ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS

CAPITAL ONE, N.A.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. _____
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	16 TT 180
	)	
Respondent.	)	

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PETITION

Petitioner CAPITAL ONE, N.A ("Capital One" or "Petitioner") petitions this Tribunal for review of a Notice of Tentative Denial of Claim issued by Respondent ILLINOIS DEPARTMENT OF REVENUE (the "Department"). Capital One seeks a refund of Retailers' Occupation Tax ("ROT") that was provisionally paid to the State of Illinois on transactions that it financed but that the purchasers never ultimately repaid to Capital One, resulting in bad debts and an overpayment of ROT to the state.

The Department denied Capital One's refund request resulting in this Petition. Capital One is entitled to a refund because it meets the express requirements of the general refund statute and corresponding regulations governing sales tax refunds due to bad debt.

STATEMENT OF JURISDICTION

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

2. This Tribunal has jurisdiction because this matter involves a Notice of Tentative Denial of Claim issued by the Department on July 11, 2016 with respect to refund claims filed for retailers' occupation tax in excess of $15,000, exclusive of interest. 35 ILCS 1010/1-45.

3. The Department's Notice of Tentative Denial of Claim, Letter ID CNXXXX2217397921, is for refund claims for retailers' occupation tax in the aggregate amount of $1,695,257 for the periods January 1, 2014 through December 31, 2015 (the "Claims"). A copy of the Notice of Tentative Denial of Claim is attached as Exhibit A.

THE PARTIES

4. Petitioner is Capital One, N.A. Its Address is: Capital One, N.A., 1680 Capital One Drive, McLean, VA 22102.

5. Petitioner's attorneys are David E. Otero, Peter Larsen and David Blum, Akerman LLP, 71 S. Wacker Drive, 46th Floor, Chicago, IL 60606, (312) 634-5700.

6. Petitioner's Illinois tax identification number is 3545-0691.

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.*

8. On credit card transactions like those that are at issue in this case, a customer of the retailer finances its purchase (both purchase price and the corresponding ROT) on its credit card. The lender reimburses the retailer upfront for the full amount financed on the customer's credit card, *including* the tax associated with the sale, and the retailer remits the tax to the State.

9. The customer then owes the lender the amounts charged to the customer's 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 credit card. If a purchaser defaults before repaying the entire amount of the purchase price and sales tax that was financed, the State has collected sales tax on more than what the purchaser *actually* paid for the purchase, which is contrary to the basis of the State's sales tax system.

10. A purchaser's default also means that the retailer remitted tax to the State that Capital One financed but never ultimately collected from the purchaser, and thus, Capital One suffered a bad debt in which the burden of the tax was shifted from the purchaser to Capital One.

FACTS

11. Capital One is a lender that finances retail purchases sourced in Illinois. All of the retail purchases of merchandise that comprise the underlying basis for the Claims were subject to Illinois retailers' occupation tax and were financed by Capital One (the "Purchases").

12. When customers purchased items on a credit basis by utilizing a credit card issued by Capital One, each of the customers then in fact financed his or her Purchases of such merchandise (*including* the retailers' occupation tax thereon).

13. Capital One entered into program agreements with certain retailers that governed the terms of sales finance programs (the "Agreements") and provided that Capital One will originate or acquire each of the customers' charge accounts and associated receivables from such retailers. Pursuant to these Agreements, Capital One paid the retailers the outstanding purchase prices of the merchandise *and* the corresponding retailers' occupation tax relating to the sales transaction (i.e., the amounts owed under the accounts). Such retailers, in turn, assigned all their rights in the accounts to Capital One, including the retailers' rights to seek tax refunds. Accordingly, Capital One retained or acquired any and all rights with respect to customers' accounts, including the right to any and all payments from the customers and the right to claim retailers' occupation tax refunds or credits.

14. The retailers reported and remitted the retailers' occupation tax relating to the customers' Purchases to the Department.

15. Certain customers subsequently defaulted on their respective credit card accounts ("Accounts") that are the subject of the Claims. All losses attributable to the defaults on the Accounts were directly borne by Capital One. Once Capital One reasonably determined that the Accounts were worthless and uncollectible, and pursuant to federal regulations, Capital One charged off the Accounts on its books and records and claimed a bad debt deduction for U.S. 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 were charged off of its books and records.

16. Because the customers defaulted before re-paying the entire amount of the purchase price and retailers' occupation tax that was financed by Capital One, 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 items purchased.

17. Because Capital One financed the Purchases, it bore the economic burden of the customers' default and the resulting bad debts. Capital One never collected the sales tax from the customers that Capital One previously paid to the retailers and that was in turn remitted to the Department.

18. Over the period of January 1, 2014 through December 31, 2015, Capital One incurred bad debts on these Purchases resulting in $1,695,257 in Illinois retailers' occupation tax that it had financed and that was previously paid to the Department.

19. Capital One correspondingly, timely filed the Claims with the Department on June 14, 2016, pursuant to 86 Ill. Admin. Code § 130.1960, for a refund of $1,695,257 in retailer's occupation tax for the reporting periods January 1, 2014 through December 31, 2015.

20. Capital One received the Department's consolidated Notice of Tentative Denial of Claim, dated July 11, 2016. See Exhibit A.

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

21. Capital One incorporates and re-alleges paragraphs 1-20 herein.

22. 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"). Capital One is entitled to its refund of the Claims because it meets all the requirements of the General Refund Statute and the corresponding Regulation. *See Citibank, N.A. v. Illinois Dept of Revenue*, Case No. 13L050072 (Circuit Court of Cook County Illinois, Oct. 17, 2013).[1] A copy of the decision is attached as Exhibit B.

23. 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).

24. 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, *inter alia*:

[1] The Department appealed this decision to the Illinois Appellate Court, No. 1-13-3650. The case is still pending.

> (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).

25. Section 130.1960(d)(3) of the Regulation is controlling with regard to the Claims. This Section specifically authorizes claimants (such as Capital One) from recovering refunds under the General Refund Statute, where tax is paid on an account receivable that subsequently becomes a bad debt and is written off as uncollectible.

26. 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 similarly instructs that a claimant that has borne the burden of the tax on an account receivable that becomes a bad debt

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. Notably, unlike Ill. Admin Code §§ 130.1960(d)(1) and (d)(2), Section (d)(3) is *not* explicitly limited to "retailers," which is consistent with the General Refund Statute.

27. Because Capital One financed each of these transactions, the retailers' occupation tax was remitted on the Purchases, and Capital One charged-off the balances on each of the applicable Accounts, Capital One is therefore entitled to a refund to the extent it bore the burden of the tax.

WHEREFORE, Capital One requests that the Tribunal:

a) Find that Capital One is entitled to a refund of retailer's occupation tax in the amount of $1,695,257 for the periods of January 1, 2014 through December 31, 2015 pursuant to 35 ILCS 120/6 and 86 Ill. Admin. Code § 130.1960, and

b) that the Department's denial of Capital One's Claims is contrary to law and thus, the Claims are to be allowed in full, and

c) Order such further relief as the Tribunal deems appropriate.

COUNT II
CAPITAL ONE IS ENTITLED TO A REFUND UNDER THE GENERAL REFUND STATUTE NOTWITHSTANDING THE DEPARTMENT'S REGULATION

28. Capital One incorporates and re-alleges paragraphs 1-20 herein.

29. 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).

30. 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.")

31. To the extent that the Department might allege Capital One is not a "retailer" under its Regulation, and attempt to distract this Tribunal on inapplicable provisions of Ill. Admin Code §§ 130.1960, this Tribunal should nonetheless exercise its discretion and decline to follow any portion of the Regulation that impermissibly contracts the scope of Illinois' refund law by creating requirements not found in the governing statute. *See Van's Mat'l Co. Inc. v. Department of Revenue*, 131 Ill. 2nd 196, 209-210 (1989). Thus, in such event, this Tribunal should find that Capital One is entitled to a refund of the overpaid taxes pursuant to Illinois' General Refund Statute. *See Citibank, N.A. v. Illinois Dept. of Revenue*.

32. Importantly, the General Refund Statute and Regulations do not provide a refund to retailers simply because of its status as a "retailer;" rather, the statue provides a refund to the retailer because it is typically the entity that bears the burden of the overpaid taxes. Thus, the class of people Illinois law is designed to protect are those that bore the burden of the overpaid taxes on financed transaction – not exclusively those "retailers" who collected and remitted the tax to the Department.

33. To that end, in *Citibank, N.A. v. Illinois Dept of Revenue, supra*, the Court explicitly stated,

> In a normal situation under ROTA, the Retailers shift the burden of the tax to the consumer by including it in the purchase price. The Court notes that

> if the burden can be shifted to the consumer than it can similarly be shifted to a finance company such as Plaintiff [Citibank].

34. Capital One's right to a tax refund is undeniably 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 Capital One, as the entity that financed the sales and charged-off the bad debts, bore the burden of the credit defaults. Notably, refunds under the General Refund Statute are specifically not limited to only retailers. 35 ILCS 120/6.

35. 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 a statute to read in a condition that would conflict with or defeat <u>the meaning and intent of the provision at issue</u>") (emphasis added).

36. Granting Capital One's Claims advances the legislative purpose behind the General Refund Statute (and the Regulation), which is to ensure that the state only collects sales 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 Capital One'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.

37. As the entity that bore the burden of the overpaid tax, Capital One is precisely the entity that Illinois' General Refund Statute (and the Department's Regulation) were designed to help. There is no basis for excluding Capital One from the protection of the General Refund Statute and corresponding Regulation. Denying Capital One's refund claim based on a finding

that it does not meet the precise language of the Regulation, whether because of inartful drafting or otherwise, would be an unjust result.

38. Therefore, if the Tribunal finds that Capital One is not entitled to a refund under the precise language of the Department's Regulation, it should exercise its discretion and decline to follow any portion of the Regulation that is contrary to the plain language, purpose and intent of the General Refund Statute. This 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 Capital One to the extent it was the entity that bore the economic burden of the overpaid retailers' occupation taxes.

WHEREFORE, Capital One requests that the Tribunal:

a) Find that Capital One is entitled to a refund of retailer's occupation tax in the amount of $1,695,257 for the periods of January 1, 2014 through December 31, 2015 under the General Refund Statute, even if there is a finding that it does not fit precisely within the language of the Department's Regulation, and

b) that the Department's denial of Capital One's Claims is contrary to law and thus, the Claims are to be allowed in full, and

c) Order such further relief as the Tribunal deems appropriate.

COUNT III
CAPITAL ONE IS ENTITLED TO A REFUND AS THE ASSIGNEE OF THE RETAILERS' RIGHTS IN THE CREDIT CARD ACCOUNTS

39. Capital One restates and re-alleges paragraphs 1-20 herein.

40. Alternatively, if this Tribunal finds that Capital One 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 Capital One is entitled to a refund as the *assignee of the rights of the Retailers* who entered into the Agreements with Capital One and who would otherwise be entitled to refunds under the General Refund Statute and Regulation.

41. There is no dispute that if a retailer had financed the Purchases themselves, then it would be entitled to ROT refunds under the General Refund Statute and corresponding Regulation. The result should thus be identical for Purchases financed by Capital One in which retailers entered into Agreements with Capital One granting it the retailers' rights in the respective accounts, *including* the retailers' rights to seek ROT refunds.

42. Illinois recognizes a broad ability of parties to assign claims. *See e.g., Kleinwort Benson North America, Inc. v Quantum Financial Svc., Inc.*, 181 Ill.2d 214, 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.")

43. 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. 213 (1985) ("The general rule is that claims against the government are assignable").

44. Illinois law also recognizes the right to assign contingent claims. *Loyola University Medical Center v. Med Care HMO*, 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.").

45. 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).

46. In summary, since Illinois law permits retailers to assign its refund claims to Capital One, Capital One is entitled to the tax refunds in the event the retailers otherwise are the only entity entitled to collect on the Claim.

WHEREFORE, Capital One requests that the Tribunal:

a) Find that Capital One is entitled to a refund of retailer's occupation tax for the periods of January 1, 2014 through December 31, 2015 as the assignee of retailers' rights in the accounts under the applicable Agreements, including their rights to seek retailers' occupation tax refund claims, and

b) that the Department's denial of Capital One's Claims is contrary to law and thus, the assignment of the claims are to be allowed in full, and

c) Order such further relief as the Tribunal deems appropriate.

Respectfully submitted,

CAPITAL ONE, N.A.

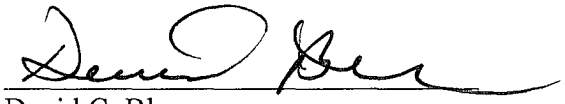

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EXHIBIT A

Notice of Tentative Denial of Claim

for Form ST-1, Sales and Use Tax and E911 Surcharge Return

STATE OF Illinois
DEPARTMENT OF REVENUE
tax.illinois.gov

#BWNKMGV
#CNXX XX22 1739 7921#
CAPITAL ONE NA
CAPITAL ONE 360
ATTN: SHAWN BEISH
15000 CAPITAL ONE DR
RICHMOND VA 23238-1119

July 11, 2016

Letter ID: CNXXXX2217397921

Account ID: 3545-0691

We have reviewed the claims described on the last page of this letter and have tentatively denied them because we have not established that this tax was paid in error or that issuing a credit memorandum would not result in unjust enrichment to you.

If you do not agree, you may contest this notice by following the instructions listed below.

If the amount of tax tentatively denied, exclusive of penalty and interest, is more than $15,000, *or* if no tax is being denied but the total penalties and interest being denied is more than $15,000, file a petition with the Illinois Independent Tax Tribunal within **60 days** of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).

In all other cases that do not fall within the jursidication of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within **60 days** of the date of this notice. Your request must be in writing, clearly indicate that you want to protest, and explain in detail why you do not agree with our actions. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this tentative denial of claim will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact that you are required to file tax returns.

If you have questions regarding this matter, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our address and telephone number are below.

Julianne Brownback
Revenue Tax Specialist

SALES TAX PROCESSING DIVISION
ILLINOIS DEPARTMENT OF REVENUE
PO BOX 19013
SPRINGFIELD IL 62794-9013

(217) 782-5906 ext. 33271
(217) 785-7852 fax

Batch Document Number	Reporting Period	Amount Claimed
16-174-820-03 021	12/2014	$878,640.00
16-174-820-03 022	12/2015	$816,617.00

EXHIBIT B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION

CITIBANK, N.A., a national banking association,	)	
Plaintiff,	)	
v.	)	**Case No. 13 L 050072**
ILLINOIS DEPARTMENT OF REVENUE; and BRIAN HAMER, as Director of the Illinois Department of Revenue,	)	
Defendants.	)	

ORDER and OPINION

I. OPINION

Plaintiff Citibank, N.A., ("Plaintiff") filed a complaint seeking judicial review of the Illinois Department of Revenue's ("Department") denial of Plaintiff's claim for refund of Retailers' Occupation Tax ("ROT"), pursuant to 86 Ill. Admin. Code § 130.1960.[1] The issue before the Court is whether Plaintiff is entitled to a refund of tax that is equal to a portion of the ROT remitted to the Department by retailers from whom certain of Plaintiff's credit account customers made retail purchases of tangible personal property, and which accounts were later written off by Plaintiff as bad debts.

FACTS

In lieu of a hearing, the parties submitted a Stipulation of Facts ("Stip.") and exhibits from which the following facts are taken.

Plaintiff provided sales financing programs to numerous retailers ("Retailers") in the State of Illinois. Stip. ¶ 2. As part of their normal business, the Retailers offered their customers

[1] Subsequent to filing its refund claim, Citicorp Trust Bank merged into Citibank, N.A., which is now the successor to Citicorp Trust Bank, fsb.

the option of financing their purchases, including the amount of Illinois tax due on such purchases, on a credit basis. Stip. ¶ 2.

Plaintiff entered into agreements ("Agreements") with Illinois Retailers which provide that Plaintiff would originate or acquire consumer charge accounts and receivables from such Retailers on a non-recourse basis. Stip. ¶ 2. Under those Agreements, Plaintiff acquired any or all applicable contractual rights relating thereto, including the right to any and all payments from the customers and the right to claim ROT refunds or credits. Stip. ¶ 2.

Under the Agreements, when a customer financed a purchase using the consumer's account, Plaintiff remitted to the Retailer the amount that the customer financed. Stip. ¶ 3. This included some or the entire purchase price, depending on whether the customer financed the entire purchase or only a portion of the purchase, and the amount of the tax that the purchaser owed based on the selling price of the property purchased. Stip. ¶ 3. The Retailers then remitted the complementary amount of ROT they owed to the State for each transaction. Stip. ¶ 3.

Some of the customers subsequently defaulted on their accounts ("Accounts"), and it is these defaulted Accounts that are the subject of Plaintiff's claim in this case. Stip. ¶ 4. When the customers defaulted on the Accounts, they did not repay the full amount of the purchase price and the ROT, and a portion of such amounts remain unpaid. Stip. ¶ 4.

After reasonable attempts to collect the balances that remained on the defaulted Accounts, Plaintiff determined that they were worthless. Stip. ¶ 5. All of the surrounding circumstances indicated that the debts were uncollectible and that legal action to enforce payment would not result in the satisfaction of execution on a judgment. Stip. ¶ 5. Plaintiff wrote the remaining balances off as worthless on its books and records. Stip. ¶ 5. It was further

stipulated that Plaintiff, and not the Retailers, "bore the economic loss on these defaulted accounts." Recommendation for Disposition ¶ 6.

Plaintiff claimed the remaining, unpaid, balances on these Accounts as bad debts, pursuant to § 166 of the Internal Revenue Code, on its United States corporate income tax returns. Stip. ¶ 6. These bad debts were written off over the period of January 1, 2008 to December 31, 2009, and claimed on Plaintiff's United States corporate income tax returns covering this period. Stip. ¶ 6.

On September 28, 2010, Plaintiff filed a claim for a refund or credit pursuant to 86 Ill. Admin. Code § 130.1960. Stip. ¶ 7. The claim was for the period from January 1, 2008 through December 31, 2009, in the amount of $1,600,853.32. Stip. ¶¶ 1, 7. That amount is the portion of Account balances that were written off as bad debts that is attributable to the ROT. Stip. ¶ 7. Of this total amount, $640,123.00 is attributable to the period of January 1, 2008 through December 31, 2008 and $960,731.00 is attributable to the period of January 1, 2009 through December 31, 2009. Stip. ¶ 7.

The Department denied Plaintiff's claim on January 31, 2011. Stip. ¶ 8. Plaintiff then protested the denial and asked for an administrative hearing. Stip. ¶ 9. The matter proceeded to hearing before Administrative Law Judge John E. White ("ALJ"). On December 11, 2012, the ALJ issued a Recommendation for Disposition in which he found Plaintiff was not entitled to a refund. On December 13, 2012, the Department issued a Final Determination of Claim, in accordance with the ALJ's recommendation, denying Plaintiff's refund claim.

STANDARD OF REVIEW

The standard of review of an administrative agency's decision depends on whether the issue presented is a question of fact, a question of law, or a mixed question of law and fact. *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 272, 917 N.E.2d 899, 904 (2009). When reviewing an administrative agency's decision, a question of fact is overturned only where the administrative decision is against the manifest weight of the evidence. *Decatur Sports Found. v. Dep't of Revenue*, 156 Ill. App. 3d 623, 627, 509 N.E.2d 1103, 1105 (4th Dist. 1987). An administrative agency's findings and conclusions on questions of fact are *prima facie* true and correct and will not be disturbed unless they are against the manifest weight of the evidence. *Cent. Furniture Mart, Inc. v. Johnson*, 157 Ill. App. 3d 907, 910, 510 N.E.2d 937, 939 (1st Dist. 1987).

A pure question of law exists where the issue is the proper interpretation of the meaning of the language of a statute. *Cinkus v. Vill. of Stickney Municipal Officers Electoral Bd.*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008). An agency's rulings on questions of law are reviewed *de novo*. *Exelon Corp.*, 234 Ill. 2d at 272.

DISCUSSION

The issue before this Court is whether Plaintiff is entitled to a refund of tax that is equal to a portion of the ROT remitted to the Department by retailers from whom certain of Plaintiff's credit account customers made retail purchases of tangible personal property, and which accounts were later written off by Plaintiff as bad debts. Because the proper interpretation of a statute is a question of law, the Court applies the *de novo* standard of review. *Id.*

"The primary rule of statutory construction is to give effect to legislative intent by first looking at the plain meaning of the language." *Davis v. Toshiba Mach. Co.*, 186 Ill. 2d 181, 184,

710 N.E.2d 399, 401 (1999). Where statutory language is clear and unambiguous, a court must give it effect as it is written "without reading into it exceptions, limitations or conditions that the legislature did not express." *Id.* at 184-85, (citation and internal quotations omitted). Courts refuse to read meanings into statutory language that were not specifically included. *See Van's Material Co. v. Dep't of Revenue*, 131 Ill. 2d 196, 545 N.E.2d 695 (1989). Where the language of a statute is clear and unambiguous, a court must apply it as written, without resort to extrinsic aids of statutory construction. *CBS Outdoor, Inc. v. Dep't of Transp.*, 2012 IL App (1st) 111387, ¶ 29, 970 N.E.2d 509, 514 (1st Dist. 2012).

It is a generally recognized principal that courts give "substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute" as these interpretations express an informed source for ascertaining legislative intent. *Illinois Consol. Tel. Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142, 152-53, 447 N.E.2d 295, 300 (1983) (citations omitted). Administrative regulations have the force of law and are construed under the same standards governing statutory construction. *CBS Outdoor, Inc.*, 2012 IL App (1st) 111387 at ¶ 27. The court's objective in interpreting an agency regulation is to ascertain and give effect to the intent of the agency. *Id.* The most reliable indicator of an agency's intent is the language of the statute itself and, where the language is clear and unambiguous, a court must apply it as written, without resort to extrinsic aids of statutory construction. *Id.* When an act defines the terms to be used in it, those terms must be construed according to the definitions given them in the act. *Laborer's Int'l Union of North America, Local 1280 v. Illinois State Labor Relations Bd.*, 154 Ill. App. 3d 1045, 1059, 507 N.E.2d 1200, 1209 (5th Dist. 1987).

When interpreting a statute, an administrative agency cannot expand statutory language by implication beyond its clear import. *See Van's Material Co.*, 131 Ill. 2d 196 (court refused to find that "manufacturing facility" was limited to manufacturing that occurred in a fixed location); *Canteen Corp. v. Dep't of Revenue*, 123 Ill. 2d 95, 525 N.E.2d 73 (1988) (court adopted the definition of "premises" which was expressed in the Department's regulation and refused to extend or restrict it as the parties asked); *Nokomis Quarry Co. v. Dep't of Revenue*, 295 Ill. App. 3d 264, 692 N.E.2d 855 (5th Dist. 1998) (The court refused to use dictionary definitions where the statute used the term "commonly regarded as manufacturing."). In each of those cases a term was defined by statute. In each of those cases the Department attempted to add to, or subtract from, the statute's language. The Illinois Supreme Court found each of the attempts to add or subtract language from the statute to be unduly restrictive and not within the scope of the statute.

Similarly, a regulation cannot create requirements, exceptions, limitations or conditions that conflict with the express legislative intent as reflected in the statutory language. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479, 639 N.E.2d 1282, 1287 (1994). Therefore, an administrative agency that promulgates regulations cannot extend its authority or impose a limitation on a statute that the legislature did not prescribe. *Wesko Plating, Inc. v. Dep't of Revenue*, 222 Ill. App. 3d 422, 425-26, 584 N.E.2d 162, 164 (1st Dist. 1991).

Section 6b of the ROTA provides that the Department's denial of a taxpayer's claim for credit constitutes prima facie proof that the taxpayer is not entitled to a credit. 35 ILCS 120/6b. The Department's prima facie case is a rebuttable presumption. This presumption is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the

Department's determinations are wrong. *Copilevitz v. Dep't of Revenue*, 41 Ill. 2d 154, 156-57, 242 N.E.2d 205, 206-07 (1968).

In Illinois, "it is well settled that in the absence of statute, taxes voluntarily paid cannot be recovered no matter how meritorious the claim." *Peoples Store of Roseland v. McKibbin*, 379 Ill. 148, 152, 39 N.E.2d 995, 998 (2009) (citing *People ex rel. Switzer v. Orrington Co.*, 360 Ill. 289 (1935)). Section 6 of the ROTA "is a special remedial statute;" and is limited to those persons, normally retailers, who have paid the tax pursuant to the act by reason of mistake, a tax that was not actually due. *Peoples Store of Roseland*, 379 Ill. at 152.

Plaintiff argues that it is entitled to a refund pursuant to Section 6 of the ROTA, which provides, in pertinent part:

> § 6. 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 or, if that person died or became a person under legal disability, to his or her legal representative, as such. ... Claims submitted by the retailer are subject to the same restrictions and procedures provided for in this Act.
>
> * * *
>
> 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; and that no understanding or agreement, written or oral, exists whereby he or she or his or her legal representative may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof; or (b) that he or she or his or her legal representative has repaid unconditionally such amount to his or her vendee (1) who bore the burden thereof and has not shifted such burden directly or indirectly, in any manner whatsoever; (2) who, if he or she has shifted such burden, has repaid unconditionally such amount to his own vendee; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his or her vendor, nor to be relieved of such burden in any manner whatsoever. No credit may be allowed or refund made for any amount

> paid by or collected from any claimant unless it appears that the claimant has unconditionally repaid, to the purchaser, any amount collected from the purchaser and retained by the claimant with respect to the same transaction under the Use Tax Act.

35 ILCS 120/6.

The Department promulgated 86 Ill. Admin. Code § 130.1960, which provides, in pertinent part:

> § 130.1960 Finance Companies and Other Lending Agencies – Installment Contracts – Bad Debts
>
> * * *
>
> 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 credit 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.
>
> * * *
>
> 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 (2000); 24 Ill. Reg. 18376 (eff. December 1, 2000).

Plaintiff argues that the bad debt regulation allows a retailer to claim a refund or deduction where (1) ROT was remitted on the sale and (2) the account is written off as uncollectible for federal tax purposes. It is undisputed that, had the Retailers provided finance

arrangements to their customers for purchases of tangible personal property, and the customers then defaulted on those, that the Retailers would be entitled to a refund of the tax. The issue before this Court is whether Plaintiff, through its non-recourse Agreements with Retailers whereby all rights to any and all payments from the customers and the right to claim ROT refunds or credits were assigned to it, is entitled to the refund.

In his Recommendation for Disposition, the ALJ went through an in-depth analysis of whether Plaintiff is a retailer or steps into the shoes of the retailer for purposes of obtaining a refund. The Court believes that this analysis is misplaced. The key issue in this case is not whether Plaintiff is a retailer, or steps into the shoes of one, but whether Plaintiff bore the burden of the tax and is therefore entitled to a refund. It is Section 130.1960(d)(3) that is controlling in this matter and not Sections (d)(1) or (2) as the ALJ stated. However, even if the issue was whether Plaintiff was a retailer, the Retailers properly assigned all their rights to the Plaintiff, who therefore stepped into the shoes of the Retailer and is entitled to the refund.

Pursuant to Section 130.1960(d)(3), when a tax is paid on an account receivable which 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 ROTA. 86 Ill. Admin. Code § 130.1960. Section (d)(3) is not limited to accounts receivable held only by retailers, nor can it be. An administrative agency that promulgates regulations cannot impose a limitation on a statute that the legislature did not prescribe. *Wesko Plating, Inc.*, 222 Ill. App. 3d at 425-26.

The ALJ stated that Section 130.1960(d)(2) requires that the party seeking the refund be a retailer. The Court disagrees. First, as stated before, Section 130.1960(d)(3) is controlling in this case and not (d)(2). Second, it is not required that the party seeking the credit or refund be the retailer who remitted ROT in the first place. Because the legislature did not limit Section 6

of ROTA to retailers, the Department's regulation, 86 Ill. Admin. Code § 130.1960, cannot limit Section 6 to retailers. In this case, Plaintiff paid tax on an account receivable that became a bad debt. Therefore, they are allowed to file a claim for credit in accordance with Section 6 of the ROTA.

Section 6 of ROTA clearly states that a claimant is entitled to a credit or refund for any amount of tax or penalty or interest that has been paid which was not due under the Act. 35 ILCS 120/6. The plain and ordinary meaning of Section 6 shows that the Act does not contemplate that only a retailer can obtain a refund. For purposes of this case, Plaintiff is entitled to a credit or refund as long as it appears that: (1) Plaintiff bore the burden of such amount; (2) Plaintiff has not been reimbursed for the tax or shifted the burden of the tax: and (3) that no understanding or agreement exist whereby Plaintiff may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof. *Id.*

Section 6 of ROTA allows recovery or credit for an overpayment of sales or use taxes only "where the taxpayer himself has borne the burden of the tax, either originally or by reason of an unconditional repayment." *W.F. Monroe Cigar Co. v. Dep't of Revenue*, 50 Ill. App. 3d 161, 162, 365 N.E.2d 574, 575 (1st Dist. 1977). In a normal situation under ROTA, the Retailers shift the burden of the tax to the consumer by including it in the purchase price. The Court notes that if the burden can be shifted to the consumer than it can similarly be shifted to a finance company such as Plaintiff.

In this case, the parties stipulated that, under the Agreements, when a customer financed a purchase using the consumer's account, Plaintiff remitted to the Retailer the amount that the customer financed, including some or the entire purchase price and the amount of the tax that the purchaser owed based on the selling price of the property purchased. The parties further

stipulated that some of the customers subsequently defaulted on their Accounts and therefore did not repay the full amount of purchase price and the ROT. Thus, it follows that Plaintiff bore the burden of the tax, as it in fact paid the tax, and was not reimbursed for the tax as the customer defaulted on the Account. As to the third requirement, Plaintiff made reasonable attempts to collect the balances owed it but was unsuccessful. The debts became uncollectible and legal action to enforce payment would not result in the satisfaction of execution on a judgment. Accordingly, at the time Plaintiff filed its claim for refund, no understanding or agreement existed whereby Plaintiff could be relieved of the burden of the tax or reimbursed for the tax payment. Therefore, Plaintiff has met the requirements of Section 6 of ROTA for obtaining a credit or refund.

The ALJ noted that the Retailers would only be entitled to a refund if they first unconditionally repaid to the purchaser the use tax they had previously collected from them. 35 ILCS 120/6. Therefore, according to the ALJ, Plaintiff would have to repay the tax to the purchaser before being allowed to claim the tax. The Court cannot agree. Repay is defined as "to pay back; refund; restore; return." Black's Law Dictionary 1167 (5th ed. 1979). This definition implies that the purchaser must have first paid the tax to Plaintiff. However, the stipulated facts of this case provide that the customers in the transactions at issue here defaulted on their Accounts, and therefore did not pay to Plaintiff the full amount of tax. Plaintiff cannot repay something it never received in the first place. Furthermore, Plaintiff is not seeking a refund for tax amounts paid by the customers. It is only seeking a refund of those amounts that the customers failed to pay. Therefore, Plaintiff is not required to refund to the purchaser the use tax that has been collected.

The ALJ stated that Plaintiff's argument that Illinois law recognizes a broad right to assign claims was misplaced. The ALJ explained that Section 130.1960 expresses two ways a bad debt might occur: (1) the Retailers would be entitled to a bad debt credit had they been the ones that extended financing to their customers, and had the customers' subsequent defaults thereby actually caused the Retailers to be unable to collect all of the selling price of the goods sold; and (2) the Retailers would have been entitled to a bad debt credit if the assignments to Plaintiff were "with recourse." 86 Ill. Admin. Code § 130.1960. The latter does not apply in this case as the Agreements between Plaintiff and the Retailers were "without recourse."

The general rule is that claims against the government are assignable in the absence of language in the statute prohibiting it. *People ex rel. Stone v. Nudelman*, 376 Ill. 535, 539, 34 N.E.2d 851, 853 (1940). There is no such prohibition contained in Section 6 or ROTA or 86 Ill. Admin. Code § 130.1960. An "assignment operates to transfer to the assignee all of the assignor's right, title, or interest in the thing assigned." *Estate of Martinek v. Martinek*, 140 Ill. App. 3d 621, 629, 488 N.E.2d 1332, 1337 (2d Dist. 1986). "The assignee, by acquiring the same rights as the assignor, stands in the shoes of the assignor." *Id.*

Through their Agreements, the Retailers assigned all of their rights under the Accounts to Plaintiff on a non-recourse basis. As assignment is not prohibited in Section 6 of the ROTA or 86 Ill. Admin. Code § 130.1960, Plaintiff stepped into the shoes of the Retailers. As the ALJ stated, had the Retailers been the ones that extended financing to their customers, and had the customers' subsequent defaults thereby actually caused the Retailers to be unable to collect the entire selling price of the goods sold, the Retailers would be entitled to a bad debt credit. As a result of the assignment of rights, Plaintiff steps into the shoes of the Retailers and is entitled to a bad debt credit if they extend financing to customers and the customers subsequently default,

thereby causing Plaintiff to be unable to collect all of the selling price of the goods. Plaintiff is therefore entitled to a bad debt credit or refund.

As a final point, the ALJ found that Plaintiff is not entitled to a bad debt credit or refund as it failed to submit the detailed information required to be included on a claim form. The Court disagrees. 35 ILCS 120/6a provides, in pertinent part:

> Sec. 6a. Claims for credit or refund shall be prepared and filed upon forms provided by the Department. Each claim shall state: (1) The name and principal business address of the claimant; (2) the period covered by the claim; (3) the total amount of credit or refund claimed, giving in detail the net amount of taxable receipts reported each month or other return period used by the claimant as the basis for filing returns in the period covered by the claim; (4) the total amount of tax paid for each return period; (5) receipts upon which tax liability is admitted for each return period; (6) the amount of receipts on which credit or refund is claimed for each return period; (7) the tax due for each return period as corrected; (8) the amount of credit or refund claimed for each return period; (9) reason or reasons why the amount, for which the claim is filed, is alleged to have been paid in error; (10) a list of the evidence (documentary or otherwise) which the claimant has available to establish his compliance with Section 6 [35 ILCS 120/6] as to bearing the burden of the tax for which he seeks credit or refund; (11) payments or parts thereof (if any) included in the claim and paid by the claimant under protest; (12) sufficient information to identify any suit which involves this Act, and to which the claimant is a party, and (13) such other information as the Department may reasonably require. Where the claimant is a corporation or limited liability company, the claim filed on behalf of such corporation or limited liability company shall be signed by the president, vice-president, secretary or treasurer, by the properly accredited agent of such corporation, or by a manager, member, or properly accredited agent of the limited liability company.

35 ILCS 120/6a.

The ALJ found that Plaintiff failed to provide detailed financial information on its claim forms. First, the ALJ states that Plaintiff failed to provide information that identifies the transactions for which it claims to have paid tax in error. The Court finds no such requirement in Section 6a nor in the Department's Form, ST-1-X Amended Sales and Use Tax and E911 Surcharge Return. Similarly, the ALJ stated that Plaintiff provided no documentary evidence at all to support its entries. Again, no such requirement is present in Section 6a. Section 6a merely

requires that the claimant provide a "list of evidence," not the evidence itself. Finally, the ALJ found that nothing on Plaintiff's claim forms show which Retailers filed original ST-1 returns, what entries were made on such returns, or where those Retailers were doing business in Illinois. None of this information is required by Section 6a or Form ST-1-X.

II. ORDER

This matter having been fully briefed, and the Court being fully apprised of the facts, law and premises contained herein, it is ordered as follows:

A. Plaintiff Citibank, N.A. is entitled to a refund pursuant to 35 ILCS 120/6;

B. The ruling of the Illinois Department of Revenue is reversed.

Judge Patrick J. Sherlock

OCT 17 2013

Circuit Court – 1942

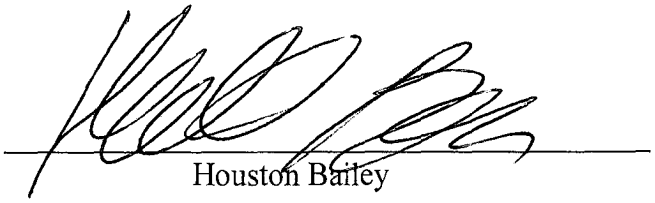
ENTERED: _____

Judge Patrick Sherlock

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, a non-attorney, certifies that he served a true and correct copy of the foregoing **Petition** upon the parties listed below, by personal service before 5:00 p.m. on September 1, 2016.

Illinois Department of Revenue
Office of Legal Services
100 W. Randolph Street, 7-900
Chicago, Illinois 60601



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