DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: August 5, 2021 12:40 PM CASE NUMBER: 2021CV31103
Plaintiffs: PHILIP ANSCHUTZ and NANCY ANSCHUTZ; v. Defendants: DEPARTMENT OF REVENUE OF THE STATE OF COLORADO; and MARK FERRANDINO, in his Official Capacity as the Executive Director of the Department of Revenue of the State of Colorado.	▲ **COURT USE ONLY** ▲ Case Number: 21CV31103 Courtroom: 215

ORDER ON DEFENDANTS' MOTION TO DISMISS

THIS MATTER comes before the Court on Defendants Department of Revenue of the State of Colorado ("Department") and Mark Ferrandino, in his official capacity as the Executive Director of the Department of Revenue of the State of Colorado's ("Ferrandino") (collectively "Defendants") Motion to Dismiss ("Motion") filed May 10, 2021. Plaintiffs Philip Anschutz and Nancy Anschutz ("Plaintiffs") filed a Response on June 15, 2021. Defendants filed their reply on June 22, 2021. The Court, having reviewed the related pleadings and relevant portions of the Court's file, and FINDS and ORDERS as follows:

BACKGROUND

The following is based on allegations contained within Plaintiffs' Complaint and Notice of Appeal ("Complaint"), accepted as true and viewed in a light most favorable to Plaintiffs for purposes of this Motion.

In April 2020, Plaintiffs filed amended federal and Colorado state income tax returns for 2018 after passage of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), and claimed refunds predicated on the amended returns. The CARES Act suspended the excess business loss deduction limit for the 2018 and 2019 taxable years, allowing taxpayers with losses in excess of the threshold to claim the entirety of the loss, instead of converting the excess to a net operating loss as was previously required. The question raised by the case before the Court is whether Colorado income tax law incorporates retroactive changes to federal law, such that

Plaintiffs and similarly situated taxpayers are entitled to amend their 2018 or 2019 Colorado tax returns to claim the retroactive federal deductions.

Plaintiffs maintain that Colorado income tax law incorporates the Internal Revenue Code and related law and regulation *in toto*, such that changes to the allowance of a deduction at the federal level are incorporated at the state level. Thus, they argue that they are entitled to amend their 2018 Colorado tax return and pursue a refund. The Department, for its part, is alleged to have engaged in emergency rulemaking in order to promulgate a rule that declared that the aforementioned deduction was *not* operative as to Colorado income tax law such that taxpayers, such as Plaintiffs, could claim a refund by filing an amended return. More generally, the emergency regulation clarified that Colorado income tax law incorporated federal changes on a prospective basis only. As a consequence, Plaintiffs' claimed refund was denied by the Department and Ferrandino.

Plaintiffs contend that the at-issue regulation was enacted in excess of the agency's authority, insofar as it was contrary to statute and legislative intent, was enacted in a procedurally improper manner, and violates the Colorado constitution. Plaintiffs assert two claims in their Complaint: 1) "Allowance of Refund under Colorado Law"; and 2) Declaratory Judgment. In essence, Plaintiffs ask this Court to determine that, under Colorado tax law, the retroactive suspension enacted in the CARES Act was incorporated into Colorado law, such that the regulation at issue is unlawful, and the denial of the refund claim was improper.

LEGAL STANDARD

Under C.R.C.P. 12(b)(5), if a plaintiff is entitled to relief under any legal theory, then the complaint is sufficient. *Denver & R. G. W. R. R. v. Wood*, 476 P.2d 299 (Colo. App. 1970). In assessing such a motion a court must accept all matters of material fact as true and view the allegations in the light most favorable to the plaintiff. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009). All inferences are to be drawn in favor of the plaintiff. *Medina v. State*, 35 P.3d 443 (Colo. 2001). The claim for relief must satisfy the plausibility standards under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Warne v. Hall*, 373 P.3d 588, 589-90 (Colo. 2016). The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.* at 591. A complaint may be dismissed if the substantive law does not support the claims asserted. *Pena v. Am. Fam. Mut. Ins. Co.*, 463 P.3d 879, 881 (Colo. App. 2018); *see also Nelson v. Nelson*, 497 P.2d 1284, 1286 (Colo. App. 1972); *Bane v. Ferguson*, 890 F.2d 11, 13 (7th Cir. 1989); *Reinhardt v. Wal-Mart Stores, Inc.*, 547 F.Supp.2d 346, 353 (S.D.N.Y. 2008); *Burns v. Cook*, 458 F.Supp.2d 29, 39 (N.D.N.Y. 2006); *Wallingford v. Zenith Radio Corp.*, 310 F.2d 693, 695 (7th Cir. 1962).

Statutory interpretation involves only questions of law. *Montezuma Valley Irrigation Co. v. Bd. of Cty. Commissioners*, 486 P.3d 428, 431 (Colo. App. 2020). The primary purpose a court in resolving questions of statutory construction is determining and giving effect to the intent of the legislature by adopting the construction that best effectuates the purposes of the legislative scheme. *Id*. A court begins by looking at the plain language of the statute, reading words and phrases in context and construing them literally according to common usage unless they have acquired a technical meaning. *Id*. If the language is unambiguous, no further investigation is required. *Id*. Language is unambiguous if it is susceptible to only one reasonable interpretation. *Id*. In determining ambiguity, a court must refer to the language itself, as well as the specific context within which the language is used, and the broader context of the statute as a whole. *Id*.

Any rules and regulations that a state agency adopts pursuant to a statutory rulemaking proceeding are presumed valid. *Wine and Spirit Wholesalers of Colo., Inc. v. Colo. Dept. of Revenue*, 919 P.2d 894, 896 (Colo. App. 1996). A plaintiff bears the burden of establishing the invalidity of a rule or regulation by establishing that the rulemaking body acted in an unconstitutional manner, exceeded its statutory authority, or otherwise acted in a manner contrary to statutory requirements. *Id*. A reviewing court may not substitute its own judgment for that of the administrative agency, and an agency's construction of its own governing statute is entitled to great weight. *Id*. The standard of review in consideration of an agency's rulemaking is reasonableness. *Id*. The *Chevron* two-step analysis applies: 1) did the legislature directly speak to the precise question at issue; and, if not, then 2) is the agency's answer to the question based on a permissible construction of the statute. *Id*. (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

ANALYSIS

Defendants advance a handful of arguments, the primary of which focuses on the interpretation of C.R.S. § 39-22-103(5.3). Defendants argue that Emergency Rule 39-22-103(5.3) (later replaced by an identical regulation through the non-emergency rulemaking process, *see* 1 CCR 201-2, Rule 39-22-103(5.3)), which purports to clarify the application of C.R.S. § 39-22-103(5.3), and upon which Defendants purportedly relied in denying the Plaintiffs' refund claim, is an appropriate exercise of agency rulemaking authority and is not contrary to statute.

Emergency Rule 39-22-103(5.3), and 1 CCR 201-2, Rule 39-22-103(5.3) (hereinafter "Rule 103(5.3)"), reads, in its entirety, as follows:

> "Internal revenue code" does not, for any taxable year, incorporate federal statutory changes that are enacted after the last day of that taxable year. As a result, federal

> statutory changes enacted after the end of a taxable year do not impact a taxpayer's Colorado tax liability for that taxable year. Changes to federal statutes are incorporated into the term "internal revenue code" only to the extent they are in effect in the taxable year in which they were enacted and further taxable years.
>
> The parent statute, C.R.S. § 39-22-103(5.3), reads, in its entirety, as follows:
>
> "Internal revenue code" means the provisions of the federal "Internal Revenue Code of 1986," as amended, and other provisions of the laws of the United States relating to federal income taxes, as the same may be effective at any time or from time to time, for the taxable year.

Plaintiffs, in their Complaint, assert that: 1) the parent statute is unambiguous and leaves no room for agency interpretation, and that Rule 103(5.3) is contrary to the parent statute; 2) in any event, the enactment of Rule 103(5.3) failed to abide the proper procedure; 3) Rule 103(5.3) "attempts a retroactive modification of existing Colorado statutory law," Complaint, ¶ 43; and 4) Rule 103(5.3) violates article X, § 20 of the Colorado constitution by both increasing an income tax rate and by changing the definition of taxable income.

Defendants, in their Motion, argue: 1) that Rule 103(5.3) reflects the most reasonable interpretation of the parent statute; 2) that the Court lacks jurisdiction to consider arguments relating to the alleged procedural infirmity of the emergency rulemaking procedure, an issue which is, in any event, moot given the adoption of the permanent regulation; 3) that Rule 103(5.3) simply reflects the most reasonable and "best" interpretation of the statute, and does not retroactively modify statutory law; and 4) that Rule 103(5.3) does not, and could not, violate the Colorado constitution.

I. This Matter is Appropriate for Determination at the Rule 12 Stage

As a threshold matter, the Court addresses Plaintiffs' contention that Defendants' Motion is a "merits argument" not appropriate for resolution at the Rule 12 stage. Response, p. 3. Plaintiffs contend that the matter is more appropriate for resolution at the summary judgment stage, arguing that "what the Defendants cannot do is conflate the legal sufficiency of the Complaint at this stage with the ultimate determination of the merits at a later stage of this case." Response, pp. 3-4. Plaintiffs continue, "[Plaintiffs'] refund claim is specifically authorized under the applicable governing statute and comports with all requisite statutory requirements…as a result, the Complaint states a claim upon which [Plaintiffs] can secure relief, and accordingly, the motion to dismiss should be denied." Response, p. 4.

The Court disagrees. A motion to dismiss can be granted if the substantive law does not support the claim for relief. *See Pena, supra*. A complainant is entitled to the assumption of truth as to its factual allegations, as well as all reasonable inferences drawn therefrom, in

reviewing the motion, but the claimant is not entitled to the assumption that the law is what it claims it to be. *See Warne*, *supra*. A court, in reviewing a motion to dismiss, is obligated to determine whether the facts alleged plausibly state a claim under prevailing substantive law. If the law is such that the factual allegations, accepted as true, do not support the claimed relief, the motion to dismiss may be granted.

Here, the central issue raised by the Complaint, and by Defendants in their Motion, is the interpretation of C.R.S. § 39-22-103(5.3) and related provisions, and the Department's Rule 103(5.3), which interprets the statute. Questions of statutory interpretation are questions of law. *Montezuma Valley Irrigation Co*, *supra*. The crux of this case is whether the statute does, or does not, incorporate retroactive changes made at the federal level into Colorado's tax scheme. It is purely a question of law. As such, it is ripe for review and determination at the Rule 12 stage. [1]

II. Review under the Administrative Procedure Act

The Court first resolves the limited question of whether review of the rulemaking procedure is jurisdictionally barred by C.R.S. § 24-4-106(4)'s thirty-five day period of limitations. Plaintiffs allege that the agency failed to make the required findings pursuant to the Administrative Procedure Act's ("APA") emergency rulemaking provision, C.R.S. § 24-4-103(6), and that the findings that were made were false or disingenuous.[2] Defendants argue that the time to challenge such alleged infirmities is governed by C.R.S. § 24-4-106(4), whereas Plaintiffs argue that C.R.S. § 39-21-105(2)(b) governs.

C.R.S. § 39-21-105(a) provides that a taxpayer may appeal the final determination of the executive director issued pursuant to specific statutes within thirty days after the mailing of such determination. An appeal to the district court is conducted *de novo*, with all questions of law and fact subject to review. C.R.S. § 39-21-105(2)(b).

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[1] *See, e.g.*, *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law…this procedure…streamlines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations'…a claim must be dismissed, *without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one*.") (emphasis added) (internal citations omitted).

[2] "The Department stated that the immediate adoption of [Rule 103(5.3)] was necessary in order to 'ensure compliance with state law' and to 'clarify and reflect the State's position with respect to recent federal legislation.' In fact, [Rule 103(5.3)] sought to change Colorado law in response to the CARES Act." Complaint, ¶¶ 37-38.

Plaintiffs' argument, then, is that because a district court is empowered to review the final determination of the executive director *de novo*, it is "authorized…to address all the questions relevant in [Plaintiffs'] refund claims," including "questions regarding the validity of the Executive Director's regulatory action under the APA." Response, p. 12. They further argue that the "35-day window argument is only applicable to pre-enforcement challenges," citing *CF&I Steel Corp. v. Colorado Air Pollution Control Commission*, 610 P.2d 85, 90 (Colo. 1980), and that "the APA's 35-day window is not applicable when the agency has taken final agency action in a specific case." Response, p. 13.

This is incorrect. The jurisdictional rule applies to "any agency action" that has determined rights and obligations or from which legal consequences will flow. *Doe 1 v. Colo. Dept. of Public Health and Envir.*, 451 P.3d 851, 858-59 (Colo. 2019). "Any agency action" includes rulemaking, *see, e.g.*, *Wine and Spirits Wholesalers*, 919 P.2d 894, as well as determinations by an agency "in a specific case." *See, e.g.*, *Gibbs v. Colorado Mined Land Reclamation Bd.*, 883 P.2d 592 (Colo. App. 1994), *abrogated on other grounds in Shootman v. Dept. of Transp.*, 926 P.2d 1200 (Colo. 1996).

Plaintiffs make no effort to show that they sought review of the procedure employed in promulgating the emergency rule (or the adoption of the permanent rule) within the jurisdictional threshold, arguing only that by requesting a hearing on the denial of the claimed refund, they have effectively preserved the issue. The Court agrees with Defendants that allowing review of the procedures by which the emergency regulation was adopted would impermissibly circumvent the jurisdictional bar to review of such agency action and vitiate the purpose of said bar. C.R.S. § 39-21-103(8)(c), which enumerates the authority of the executive director during a hearing, notes that the tax, penalty, and interest questioned may be modified, but provides no authority to sit in review of the agency's rule-making procedure. Plaintiffs have provided no authority which leads this Court to conclude otherwise.

The time to review the procedure by which these regulations were enacted has passed, and the Court is without jurisdiction to consider such issues outside of the period provided by statute.

III. C.R.S. § 39-22-103(5.3)

The core questions presented by Plaintiffs through this lawsuit is whether the Department exceeded its authority in promulgating Rule 103(5.3). Plaintiffs argue that Rule 103(5.3) is inconsistent with the plain language of C.R.S. § 39-22-103(5.3) and is violative of the Colorado constitution.

a. Principles of Law

Administrative agencies are legally bound to comply strictly with their enabling statutes. *Adams v. Colorado Dep't of Soc. Servs.*, 824 P.2d 83, 86 (Colo. App. 1991). The authority to regulate does not include the authority to legislate. *Id.* Therefore, unless expressly or impliedly authorized by statute, administrative rules and regulations are without force and effect if they add to, change, modify, or conflict with an existing statute. *Id.*

In construing a statute, a court's goal is to effectuate the legislature's intent. *Dep't of Revenue v. Agilent Techs., Inc.*, 441 P.3d 1012, 1016 (Colo. 2019). A court looks to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and applies words and phrases in accordance with their plain and ordinary meanings. *Id.* A court will avoid constructions that would render superfluous any words or phrases or that would lead to illogical or absurd results. *Id.* If the statutory language is clear, a court will apply it as written and will not resort to other rules of statutory construction. *Id.* A court may consider, but is not bound by, an agency's interpretation of its governing statute. *Id.* at 1016-17. Judicial deference to an agency's interpretation is most appropriate where the statute is ambiguous and the question at issue comes within the agency's special expertise. *Rare Air Limited, LLC v. Property Tax Administrator*, 459 P.3d 547, 551 (Colo. App. 2019).

If a statute is susceptible to more than one interpretation, a court's primary task is to ascertain and give effect to the intent of the General Assembly. *Huff v. Tipton*, 810 P.2d 236, 238 (Colo. App. 1991). When a dispute arises as to the meaning of a statute, the court may consider the consequence of the construction urged. *Id.* at 237. If the statute is part of a comprehensive legislative program, it is essential that in ascertaining legislative intent, the balance of the enactments relating to the same subject matter be considered. *Id.* at 238; *Welch v. Colorado State. Plumbing Board*, 474 P.3d 236, 241 (Colo. App. 2020) (noting interpretive aids employed in construing an ambiguous statute include "'the common law or former statutory provisions, including laws upon the same or similar subjects'; the legislative declaration and purpose of the statute; and the consequences of a particular interpretation.") (internal citations omitted).

Regarding a challenge to the constitutionality of a regulation, challenges come in one of two forms: as-applied, and facial challenges. *Dolan v. Fire & Police Pension Ass'n*, 413 P.3d 279, 286 (Colo. App. 2017). As-applied challenges are subject to review pursuant to C.R.C.P. 106(a)(4) and must be brought within the jurisdictional period of limitations. *Id.* Facial challenges are subject to review under C.R.C.P. 57. *Id.* It is presumed that rules and regulations are constitutional, and the burden is upon the attacking party to establish their invalidity beyond a reasonable doubt. *Id.* A court will not seek out reasons to invalidate a rule, but will interpret it to preserve its validity. *Grossman v. Dean*, 80 P.3d 952, 964 (Colo. App. 2003). A rule is

facially unconstitutional only if no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner. *Id*.

b. Interpreting C.R.S. § 39-22-103(5.3)

Plaintiffs contend that Rule 103(5.3) is an attempt at retroactively changing Colorado's tax scheme by enacting a regulation which contradicts the plain language and accepted historical application of Colorado's "rolling conformity" paradigm. *See* Complaint, ¶¶ 26-38, 43. Defendants, in response, argue that Rule 103(5.3) does not contradict the statutory scheme, but rather elucidates the statute by providing an explicit interpretative gloss.

The Court begins by reviewing the plain language of the statute at issue. C.R.S. § 39-22-103(5.3), which defines the phrase "Internal revenue code" as it is used in C.R.S. § 39-22-101 *et seq*., reads as follows:

> "Internal revenue code" means the provisions of the federal "Internal Revenue Code of 1986", as amended,[3] and other provisions of the laws of the United States relating to federal income taxes, as the same may become effective at any time or from time to time, for the taxable year.

Plaintiffs assert that the plain language of the statue is clear and unambiguous, drawing specific attention to two phrases: 1) "as amended;" and 2) "as the same may become effective at any time or from time to time, for the taxable year." *See*, *e.g.*, Complaint, ¶ 15(a); Response, p. 6. Plaintiffs' reading of the statute is that these phrases clearly indicate the legislature's intent to fully incorporate, without limitation, the federal tax scheme at any given time. The phrase "as amended" and "as the same may become effective at any time or from time to time" are argued to be indicative that any changes to the Internal Revenue Code, whenever made, and operating in whichever temporal direction, are incorporated *in toto*. Therefore, when the CARES Act retroactively modified the 2018 and 2019 taxable years to remove the excess business loss limit, Colorado incorporated that modification and it became effective in Colorado immediately.

Defendants offer a different reading. In their view, C.R.S. § 39-22-103(5.3) sets forth two components that collectively constitute the definition of the phrase "Internal revenue code": 1) provisions of the "Internal Revenue Code of 1986", as amended for the taxable year; and 2) other provisions of the laws of the United States relating to federal income taxes, as the same may become effective at any time or from time to time. Motion, p. 8; Reply, p. 5. In other words, the qualifying phrase "as the same may become effective at any time or from time to time" modifies "other provisions of the laws of the United States relating to federal income

[3] 26 U.S.C.A. § 1 *et seq*.

taxes," but not "the Internal Revenue Code of 1986, as amended." As a result, Defendants argue, the statute limits the incorporation of amendments to the Internal Revenue Code of 1986 to only those that are in effect for current or future taxable years.

Defendants' reading seems to turn heavily on the operation of the term "for the taxable year." The question, as the Court sees it, is whether the phrase "for the taxable year" operates to create a time limitation on when amendments are incorporated (*i.e.* only those amendments in effect during a particular taxable year are applicable to that taxable year) or whether the phrase simply identifies taxable years as discrete units.

The Court finds the statute to be ambiguous. First, the phrase "as the same may become effective at any time or from time to time" could be reasonably read to qualify either both the Internal Revenue Code of 1986, as amended, and "other provisions of the laws of the United States relating to federal income taxes." It likewise could be reasonably read to qualify only the "other provisions" phrase. Likewise the phrase "for the taxable year" creates an ambiguity, as it could be reasonably read to set forth a time from during which the provisions of the Internal Revenue Code could be considered applicable for a particular tax year, or it could simply silo the discrete tax years.

This is all to say the statute does not clearly provide for the application of one construction or the other. Both parties' positions find support in the plain language of the statute, and the Court cannot say with confidence that one reading operates to the exclusion of another. Given this ambiguity, the Court turns to the available interpretive aids to divine the legislative intent.

i. Balance of legislative scheme

The Court first considers the statutory scheme as a whole and whether said scheme provides context for the interpretation of the statute. *See Adams*, 824 P.2d at 86; *Huff*, 810 P.2d at 238. A review of the accompanying statutes provides little, if any, insight into the question before the Court.

C.R.S. § 39-22-102 sets forth the legislative declaration concerning the Colorado Income Tax Act of 1987. The state purposes of the act are: 1) simplifying the preparation of state income tax returns; 2) aiding in the interpretation of the state income tax law through increased use of federal judicial and administrative determinations and precedents; and 3) improving the enforcement of the state income tax laws through better use of information obtained from federal income tax audits.

Plaintiffs contend in their Complaint that the stated purpose of simplifying the preparation of income tax returns is undercut by the Defendants' position by creating two

taxation schemes: one in which a retroactive deduction is applicable, at the federal level, and one in which it is not, at the state level. Complaint, ¶ 29. The Court does not find this argument to carry much weight, in either direction. Limiting the incorporation of federal changes to a prospective basis has little effect, if any, on the *preparation* of income tax returns. The word "preparation," from the latin *praeparare*, meaning "to make ready before," indicates activity occurring prior to an event. In other words, it is prospective. One could argue that a prospective reading aids in the mission to simplify preparation of tax returns by removing uncertainty that future changes might affect prior years' returns. There is a simplicity in repose. On the other hand, Plaintiffs' argument of "one set of rules" is admittedly simple, as well. The legislative declaration of the purpose of the statute is a wash in terms of providing insight into the intent of the legislature on this particular question.

There is little else in the way of statutory context, with respect to the overall legislative scheme, that provides insight into the General Assembly's intention regarding the incorporation of retroactive changes to the federal scheme. There are myriad Colorado state income tax laws concerning deductions, credits, *et cetera*, to taxpayers. The prevailing legislative tradition appears to be prospective. *See, e.g.*, C.R.S. § 39-22-530 (enacted in 2008, creating an income tax credit for income tax years beginning January 1, 2009); *see also* C.R.S. § 39-22-529 (effective December 31, 2006, disallowing as a deductible business expense for state income tax purposes any wages or remuneration for labor services totaling six hundred dollars or more paid by an employer to an unauthorized illegal alien whom the employer knew at the time of hiring to be unauthorized, but exempting from this disallowance any individual hired prior to December 31, 2006). However, because these statutes are specific allowances or disallowances provided for by the legislature, they offer little insight into the intent regarding the incorporation of federal statutes.

Of course, there have also been tax laws in Colorado which are designed to apply retroactively, but these tend to appear in the context of property taxes, and frequently concern underreporting. *See, e.g.*, *Martin v. Board of Assessment Appeals of State*, 707 P.2d 348 (Colo. 1985) (concerning challenge to a change in method of valuation as impermissibly retroactive); *Kinder Morgan CO2 Co., L.P. v. Montezuma County Bd. of Com'rs*, 396 P.3d 657 (Colo. 2017) (finding statutory scheme allowed retroactive assessments based on underreported selling price or volume of oil and gas); *Shell Western E&P, Inc. v. Dolores County Bd. of Com'rs*, 948 P.2d 1002 (Colo. 1997) (retroactive change to the manner in which delinquent interest calculated retroactive, but not retrospective); *Jet Black, LLC v. Routt County Bd. of County Com'rs*, 165 P.3d 744 (Colo. App. 2006) (concerning statute authorizing retroactive assessments of taxes for priors years on property previously omitted). Likewise, these statutes offer little insight into the question before the Court because they simply do not speak to the intention regarding incorporation of federal income tax law.

It thus appears that the legislative scheme provides no clear context upon which the Court can definitively discern an intent. What weight there is behind the statutory context, however, does seem to counsel in favor of prospective incorporation, as Colorado's specific income tax provisions tend to be given operative effect in a prospective fashion, unlike what is apparently the prevailing tradition in federal income tax legislation. *Compare U.S. v. Darusmont*, 449 U.S. 292, 297 (1981) ("In enacting general revenue statutes, Congress almost without exception has given each such statute an effective date prior to the date of actual enactment.") *with California Co. v. State*, 348 P.2d 382, 398 (Colo. 1959) (declining to afford retroactive construction for tax statute for period from January 1, 1953 through March 27, 1953, the date of enactment due to lack of clear legislative intent).

ii. Impact of proposed constructions

The Court next turns to the impact of the proposed constructions offered by both parties. *Adams*, 824 P.2d at 86 (a court, when construing a statute, must "consider the ends that the statute was designed to accomplish and the consequences that would follow from alternative constructions."); *Welch*, 474 P.3d at 241 (noting that the "consequences of a particular interpretation" is an interpretive aid).

Defendants argue that Plaintiffs' proposed interpretation creates significant problems in terms of compliance with Colorado's constitutional mandates, with respect to Article X, § 16 as well as the refund requirement under Article X, § 20. Defendants also argue that the Plaintiffs' interpretation is contrary to the general prohibition against retrospective legislation under Article II, § 11. Plaintiffs do not address these contentions in their Response.

Article X, § 16 of the Colorado Constitution provides that "no appropriation shall be made, nor any expenditure authorized by the general assembly, whereby the expenditure of the state, during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure…" The purpose of this provision "is to prohibit the making of appropriations authorizing expenditures for any fiscal year in excess of the revenue provided for the payment thereof during said period, to the end that indebtedness beyond the current means of discharging the same may be precluded." *People ex rel. Colo. State Hosp. v. Armstrong*, 90 P.2d 522, 525-26 (Colo. 1939). This provision operates by voiding any assessments that remain unpaid at the exhaustion of the total revenue for a given fiscal year. *Id.* at 525.

Article X, § 20 contains the "Taxpayer's Bill of Rights" ("TABOR"). TABOR was enacted to limit the discretion of government officials to take certain taxing, revenue, and spending actions in the absence of voter approval. It contains a provision providing for the refund of revenues collected, kept, or spent illegally, with 10% interest accruing "from the initial

conduct." Art. X, § 20(1). It likewise contains provisions for the refunding of revenues received in excess of certain spending limits. *See* Art. X, § 20(7). Defendants contend that Plaintiffs' interpretation would cause havoc in the administration of the refunds. By way of example, they argue that after the 2019 fiscal year, Colorado issued hundreds of millions of dollars in refunds, refunds which, if Plaintiffs' interpretation holds, would now be excessive, creating a windfall for taxpayers at the expense of future budgets.

The Court does not credit Defendants' concerns with respect to the "balanced budget requirement," *i.e.* Art. X, § 16. The constitutional provision does not appear to require a budget remain in balance in perpetuity; the provision rather only concerns itself with expenditures for which "the total tax *then* provided for" is insufficient. If the 2018 fiscal year budget is balanced, a retroactive change in 2020 to the 2018 tax revenue would not impact that calculus for purposes of this provision. The provision only applies to taxes and spending in a given moment in time, and future changes would not invalidate spending that has already occurred. A retroactive allowance of a deduction, thereby reducing the tax revenue attributable to years past, simply would not implicate this provision, at least on its face.

However, the unavoidable reality of Plaintiffs' interpretation is that the refund associated with the prior tax year would have to be borne by the one in which it was claimed. Plaintiffs are asking for a check, and that money has to come from somewhere. Refunds are paid out of a special reserve. *See* C.R.S. § 39-21-108(2); C.R.S. § 39-22-622. Reserve increases qualify as "state fiscal year spending," for which there is a cap. C.R.S. § 24-77-102; Art. X, § 20(7). While reserve expenditures are exempted from the definition of fiscal year spending, *see* Art. X, § 20(2)(e), large sums of money paid out in refunds would require a replenishing of the reserve, which must, by statute, be maintained. Retroactive changes, such as those at issue in this case, could create surprise cost burdens for future years by draining available reserves and necessitating reserve increases, jeopardizing budgetary planning efforts by forcing the state to dedicate a portion of its spending capacity on replenishing the refund reserve at the expense of other state projects.[4] Plaintiffs are just one taxable unit, and they are asking for nearly eight million dollars.[5] The significance of the expenditure associated with issuing refunds, consistent

[4] Consider *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1 (Colo. 1993), which noted that, without a exception for lottery proceeds from state fiscal year spending, fluctuations in proceeds could cause "state fiscal year spending to increase in a way that the General Assembly could not predict." The consequence of such unpredictability could be a refund to comply with spending limits, which, coupled with the dedicated nature of spending lottery proceeds, would "necessarily take away from another part of the state budget." *Id.* at 11.

[5] The Court notes that the parties have endeavored to keep the amount of the refund suppressed pursuant to the Protective Order entered in this matter. Plaintiffs have availed themselves of a public forum, and given the issues raised in the briefs, the Court concludes that whatever privacy interest Plaintiffs may have in protecting the amount of the refund request is outweighed by the public's right to know. Moreover, C.R.S. § 39-21-113(4)(a) authorizes a

with Plaintiffs' interpretation, to all those who would qualify seems highly problematic, compounded by the fact that it was neither the Colorado legislature nor the voters who mandated this expenditure.

The Court finds Defendants' argument concerning TABOR refunds less than compelling, however. TABOR limits the amount a state can spend in a year, and mandates refunds in the following fiscal year for any revenue received in excess of that limit. *Thorpe v. State*, 107 P.3d 1064, 1067 (Colo. App. 2004); Art. X, § 20(7). The Court does not share Defendants' concerns over the purported windfall by way of excessive refunds. The General Assembly appears to have developed a legislative scheme for precisely this issue. C.R.S. § 24-77-103.7 provides for "over-refunds of state revenues." It applies when "the amount of state revenues actually refunded during any given fiscal year exceeds the amount of state revenues…required to be refunded." C.R.S. § 24-77-103.7(1). Any over-refund operates to reduce the amount of state revenue in excess of the limitations in future years (with preference for the earliest application possible). C.R.S. § 24-77-103.7(2). Thus, any refunds rendered excessive by the application of a reduction in taxable income attributable to a prior fiscal year could be recouped by reducing future refunds.

The retroactive changes brought about by the CARES Act are essentially a roundabout stimulus. The result is not a simple reduction in taxes collected, or the granting of a future tax credit or rate reduction (as are available for excess revenue refunds under TABOR), but by affirmative payments made to taxpayers. *See* C.R.S. § 39-21-108(2) (requiring the executive director to issue a voucher for refunds in appropriate cases, the receipt of which by the controller will result in the issuance of warrant for payment). Because the refunds come from a reserve, transfers to which qualify as state fiscal year spending and thus count towards the overall cap imposed by TABOR, there is a colorable concern that retroactive changes could divert money away from other state budgetary concerns.

iii. Presumption for prospective operation

Defendants argue that the presumption in favor of prospective application of laws counsels in favor of their interpretation of the statute. Plaintiffs do not explicitly address this argument, but do argue generally that the legislative intent is clear from the statute, and thus presumably would take the position that the presumption is overcome by clear legislative intent.

"It is a fundamental rule…that statutes are not to be construed as having a retroactive effect unless the purpose and intention of the legislature to give them a retroactive effect clearly appears." *City & Cty. of Denver v. Armstrong*, 97 P.2d 448, 449 (Colo. 1939); *see also State Bd.*

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court to admit as public evidence "so much of said [tax information] or of the facts shown thereby as are pertinent to the action or proceeding and no more."

of Equalization of State of Colo. v. Am. Airlines, Inc., 773 P.2d 1033, 1040 (Colo. 1989) (assembling cases supporting rule of presumptive prospective construction); C.R.S. § 2-4-202. Indeed, the Colorado Court of Appeals noted that "it has generally been held that tax assessments may not be altered for tax years that have already closed," while acknowledging a common exception for antedating the application of a tax statute to the beginning of the tax year during which it was enacted. *Martin*, 707 P.2d at 352. While there is no doubt that there must be a clear indication of intent for retroactive application, that intent need not be expressed explicitly in the legislation. *Shell W. E&P, Inc.*, 948 P.2d at 1012.

The Court has found that the statute is ambiguous and has, thus far struggled to divine any sort of clear legislative intent regarding the incorporation of retroactive federal changes. Certainly, it cannot be said that the statute exudes the "clearest mandate" required to overcome the presumption for prospective operation. *Claridge Apartments Co. v. C.I.R.*, 323 U.S. 141, 164 (1944). The Court takes note of the presumption and the absence of a clear expression of legislative preference in determining whether the statute incorporates retroactive changes.

iv. Agency Deference

The Court considers the degree to which agency deference is appropriate in this context. The crux of this case is whether Rule 103(5.3), the stated purpose of which "is to clarify that the term 'internal revenue code' incorporates changes to federal statute only on a prospective basis," sets forth a valid interpretation of C.R.S. § 32-22-103(5.3). The purported basis of Rule 103(5.3) is, among others, C.R.S. § 39-21-112, which provides for the authority of the executive director to promulgate rules in order to aid in the administration of the relevant tax statutes.

In *Chevron*, 467 U.S. at 842-43, the Supreme Court of the United States set forth a two-step inquiry when reviewing the propriety of an administrative regulation. First, a court asks whether the legislature has "directly addressed the precise question at issue." *Id*. If it has, the inquiry is at an end, and the intent of the legislature is imposed. *Id*. If it has not, then the court asks whether the agency's interpretation of the statute through its rule is based on a permissible construction of the statute. *Id*. at 843. A construction is "permissible" so long as it is neither arbitrary or capricious in substance, or manifestly contrary to statute. *Mayo Foundation for Medical Educ. and Research v. U.S.*, 562 U.S. 44, 53 (2011).

Colorado courts follow the same model. *See Wine and Spirits Wholesalers*, 919 P.2d at 897 (finding the reasoning in *Chevron* "particularly persuasive"); *see also Jefferson Cty. Bd. of Cty. Com'rs v. S.T. Spano Greenhouses, Inc.*, 155 P.3d 422 (Colo. App. 2006) (noting that "if a property tax statute does not provide specific guidance on a particular issue, a reviewing court will consider the Property Tax Administrator's interpretation of the appropriate provision."). Multiple courts have held that "administrative interpretations are most useful to the court when

the subject involved calls for the exercise of technical expertise which the agency possesses and when the statutory language is susceptible to more than one reasonable interpretation." *El Paso Cty. Bd. of Equalization v. Craddock*, 850 P.2d 702, 705 (Colo. 1993); *S.T. Spano Greenhouses*, 155 P.3d at 425 ("Judicial deference to an administrative agency's interpretation of a statute is appropriate if the statute before the court is subject to different reasonable interpretations and the issue comes within the administrative agency's expertise.").

The Court has already found C.R.S. § 39-22-103(5.3) to be ambiguous (*i.e.* subject to more than one reasonable interpretation). In addition, the issue touches on areas within the agency's expertise, specifically regarding the administration of tax collection and the impact of retroactive tax amendments within the context of Colorado's relatively unique taxation landscape. The agency's interpretation of C.R.S. § 39-22-103(5.3), and its embodiment in Rule 103(5.3), is therefore accorded appropriate deference. *See A.D. Store Co., Inc. v. Executive Director of Dept. of Revenue of State of Colo.*, 997 P.2d 1241, 1243 (Colo. App. 1999) ("Further, because the Department of Revenue is charged with the administration and enforcement of state tax laws, *see* § 24-35-101, C.R.S. 1999, its interpretation of tax statutes is entitled to deference."), *reversed on other grounds in* 19 P.3d 680 (Colo. 2001).

v. Subsequent ratification

The Court considers what evidence of legislative intent can be discerned from the subsequent "ratification," in a sense, of Rule 103(5.3) by amendments to Colorado's tax code that rely on that validity of Rule 103(5.3)'s interpretation.

Defendants argue that the General Assembly relied on the Defendants' interpretation in passing HB 20-1420, §§ 2-3 and HB 21-1002, and in so doing have revealed their intent to not incorporate retroactive changes to federal law. Plaintiffs again do not specifically address this issue.

When a legislature has reenacted or amended a statute, a failure to repeal the agency's interpretation is persuasive evidence that the administrative interpretation was intended by the legislature. *Hewlett-Packard Co. v. State, Dept. of Revenue*, 749 P.2d 400, 406 (Colo. 1988); *see also Colonial Bank v. Colo. Financial Services Bd.*, 961 P.2d 579, 585 (Colo. App. 1998) ("When the General Assembly has amended a statute, a failure to repeal the agency's interpretation is persuasive evidence that the administrative interpretation was intended by the General Assembly.").

When the administrative interpretation is longstanding, the failure of the legislature to repeal or modify it is accorded even greater weight. *See N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) ("A court may accord great weight to the longstanding

interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."); *Schlagel v. Hoelsken*, 425 P.2d 39, 42 (Colo. 1967) ("The action of the legislature was, in our view, a specific ratification of the interpretation given the general act by the Public Utilities Commission and the public over the many, many years in which the businesses herein affected were developed under regulation.").

Certainly, no great period has passed since the agency announced its interpretation via promulgation of Rule 103(5.3). In *Schlagel*, the interpretation had existed for over twenty years. Here, the emergency Rule was adopted on June 2, 2020. HB 20-1420 was introduced on June 8, 2020, and signed into law on July 11, 2020. HB 21-1002 was introduced on January 13, 2021, and signed into law on January 21, 2021.

That relative recency of Rule 103(5.3), with respect to subsequent legislative amendments endorsing it, does not diminish the probative value of HB 20-1420 and HB 21-1002. HB 20-1420 added, among other provisions, subsection (3)(m) to C.R.S. § 39-22-104, which requires that a taxpayer add to his federal taxable income for the 2020 taxable year "an amount equal to a taxpayer's excess business loss as determined under section 461(l) of the internal revenue code without regard to the amendments made by section 2304 of the 'CARES Act.'" The Final Fiscal Note for HB 20-1420 comments on this provision (among others), noting that "these additions effectively reverse certain expanded income tax deductions allowed under the federal [CARES Act]." Relatedly, HB 21-1002 enacted changes to C.R.S. § 39-22-104 that allowed a taxpayer who took advantage of the CARES Act by filing amended 2018 or 2019 federal tax returns to claim the previously disallowed excess business loss deduction on a carry-forward basis to future years for Colorado state income tax purposes. *See* C.R.S. § 39-22-104(4)(z).

The legislative endorsement is clear. These amendments to C.R.S. § 39-22-104 were predicated on addressing, in relevant part, the retroactive CARES Act changes. The explicit and necessary assumption underlying these amendments is that Colorado taxpayers will not be able to amend their 2018 and 2019 state tax returns to claim the retroactive federal income tax deductions allowed by the CARES Act. The legislature enacted these changes with explicit knowledge of Rule 103(5.3) and took action in accordance with the principle that C.R.S. § 39-22-103(5.3) does not incorporate retroactive changes to federal tax law. Going beyond merely failing to repeal the agency's interpretation, the General Assembly affirmatively legislated in accordance with it.

c. Constitutionality of Rule 103(5.3)

Plaintiffs maintain that Rule 103(5.3) violates Art. X, § 20(8) of the Colorado Constitution. They argue that the Rule does this in two primary ways: 1) by increasing the income tax rates through disallowing an available deduction, and 2) by changing the definition of Colorado taxable income. Complaint, ¶ 50. Plaintiffs also contend that these changes were not voted upon by the people of Colorado, as require before any such change can be effective pursuant to Art. X, § 20(4)(a).

Defendants counter that the Rule does not impart a tax rate increase because it does not adjust that tax rate at all. Motion, p. 13. The Court agrees. While the elimination of a deduction, exemption, exclusion, or tax credit can certainly be characterized as a "tax rate increase," s*ee, e.g.*, *Honeywell, Inc. v. U.S.*, 973 F.2d 638, 642-43 (8th Cir. 1992) (internal citation omitted), this argument presupposes the existence of an entitlement to the claimed deduction in the first instance.

Because the Court has found that C.R.S. § 39-22-103(5.3) does not incorporate retroactive changes to federal income tax law into the Colorado scheme, Plaintiffs had no entitlement to the deduction in the first instance. Because they were not entitled to the deduction, there has been no change to the rate. This argument consequently fails.

Defendants next argue that Rule 103(5.3) cannot constitute a change in the definition of taxable income because the Department cannot, by rule, modify the statutory definition. The argument is simple. Any regulation which is inconsistent with or contrary to statute is void and of no effect. *Miller Int'l, Inc. v. Colo. Dep't of Revenue*, 646 P.2d 341, 344 (Colo. 1982). A change is necessarily inconsistent with that to which it previously was. Consequently, a rule that purports to effect a change to the statutory definition of state taxable income is void and of no effect. Because it is void and of no effect, it cannot offend the constitution.

The Court agrees. The argument is really a roundabout way of stating that, if the Court upholds the Rule (which it has done here), it has necessarily found that it has not modified the statute. Because it has not modified the statute, it has not changed the definition of taxable income.

In short, the Rule neither constitutes an income tax rate increase, because there has been no change, nor does it redefine taxable income as the Rule is consistent with the underlying statute.

CONCLUSION

Plaintiffs' claims turn entirely on the construction and interpretation of C.R.S. § 39-22-103(5.3). That statute provides no clear indication as to whether the incorporation of the internal

revenue code is to happen exclusively prospectively. The statutory scheme likewise provides little guidance on the question; notably absent from the scheme is the sort of "clear mandate" required to overcome the presumption of prospective application. Furthermore, Colorado's tax landscape, as mandated by TABOR, creates certain difficulties in accommodating sudden unexpected retroactive amendments to the availability of deductions and entitlements to refunds. Given this context, the Defendants' interpretation of the statute through Rule 103(5.3) is, at the least, a reasonable interpretation and is thus entitled to deference. Finally, the General Assembly's endorsement of the Defendants' interpretation through not only a failure to repeal the interpretation, which they actively acknowledge, but by legislating in accordance with it, suggests that the legislature's intent was for changes to the internal revenue code be adopted on a prospective basis. Consequently, this Court finds that Plaintiffs' proposed construction of C.R.S. § 39-22-103(5.3), and thus, the foundation of their claims, is wanting. For these reasons, Defendants' Motion is GRANTED, and this matter is dismissed WITH PREJUDICE.

ENTERED this 5th day of August, 2021.

BY THE COURT:

J. Eric Elliff
District Court Judge