STATE OF DELAWARE
DEPARTMENT OF FINANCE
OFFICE OF THE SECRETARY

THOMAS J. COOK
SECRETARY OF FINANCE

April 22, 2014

Temple-Inland Inc.
c/o Marla F. Adair, Chief Counsel,
Global Corporate Tax Governance, Treasury & Tax
International Paper Company
6400 Poplar Ave., Tower II
Memphis, TN 38197

Re: Temple-Inland Inc. v. Michelle Whitaker, Audit Manager for the Office of Unclaimed Property, Department of Finance, State of Delaware

Dear Ms. Adair,

As mandated by 12 *Del. C.* § 1156(j), I have reviewed the determination of Ronald S. Gellert, the Independent Reviewer in this matter. Mr. Gellert was appointed by me pursuant to 12 *Del. C.* § 1156(g) to consider Temple-Inland's appeal of the Audit Manager's findings and determination related to Temple-Inland's protest of the Statement of Findings and Request for Payment issued by the Office of Unclaimed Property on March 27, 2013.

Having carefully reviewed the record and considered the opinion issued by Mr. Gellert on April 3, 2014, I have determined that the findings are supported by substantial evidence. I hereby adopt the opinion in its entirety. Attached is a copy of the written decision.

This determination is final as to the Department of Finance.

Sincerely,

Thomas J. Cook
Secretary of Finance

cc: Ronald S. Gellert, Esquire
Diane Green-Kelly, Esquire
Brian Rostocki, Esquire
Michelle Whitaker, Audit Manager
Edward K. Black, Deputy Attorney General
Caroline Lee Cross, Deputy Attorney General
David Gregor, State Escheator

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IN THE DEPARTMENT OF FINANCE OF THE STATE OF DELAWARE

Temple Inland Inc.,	:	
Appellant.	:	Administrative Appeal Pursuant to
v.	:	12 Del. C. § 1156
Michelle M. Whitaker, Audit Manager	:	
For the Office of Unclaimed Property,	:	
Department of Finance, State of Delaware;	:	
Appellee.	:	
	:	

OPINION

This matter arises from the appeal of Temple Inland Incorporated ("Appellant" or "Temple Inland") from the written determination, dated July 19, 2013 (the "July Determination"), of Michelle M. Whitaker, Audit Manager for the Office of Unclaimed Property, Department of Finance, State of Delaware ("Audit Manager" or "Appellee" or "State" or "Delaware") in which the Audit Manager rejected the majority of Temple Inland's protest and made demand on behalf of the State for $2,033,390.74 in unreported unclaimed property.

For the reasons stated herein, the Independent Reviewer **affirms in part and reverses in part.**

I. FACTUAL BACKGROUND

Temple Inland is an entity incorporated in Delaware. Temple Inland has operations in numerous states and does not maintain its principal headquarters in Delaware. In December 2008, Temple Inland was notified by the State of Delaware that the State would be conducting an examination of Temple Inland's books and records to determine Temple Inland's compliance with 12 *Del. C.* § 1101, *et seq.* (the "Delaware Escheats Statute").

The State authorized its agent, Kelmar Associates, LLC ("Kelmar") to conduct the review on behalf of the State. As part of the investigation, Temple Inland revealed that it no longer maintained the relevant records on the accounts payable account prior to 2003 and for its payroll account prior to 2004.

At that time, the parties had some discussions regarding the State's desire to perform a sampling of information that was accessible after 2003 and 2004, respectively, in order to conduct an estimation of unreported amounts to have been escheated for periods prior thereto.

Michael Borish on behalf Kelmar completed a Report of Examination ("ROE") which report was provided to Temple Inland for review and comment on February 14, 2013. Temple Inland subsequently provided additional information and comments to the ROE. On March 27, 2013, the State of Delaware, via the State's Audit Manager, issued a revised ROE to Temple Inland with a request for payment of $2,128,834.13.

Thereafter, on May 22, 2013, pursuant to 12 *Del C.* § 1156(b), Temple Inland submitted a protest to the Audit Manager. In raising substantially similar arguments contained in the current appeal, Temple Inland acknowledged at most only $147.30 was due, which payment it presented with its protest.

On July 19, 2013, the Audit Manager responded with a written determination of the protest, which sustained two of Temple Inland's objections and denied the remainder of the objections. As part of the Audit Manager's Statement of Findings, the Audit Manager included a Revised Request for Payment in the amount of $2,033,390.74.

On August 15, 2013, Temple Inland submitted its notice of appeal pursuant to 12 *Del. C.* § 1156(f) with the Delaware Secretary of Finance, Thomas Cook.

Subsequently, on October 31, 2013, subject to a conflict review, Secretary Cook appointed Ronald S. Gellert, Esquire as the Independent Reviewer pursuant to 12 *Del. C.* § 1156. Briefs were submitted by the parties on January 22, 2014. Oral argument was heard on the Temple Inland appeal on January 29, 2014.

II. ISSUES ON APPEAL

As set forth in its brief, Appellant describes the issues on appeal as follows:

1. Whether the State exceeded its authority by estimating a liability for Temple Inland for periods prior to 2003 for accounts payable and prior to 2004 for payroll because (a) 12 Del C. § 1155, which authorizes the State Escheator to assess an estimation penalty for failure to retain records, is expressly applicable only to failures after July 23, 2010, and (b) federal common law prohibits a State from estimating actual unclaimed property and preempts §1155.

2. Whether the State's examination of Temple Inland's records showed that Temple Inland is in material compliance with the Delaware Escheat Law with respect to both its account payable and payroll, and therefore no additional assessment was justified.

3. Whether the State's use of adjusted revenues as a benchmark for estimating unreported unclaimed property is arbitrary, capricious and against the manifest weight of the evidence.

4. Whether the State improperly treated unclaimed property that was previously escheated to Delaware and other states as evidence of noncompliance with escheat laws.

III. RELEVANT STATUTORY PROVISIONS

12 Del. § 1101 *et seq.*

IV. STANDARD OF REVIEW

Pursuant to 12 *Del. C.* § 1156(h):

> [t]he appeal to the independent reviewer is de novo on the record. The record on appeal to the independent reviewer shall be based solely upon documents submitted during the course of the examination to the Audit Manager ..., other nonprivileged materials prepared by or for the Audit Manager during the conduct of an

examination, expert reports submitted to the Audit Manager by the person filing a protest, other nonprivileged materials and expert reports prepared by or for the Audit Manager during the consideration of a protest.

The parties do not dispute the de novo nature of this review. In addition, the parties do not dispute that the Independent Reviewer is limited to a review of evidence contained in the record before the Audit Manager when reviewing Temple Inland's initial protest.

Under the de novo standard of review, the Independent Reviewer examines the decision of the Audit Manager "anew and without any deference". *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

V. DISCUSSION AND ANALYSIS

A. Estimation of Liability: Is It Prospective Only And/Or Preempted By Federal Common Law

Temple Inland's primary discussion at oral argument focused on the ability of states to perform an estimation of escheat liability. As discussed herein, Temple Inland argues that estimation of liability is preempted by federal common law.

1. Federal Common Law Preemption

Temple Inland recognizes the right of states to recover and hold unclaimed property under its escheat laws. Temple Inland cites *Texas v. New Jersey*, 379 U.S. 674 (1965), *Pennsylvania v. New York*, 407 U.S. 206 (1972), and *Delaware v. New York*, 507 U.S. 490 (1993), for the proposition that property must be first identified in order for a state to take custody of the unclaimed property. The State does not dispute this basic position.

However, Temple Inland interprets the Supreme Court decisions as holding that a *specific* identification of the property is required in order for a state to take custody of such unclaimed property, thereby eliminating the ability to perform any estimation of unclaimed property. As a

result, Temple Inland argues that if property cannot be specifically identified, then it is not subject to recovery and custody under escheat laws.

The Independent Reviewer does not agree.

The Uniform Unclaimed Property Act (the "UUPA") addresses the issue of identification of unclaimed property. Section 20 of the UUPA permits state administrators to examine the records of entities operating within its state to conduct such identification. Notably, where such records are unavailable, subsection 20(f) of the UUPA permits the administrator to recover and hold "the amount the administrator reasonably estimates, on the basis of any available records of the holder or by any other reasonable method of estimation, should have been but was not reported."

In other words, if a state cannot readily identify property through a party's records, it may make reasonable estimations of what unclaimed property may exist. Thus, a state is permitted to account for instances whereby property should be held by the State but it is not presently known for whom and how much.

Although the property cannot be specifically identified here through prior corporate records, the State argues that it is the process of estimation that meets the requirement of identification of the property. As a result, the State contends that it meets the property identification requirement established by the Supreme Court.

In turn, Temple Inland argues that *Texas v. New Jersey* and its progeny set forth a clear federal common law prohibiting estimation, and therefore a state may not identify property through estimation.

However, the argument that the Supreme Court established a common law prohibiting an estimation of unreported unclaimed property amounts is not supported by the plain reading of the case law.

Pennsylvania v. New York and *Texas v. New Jersey* do not address the issue of estimation, nor do they explicitly require specific identification of property. These cases concern the issue of competing state interests in unclaimed property and how to efficiently administer potential competing interests. In these cases, the Supreme Court merely established a priority system among states for the collection and administration of unclaimed property. The Supreme Court determined in *Pennsylvania* that the state with the primary priority over administering funds would be the state of the owner's identifiable address, if applicable. The Supreme Court noted that where no such identifiable address was ascertainable, then the state of incorporation would prevail as a uniform means to determine where unclaimed property would be held and administered. While addressing a different set of circumstances, *Texas* reiterated and reaffirmed this priorty system for the placement of unclaimed property.

Yet again, in *Delaware v. New York*, the Supreme Court confirmed the priority system it had previously enumerated. The potentially relevant issue that arose in *Delaware* was the claim asserted by New York that when applying the priority system, the mechanism enumerated by the Supreme Court should permit for the statistical estimation of potential owners' addresses. The Supreme Court rejected this claim. The Supreme Court found that the address estimation would not involve the owners, but rather the addresses of their brokers. Moreover, this would not accomplish the previously stated preference to have property held in the state of the owner. *Delaware*, 507 U.S. at 508-09. The Supreme Court further affirmed its decisions by finding that

estimating addresses would detract from the uniformity it established in the *Pennsylvania* and *Texas* cases. *Id.*

None of these Supreme Court decisions address the issue of estimation of amount of unclaimed property. Plainly therefore, these cases do not expressly prohibit estimation of amounts. Furthermore, the extrapolation of the *Delaware* decision against estimating addresses to the argument of estimating amounts at issue here is inapposite.

The only reported decision addressing the issue of estimating unclaimed property is *State of New Jersey v. The Chubb Corporation, et al.*, 570 A.2d 1313 (N.J. Super. 1989) (finding that estimation would be appropriate where insufficient records exist and the methodology of estimation is appropriate).[1]

Several years following *Delaware*, the laws on the issue of unclaimed property were further clarified in the UUPA. The revised UUPA, released in 1995, replaced the 1981 version of the UUPA. The 1995 UUPA, drafted by the National Conference of Commissioners on Uniform State Laws, specifically included Section 20(f):

> If, after the effective date of this [Act], a holder does not maintain the records required by Section 21 and the records of the holder available for the periods subject to this [Act] are insufficient to permit the preparation of a report, the administrator may require the holder to report and pay to the administrator the amount the administrator reasonable estimates, on the basis of any available records of the holder or by any other reasonable method of estimation, should have been but was not reported.

Section 20(f) of the 1995 UUPA actually broadens the 1981 UUPA. Furthermore, Section 30 of the UUPA allows estimation based on "any available records". Thus, the

[1] The Independent Reviewer recognizes Temple Inland's position that the *Chubb* case was determined prior to the *Delaware* ruling. Notably, however, there is no subsequent case law where a court extrapolates the *Delaware* ruling to prohibit appropriate estimations based on insufficient records.

inclusion of the phrase "or by any other reasonable method of estimation" significantly broadens the analysis that a state may undertake in evaluating and determining unclaimed liabilities.

Moreover, the specific inclusion and broadening of the estimation provisions fully supports the State's position that estimation is in fact appropriate in this case.

Finally, the Independent Reviewer notes the point raised by the State that should the Independent Reviewer accept Temple Inland's position that estimation is inappropriate even in the instance of insufficient records, this would amount to a windfall for the company that does not keep sufficient records.

Temple Inland's retort to this position is that the State is the true party to achieve a windfall through estimation. The thrust of this argument is that if property and/or an owner cannot be identified, it is unlikely that such property will ever be claimed and the state will retain the property. While this argument has some attractive elements, the Independent Reviewer is mindful that a state only holds the property of owners in escheat until recovery is made by the owner or the length of time passes where no owner makes efforts to recover its property. To leave the property with the holder rather than the state (for the benefit of the owner) does not achieve the goal that escheat statutes are meant to address.[2]

In sum, therefore, the Independent Reviewer finds that estimation of unclaimed property liabilities is not preempted by federal common law and is therefore generally acceptable when such estimation is made in a reasonable fashion.

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[2] The Independent Reviewer recognizes those rulings noting the "greater good" principle as a basis for states to hold unclaimed funds until recovered or the funds are ultimately absorbed into state coffers. While the Independent Reviewer does not reject that concept, the preference is to base this ruling on a more tangible concept of whether an entity may hold property on its books (and its accounts) when it is not the rightful owner to same. Consistent with the UUPA, the Independent Reviewer find that the state is a more neutral holder of such unclaimed property.

2. Scope of Authority under Delaware Law

In finding that estimation of unclaimed property liabilities is not preempted by federal common law, the analysis now turns to the applicability of Delaware law to the process of estimating such claims under 12 *Del. C.* § 1155.

As set forth herein, the Independent Reviewer finds that the Delaware statute in fact permits such estimation and that Delaware acted appropriately in taking steps to estimate such claims.[3]

To begin, there is no dispute that the plain language of the statute permits the estimation of unreported property for escheat purposes. Rather, the dispute centers on whether or not the enactment of 12 *Del. C.* § 1155 only permits an estimation prospectively.

Temple Inland points to the 1995 UUPA, Section 20(f) as providing guidance on whether the State may look back to determine liability from years prior to the effective date of the act: "(f) If, after the effective date of this [Act]...."

Thus, Temple Inland points out that the examination and estimation may only be done prospectively.

Temple Inland further argues that the Delaware act, which was signed into law on July 23, 2010, was intended to apply prospectively only. Temple Inland cites S.B. No. 272 (amending 12 Del. C. § 1155) as stating: "Sections 3 through 13 of this Act shall become effective upon their enactment into law."

Accordingly, Temple Inland argues that it is unambiguous that the State could only conduct its estimation analysis if necessary (and if not otherwise preempted by federal common

[3] The propriety of the methods of estimation will be addressed in greater detail below.

law) from and after the July 23, 2010 enactment date. Looking back before that date would not be permitted.

The contrary point asserted by the State is that the adoption of the UUPA was not wholesale, and rather, the Delaware legislature made a very significant exclusion regarding the prospective nature of the UUPA.

While the UUPA begins with the phrase: "If, after the effective date of this [Act] ...", the Delaware statute excised this limitation provision from its adoption. As a result, the Delaware statute instead states:

> Where the records of the holder for the periods subject to this chapter are insufficient to permit the preparation of a report, the State Escheator may require the holder to report and pay to the State the amount of abandoned or unclaimed property that should have been but was not reported that the State Escheator reasonably estimates to be due and owing on the basis of any available records of the holder or by any other reasonable method of estimation.

The State argues that the specific exclusion of the prospective language of the UUPA unambiguously makes the estimation of prior years permissible.

Thus, although both parties deem the application of the statute unambiguous, the positions are diametrically opposed. In such an instance, perhaps the only thing clear is that there is ambiguity. *See Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1996) ("A statute is ambiguous if it is reasonably susceptible of different conclusions or interpretations.").

In such cases, examining the supporting information is permissive in determining the intent of the drafters. *See id.* ("If the statute is ambiguous, a court must seek to resolve the ambiguity by ascertaining legislative intent.").

The State points to synopsis S.B. No. 272, § 13(c), which states:

> Sections 3 and 4 of the Act clarify that, in accordance with established accounting and industry practice, the State may employ estimation techniques in certain

circumstances in order to determine a holder's liability for abandoned or unclaimed property.

While this provision helps justify the State's ability to perform an estimation, there are no temporal clues to help provide clarity as to the period of time that may be estimated.[4]

Thus, the Independent Reviewer must look to case law on whether the application of a statute on a retrospective basis is permissible.

To address this question, both parties discuss *A.W. Fin. Services., S.A. v. Empire Res. Inc.*, 981 A.2d 1114 (Del. 2009). In *A.W. Fin. Services*, the Delaware Supreme Court addressed whether an amended portion of the Delaware escheat laws concerning a period of dormancy for stock could apply retroactively. The Delaware Supreme Court held that it could not. In so doing the Court stated: "there is a presumption against retroactivity." *Id.* at 1120 (citing *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 529 (Del. Ch. 2005)). The Court continued that retroactivity may only apply where there is an unambiguous desire of the General Assembly to do so. *Id.* Importantly, the Court made the final observation on this point, "[t]his Court has recognized that a statutory amendment 'may apply retroactively' if it is remedial, but that rule has no application here. A statute is remedial where it relates to 'practice, procedure or remedies and does not affect substantive or vested rights.'" (citing *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 354 (Del. 1993)).

Thus, the only way that the State could proceed with a retroactive application is if the statutory amendment is remedial in nature.

In reviewing whether the amendments are remedial or not, the analysis turns to an examination of the facts of the case at hand. Although an extensive factual record does not exist

[4] On balance, it would seem that the Delaware General Assembly's specific act of excising the uniform act's prospective application may be a more direct indication of the desire to permit a retroactive examination than the statement that an act becomes effective when signed into law.

here, what is contained in the record indicates that the State of Delaware had been performing retroactive estimations prior to the 2010 amendment. There is no evidence to support a different conclusion.

The Independent Reviewer therefore finds that the amendment was a remedial codification of the existing practice at the time that the amendment was enacted.

Temple Inland astutely notes that even if a prior practice was occurring, it does not make it lawful.[5] At oral argument, Temple Inland cited the prior lack of *Miranda* warnings as an example of a practice that was later found impermissible such that codification of same would have been similarly unlawful. The apparent connection from *Miranda* warnings to escheat estimation statutes is Temple Inland's insistence that federal common law preempts the estimation and therefore enacting a statute preempted by federal common law is not lawful. As the Independent Reviewer has already determined that the federal common law does not prohibit such estimation, the analogy to *Miranda* warnings does not apply here.

Delaware was merely codifying its existing practice of reviewing and estimating unclaimed property liabilities, a practice that was accepted by the National Conference of Commissioners of Uniform State Laws in the UUPA of 1981 and as amended and expanded in 1995.

To further address the *A.W. Fin. Services* ruling, Temple Inland insists that the amendment must be deemed substantive since if otherwise permitted to retroactively apply the estimation statute, Delaware would be committing an impermissible taking. *See id.* at 1120

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[5] Temple Inland also makes an intriguing point that the "look-back" amounts to a penalty for not maintaining records. Temple Inland argues it is not permissible to penalize a party when a rule did not exist on the books. Temple Inland cites to the comments of the UUPA wherein the estimation and review is viewed as a penalty against maintaining records. The problem with relying on the comments to the UUPA arises because the uniform act is not ambiguous regarding whether it is appropriate to estimate for prior years. Since the practice of estimation was in existence at the time of codification, it is difficult to view it as a surprise or a penalty.

("retroactive application would facilitate the taking of property without due process, which is a substantive right").

However, as the Supreme Court found in *Texas*, unclaimed escheatable property is not property of the holder, it is property of the owner. *Texas*, 379 U.S. at 680-81. It is therefore inconsistent to claim a due process violation over the taking of property from a party to which the property did not belong.

Accordingly, the Independent Reviewer finds that the estimation amendments may be applied retroactively as they are a remedial codification of a permissible practice by the State, and the amendments do not affect the substantive rights of the holders of property that is in fact owned by someone else.

B. Temple Inland's Compliance with Delaware Escheat Laws for the Sample Period

The second major argument raised by Temple Inland is that, while reserving rights under its common law preemption argument, Temple Inland was in compliance with its obligations under Delaware escheat laws and therefore no money would be due to be placed into escheat.

Temple Inland points to the Kelmar Report which provides that Temple Inland has no liability due to Delaware for unreported unclaimed property for the periods of 2003-2007.

Temple Inland argues that even though there is no unclaimed liability to Delaware for this portion of the reporting period, the State unreasonably requires Temple Inland to place substantial sums into escheat.

Delaware's retort to this position is that even if Temple Inland is correct that all identifiable funds due to Delaware have been placed into escheat (under the first prong of the priority scheme), the analysis as made in the Kelmar Report is a more comprehensive analysis of all of Temple Inland's obligations to all states during the review period. For this argument, the

State applies the reasoning of *Texas v. New Jersey* regarding the second priority prong enumerated therein.

Therefore the question arises as to whether the State may expand its estimation analysis to all unidentifiable property during a review period.

The Independent Reviewer agrees with the State's position in this regard. Although neither party provides specific authority on this point, the Independent Reviewer examines this issue from what a state may do under the respective common law and escheat laws.

Principally, as noted *supra*, under *Texas v. New Jersey*, the state of incorporation may hold all otherwise unidentifiable property in escheat. Under the Uniform Unclaimed Property Act, states may estimate unidentifiable property due to be paid into escheat. There is a logical foundation therefore to permit the state of incorporation to estimate *all* obligations that would be due to be held in escheat by the state of incorporation. In other words, if a state may hold all of the unidentifiable property, it should be entitled to estimate all unidentifiable property.

1. Is the Kelmar Report a Reasonable Means of Estimation?

Temple Inland then focuses on the Kelmar Report to determine whether or not it is a reasonable method of estimation as required in 12 Del. C. § 1155.[6]

a. Sampling

Temple Inland objects to the sample chosen by Kelmar for its report and the conclusions the State derived therefrom.

It is the lack of records that make the analysis particularly difficult. On the one hand as Temple Inland suggests, it imposes an obligation on Temple Inland to prove the negative – that it

[6] Temple Inland did not submit a counter-report. Nor did Temple Inland produce a full expert report demonstrating that the Kelmar Report was inherently flawed. As discussed herein, Temple Inland does address certain of the assumptions and conclusions of the Kelmar Report and provides calculations based on what Temple Inland believes is the correct analysis.

did not owe anything and/or already submitted those amounts into escheat. However, but for the lack of records on hand, these conclusions would be readily derived.

Therefore using a statistical analysis of what might have been due to be placed in escheat presents a reasonable way to estimate the obligations.

Although Temple Inland recognizes that statistical sampling is generally acceptable in terms of estimating amounts, Temple Inland pinpoints certain transactions that suggest that the analysis is flawed in this instance.

Accounts Payable Account:

- Fox Hardwood – Tennessee exception of business to business
- Mike Harrelson – check issued in error – no amounts due
- Charitable Donation – not an "obligation"
- Property already escheated to Texas – (since removed from Delaware's analysis)

Payroll Account:

- Vacation Pay (previously paid to employee)
- Re-issued and remediated
- Property already escheated to Arizona – (since removed from Delaware's analysis)

Temple Inland makes compelling arguments for several of the issues raised above. In certain instances, Delaware has accepted Temple Inland's position and reduced its demand. For the remaining issues, the State references that is has applied a margin of error for both the Payables and Payroll account calculations.

Temple Inland does not refute the existence and application of a margin of error to address a potential lack of precise conclusions by the State. It appears beyond dispute that the margin of error was designed to address certain inaccuracies that might be inherent in applying a statistical sample.

Moreover, as the State notes, the statistical sample that the State examined may very well have included a larger sample of escheatable obligations analysis and therefore yielded a larger estimated obligation.[7]

As a result of the foregoing, while noting potential errors inherent to a statistical sample analysis, and especially in the absence of a competing methodology, the Independent Reviewer finds that this portion of the analysis is reasonable and appropriate.

b. Adjusted Revenues / ACH Analysis

Temple Inland then raises concerns regarding the methodology used by the State to estimate what obligations Temple Inland may have incurred. Temple Inland questions the use of revenues adjusted by estimated ACH transactions over the subject period.[8] Temple Inland insists that the analysis must be viewed with all revenues, not removing those revenues likely the subject of an ACH transaction in the sample period.

While the Independent Reviewer notes again the lack of an expert analysis refuting the State's methodology in the record, the State must first demonstrate that it is reasonable.

The Independent Reviewer finds that the State did not meet its burden for this portion of the analysis. The State enters its premise that the frequency of ACH transactions have increased

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[7] Naturally, that works both ways. The State could have randomly selected an obligation sample that yielded a lower estimate. Ultimately, accepting the premise that a statistical analysis is appropriate for estimation purposes, and in the absence of evidence suggesting that the sample used was inappropriately derived, the sample chosen by the State is adequate.

[8] Temple Inland also questions the application of the ratio factor to revenues, rather than something more logical such as payables or expenses. To reflect revenue rather than expenses potentially charges Temple Inland for increased profits, not merely increased expenses, nor better yet, payments made by Temple Inland. Considering that the escheat analysis focuses on payments owed by Temple Inland, revenues may not be the best metric to test unclaimed liabilities. The record does not reflect whether those data points are readily ascertainable. Further, there is some discussion in the record regarding using an alternate denominator, however Temple Inland did not provide such.

over time since the beginning of the 1986 inquiry period. While there is no dispute that ACH transactions have increased over time, especially relating to payroll, the analysis provided does not appear to adequately adjust for this gradual increase.

Rather, the State's adjustment centers around a "ratio estimator" factor of 0.00365273% for the accounts payable account. Likewise, the State uses the ratio estimator of 0.00237202% for its payroll account during the same period.

These factors are established by first taking as the numerator net unremediated amounts from the sample period plus amounts previously escheated during the base period. The denominator is the total revenue for the sample years, reduced by an amount intended to adjust revenues by ACH transactions arising from the payables and payroll accounts respectively.

Once the ratio is created, it is multiplied by revenues over the years for which no records exist.

By lowering the revenue amounts by estimated ACH transactions for establishing the ratio, Temple Inland argues, the ratio estimator factor is artificially higher, thereby resulting in a higher liability when applied to full revenues over the periods with no records.

The Independent Reviewer agrees with Temple Inland's argument in this regard. While it is a logical consideration that ACH transactions have increased over time, there is no clear demonstrable correlation of the ACH adjustment applied by Kelmar. Moreover, the Independent Reviewer notes that Kelmar applies the ACH adjustment factor in a static fashion across the board against calendar sales from 1986 through 2002, rather than reflecting a more likely increase of ACH transactions over time.

To refute the State's analysis, Temple Inland instead uses the ratio estimators of 0.00260434% for accounts payable and 0.00071594% for payroll during the same periods.

These ratios reflect full revenues for the sample periods and provide for no adjustment of ACH transactions.

The two ratios yield a significant difference:

Accounts Payable:	
State:	$1,176,767.77
Temple Inland:	$ 678,976.34
Payroll:	
State:	$ 952,066.36
Temple Inland:	$ 64,780.85[9]

While the Independent Reviewer agrees with the State that some adjustment for ACH transactions is appropriate, the static use of the ratio in context to the ACH transactions, while perhaps most convenient, does not accurately reflect the gradual increased use of ACH transactions as we move closer to the present time. Unlike the several points above whereby errors may exist but are accounted for in the margin of error, there is no margin of error protecting against the inherent inaccuracies involved with this type of estimation.

Conversely, although the Independent Reviewer agrees with Temple Inland that the State's methodology for the use of ACH transactions versus revenues for this period may not yield the most accurate result, the Independent Reviewer maintains similar concerns about Temple Inland's counter-analysis on this point. In ignoring the increased frequency of ACH transactions altogether in providing its ratio estimators, Temple Inland's analysis seems to inaccurately skew the estimation too far in the other direction.

Recognizing merit in the use of some amount of ACH transactions, applying the sets of figures on an average basis (applying the State's already downward adjusted demand of

[9] Notably the Temple Inland figures here reflect those amounts prior to the application of other remedial analyses raised, *infra*, by Temple Inland.

$2,033,390.74), the amount due would be $1,388,573.97. The Independent Reviewer finds that this figure, while not a perfect figure, more accurately reflects the analysis with a gradual element of ACH transactions. *See cf., VFB, LLC v. Campbell Soup Co.*, 482 F.3d 624, 633 (3d Cir. 2007) (in the context of competing valuations of an asset, noting that "[v]aluing an asset is a difficult task that depends upon detailed factual determinations . . . ." and providing guidance on reconciling competing evidence) (citing *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 210 (3d Cir. 2006)).

In the instant case, both the State and Temple Inland provide calculations based on adjustments for ACH transactions that the Independent Reviewer finds inaccurate. It is without dispute that the frequency of ACH transactions have increased over the subject period. The amount set forth herein applies that fact when considering and therefore adjusting the amounts proposed by the State and Temple Inland. [10] *See cf. Rakow v. Commissioner*, 77 T.C.M. (CCH) 2066 (1999) (in the context of competing valuations of stock, rejecting both the petitioner's and respondent's valuations, and instead employing a variation on one valuation method "which more closely approximates" the underlying data).

As a result therefore, the Independent Reviewer sustains in part Temple Inland's objection to the demand and reduces the obligation to $1,388,573.97.

[10] In making this determination, the Independent Reviewer considered remanding on this point in order to require the performance of a revised analysis reflecting a realistic adjustment based on more accurate ACH trends over the subject period. However, without specific records for the subject period, it is clear that the data identifying the increased frequency of the use of ACH transactions would not be available to more accurately conduct this analysis. With no such records, the Independent Reviewer recognizes that presumably Kelmar could find some other methodology using industry related figures to calculate an estimate of ACH transaction frequency over the subject period. However, the use of estimated ACH adjustment on already estimated figures would further dilute the potential accuracy of Temple Inland's operations for the subject period.

C. Whether The State Improperly Treated Unclaimed Property Previously Escheated As Evidence Of Non Compliance

Temple Inland's final point is that the State improperly applied figures of unclaimed property previously escheated to Delaware and other states as evidence of non-compliance in its analysis of total obligations due.

In other words, Temple Inland argues that it has shown evidence of compliance in these years and yet the State is extrapolating the amounts it did pay as non-compliance for those years where no records exist. Temple Inland takes the position that it is patently unfair for the State to extrapolate non-compliance out of unclaimed property submitted in compliance with the various states' escheat laws.

The State argues that without records, all it is capable of doing is looking at unclaimed amounts that are subject to escheat and extrapolate unclaimed amounts over the period without records. The State makes no judgment on compliance or non-compliance for other years. Without records demonstrating compliance, it therefore assumes non-compliance for that timeframe.[11]

In any instance, the Independent Reviewer is reminded that the sample was merely a smaller section of payments analyzed for potential unclaimed property liability. The Independent Reviewer agrees with the State that a review of unclaimed property during periods with records lends itself to an objective analysis of what is likely to have been the liability during periods without records. There is no accurate or rational basis to make a judgment of whether Temple Inland should be deemed to have been compliant with all or certain amounts during the period without records. Since Temple Inland did not produce evidence to refute the State's

[11] Although the State references certain compliance inconsistencies during the years where Temple Inland did maintain records, there are not enough facts in the record to base a finding therefrom.

position, the Independent Reviewer will accept the State's analysis on this point. *See cf. Buris v. Commissioner*, 81 T.C.M. (CCH) 1227 (2001) (relevant by analogy in noting that the court can estimate a taxpayer's deductible expense "only when the taxpayer provides evidence sufficient to establish a rational basis upon which the estimate can be made.").

VI. CONCLUSION

For the foregoing reasons, the July 19, 2013 decision of the Audit Manager is affirmed in part and reversed in part such that the obligation owed shall be reduced from $2,033,390.74 to $1,388,573.97.

Dated: April 3, 2014

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