

arcane procedural snare'") (internal citations omitted); c*f. AEG Processing Center,* 2013 S.D. 75, ¶ 26 (plaintiff did not act reasonably because it had "exclusive control" over filing a bond within the limitations period to preserve its claim).

Equitable tolling is appropriate here because, like the claimant in *Dakota Truck Underwriters*, Citibank was incapable of asserting its claim during the limitations period, and it proceeded diligently with its claim as soon as it was able to do so. This is precisely the type of situation to be addressed by the remedy of equitable tolling.

CONCLUSION

For all of the reasons stated herein, Citibank respectfully requests that the Court reverse the Decision and enter an order granting Citibank's motion for summary judgment.

Dated this 7th day of July, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents and Table of Authorities, and certificate of counsel, this brief contains 4,980 words as counted by Microsoft Word.

/s *Jason R. Sutton*
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CERTIFICATE OF SERVICE

I, Jason R. Sutton, hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P. and that on the 7th day of July 2014, a true and correct copy of the foregoing was served was served electronically upon;

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