NO. CV 09 4020286S	:	SUPERIOR COURT
BYK CHEMIE USA, INC.	:	TAX SESSION
v.	:	NEW BRITAIN
COMMISSIONER OF REVENUE SERVICES	:	APRIL 28, 2011

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS

The plaintiff, BYK Chemie USA, Inc. (BYK), brings this action appealing an adverse decision by the commissioner of revenue services (commissioner) pursuant to General Statutes § 12-597, denying BYK relief from the imposition of a petroleum products gross earnings tax, penalties and interest, for the audit period of January 1, 1999 through December 31, 2005.

The plaintiff's complaint was brought in four counts.

In count one, the plaintiff alleges that the action was brought pursuant to § 12-597 and recites as follows in paragraph 10:

"The Department, through its Determination, erroneously imposed Tax, penalty and interest not authorized by the Tax law because BYK does not import or cause to be imported into Connecticut petroleum products for sale, use or consumption in Connecticut."

Count two includes paragraphs one through ten of the first count and recites further in paragraph eleven as follows:

"Should the Court find that BYK did import or cause to be imported into Connecticut petroleum products for sale, use or consumption in Connecticut, the Determination can not be sustained because the Petroleum Solvents were subsequently sold for exportation from Connecticut for sale or use outside of Connecticut as component parts of BYK's Additive, a petroleum product pursuant to the statutory definition under . . . § 12-587. Pursuant to § 12-587a (b), where a company subsequently exports petroleum products for sale or use outside Connecticut the company shall be allowed a credit against the Tax."[1]

Count three also includes counts one through ten of the first count and further recites in paragraph eleven as follows:

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[1] General Statutes § 12-587 (a) (4) defines "petroleum products" to mean "those products which contain or are made from petroleum or a petroleum derivative[.]"

Furthermore, General Statutes § 12-587a (b) provides as follows:

"Any company liable for the tax imposed under subsection (c) of section 12-587 on the consideration given or contracted to be given for petroleum products which it imports or causes to be imported into this state for sale, use or consumption in this state, shall be allowed a credit against tax under subsection (c) of section 12-587 if the company subsequently exports such petroleum products for sale or use outside this state, in the amount of tax paid to the state with respect to the sale, use or consumption in this state of such products."

"The Department, through its Determination, violated the Commerce Clause of the United States Constitution by assessing tax on earnings not attributable to Connecticut."

Count four incorporates paragraphs one through ten of the first count and further recites in paragraph eleven as follows:

"The Department through its Determination, violated the Due Process Clause of the United States Constitution by assessing tax on earnings not attributable to Connecticut."

The commissioner moves to dismiss this action on the grounds that the plaintiff has not complied with General Statutes § 12-600, requiring the plaintiff to prepay the petroleum gross earnings taxes due, along with interest and penalties, prior to the commencement of this action and that this failure to prepay deprives the court of subject matter jurisdiction.[2]

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) C.R. Klewin Northeast, LLC v. State, 299 Conn. 167, 174, 9 A.3d 326 (2010).

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[2] See affidavit of Marc Papandrea from the Department of Revenue Services' Audit Division (attached to defendant's motion to dismiss), in which he recited the imposition of an assessment against BYK for the audit period in the amount of $188,349.11, penalty in the amount of $18,834.93 and interest in the amount of $121,228.49 (as of the date of notice, December 31, 2007). Papandrea avers that the department has no record of BYK making any payment.

General Statutes § 12-600 provides as follows:

"Any taxes, penalties or interest due from any company under the provisions of sections 12-587 to 12-602, inclusive, *shall be paid in full before any action may be instituted in any state court to challenge all or any part of the provisions of said sections.* No injunction or restraining order shall be issued by any state court to stay or prevent the imposition or collection of taxes as provided under said sections."
(Emphasis added.)

The plaintiff opposes the defendant's motion to dismiss, claiming that its appeal of the commissioner's determination was brought pursuant to § 12-597, not § 12-600.

General Statutes § 12-597 provides as follows:

"Any taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner of Revenue Services made in relation to the tax imposed under section 12-587 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of New Britain . . . . The authority issuing the citation shall take from the appellant a bond or recognizance to the state of Connecticut with surety to prosecute the appeal to effect and to comply with the orders and decrees of the court in the premises."

The commissioner, on the other hand, argues that the plain language of § 12-600 is clear and unambiguous and that the interpretation of this statute by the Supreme Court in Texaco Refining & Marketing Co. v. Commissioner, 202 Conn. 583, 585-586, 522 A.2d 771 (1987), supports the department's position that the petroleum products gross earnings tax, penalties and interest must be paid by a taxpayer prior to the commencement of an appeal, and BYK's failure to prepay deprives this court of subject matter jurisdiction to hear the appeal. See defendant's 11/29/10 memorandum of law, p. 4.

It is the plaintiff's main argument in opposing the defendant's motion to dismiss that, in enacting § 12-600, it was not the legislature's intent to require those companies challenging the commissioner's determination to prepay the tax prior to taking an appeal, but to have the statute apply only to those companies challenging the constitutionality of the petroleum products gross earning tax. In support of this argument, the plaintiff turns to the legislative history of the tax and to the court's holding in Ger Oil Co. v. Commissioner, Dept. of Revenue Services, Superior Court, judicial district of New Britain, Docket No. CV 98 0492495S, 2000 Ct. Sup. 16050, 28 CLR 496 (December 19, 2000, *Aronson, JTR).* See plaintiff's 12/6/10 memorandum of law, pp. 4-5.

First, § 12-597, by its clear language, is the only statutory section that authorizes a taxpayer to appeal the commissioner's determination in regard to the petroleum products gross earnings tax.

Second, § 12-600 is not a statutory provision that authorizes an appeal; it is a qualifying statute to § 12-597. The only provision of § 12-600 that is relevant is the requirement, before instituting a challenge to all or any part of the provisions of §§ 12-587 to 12-602, inclusive, that any taxes, penalties or interest due must be paid in full.

The issue in the present case remains whether § 12-600 requires all appeals taken pursuant to § 12-597 to prepay any taxes, penalties or interest or whether it applies to appeals challenging the constitutionality of the tax provisions of § 12-587. In order to resolve the issue, the court must interpret the legislature's intent in creating § 12-600. See Dechio v. Raymark Industries, Inc., 299 Conn. 376, 389, 10 A.3d 20 (2010) ("process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply").

As both parties note, this court has previously decided in Ger Oil that there is a significant difference between § 12-597 and § 12-600 and that the taxpayer in Ger Oil was not required to prepay the tax imposed by the commissioner prior to instituting its appeal under § 12-597.

In support of its interpretation of § 12-600, the department contends that the following statement in Texaco Refining, 202 Conn. 585-86, is relevant here:

"[Texaco] sought administrative relief from [the department's] ruling pursuant to General Statutes § 12-595 but the [Commissioner], after a hearing, upheld the department's conclusion that [Texaco] was liable for the additional tax, interest and penalties. [Texaco] *paid this amount in full, under protest, as it was required to do by General Statutes § 12-600, before commencing its appeal to the trial court pursuant to General Statutes § 12-597."*[3]

(Emphasis added.) See also defendant's 11/29/10 memorandum of law, p. 5.

The Texaco Refining court discussed that "[t]he sole issue in this case, which comes to us by way of reservation is whether moneys collected as a tax from customers are includable in the Connecticut gross earnings tax on the sale of petroleum products."[4] Id., 583-84.

The court notes that the prepayment of tax, penalties and interest was not at issue in the Texaco cases, nor was the interpretation of the language in § 12-600 given judicial scrutiny or analysis. Where a court has purported to determine a question that was not in

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[3] Although not cited by the department, the same comment appears in Texaco, Inc. v. Groppo, 215 Conn. 134, 135 n.3, 574 A.2d 1293 (1990), in which the court noted as follows: "As required by General Statutes § 12-600, the plaintiff had previously paid, under protest, the full amount of its assessment for the additional taxes, interest and penalties."

[4] Similarly, in Texaco v. Groppo, 215 Conn. 134-35, the court discussed that "[t]he sole issue in this tax appeal is the applicability of the gross earnings tax imposed by General Statutes § 12-587 to sales in Connecticut of petroleum products that were marketed and distributed in states other than Connecticut."

issue nor necessary for its decision, it is considered to be "obiter dictum." See, e.g., Byme, Inc. v. Ivy, 241 S.W.3d 229 (Ark. 2006).

"Obiter dictum" is defined in Black's Law Dictionary (9th ed.), p. 1177, as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."

In determining the legislative meaning of § 12-600, it is of key importance to note that the legislature used different language in § 12-597 and § 12-600. Section 12-597, entitled "Appeals by taxpayer", authorizes "[a]ny taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner . . . made in relation to the tax imposed under section 12-587 . . . ." Whereas § 12-600, entitled "Taxes to be paid before instituting action on tax in court", provides that "[a]ny taxes, penalties or interest due from any company under the provisions of sections 12-587 to 12-602, inclusive, shall be paid in full before any action may be instituted in any state court to challenge all or any part of the provisions of said sections." In effect, it appears that one statute, § 12-600, prohibits a taxpayer from taking an appeal authorized by another statute, even though the taxpayer complies with the conditions imposed by that other statute.

In comparing the language in § 12-597 with the language in § 12-600, the court notes that the language in § 12-600, "[challenging] all or any part of the provisions of said sections", has a different meaning from the provision in § 12-597 providing that an aggrieved taxpayer may challenge "any order, decision, determination or disallowance of the Commissioner . . . ." In § 12-597, the taxpayer is attacking the decision of the commissioner. In § 12-600, the taxpayer is attacking the provisions of §§ 12-587 through 12-602.

The legislature is presumed to enact a statute with knowledge of existing statutes to create a harmonious body of law. See Berger v. Tonken, 192 Conn. 581, 589, 473 A.2d 782 (1984). "It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) Lopa v. Brinker International, Inc., 296 Conn. 426, 433, 994 A.2d 1265 (2010).

However, there are two questions that arise because it is not clear whether the provisions of § 12-597 stand alone or are modified by § 12-600:

1) Where § 12-597 requires the appeal to be brought in the Superior Court in New Britain, does § 12-600 override § 12-597 by permitting the appeal to be brought "in any state court"?

2) Where § 12-597 requires an appealing taxpayer to provide security to the commissioner for the payment of tax (if unsuccessful in the appeal), must the taxpayer also prepay any tax, penalty or interest pursuant to § 12-600?

"When a statute is not plain and unambiguous, we also look for interpretive guidance 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. . . ." (Internal quotation marks omitted.) Wilton Meadows Ltd. Partnership v. Coratolo, 299 Conn. 819, 825, 14 A.3d 982 (2011).

Section 12-587 sets out the petroleum products gross earnings tax, whereas § 12-597 provides a process for the taxpayer to take an appeal to the Superior Court for the judicial district of New Britain in order to challenge "any order, decision, determination or disallowance of the Commissioner of Revenue Services made in relation to the tax imposed under section 12-587 . . . ."

A clear distinction is evident between the language of § 12-597 and § 12-600. In

§ 12-597, the right of appeal is from a disallowance by the commissioner, whereas §12-600 makes no reference to a commissioner's disallowance as a basis of appeal but contains only the language requiring a prepayment of any taxes, penalties or interest "before any action may be instituted in any state court to challenge all or any part of the provisions of said sections." In addition, instead of requiring a prepayment of any taxes, penalties or interest, § 12-597 requires an appellant to furnish a security to prosecute the appeal.

The commissioner, claiming that the language of § 12-600 is clear and unambiguous, focuses on the legislature's use of the words "shall be paid in full before any action may be instituted in any state court." The commissioner interprets this language to mean that § 12-600 "mandates that any taxes, penalties or interest **must** be paid in full before instituting **any** action in court." (Defendant's 1/18/11 memorandum of law, pp. 2-3.) However, this is not what the language in § 12-600 recites. Omitted from the commissioner's reading of § 12-600 are the words "in any state court to challenge all or any part of the provisions of said sections." The language in § 12-600 referring to "any state court" is inconsistent with the language of § 12-597 which requires all appeals taken pursuant to § 12-587 to specifically be brought to the Superior Court for the judicial district of New Britain.

The language in § 12-600, referring to "any state court," could be interpreted to mean any state court in Connecticut or any state court in the United States. It could also be interpreted that if an oil company brings an action in the courts of a sister state challenging the provisions of §§ 12-587 to 12-602, any taxes, penalties and interest due must be prepaid. See General Statutes § 12-34e, "Collection of tax owed to other state or the District of Columbia."[5]

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[5] General Statutes § 12-34e provides, in relevant part, as follows:

> "(a) For the purposes of this section:
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> "(1) 'Taxpayer' means any person identified by a claimant state under this section as owing taxes to such claimant state;
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> "(2) 'Claimant state' means any other state or the District of Columbia that allows the commissioner, in cases where a taxpayer owes taxes to this state, to certify that such tax is owed and to request the tax officer of such other state or such district to collect such taxes owed to this state and provides for the payment of such collected amount to this state;
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> "(3) 'Taxes' means any amount of tax imposed under the laws of the claimant state, including additions to tax for penalties and interest, which is finally due and payable to the claimant state by a taxpayer, and with respect to which any administrative or judicial remedies, or both, have been exhausted or have lapsed, and which is legally enforceable under the laws of the claimant state against the taxpayer, whether or not there is an outstanding judgment for such sum[.]"

Section 12-39*l*[6] requires all appeals from "an order, decision, determination or disallowance of the Commissioner of Revenue Services" to be heard by two judges appointed by the Chief Court Administrator in the judicial district that the Chief Court Administrator deems appropriate.

The background regarding the petroleum products gross earnings tax was thoroughly explained by the court, *Blumenfeld, Senior District Judge*, in Mobil Oil Corp. v. Dubno, 492 F. Supp. 1004, 1005-1006, 1014 (1980).[7]

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[6] General Statutes § 12-39*l* provides, in relevant part, as follows:

"(a) Except as otherwise provided by statute, 'tax appeal' means an appeal from an order, decision, determination or disallowance of the Commissioner of Revenue Services[.]

"(b) The Chief Court Administrator shall appoint two judges of the Superior Court to hear tax appeals. . . . The appeals may be heard at the judicial district that the Chief Court Administrator deems appropriate."

[7] "Section 1 of Public Act 80-71 of the 1980 Connecticut General Assembly ('the Act') singles out a narrow group of companies and imposes a two-percent tax on the gross receipts of those companies from their sales in Connecticut. Only a company that is engaged primarily in the *refining and distribution of petroleum* products and that distributes such products to wholesale and retail dealers for marketing and distribution in Connecticut must pay the tax. Since there are no petroleum refineries in Connecticut, the restrictions on the application of the tax contained in section 1 effectively limit the tax to integrated petroleum companies engaged in both the refining and distribution of petroleum products in a number of states. In contrast, companies that only distribute petroleum products are not taxed on their receipts from sales in Connecticut.

"In the ordinary course of business, the cost of a tax such as the gross receipts tax would be passed along to purchasers in the form of higher prices. In order to avoid the predictable application of the tax burden to Connecticut purchasers, the General Assembly enacted [§] 13 of the Act.

The legislative history of the statutory sections dealing with the petroleum products gross earnings tax is replete with various legislators' concern that the integrated oil companies (targeted by this tax) would pass the tax on to Connecticut consumers. A second concern was whether the subject tax would stand a constitutional challenge. With

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"Section 13 (a) contains a general statement of legislative intent: 'It is . . . the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon . . . and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies.' Section 13 (a) itself contains no provision respecting the price of petroleum products.

"Implementing the intent to have the gross receipts tax treated as an overhead cost, section 13 (b) forbids each company subject to the tax to raise its wholesale prices in Connecticut by any amount higher than the average amount by which it raised such prices 'in all ports on the eastern coast of the United States.' Because of section 13 (b), such costs may not be added entirely to prices in Connecticut, but may be recouped only on a pro rata basis from all customers in the states (including Connecticut) to which petroleum products are distributed from east coast ports.

"The pricing provisions of section 13 (b) apply only to petroleum products 'exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159 [EPAA].' At the present time, these so-called exempt products include home heating oil, diesel fuel, residual fuel oil, automotive motor oil, industrial oil and greases, and aviation fuel.

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"There can be no doubt that section 13 (b) of the Act directly conflicts with the federal energy policy embodied in the EPAA. Because it subjects to price regulation petroleum products that federal authorities have decided should be free of price regulation, section 13 (b) 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the EPAA. Accordingly, under the test for pre-emption enunciated by the Supreme Court, section 13 (b) is invalid under the Supremacy Clause."

(Citation omitted; emphasis in original; internal quotation marks omitted.)

these concerns, it appears that the legislature enacted § 12-600 to place a burden on those integrated oil companies challenging the constitutionality of the enactment of the tax by requiring the prepayment of any taxes, penalties or interest prior to instituting an action.

The legislature was concerned about balancing the state budget because part of the budget was $60 million of anticipated revenue from imposing a 2% tax on the gross earnings of a small section of national oil companies generally referred to as integrated oil companies. It was important for the legislature to preserve the $60 million tax knowing that the integrated oil companies would challenge the constitutionality of the imposition of the tax in the courts. Because of this concern, it appears that the provision in § 12-600 requiring prepayment of any taxes, penalties or interest before challenging the constitutionality of the statute would at least leave $60 million in the budget, pending the outcome of any court action.[8]

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[8] See plaintiff's appendix to its 1/14/11 memorandum of law.

Speaking to the adoption of the petroleum products gross earnings tax, Representative Emmons (101st) stated:

"The bill that is in the file is supposed to bring in $60 million in taxes. Probably we won't collect the taxes because as has been discussed earlier any company can now go to the federal courts to get an injunction against our law and does not have to pay the tax - - to go to a federal court, so we may sit and litigate the bill for quite some time and not have the revenue coming in."

House Proceedings, Vol. 23, Pt. 6, p. 1814 (April 11, 1980).

Rep. Emmons and Rep. Stolberg further discussed the federal courts:

Rep. Emmons: (101st)

"By inserting the word 'state' before court, can one assume then that if the oil companies chose not to pay the tax that they could still go to the state court for - - the federal courts - - for relief either of the tax altogether under energy regulations or for certain matters of constitutionality?"

Speaker Abbate:

"Rep. Stolberg, will your respond?"

Rep. Stolberg: (93rd)

"Because of the wording of the amendment, the state would argue that the court of original jurisdiction on all matters would be the state court system. Upon exhaustion of those remedies, presumably the oil companies could attempt original jurisdiction under federal courts. The state would argue that they have not exhausted state remedies, thus argue that any contest would have to move through the state courts. Upon completion in the state courts, an appeal could be taken then to the federal courts, if they give jurisdiction."

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Rep. Emmons (101st):

"I happen to think that the amendment is a good one, but I would like, just speaking to it, suggest that it does not provide us with a guarantee of the $60 million for this coming year, that if an oil company can go to a federal court and does not have to be paying the tax - - to be allowed to go to a federal court - - that they may very well decide not to pay the state of Connecticut. And while the state may say that the original jurisdiction belongs in the state courts, I think that because of some of the sections relative to pricing, one could say that this is getting into the area of interstate commerce as we are meddling with what is the pricing situation elsewhere. And the fact that this tax shall be a cost borne by other people, in other states."

House Proceedings, Vol. 23, Pt. 6, pp. 1796-1797 (April 11, 1980).

Of further note are the remarks of Senator Johnson (6th):

After considering the legislative history of § 12-600, the disparity in the provisions between § 12-597 and § 12-600, and what the legislature was seeking to accomplish, this court concludes that the provisions of § 12-600 were not created to affect the provisions of § 12-597. Section 12-600 attempts to obtain $60 million dollars in tax and frustrate the integrated oil companies from passing this tax onto Connecticut consumers during a very tight budgetary legislative session.

Counts one and two of the plaintiff's complaint allege that the commissioner "erroneously imposed Tax, penalty and interest not authorized by the Tax law because

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"Senator Beck, what apparently used to be the old Sec. 19 which deprived the Federal Courts the jurisdiction to hear any action challenging this law or the taxes laid until the taxes have been paid, is that section in the bill or not in the bill?"

Senator Beck:

"Senator Johnson, in our amendment, we provide, and the provision was not clear, that this will be heard in the state courts, that's where the jurisdiction will start, and of course any legislation can go on from there."

Senate Proceedings, Vol. 23, Pt. 3, pp. 879-880 (April 10, 1980).

Senator Prete (14th) further discussed the reason behind the tax:

"It's a relatively easy way of raising sixty million dollars. It's popular. That's why it is here. But we should not be deluded into thinking that it is anything other than taxing the people of the State of Connecticut because that is exactly who is going to pay for it. . . . One last point. If, indeed, it is unconstitutional, then we most certainly will be back here, and it won't take very long for a judge to stay the implementation of this tax. If it is stayed, we are going to be back here in a big hurry, with a huge deficit, sixty million dollars worth."

Senate Proceedings, Vol. 23, Pt. 3, pp. 869-871 (April 10, 1980).

BYK does not import or cause to be imported into Connecticut petroleum products for sale, use or consumption in Connecticut. Thus the imposition of Tax, penalty and interest should not be sustained." (Count one of plaintiff's complaint, ¶ 10.) See also count two of plaintiff's complaint, ¶ 11. These counts do not challenge the constitutionality of the subject tax.

"[W]hen the issue is the imposition of a tax, rather than a claimed right to an exemption or a deduction, the governing authorities must be strictly construed against the commissioner [of revenue services] and in favor of the taxpayer." (Internal quotation marks omitted.) HVT, Inc. v. Law, 300 Conn. 623, 629, __A.3d __ (2011), quoting Key Air, Inc. v. Commissioner of Revenue Services, 294 Conn. 225, 233, 983 A.2d 1 (2009).

However, the commissioner is correct that the allegations in counts three and four of the plaintiff's complaint indeed challenge the constitutionality of the taxes due under the petroleum products gross earnings tax.

Accordingly, as to counts one and two, the defendant's motion to dismiss is denied. As to counts three and four, the defendant's motion to dismiss is granted for the plaintiff's failure to prepay the taxes, penalties and interest assessed against it as directed by § 12-600. Judgment may enter accordingly for counts three and four, without costs to any party.

Arnold W. Aronson
Judge Trial Referee