

ILLINOIS INDEPENDENT
TAX TRIBUNAL

SYNCHRONY BANK, FORMERLY)	
GE CAPTIAL RETAIL BANK,)	
)	
Petitioner,)	
v.)	No. 16 TT 91
)	Judge Brian Barov
)	
ILLINOIS DEPARTMENT OF)	
REVENUE,)	
)	
Respondent.)	

DEPARTMENT’S ANSWER TO PETITION

Respondent, the Illinois Department of Revenue (the “Department”), by and through its attorney, Lisa Madigan, Illinois Attorney General, for its Answer to the Petition (the “Petition”), hereby states as follows:

STATEMENT OF JURISDICTION

1. Synchrony brings this petition pursuant to the Illinois Independent Tax Tribunal Act of 2012. 35 ILCS 1010 et seq.

ANSWER: The Department admits the allegations contained in paragraph 1.

2. This Tribunal has jurisdiction because this matter involves a Notice of Tentative Denial of Claim issued by the Department on March 9, 2016 with respect to a refund

claim for retailers' occupation tax in excess of \$15,000, exclusive of interest. 35 ILCS 1010/1-45.

ANSWER: The Department admits the allegations contained in paragraph 2.

3. The Department's Notice of Tentative Denial of Claim, Letter ID CNXXXI 7215324964, is for a refund claim for retailers' occupation tax in the amount of \$4,653,688 for the period July 1, 2015 through December 31, 2015 (the "Claim"). A copy of the Notice of Tentative Denial of Claim is attached as Exhibit A.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit A and referred to in Paragraph 3 and state that such document speaks for itself.

THE PARTIES

4. Petitioner is Synchrony Bank formerly GE Capital Retail Bank, 777 Long Ridge Road, Stamford, CT 06902. Its phone number is (203) 585-2095.

ANSWER: The Department admits the allegations contained in paragraph 4.

5. Petitioner's attorneys are David E. Otero and Peter Larsen, Akerman LLP, 50 N. Laura St., Suite 3100, Jacksonville, FL 32202, (904)-798-3 700; and David C. Blum, Akerman LLP, 71 S. Wacker Drive, 46th Floor, Chicago, IL 60606, (312) 780-8018.

ANSWER: The Department admits the allegations contained in paragraph 5.

6. Petitioner's tax identification numbers are 06-1236737 and 4154-8876.

TAXES ON RETAIL SALES IN ILLINOIS AND CREDIT CARD TRANSACTIONS

7. In Illinois, the Retailers' Occupation Tax Act ("ROTA") and the Use Tax Act ("UTA") are a complimentary tax system that is commonly referred to as "sales tax." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351, 362-63, 919 N.E.2d 926 (Ill. 2009). Generally, the Retailers' Occupation Tax Act imposes a tax on persons engaged in the business of selling tangible personal property to purchasers for use or consumption, and it is computed based on the retailer's gross receipts. 35 ILCS 120/et seq.; *Kean*, 235 Ill.2d at 362-63. The Use Tax Act imposes a tax on the privilege of using tangible personal property purchased at retail from a retailer, and the tax is computed based on the selling price of the tangible personal property. 35 ILCS 105/ et seq.; *Kean*, 235 Ill.2d at 362-63. Thus, the retailer remits the retailers' occupation tax to the Department, and the retailer also collects the use tax from the purchaser (its customer). *Kean*, 235 Ill.2d at 362-63. However, the retailer is not required to remit the use tax to the Department to the extent that it has already remitted the retailers' occupation tax to the Department on the same transaction. *Id.*

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provisions and case law set forth or referred to in paragraph 7 and state such case law and statutes speak for themselves.

8. A private label credit card is a credit card that displays the retailer's logo but typically is financed by a third party lender. The credit card typically can only be used at the retailer's stores or at closely related affiliates. On private label credit card transactions like those that are at issue in this case, a customer of the retailer finances its

purchase price and corresponding tax remitted to the Department by using the customer's private label credit card. The lender reimburses the retailer for the amounts financed on the customer's private label credit card, *including* the tax associated with the sale, and the retailer remits the tax to the State.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8 and therefore neither admits or denies the allegations.

9. The customer then owes the lender the amounts charged to the customer's private label credit card. Lender is therefore the entity that paid the tax, and it is the entity that bears the economic burden of the tax until the customer repays the lender for the amounts charged to the customer's private label credit card.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 and therefore neither admits or denies the allegations.

FACTS

10. Synchrony is a lender that finances retail purchases sourced in Illinois. All of the retail purchases of merchandise that are the underlying basis for the Claim were subject to Illinois tax and were financed by Synchrony (the "Purchases").

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 and therefore neither admits or denies the allegations.

11. As part of its regular business, each of the retailers from which the Purchases occurred ("Retailers") offered each of its retail customers the option of financing the

purchase price of his or her Purchases (the "Customers"), including retailers' occupation tax, on a credit basis by utilizing a credit card displaying the Retailer's logo. Each of the Customers then in fact financed his or her Purchases of such merchandise (including the retailers' occupation tax thereon) from one of the Retailers using the Customer's credit card.

ANSWER: The Department admits the allegations contained in paragraph 11.

12. Synchrony entered into program agreements with the Retailers that governed the terms of the sales finance programs (the "Agreements") and provided that Synchrony will originate or acquire each of the Customers' charge accounts and associated receivables from the Retailers (the "Accounts"). Under the Agreements, Synchrony paid the Retailers the outstanding purchase prices of the merchandise and retailers' occupation tax relating to the merchandise (the amounts owed under the Accounts) for each of the Purchases. The Retailers, in turn, assigned all their rights in the Accounts to Synchrony, including the Retailers' rights to seek tax refunds. Accordingly, Synchrony has retained or acquired any and all rights with respect to the Customers' Accounts, including the right to any and all payments from the Customers and the right to claim retailers' occupation tax refunds or credits.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 and therefore neither admits or denies the allegations.

13. Each of the Retailers reported and remitted the retailers' occupation tax relating to the Customers' Purchases to the Department.

ANSWER: The Department admits the allegations contained in paragraph 13.

14. The Customers subsequently defaulted on the respective Accounts that are the subject of the Claim. All losses attributable to the defaults on the Accounts were directly borne by Synchrony. Once Synchrony reasonably determined that the Accounts were worthless and uncollectible, and legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, Synchrony charged off the Accounts on its books and records and claimed a bad debt deduction for federal income tax purposes pursuant to 26 U.S.C. § 166. The unpaid portions of the Accounts claimed as a bad debt deduction for federal income tax purposes and charged off on the books and records included retailers' occupation tax that was not repaid by the Customers. Any subsequent recoveries were deducted before the Claim was filed.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 and therefore neither admits or denies the allegations.

15. Because the Customers defaulted before re-paying the entire amount of the purchase price and tax that was financed by Synchrony, the Department collected tax on more than what the Customers ultimately paid. This is contrary to the basis of Illinois' sales tax system, which is premised on collecting tax on the price that the purchaser actually pays for the item.

ANSWER: Although paragraph 15 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 15.

16. Because Synchrony financed the Purchases, it bore the economic burden of the Customers' default and the resulting bad debts. Synchrony never collected the sales tax from the Customers that Synchrony previously paid to the Retailers and that was in turn remitted to the Department.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 and therefore neither admits or denies the allegations.

17. Over the period of July 1, 2015 through December 31, 2015, Synchrony incurred bad debts on these Purchases corresponding to \$4,653,688 in retailers' occupation tax that it had financed and that was previously paid to the Department.

ANSWER: The Department is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17 and therefore neither admits or denies the allegations.

18. On January 15, 2016, Synchrony filed a refund claim with the Department, pursuant to 86 Ill. Admin. Code § 130.1960, for a refund of \$4,653,688 in retailer's occupation tax for the period of July 1, 2015 through December 31, 2015.

ANSWER: The Department admits the allegations contained in paragraph 18.

COUNT I
SYNCHRONY IS ENTITLED TO A REFUND UNDER ILLINOIS' GENERAL REFUND STATUTE AND
THE DEPARTMENT'S CORRESPONDING REGULATION

19. Synchrony incorporates and re-alleges paragraphs 1-18 herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-18 as if fully set forth herein.

20. The Retailers' Occupation Tax Act provides a right to a refund of overpaid taxes. 35 ILCS 120/6 (the "General Refund Statute"). The Department also recognizes the inequities that occur with respect to the prepayment of sales related taxes on financed purchases and subsequent bad debts, and it has addressed this specific problem in a regulation entitled "Finance Companies and Other Lending Agents - Installment Contracts - Bad Debts." 86 Ill. Admin. Code § 130.1960 (the "Regulation"). Synchrony is entitled to its refund because it meets all the requirements of the General Refund Statute and the corresponding Regulation. *See Citibank, NA. v. Illinois Dept of Revenue*, Case No. 13 L 050072 (Circuit Court of Cook County Illinois, Oct. 17, 2013). (Copy attached as Exhibit B).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory and regulatory provisions as well as the case law set forth or referred to in paragraph 20 and state that such statute, regulation and decision speak for themselves.

21. Section 6 of the Retailers' Occupation Tax Act (the General Refund Statute) provides a general right to a refund for overpaid taxes. It provides, in part:

Credit memorandum or refund. If it appears, after claim therefor filed with the Department, that an amount of tax or penalty or interest has been paid which was not due under this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment

No credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears (a) that **the claimant bore the burden of such amount** and has not been relieved thereof nor reimbursed therefor and has not shifted such burden directly or indirectly through inclusion of such amount in the

price of the tangible personal property sold by him or her or in any manner whatsoever

35 ILCS 120/6 (emphasis added).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 21 and state such provision speaks for itself.

22. The Department also has promulgated 86 Ill. Admin. Code § 130.1960 (the Regulation) in order to address sales taxes that are overpaid as a result of subsequent credit defaults. The Regulation allows a claimant who bore the burden of the overpaid taxes to obtain a refund of those taxes. Specifically, the Regulation provides, in part:

(d) Bad Debts

(1) In case a retailer repossesses any tangible personal property and subsequently resells such property to a purchaser for use or consumption, his gross receipts from such sale of the repossessed tangible personal property are subject to Retailers' Occupation Tax. He is entitled to a bad debt with respect to the original sale in which the default has occurred to the extent to which he has paid Retailers' Occupation Tax on a portion of the price which he does not collect, or which he is not permitted to retain because of being required to make a repayment thereof to a lending agency under a "with recourse" agreement.. Retailers of tangible personal property other than motor vehicles, watercraft, trailers and aircraft that must be registered with an agency of this State may obtain this bad debt credit by taking a deduction on the returns they file with the Department for the month in which the federal income tax return or amended return on which the receivable is written off is filed, or by filing a claim for credit as provided in subsection (d)(3) of this Section

(2) Retailers who incur bad debt on any tangible personal property that is not repossessed may also obtain bad debt credit as provided in subsections (d)(1) and (3).

(3) In the case of tax paid on an account receivable that becomes a bad debt, the tax paid becomes a tax paid in error, for which a claim for credit may be filed in

accordance with Section 6 of the Retailers' Occupation Tax Act, on the date that the Federal income tax return or amended return on which the receivable is written off is filed.

86 Ill. Admin. Code § 130.1960 (emphasis added).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 22 and state such regulation speaks for itself.

23. Section 130.1960(d)(3) of the Regulation is controlling with regard to the Claim, and Sections 130.1960(d)(1) and (2) of the Regulation do not apply. The Regulation does not prohibit claimants other than retailers (such as Synchrony) from recovering refunds under the General Refund Statute.

ANSWER: The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 23 and state such regulation speaks for itself.

24. In summary, the authorizing statute (the General Refund Statute- 35 ILCS 120/6) requires the claimant to bear the burden of the tax. The Regulation explains that a claimant that has borne the burden of the tax can obtain a refund or deduction where (1) the retailers' occupation tax was remitted on the sale and (2) the account was written off as uncollectible for federal income tax purposes. Because Synchrony financed each of these transactions, the retailers' occupation tax was remitted on the Purchases, and Synchrony charged-off the balances on each of the applicable Accounts, Synchrony is entitled to a refund to the extent it bore the burden of the tax.

ANSWER: Although paragraph 24 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 24.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count I of this matter;
- B) That the Department's Notice of Tentative Denial of Claim be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

COUNT II

SYNCHRONY IS ENTITLED TO A REFUND UNDER THE GENERAL REFUND STATUTE NOTWITHSTANDING THE DEPARTMENT'S REGULATION

25. Synchrony incorporates and re-alleges paragraphs 1-18 herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-18 as if fully set forth herein.

26. The Department has the authority "to make, promulgate and enforce reasonable rules and regulations relating to the administration and enforcement of the provisions of the Retailers' Occupation Tax Act." *Du-Mont Ventilating Co. v. Department of Revenue*, 73 Ill. 2d 243, 247 (1978).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 26 and states such case law speaks for itself.

27. However, the Department's regulations are not binding on this Tribunal; they are at most only entitled to some deference or respect. *Id.* at 247 ("The rule merely interprets the scope of the statutory exemption provision, and as such is entitled to some

respect as an administration interpretation of the statute, but it is not binding on the courts.")

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 27 and states such case law speaks for itself.

28. Even if Synchrony was not entitled to a refund under the Department's Regulation as the Department may argue because it is not a retailer, the Tribunal should exercise its discretion and decline to follow the contrary Regulation and find that Synchrony is nevertheless entitled to a refund of the overpaid taxes under the General Refund Statute.

ANSWER: Although paragraph 28 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 28.

29. Synchrony's right to a tax refund is derived from the Retailers' Occupation Tax Act. As the language that the legislature chose to use in the General Refund Statute makes clear, the principal consideration for obtaining a refund is whether the *claimant bore the burden* of the overpaid tax, and there is no question that Synchrony, as the entity that financed the sales and charged-off the bad debts, bore the burden of the credit defaults. Refunds under the General Refund Statute are specifically not limited to retailers. 35 ILCS 120/6.

ANSWER: Although paragraph 29 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 29.

30. As the Illinois Supreme Court has made clear, the statutory purpose is an important consideration in construing a statute. *Branson v. Dept. of Revenue*, 168 Ill.2d 247, 258, 659 N.E.2d 961 (1995) ("It is improper for a court to depart from the plain terms of statute to read in a condition that would conflict with or defeat the meaning and intent of the provision at issue") (emphasis added).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 30 and states such case law speaks for itself.

32. Granting Synchrony's Claim advances the legislative purpose behind the General Refund Statute (and the Regulation), which is to ensure that the state only collects sales related tax on the price the purchasers actually pay and to provide a refund to the entity that bore the economic burden of the overpaid taxes. Conversely, denying Synchrony's refund request would *unjustly enrich the state* in contravention of these principles and effectively allow it to collect and retain taxes at a rate higher than that permitted by law.

ANSWER: Although paragraph 32 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 32.

33. Therefore, if the Tribunal finds that Synchrony is not entitled to a refund under the precise language of the Department's Regulation, it should exercise its discretion and decline to follow the Regulation as contrary to the plain language and purpose of the General Refund Statute. The Tribunal should instead reach the just and proper result that the General Refund Statute (and Regulation) were specifically designed to achieve, which

is to provide a refund to Synchrony to the extent it bore the economic burden of the overpaid retailers' occupation taxes.

ANSWER: Although paragraph 33 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 33.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count II of this matter;
- B) That the Department's Notice of Tentative Denial of Claim be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

COUNT III

SYNCHRONY IS ENTITLED TO A REFUND AS THE ASSIGNEE OF THE RETAILER'S RIGHTS IN THE PRIVATE LABEL CREDIT CARD ACCOUNTS

34. Synchrony restates and re-alleges paragraphs 1-18 herein.

ANSWER: The Department repeats and incorporates its answers to paragraphs 1-18 as if fully set forth herein.

35. Alternatively, if this Tribunal finds that Synchrony is not entitled to a refund in its own right under the General Refund Statute and the corresponding Regulation (Count I), or the General Refund Statute alone (Count II), then it should nevertheless find that Synchrony is entitled to a refund as the assignee of the rights of the Retailers who would otherwise be entitled to refunds under the General Refund Statute and Regulation.

ANSWER: Although paragraph 35 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 35.

36. There is no dispute that if the Retailers had financed the Purchases themselves, then they would be entitled to refunds under the General Refund Statute and corresponding Regulation. Instead, the Retailers entered into Agreements under which the Retailers granted Synchrony the Retailers' rights in the Accounts, *including* the Retailers' rights to seek tax refunds.

ANSWER: The Department admits that if the Retailers had financed the Purchases themselves, they would have been entitled to refunds but is without knowledge or information sufficient to form a belief as to the remaining allegation contained in paragraph 36 and therefore neither admits or denies that allegation.

37. Illinois recognizes a broad ability of parties to assign claims. *See e.g., Kleinwort Benson North America, Inc. v Quantum Financial Svc., Inc.*, 181Ill.2d214, 225, 692 N.E.2d 269 (1998) ("Basically, in Illinois, the only causes of action that are not assignable are torts for personal injuries and actions for other wrongs of a personal nature, such as those that involve the reputation or feelings of the injured party.")

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 37 and states such case law speaks for itself.

38. Illinois law expressly recognizes the right to assign claims against the government. *People ex. rel. Stone v. Nudelman*, 376 Ill. 535, 539 34 N.E.2d 851 (1940) ("**The general rule, in the absence of language of the statute prohibiting it, is that claims against the government are assignable**"); *Collins Company, Ltd. v. Carboline Co.*, 125 Ill.2d 498, 512, 532 N.E.2d 834 (1988) ("Once made, an assignment puts the assignee into the shoes of

the assignor"); *Clark v. Illinois*, 38 Ill.Ct.Cl. 2 13 (1985) ("The general rule is that claims against the government are assignable").

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 38 and states such case law speaks for itself.

39. Illinois law also recognizes the right to assign contingent claims. *Loyola University Medical Center v. Med Care HAI/O*, 180 Ill. App. 3d 471, 478, 535 N.E.2d 1125, 1129 (1989) (explaining that, "a valid assignment of a conditional right is enforceable in equity.").

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 39 and states such case law speaks for itself.

40. The South Carolina Court of Appeals considered a similar issue and in part relying on Illinois law, found that tax refund claims are generally assignable. *Slater Corp. v. South Carolina Tax Commission*, 280 S.C. 584, 587, 314 S.E.2d 31 (1984) ("While our Supreme Court has apparently not ruled specifically on the assignability of a claim for a tax refund, the greater weight of authority allows such a claim to be assigned.") **"This view is followed even where the provision of the refunding statute authorizes the refund be made or credit be given to the person aggrieved by or making the overpayment."** *Id.* (citing to *People ex rel. Stone v. Nudelman*, 376 Ill. 535, 34 N.E.2d 851 (1940)) (emphasis added).

ANSWER: The Department admits the existence, force and effect, at all relevant times of the case law set forth or referred to in paragraph 40 and states such case law speaks for itself.

41. In summary, since Illinois law permits the Retailers to assign their refund claims to Synchrony, Synchrony is entitled to the tax refunds in the event the Retailers otherwise are the only entity entitled to collect on the Claim.

ANSWER: Although paragraph 41 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 41.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in Count III of this matter;
- B) That the Department's Notice of Tentative Denial of Claim be determined to be correct;
- C) That this Tribunal grant such other additional relief it deems just and proper.

Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General

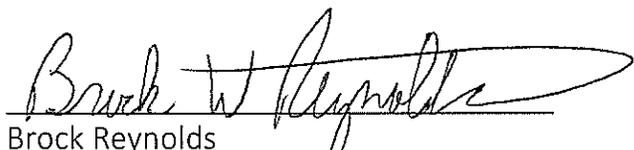
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STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT AS TO LACK OF SUFFICIENT KNOWLEDGE

I, BROCK REYNOLDS, being first duly sworn, deposes and says that I am an employee of the Illinois Department of Revenue, that I have read the foregoing Department's Answer to Petitioner's Petition to the Illinois Independent Tax Tribunal, that I am well acquainted with its contents, and under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, I certify that I lack the required personal knowledge to either admit or deny, in whole or in part, paragraphs, 8-10, 12, 14, 16-17 and 36 pursuant to 735 ILCS 5/2-610(b) and Tribunal Rule 5000.310(b)(3). I hereby certify that the statements set forth in this affidavit are true and correct to the best of my knowledge, information and belief.


Brock Reynolds
Division Manager – Sales Tax Processing Division
Illinois Department of Revenue

Date: 7/29/16

CERTIFICATE OF SERVICE

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Answer to Petitioner's Petition upon:

David C. Blum
Akerman LLP
51 S. Wacker Drive
46th Floor
Chicago, IL 60661

By attachment to email to david.blum@akerman.com on July 29, 2016.



Michael Coveny,
Assistant Attorney General