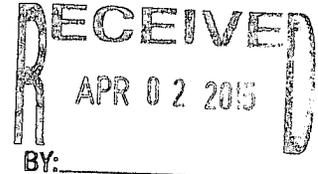


**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

MERCEDES-BENZ FINANCIAL)
SERVICES USA, LLC,)
)
Petitioner,)
)
vs.)
)
ILLINOIS DEPARTMENT OF REVENUE,)
)
Respondent.)



Case No. _____
 JY TGL

PETITION

Petitioner MERCEDES-BENZ FINANCIAL SERVICES USA, LLC ("Mercedes-Benz") petitions this Tribunal for review of Respondent Illinois Department of Revenue's denial of its claim for a refund.

STATEMENT OF JURISDICTION

1. Mercedes-Benz 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 the Department's denial of a refund claim for retailers' occupation tax in excess of \$15,000, exclusive of interest. 35 ILCS 1010/1-45.

3. On November 21, 2014, Mercedes-Benz filed a claim for a refund of retailers' occupation tax of \$122,775,28 for the period of January 1, 2012 to March 31, 2014 (the "Claim").

4. On February 9, 2015, the Department issued a letter stating that it had reviewed Mercedes-Benz's refund claim but not allowing the claim, which is a denial of its refund claim.

A copy of the Department's denial is attached as Exhibit A.

THE PARTIES

5. Petitioner is Mercedes-Benz Financial Services USA, LLC, 36455 Corporate Drive, 3 East, Farmington Hills, Michigan 48331. Its phone number is (248) 991-6700.

6. Petitioner's attorneys are Fred Marcus, Horwood, Marcus & Berk Chtd., 500 West Madison St., Suite 3700, Chicago, Illinois 60661, (312) 606-3200, and Brian R. Harris, Akerman LLP, 401 East Jackson St., Suite. 1700, Tampa, Florida 33602 (813) 209-5011.

7. Petitioner's tax identification number is 20-8653034.

TAXES ON RETAIL SALES IN ILLINOIS

8. 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.

9. 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.*

FACTS

10. Mercedes-Benz is a retailer that financed the sales of motor vehicles, including automobiles and trucks, to consumers along with the retailers' occupation tax due on those sales.

11. The retailers, at the time of the sales, entered into retail installment sale contracts with their customers for the sales of these motor vehicles. The retailers contemporaneously assigned to Mercedes-Benz all of the retailers' right, title and interests in the installment sale contracts. In exchange for the assignments, Mercedes-Benz paid the retailers the amount financed under the installment sale contracts, including the purchase price of the motor vehicles and the retailers' occupation tax due on the sales.

12. The retailers then reported and remitted the retailers' occupation tax paid by Mercedes-Benz to the Department. Thus, Mercedes-Benz funded and paid the retailers' occupation tax and it bore the economic burden of that tax until such time as the purchasers repaid their obligations under the installment sale contracts.

13. Some of the customers defaulted on their installment sales contracts and never repaid Mercedes-Benz the entire amounts financed under those contracts, including retailers' occupation tax. In some instances, Mercedes-Benz repossessed the motor vehicles, but even after the repossession and sales of the motor vehicles, unpaid balances remained.

14. Mercedes-Benz charged off the unpaid balances on its books and records, and it claimed a bad debt deduction pursuant to 26 U.S.C. § 166 for these amounts on its federal income tax returns. These amounts that Mercedes-Benz charged off on its books and records and

deducted on its federal income tax returns included the retailers' occupation tax that was not repaid by the purchasers.

15. Because the purchasers defaulted before re-paying the entire amount of the purchase price and tax that Mercedes-Benz financed, the Department collected tax on more than what the purchasers 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.

16. Because Mercedes-Benz financed the sales, it bore the economic burden of the purchasers' defaults and the resulting bad debts. Mercedes-Benz never collected the retailers' occupation tax from the purchasers Mercedes-Benz previously paid to the retailers that they remitted to the Department.

17. Over the period of January 1, 2012 to March 31, 2014, Mercedes-Benz incurred bad debts on these purchases corresponding to \$122,775.28 in retailers' occupation tax that it had financed and that was previously paid to the Department.

18. On November 21, 2014, Mercedes-Benz filed a refund claim with the Department, pursuant to 86 Ill. Admin. Code § 130.1960, for a refund of \$122,775.28 in retailer's occupation tax for the period of January 1, 2012 to March 31, 2014. Any subsequent collections of the bad debts that Mercedes-Benz had previously written off on its books and records were excluded from its refund claim.

COUNT I

MERCEDES-BENZ IS ENTITLED TO A REFUND UNDER ILLINOIS' GENERAL REFUND STATUTE AND THE DEPARTMENT'S CORRESPONDING REGULATION

19. 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"). Mercedes-Benz is entitled to its refund 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). (Copy attached as Exhibit B).

20. 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).

21. The Department also has promulgated 86 Ill. Admin. Code § 130.1960 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).

22. Section 130.1960(d)(3) controls with regard to Mercedes-Benz's refund claim. The regulation does not prohibit claimants other than retailers (such as Mercedes-Benz) from recovering refunds under the General Refund Statute.

23. 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 Mercedes-Benz financed each of these transactions and thus bore the burden

of the tax, the retailers' occupation tax was remitted on the purchases, and Mercedes-Benz charged-off the unpaid balances, it is entitled to a refund.

THEREFORE, Mercedes-Benz requests that the Tribunal:

a) Find that Mercedes-Benz is entitled to a refund of retailer's occupation tax in the amount of \$122,775.28 for the period of January 1, 2012 to March 31, 2014 pursuant to 35 ILCS 120/6 and 86 Ill. Admin. Code § 130.1960, and that the Department's denial of Mercedes-Benz's refund claim is contrary to law, and that Mercedes-Benz's refund claim should be allowed in full.

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

COUNT II

MERCEDES-BENZ IS ENTITLED TO A REFUND UNDER THE GENERAL REFUND STATUTE NOTWITHSTANDING THE DEPARTMENT'S REGULATION

24. 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).

25. 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.")

26. Even if Mercedes-Benz 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 Mercedes-Benz is nevertheless entitled to a refund of the overpaid taxes under the General Refund Statute.

27. Mercedes-Benz'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 Mercedes-Benz, 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 not limited to retailers. 35 ILCS 120/6.

28. 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 the meaning and intent of the provision at issue") (emphasis added).

29. Granting Mercedes-Benz'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 Mercedes-Benz's refund claim 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.

30. As the entity that bore the burden of the overpaid tax, Mercedes-Benz is precisely the entity that Illinois' General Refund Statute (and the Department's regulation) were designed to help. There is no basis for excluding Mercedes-Benz from the protection of the General Refund Statute and corresponding regulation. Denying Mercedes-Benz'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.

31. Therefore, if the Tribunal finds that Mercedes-Benz 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 Mercedes-Benz as the entity that bore the economic burden of the overpaid retailers' occupation taxes.

THEREFORE, Mercedes-Benz requests that the Tribunal:

a) Find that Mercedes-Benz is entitled to a refund of retailer's occupation tax in the amount of \$122,775.28 for the period of January 1, 2012 to March 31, 2014 under the General Refund Statute even if it does not fit within the language of the Department's regulation, that the Department's denial of Mercedes-Benz's Claim is contrary to law, and that Mercedes-Benz's refund claim should be allowed in full.

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

COUNT III
MERCEDES-BENZ IS ENTITLED TO A REFUND AS THE ASSIGNEE OF THE
RETAILERS' RIGHTS IN THE ACCOUNTS

32. Alternatively, if this Tribunal finds that Mercedes-Benz 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 Mercedes-Benz 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.

33. 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 assigned Mercedes-Benz their rights in the installment sale contracts, including the retailers' rights to seek tax refunds.

34. 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.")

35. 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").

36. 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.").

37. 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).

38. In summary, since Illinois law permits the retailers to assign their refund claims to Mercedes-Benz, Mercedes-Benz is entitled to the tax refunds in the event the retailers otherwise are the only entity entitled to collect on the claims.

THEREFORE, Mercedes-Benz requests that the Tribunal:

a) Find that Mercedes-Benz is entitled to a refund of retailer's occupation tax in the amount of \$122,775.28 for the period of January 1, 2012 to March 31, 2014 as the assignee of the Retailers' rights in the Accounts, including their rights to seek retailers' occupation tax refund claims, and that the Department's denial of Mercedes-Benz's Claim is contrary to law, and that Mercedes-Benz's refund claim should be allowed in full.

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

Respectfully submitted,

**MERCEDES-BENZ FINANCIAL
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