NO. CV 06 4012046S	:	SUPERIOR COURT
ACHILLION PHARMACEUTICALS, INC.	:	TAX SESSION
	:	JUDICIAL DISTRICT OF
v.		
	:	NEW BRITAIN
PAM LAW, COMMISSIONER OF REVENUE SERVICES	:	FEBRUARY 7, 2008

MEMORANDUM OF DECISION

As a result of cross-motions for summary judgment in the above entitled case, the court issued a memorandum of decision (MOD) dated May 31, 2007, concerning the proper interpretation of General Statutes § 12-217ee (the Exchange Statute) as applied to the plaintiff's claim for the remaining two-thirds of its 2003 rolling research and development (R&D) credits in 2004. The court, in construing the meaning of the Exchange Statute, concluded that there was insufficient facts presented to the court from which to implement the court's construction of the applicable statutes.

As the court noted in its MOD, the issue in this case is whether, in the year 2004, Achillion was entitled to obtain a cash refund of the two-thirds balance of a tax credit created by General Statutes § 12-217n, for rolling R&D expenses incurred in 2003, subject to certain conditions, as may be authorized by § 12-217ee.

In order for Achillion to be entitled to a cash refund of the rolling R&D tax credits earned in 2003 but carried over to 2004, the court, in its MOD, p. 9, set forth the following criteria to be considered under the Exchange Statute, § 12-217ee:

(1) the plaintiff must be entitled to a rolling R&D tax credit pursuant to § 12-117n;

(2) the plaintiff must use the "full amount of all allowable credits carried forward to such year from any prior income year" pursuant to § 12-117n (d) (4);

(3) the plaintiff is limited to one-third of the rolling R&D tax credit in any one year; and

(4) the plaintiff must have no tax liability in the year it seeks a cash refund.

The parties have entered into the following stipulation of facts, as recited in the joint stipulation of facts, dated November 21, 2007:

"12. The parties agree that the Plaintiff had available to it in taxable year 2004 a carryforward in the amount of $90,387 that was earned under Conn. Gen. Stat. § 12-217n ("Rolling Tax Credit") in taxable year 2001.

"13. The parties agree that the 2001 Rolling Tax Credit carryforward in the amount of $90,837 represents the remaining two-thirds of the Plaintiff's 2001 Rolling Tax Credit.

"14. The parties agree that the Plaintiff had available to it in taxable year 2004 a carryforward of a Rolling Tax Credit in the amount of $230,129 that was earned in taxable year 2002.

"15. The parties agree that the 2002 Rolling Tax Credit carryforward in the amount of $230,129 represents the remaining two-thirds of the Plaintiff's 2002 Rolling Tax Credit.

"16. The parties agree that the Plaintiff had available to it in taxable year 2004 a carryforward of a Rolling Tax Credit in the amount of $429,335 that was earned in taxable year 2003.

"17. The parties agree that the 2003 Rolling Tax Credit carryforward in the amount of $429,335 represents the remaining two-thirds of the Plaintiff's 2003 Rolling Tax Credit."[1]

Achillion accumulated, as of the tax year of 2004, a total rolling tax credit of $750,301 for the tax years of 2001, 2002 and 2003.

Having sought and received a cash refund of one-third of the rolling tax credits in the tax years of 2001, 2002 and 2003, Achillion now seeks to apply for and receive from the commissioner the remaining two-thirds balance of the 2003 rolling tax credits of $429,335 in 2004 under the Exchange Statute.

Achillion and the commissioner raise conflicting interpretations of § 12-217ee, the Exchange Statute, arising from the imposition of a business tax on corporations doing business in Connecticut pursuant to Part I, Imposition and Payment of Tax under Chapter 208, the Corporation Business Tax.

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[1] Footnote eight to paragraph 17 recites: "In taxable year 2003, the total amount of the tentative credit claimed by the Plaintiff was $644,002. In taxable year 2003, the Plaintiff applied to exchange for refund one-third of said tentative credit, or $214,667, and was issued a refund by the Department in the amount of $139,533 ($214,667 x .65 = $139,533). The remaining two-thirds of said tentative credit, or $429,335, was carried forward pursuant to Conn. Gen. Stat. § 12-217n (d) (4)."

In order to understand the legislative scheme in providing for and in the operation of tax credits, a survey of statutes providing for tax credits is useful to determine how these tax credits interact with each other.

The legislature enacted "nineteen separate statutes that provide tax credits for various activities." Bell Atlantic NYNEX Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 240, 259, 869 A.2d 611 (2005).[2]

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[2] The nineteen types of business tax credits noted in Bell Atlantic NYNEX are contained in the present list of statutory tax credits as follows:

§§ 12-217a and 12-217b. Tax credits for expenditures for water pollution abatement facilities.

§§ 12-217c and 12-217d. Tax credit for expenditures for air pollution abatement facilities and individual waste treatment facilities.

§ 12-217e. Tax credits for certain manufacturing and service facilities as provided under §§ 32-9p and 32-9r.

§ 12-217f. Tax credit for employers participating in certain state-approved programs combining high school study and part-time employment.

§ 12-217g. Tax credits for apprenticeship training in manufacturing, construction and plastics-related trades.

§ 12-217i. Tax credits for investments in vehicles powered by clean alternative fuels or electricity, for construction of or improvements to alternative fuel filling stations and for converting motor vehicles to utilize alternative fuels.

§ 12-217j. Tax credit for research and experimental expenditures.

§ 12-217*l*. Tax credit for expenditures for grants to institutions of higher education for

research and development related to technological advancements.

§ 12-217n. Rolling tax credit for research and development expenses.

§ 12-217o. Tax credit for machinery and equipment expenditures.

§ 12-217s. Tax credit for expenditures related to traffic reduction programs.

§ 12-217t. Tax credit for personal property taxes paid on electronic data processing equipment.

§ 12-217u. Tax credit for financial institutions constructing new facilities and creating new jobs.

§ 12-217v. Tax credit for qualifying corporations in enterprise zones.

§ 12-217w. Tax credit for investment in fixed capital.

§ 12-217x. Tax credit for human capital investment.

§ 12-217y. Tax credit for employing persons who are receiving benefits from the temporary family assistance program.

§ 12-217aa. Order of credits.

§ 12-217bb. Tax credit for electric suppliers hiring displaced workers.

§ 12-217cc. Tax credit for certain small businesses obtaining financing from federal Small Business Administration.

§ 12-217dd. Tax credit for donation of open space.

§ 12-217ee. Refund of unused credits under §§ 12-217j and 12-217n.

§ 12-217ff. Tax credit for donation of land for educational use.

§ 12-217gg. Tax credit for employment expansion project.

The operative statutory sections that apply in this case are as follows:

Section 12-217zz provides an overarching requirement that "[n]otwithstanding any other provision of law, the amount of tax credit or credits otherwise allowable against the tax imposed under this chapter for any income year shall not exceed seventy per cent of the amount of tax due from such taxpayer under this chapter with respect to such income year of the taxpayer prior to the application of such credit or credits."

Section 12-217aa regarding the order of credits provides that "(a) Except as otherwise provided in section 12-217t [tax credit for personal property taxes paid on electronic data processing equipment], whenever a company is eligible to claim more than one corporation business tax credit, the credits shall be claimed for the income year in the following order: (1) Any credit that may be carried backward to a preceding income year or years shall first be claimed (A) with any credit carry-back that will expire first being claimed before any credit carry-back that will expire later or will not expire at all, and (B) if the credit carry-backs will expire at the same time, in the order in which the company may receive the maximum benefit; (2) any credit that may not be carried backward to a preceding income year or years and that may not be carried forward to a succeeding income year or years shall next be claimed, in the order in which the company may receive the maximum benefit; and (3) any credit that maybe carried forward to a succeeding income year or years shall next be claimed (A) with any credit carry-forward that will expire first being claimed before any credit carry-forward that will expire later or will not expire at all, and (B) if the credit carry-forwards will expire at the same time, in the order in which the company may receive the maximum benefit."

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§ 12-217hh. Tax credit for hiring displaced worker.

§ 12-217ii. Jobs creation tax credit program.

§ 12-217jj. Film production tax credit.

§ 12-217zz. Limit on credits under this chapter.

The obvious purpose of § 12-217aa is to require the taxpayer to use tax credits that will expire first, whether the credit is a carryback or a carryforward, so that the taxpayer may obtain the maximum tax benefit available. Although other subsections of § 12-217 have restrictive time limitations, § 12-117n (d) (4) has no time limitation on when the credit can be taken. This subsection merely recites that the "[c]redits that are allowed under this section but that exceed the amount permitted to be taken in an income year by reason of subdivision (1), (2) or (3) of this subsection, shall be carried forward to each of the successive income years until such credits . . . are fully taken."

It appears that the legislature crafted each tax credit under the corporate business tax so that there is no commonality to the language in each tax credit statute. For example, the following statutory sections show how the legislature provided for the use of tax credits and when the credits will expire. See § 12-217j (b) (1) (credit allowed for research and experimental expenditures) reciting that "[i]n no case shall a credit, or any portion of a credit, that is not used by a taxpayer be carried forward for a period of more than fifteen years." Also see § 12-217j (b) (2) (A) reciting that "[i]n no case shall a credit, or any portion of a credit, that is not used by a biotechnology company be carried forward for a period of more than fifteen years."

Furthermore, § 12-217u (f) (1) provides that "[t]he credit allowed under this subsection may be claimed each year for five consecutive income years beginning with

the tenth income year after the initial qualified year" and § 12-217v (b) provides that "[t]here shall be allowed as a credit against the tax imposed on any corporation under this chapter . . . in an amount equal to (1) one hundred per cent of the tax liability of the corporation under said chapter with respect to the first three taxable years of the corporation and (2) fifty per cent of the tax liability of the corporation under this chapter with respect to the next seven taxable years of the corporation."

Section 12-217n, the creation statute of the rolling tax credit for R&D expenses, provides as follows:

> "(a) There shall be allowed as a credit against the tax imposed by this chapter the amount determined under subsection (c) of this section in respect of the research and development expenses paid or incurred during any income year, subject to the limitations of this section."

The following items limit the allowance of a tax credit for R&D expenses as created by § 12-217n:

- R&D expenses are limited to those expenses deductible under § 174 of the Internal Revenue Code (IRC)[3] and such expenditures have not been funded by any person or governmental agency. See § 12-217n (b) (1).

- The taxpayer must be a qualified small business with a gross income for the previous income year not exceeding one hundred million dollars and has not

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[3] IRC § 174 provides as follows: "Research and Experimental Expenditures. (a) Treatment as Expenses – (1) In General – A taxpayer may treat research or experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction."

met the commissioner's gross income test through transactions with a related person. See § 12-217n (b) (4) (A)-(B).

- The tentative credit, in any income year, shall be limited to an amount of 6% of such research and development expenses. See § 12-217n (c) (1).

- "No more than one-third of the amount of the credit allowable for any income year may be included in the calculation of the amount of the credit that may be taken in that income year." See § 12-217n (d) (2).

The problem with this case is that Achillion is dealing with two different statutes. Section 12-217n creates a tax credit based on R&D expenses incurred by a qualified small business. Section 12-217ee allows a qualified small business to cash in the tax credit created under § 12-217n, all be it for a reduced amount, if the business is unable to use the tax credit because it has no tax liability to offset it.

The legislature provided that where a company earns a tax credit under § 12-217n and cannot use the tax credit because the company has no tax liability from which to offset the tax credit, the company need not wait until some future time when it will have a tax liability from which to deduct the R&D credit, but may cash in the tax credit earned under § 12-217n and receive an immediate reduced benefit for the tax credit.

There does not appear to be any intention on the part of the legislature to have § 12-217ee override the provisions of § 12-217n as argued by the plaintiff. Since § 12-217ee only refers to tax credits generated under § 12-217t and § 12-217n, it would appear

that the Exchange Statute, § 12-217ee, was not enacted to allow the cashing in of tax credits under any other statute.

Achillion centers its argument on the Exchange Statute, § 12-217ee, overriding the provisions of the tax credit provided for in § 12-217n so that the provision in subsection (d) (2) therein, providing that no more than one-third of the credit can be used in any one income year, would not prevent Achillion from using the balance of its two-thirds tax credit in year 2004. However, there appears to be nothing in the Exchange Statute that would override the provisions of § 12-217n, the creation statute. The purpose of the Exchange Statute is to implement the creation statute so that a company may obtain a use of the tax credit when it did not have any tax liability.

In addition, it appears that the legislature had in mind a fiscal responsibility that would place a limit on the use of tax credits so that credits would be spread out and the total amount taken would not have a detrimental impact on the overall collection of taxes by the state. It appears from various statutory provisions providing for tax credits that tax benefits should not be taken all at once, but spread over a period of time.

As an example, § 12-217n limits the amount of tax credits that can be taken in any one year to one-third of the total credits. Section 12-217n (c) (1)-(2) places a dollar limit on the amount of a tax credit that may be taken. The order of credits provided for in § 12-217aa restricts the tax credit to be taken by requiring the taxpayer to use prior tax credits earned before the taxpayer may use current tax credits. Finally, § 12-217zz places a ceiling "not [to] exceed seventy per cent of the amount of tax due from such taxpayer

under this chapter with respect to such income year of the taxpayer prior to the application of such credit or credits."

If, as Achillion argues, the provisions of § 12-217ee override the limiting factors in § 12-217n, it would be necessary for the court to read into the language of the Exchange Statute a provision that the limitations recited in the creation statute should be disregarded for the purpose of the Exchange Statute, or language to the effect that the provisions of the Exchange Statute shall override the provisions of the creation statute or any other statute that would restrict the use of the Exchange Statute.

If the court accepted Achillion's interpretation of the Exchange Statute, it would follow that, where § 12-217ee (a) (3) allows the taxpayer to make the election whether to carryforward the tax credit to future years or to elect to cash in the tax credit at 65 cents on the dollar, the provision in § 12-217n (d) (4) that prior tax credits must be used first before using current tax credits would not apply either to the carryforward provision of § 12-217ee or to the provision allowing a cash refund of the tax credit. However, there is no specific language in § 12-217ee to support Achillion's interpretation.

Similarly, there is nothing in the language of § 12-217ee that limits the use of rolling R&D tax credits only to the year in which the tax credit arose. The commissioner argues that under the Exchange Statute, a corporation with tax credits earned under § 12-217n, can cash in only one-third of the tax credit earned in one year and cannot carryover the remaining two-thirds of the rolling R&D tax credit.

From the commissioner's standpoint, the Exchange Statute limits Achillion to obtaining only one-third of discounted tax credits, leaving the remaining two-thirds of the tax credits to be used to offset Achillion's future tax liabilities. In other words, the commissioner construes the Exchange Statute to limit a taxpayer to just one bite of the apple to obtain a cash discount of tax credits and that bite must come only in the year that the tax credit was earned. In other words, if, according to the commissioner, Achillion had no tax liability in the year 2003, it could never use the Exchange Statute in future years to cash in rolling R&D tax credits earned in year 2003.

There is no such language in the Exchange Statute that limits the use of the discount only to the year the tax credit was earned or limits it to only one-third of the rolling R&D tax credits in the year earned, nor can the court supply the missing language to accommodate the commissioner's construction of this statute. Clearly, when the legislature intends to limit the use of a tax credit in § 12-217ee, it certainly knows how to do it with specific language as noted throughout the tax credit sections.[4]

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[4] See e.g., General Statutes § 12-217j (b) (1), regarding tax credit for R&D expenditures, providing that an unused tax credit that "exceeds the tax due and owing by the taxpayer shall be carried forward to each of the successive income years until such credit, or applicable portion of the credit, is fully taken. *In no case shall a credit, or any portion of a credit, that is not used by a taxpayer be carried forward for a period of more than fifteen years*." (Emphasis added.) See also General Statutes § 12-217ii (b) (3), regarding a jobs creation tax credit program, providing that "[t]he credit shall be claimed in the income year in which it is earned. *Any credits not used in a tax year shall expire*." (Emphasis added.) See General Statutes § 12-217t (f), providing for tax credit for personal property taxes paid on electronic data processing equipment, as follows: "If the amount of credit allowable under this section exceeds the sum of (1) the corporation business tax, if any, and (2) any taxes imposed by chapter 207, 208a, 209, 210, 211 or 212 paid by the taxpayer, after all other credits allowable

It is a cardinal rule of statutory construction that a court may not provide missing language in a statute in order to give effect to that statute. "[W]e will not supply language to change the clear meaning of a statute in the absence of any indication that the legislature intended such a construction[.]" Gonsalves v. West Haven, 232 Conn. 17, 23, 653 A.2d 156 (1995). No such intention is explicitly given for the commissioner's construction of the Exchange Statute. "We will not impute to the legislature an intent to limit [a] term where such intent does not otherwise appear in the language of the statute." (Internal quotation marks omitted.) Secretary of OPM v. Employees' Review Board, 267 Conn. 255, 274, 837 A.2d 770 (2004).

Achillion argues that § 12-217ee overrides § 12-217n since § 12-217ee (a) (2) explicitly allows a taxpayer with no tax liability to use credits for an exchange in contrast to § 12-217n (d) (3), where the total amount of credit taken may not exceed 50% of the tax liability. There is a problem with this analysis because the language in the Exchange Statute is supplemental to § 12-217n and provides an alternative to applying the R&D tax credit to a tax liability. This language does not override the language of § 12-217n, but permits a taxpayer the option of electing to take a full tax credit versus taking a reduced cash credit under certain circumstances set out in the statute.

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against such taxes have first been applied, then *any balance of the credit allowable under this section remaining may be taken in any of the five succeeding income years*." (Emphasis added.)

The blocking effect of the ordering rule under the rolling R&D statute would only apply to previously earned tax credits that could be converted into cash under the Exchange Statute. Otherwise, the plaintiff's point would be well taken that a tax credit, having no application to the Exchange Statute, could defeat the legislative purpose of permitting a taxpayer having R&D tax credits to exchange these credits for 65% of the cash value of the credits. As an example, Achillion's argument poses a hypothetical assuming "that in the year it was formed (Year 1), Newco earned a fixed capital investment credit under C.G.S. Section 12-217w (the 'Fixed Capital Credit') with respect to the purchase of capital equipment, and used that capital equipment to conduct R&D in Connecticut, which earned Newco a Rolling R&D Credit as well," (plaintiff's brief, dated November 26, 2007, p. 4) could have had a blocking effect since under the ordering rule, a tax credit with a five-year expiration date would have to be used prior to the use of a tax credit with no expiration date.

This argument has little merit since the Exchange Statute specifically refers only to tax credits earned under § 12-217j or §12-217n. The tax credit earned under § 12-217w has its own built-in Exchange Statute, as noted in § 12-217w (f): "If the fixed capital on account of which a corporation has claimed the credit allowed by this section is not held and used in this state in the ordinary course of the corporation's trade or business in this state for three full years following its acquisition as provided in subsection (a) of this section, the corporation shall recapture one hundred percent of the amount of the credit allowed under this section on its corporation business tax return required to be filed for

the income year immediately succeeding the income year during which such three-year period expires. If the fixed capital on account of which a corporation has claimed the credit allowed by this section is not held and used in this state in the ordinary course of the corporation's trade or business in this state for five full years following its acquisition as provided in subsection (a) of this section, the corporation shall recapture fifty per cent of the amount of the credit allowed under this section on its corporation business tax return required to be filed for the income year immediately succeeding the income year during which such five-year period expires."

The basic principle of law that guides this court is that "[t]he process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . .

"In performing this task, we begin with a searching examination of the language of the statute, because that is the most important factor to be considered. In doing so, we attempt to determine its range of plausible meanings, and if possible, narrow that range to those that appear most plausible. We do not, however, end with the language. We recognize, further, that the purpose or purposes of the legislation, and the context of the

language, broadly understood, are directly relevant to the meaning of the language of the statute." (Internal quotation marks omitted.) Bell Atlantic NYNEX Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 249-50.

It is well recognized that a tax deduction is a deduction against income so as to lower the amount of income subject to a tax,[5] whereas a tax credit, on the other hand, is a direct deduction from the tax owed by the taxpayer.[6] In effect, the tax to be paid by a taxpayer would ordinarily go to the governmental treasury as public funds, but because a tax credit is granted, the funds are diverted from the public treasury to the taxpayer. See Kotterman v. Killian, 972 P.2d 606, 639-42 (Az. 1999) (Justice Feldman dissenting).[7]

An additional principle of law that is most applicable to this case is that a tax credit "operates in a manner analogous to a tax exemption in that it relieves potential taxpayers of a tax burden that they would otherwise bear, we must construe it strictly against the party claiming the credit — that is, because the credit is a matter of legislative grace, we

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"Deductions. Amounts allowed by law to reduce income prior to application of the tax rate to compute the amount of tax which is due. . . . Deductions directly reduce income for the purpose of arriving at taxable income." West's Tax Law Dictionary (2007 Ed.) pp. 226-27.

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"Tax Credit. A tax credit reduces tax liability in contrast to a deduction which reduces income subject to tax." West's Tax Law Dictionary (2007 Ed.) p. 916.

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In Connecticut, the state treasurer accounts for the collection of taxes. See General Statutes § 3-17 requiring the state treasurer to supervise the collection of state taxes and revenue and provide for proper accounting of the same. The statute provides that "[t]he Treasurer shall receive all moneys belonging to the state and disburse the same only as he is directed by law. The Treasurer shall superintend the collection of the state taxes and revenue, receive all such revenue and make proper entries and credits for the same."

must interpret it to include only that which falls strictly within its terms." Bell Atlantic NYNEX Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 251. Additionally, "[i]t is . . . well settled that the burden of proving entitlement to a claimed tax exemption rests upon the party claiming the exemption." (Internal quotation marks omitted.) Id., 252.

Textually, the Exchange Statute, as applied to the facts in this case, provides that Achillion, as a qualified small business, having a tax credit earned in 2003 under § 12-217n for R&D and having no tax liability in the income year of 2004, may elect to exchange the 2003 credit for a refund of sixty-five per cent of the value of the credit. Of paramount importance is the language in subsection (a) of the Exchange Statute, § 12-217ee, providing that: "Any amount of credit refunded under this section shall be refunded to the taxpayer under the provisions of *this chapter*. . . ." (Emphasis added.)

Turning to the applicable provisions of "this chapter," § 12-217n, the statute that created the rolling R&D tax credit for R&D expenses, provides in § 12-217n (d) (2) that "[n]o more that one-third of the amount of the credit allowable for any income year may be included in the calculation of the amount of the credit that may be taken in that income year."

In addition to restricting the use of the tax credits earned under § 12-217n to no more than one-third of the credit each year, § 12-217n (d) (4) further restricts the use of the tax credit so that "[n]o credit permitted under this section shall be taken in any income year until the full amount of all allowable credits carried forward to such year from any

prior income year, commencing with the earliest such prior year, that otherwise may be taken under subdivision (2) of this subsection in that income year have been fully taken."

The language in the Exchange Statute, reciting that the refund shall be made in accordance with the provisions of "this chapter", explicitly incorporates the provisions of § 12-217n, where the credit was originally created. If the court were to accept Achillion's argument that the Exchange Statute was intended by the legislature to override the provisions of §12-217n, and in particular subsections (d) (2) and (d) (4) therein, there would be nothing restricting a taxpayer from picking and choosing which credits it uses for a cash refund and when it uses those credits. This disregard of the provisions of § 12-217n, as applied to the Exchange Statute, would fly in the face of a significant tenant of statutory construction that "a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . ." (Internal quotation marks omitted.) Viera v. Cohen, 283 Conn. 412, 431, 927 A.2d 843 (2007). In this case, there is no good reason to construe a refund statute so as to evade the legislative direction to provide an orderly use of tax credits according to their expiration dates as well as the requirement that tax credits not be taken in lump sums.

Consistent with the issue in this case, as previously stated above, and considering the criteria set out by the court in its MOD, together with the facts as stipulated by the parties, the following results:

- The plaintiff is entitled to a 2003 rolling R&D tax credit pursuant to § 12-217n. As to this criteria, the parties have stipulated that the plaintiff is entitled to a rolling R&D tax credit earned for the income year of 2003 in the total amount of $644,002, a refund of which amounted to one-third of the tentative credit or $214,667 reduced to a cash amount of $139,533 ($214,667 x .65), leaving a credit balance of $429,335 (two-thirds of $644,002) carried forward to 2004.

- The plaintiff must use the "full amount of all allowable credits carried forward to such year from any prior income year" pursuant to § 12-217n (d) (4). As to this, the parties have stipulated that the plaintiff has a balance of a rolling tax credit earned in the income year of 2001 of $90,837 (representing two-thirds of the original rolling tax credit carried forward). The parties have further stipulated that the plaintiff has a balance of a rolling tax credit of $230,129 (representing two-thirds of the original rolling tax credit carried forward) earned in the income year of 2002.

- The plaintiff is limited to one-third of the rolling R&D tax credit earned in any one year. As to this, the plaintiff seeks to bypass the existing rolling R&D tax credits earned for the income year of 2001 and the income year of 2002 in favor of seeking the cash payment of the two-thirds balance of the rolling R&D tax credits earned for the income year of 2003.[8]

- The plaintiff must have no tax liability in the year it seeks a cash refund. The parties have stipulated that the plaintiff had no tax liability in the income year of 2004 in which year the plaintiff seeks to be reimbursed for the remaining two-thirds balance of the rolling R&D tax credits earned for the income year of 2003.

It is obvious that the plaintiff, having outstanding rolling R&D tax credits earned in the income years of 2001 and 2002, is not entitled to the payment of the rolling R&D tax credits earned in the subsequent income tax year of 2003 without first using up prior

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[8] The plaintiff points out that in the income year of 2004, it was eligible to receive the remaining two-thirds balance of the rolling R&D tax credit for 2001 since it had previously applied for and was granted in 2001 one-third of the discounted rolling R&D tax credit for 2001.

rolling R&D tax credits. The plaintiff's request for the exchange payment covering rolling R&D tax credits for the income years of 2003 ($429,335) is premature until the use of the rolling R&D tax credits earned in 2001 and 2002 have been resolved either by exchange or by credit against a tax liability.

Because the plaintiff has failed to comply with the provisions of the Exchange Statute, § 12-217ee, the plaintiff's appeal cannot be sustained. Accordingly, judgment may enter in favor of the defendant without costs to either party.

Arnold W. Aronson
Judge Trial Referee