

ST 12-13

Tax Type: Sales Tax

Tax Issue: Bad Debt Write-Off

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

---

ABC BUSINESS,	)	Docket No.	XXXXXX
	)	Account ID	XXXXXX
Taxpayer	)	Claim Periods	4/06 — 6/09
v.	)		
THE DEPARTMENT OF REVENUE	)	John E. White,	
OF THE STATE OF ILLINOIS	)	Administrative Law Judge	

---

**RECOMMENDATION FOR DISPOSITION**

**Appearances:**

Jack Black and Mary Brown, Many Attorneys, and Joe Green, Many More Attorneys, appeared for Taxpayers; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:**

This matter involves the Illinois Department of Revenue's (Department) denial of an amended return that ABC Business (ABC Business) filed to claim a credit or refund regarding certain bad debts ABC Business wrote off on its federal income tax returns for the period from April 2006 through and including March 2009.

In lieu of hearing, the parties submitted a stipulated record, which included the parties' Stipulation of Facts (Stip.) and three exhibits. The issue is whether ABC Business is entitled to a refund regarding amounts of retailers' occupation tax that certain motor vehicle retailers paid to the Department regarding sales of motor vehicles for which ABC Business provided financing. I am including in this recommendation findings of fact and conclusions of law. I recommend the denial be finalized as issued.

**Findings of Fact:**

## **Facts Regarding the Claims At Issue**

1. On June 10, 2009, ABC Business filed an amended return to claim a refund in the amount of \$4,630,622.71 regarding the period from April 1, 2006 through and including March 31, 2009. Stip. ¶¶ 1, 10.
2. Prior to January 1, 2006, XYZ-ABC Business (XYZ-ABC Business) was a registered retailer in Illinois with the retailer identification number XXXXX. Stip. ¶ 2. ABC Business is the successor to XYZ-ABC Business. Stip. ¶ 1.
3. Since January 1, 2006, ABC Business has been a registered retailer in Illinois with the retailer identification number XXXXX. Stip. ¶ 2. After being acquired by Any Bank in early 2011, ABC Business changed its name to Any Green Bank (ANY GREEN BANK), and ANY GREEN BANK remains a retailer with the same IBT number. *Id.*
4. In addition to being an Illinois retailer, ABC Business also financed credit and installment sales of motor vehicles that other retailers of motor vehicles sold to consumers in Illinois. Stip. ¶ 2.
5. ABC Business was not the retailer in any of the sales transactions the gross receipts from which are related to ABC Business's amended return/claim for refund. Stip. ¶ 2. Instead, ABC Business financed the sales of motor vehicles that other Illinois motor vehicle retailers (Retailers) sold, at retail, to purchasers for use in Illinois. *Id.*
6. At the time of the sales, the Retailers entered into retail installment sales contracts (Contracts) with the purchasers to reflect the financing of the sales of motor vehicles. Stip. ¶ 3. Although no Contract is included as an exhibit to the parties' Stipulation, the parties agree that, pursuant to the Contracts, the purchasers agreed to pay the entire amount financed over time in fixed installments of specific sums. *Id.*; *see also* 815 ILCS 375/1 *et seq.* (Illinois Motor Vehicle Retail Installment Sales Act, requiring certain provisions to be included within all motor vehicle retail installment sales contracts). The amount financed was the total purchase price of the vehicle plus the total Retailers' Occupation Tax (ROT) due on the sale minus any down payment. *Id.* If the purchaser made a down payment, it was applied pro rata between the total purchase price and the total ROT due on the sale. *Id.*

7. At the time of the sales, the Retailers assigned to ABC Business all of the Retailers' rights, titles and interests in the Contracts without recourse. Stip. ¶ 4. These assignments included the right to enforce the debt and to repossess the collateral in the event of a default by the purchasers. *Id.*
8. In exchange for the assignments, ABC Business paid to the Retailers the amount financed under the Contracts. Stip. ¶ 5.
9. The Retailers reported and remitted the full amount of ROT due from them on their sales to customers for use in Illinois to the Department, using the proceeds they received from ABC Business to finance the purchases of such motor vehicles. Stip. ¶ 5.
10. Subsequent to the sale and payment and remittance of the ROT, some customers defaulted on their Contracts, and it is these defaulted Contracts that are the subject of this case. Stip. ¶ 6. When the purchasers defaulted on their Contracts, they did not repay the full amount of the purchase price and the ROT, and a portion of such amounts remains unpaid. *Id.*
11. When some customers defaulted on the Contracts, ABC Business repossessed some of the vehicles. Stip. ¶ 7. In other instances, the vehicles were not repossessed. *Id.* When some vehicles were repossessed and sold, ABC Business applied the sale proceeds pro rata to what remained of the purchase price and the ROT. *Id.* Many times, even after the application of the sales proceeds, the Contracts still had unpaid balances. *Id.*
12. After reasonable attempts to collect the balances on the defaulted Contracts, ABC Business determined that the unpaid balances due were worthless. Stip. ¶ 8. That is, 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. *Id.*
13. ABC Business claimed the remaining, unpaid, balances on the Contracts it determined were worthless as bad debts, pursuant to § 166 of the Internal Revenue Code (Code), on its United States corporate income tax returns. These bad debts were written off over the period of April 1, 2006 to March 31, 2009. Stip. ¶ 9.

14. On June 10, 2009, ABC Business filed a claim for refund or credit (Claim) pursuant to 86 Ill. Admin. Code § 130.1960. Stip. ¶ 10; Stip. Ex. A (copy of claim form and attachment). This Claim was for the period from April 1, 2006 to March 31, 2009. Stip. ¶¶ 1, 10; Stip. Ex. A. The Claim sought a refund in the amount of \$4,630,622.71. Stip. ¶¶ 1, 10; Stip. Ex. A.
15. The Claim does not contain the detailed information and amounts required to be reported within Part 3 of the form. *Compare* Stip. Ex. A with 35 ILCS 120/6a.
16. The Department denied ABC Business's Claim on August 6, 2010 (Stip. ¶ 11; Stip. Ex. B), following which ABC Business protested that denial, and asked for an administrative hearing. Stip. ¶ 12; Stip. Ex. C (copy of ABC Business's protest).

**Conclusions of Law:**

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. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). A taxpayer cannot overcome the statutory presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determination is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

Here, ABC Business argues that it is entitled to a refund under both ROTA § 6 and pursuant to ROT regulation (ROTR) § 130.1960. ABC Business Financial Services America, LLC's Opening Brief (Taxpayer's Brief), *passim*. I address each authority separately.

## Whether ABC Business's Claim Is Authorized by ROTA § 6

Section 6 of the ROTA 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. ... However, as to any claim for credit or refund filed with the Department on and after each January 1 and July 1 no amount of tax or penalty or interest erroneously paid (either in total or partial liquidation of a tax or penalty or amount of interest under this Act) more than 3 years prior to such January 1 and July 1, respectively, shall be credited or refunded, except that if both the Department and the taxpayer have agreed to an extension of time to issue a notice of tax liability as provided in Section 4 of this Act, such claim may be filed at any time prior to the expiration of the period agreed upon.

\*\*\* 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.

Section 6 of the ROTA “is a special remedial statute. Its general purpose is limited to those who have paid a tax pursuant to the act which, by reason of some mistake of law or fact, they should not have paid.” Peoples Store of Roseland v. McKibben, 379

Ill. 148, 152, 39 N.E.2d 995, 998 (1942). More to the point, ROTA § 6 makes clear that the reason why retailers are entitled to a refund of tax they should not have paid is because tax was not due in the first place. 35 ILCS 120/6 (“If it appears ... 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, ...”) (emphasis added).

To determine whether, in this case, certain tax monies were paid in error — that is, paid even though they were not due — requires two things. First, one must take into account the components of what is commonly referred to as Illinois “sales tax” and second, one must take into account how Illinois imposes such “sales tax” on the retail sale and/or purchase of motor vehicles for use in Illinois.

The Illinois Supreme Court has described the component parts of “sales tax” as follows:

The Retailers' Occupation Tax Act imposes a tax upon persons engaging in selling tangible personal property at retail. The amount of the tax is computed as a specified percentage of the gross receipts of such sales at retail. [all citations omitted] A 'sale at retail' is any transfer for a valuable consideration of the ownership of or title to tangible personal property to a purchaser for use or consumption and not for resale. The retailer is required to remit the tax to the Illinois Department of Revenue.

The Use Tax Act complements the Retailers' Occupation Tax Act. It imposes a tax, at the same rate as the retailers' occupation tax, upon the privilege of using in this State tangible personal property purchased in retail. In the usual situation the tax is collected from the purchaser by the retailer, but to the extent that the retailer remits to the Department of Revenue the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property, he is not required to remit the tax imposed by the Use Tax Act.

\*\*\*

Hagerty v. General Motors Corp., 59 Ill. 2d 52, 5455, 319 N.E.2d 5, 6 (1974). Under the Use Tax Act (UTA), the privilege upon which tax is imposed — use — is defined to mean “the exercise by any person of any right or power over tangible personal property incident to the ownership of that property ....” 35 ILCS 105/2.

The complementary texts of the UTA and the ROTA show that, in certain respects, the Illinois General Assembly intended to treat retailers who sell motor vehicles (and watercraft, aircraft and trailers that are required to be registered with an agency of this State) differently than retailers who sell other items of tangible personal property. Specifically, UTA § 9 provides:

Sec. 9. Except as to motor vehicles, watercraft, aircraft, and trailers that are required to be registered with an agency of this State, each retailer required or authorized to collect the tax imposed by this Act shall pay to the Department the amount of such tax (except as otherwise provided) at the time when he is required to file his return for the period during which such tax was collected, less a discount of 2.1% prior to January 1, 1990, and 1.75% on and after January 1, 1990, or \$5 per calendar year, whichever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request. In the case of retailers who report and pay the tax on a transaction by transaction basis, as provided in this Section, such discount shall be taken with each such tax remittance instead of when such retailer files his periodic return. A retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act, with respect to the sale of the same property.

**Where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the period for which the return is filed, the retailer, in collecting the tax (except as to motor vehicles, watercraft, aircraft, and trailers that are required to be registered with an agency of this State), may collect for each tax return period, only the tax applicable to that part of the selling price actually received during such tax return period.**

\*\*\*

In addition, with respect to motor vehicles, watercraft, aircraft, and trailers that are required to be registered with an agency of this State, every retailer selling this kind of tangible personal property shall file, with the Department, upon a form to be prescribed and supplied by the Department, a separate return for each such item of tangible personal property which the retailer sells ... \*\*\*

**The transaction reporting return in the case of motor vehicles or trailers that are required to be registered with an agency of this State, ... the amount of tax due from the retailer with respect to such transaction; the amount of tax collected from the purchaser by the retailer on such transaction (or satisfactory evidence that such tax is not due in that particular instance, if that is claimed to be the fact); the place and date of the sale; a sufficient identification of the property sold; such other information as is required in Section 5-**

402 of the Illinois Vehicle Code, and such other information as the Department may reasonably require.

\*\*\*

Such transaction reporting return shall be filed not later than 20 days after the date of delivery of the item that is being sold, but may be filed by the retailer at any time sooner than that if he chooses to do so. The transaction reporting return and tax remittance or proof of exemption from the tax that is imposed by this Act may be transmitted to the Department by way of the State agency with which, or State officer with whom, the tangible personal property must be titled or registered (if titling or registration is required) if the Department and such agency or State officer determine that this procedure will expedite the processing of applications for title or registration.

**With each such transaction reporting return, the retailer shall remit the proper amount of tax due** (or shall submit satisfactory evidence that the sale is not taxable if that is the case), **to the Department or its agents, whereupon the Department shall issue, in the purchaser's name, a tax receipt (or a certificate of exemption if the Department is satisfied that the particular sale is tax exempt) which such purchaser may submit to the agency with which, or State officer with whom, he must title or register the tangible personal property that is involved (if titling or registration is required) in support of such purchaser's application for an Illinois certificate or other evidence of title or registration to such tangible personal property.**

\*\*\*

**Where a retailer collects the tax with respect to the selling price of tangible personal property which he sells and the purchaser thereafter returns such tangible personal property and the retailer refunds the selling price thereof to the purchaser, such retailer shall also refund, to the purchaser, the tax so collected from the purchaser.** When filing his return for the period in which he refunds such tax to the purchaser, the retailer may deduct the amount of the tax so refunded by him to the purchaser from any other use tax which such retailer may be required to pay or remit to the Department, as shown by such return, if the amount of the tax to be deducted was previously remitted to the Department by such retailer. If the retailer has not previously remitted the amount of such tax to the Department, he is entitled to no deduction under this Act upon refunding such tax to the purchaser.

\*\*\*

35 ILCS 105/9 (emphasis added). Nearly identical provisions are included within ROTAs § 3. 35 ILCS 120/3.

To summarize, the UTA and the ROTAs' distinct treatment of motor vehicle retailers (as well as retailers of watercraft, aircraft, etc.) versus other retailers differs in the type of return required to be filed, and when tax is due. 35 ILCS 105/9; 35 ILCS

120/3. Retailers of tangible personal property other than motor vehicles are generally allowed to report the gross receipts from all of their sales on a monthly basis, not later than 20 days after the month in which gross receipts are realized. 35 ILCS 105/9; 35 ILCS 120/3. Motor vehicle retailers, on the other hand, must (unless they make a single sale of more than one vehicle to single purchaser) report each separate sale on a separate transaction return, which must be filed within 20 days from the date of the delivery of the motor vehicle. 35 ILCS 105/9; 35 ILCS 120/3. Additionally, “[t]he transaction reporting return prescribed [by UTA § 9 and by ROTA § 3] and supplied to retailers by the Department not only shall serve as such return (for both the buyer and the seller), but also may serve as the dealer's invoice to the purchaser.” 86 Ill. Admin. Code § 130.540(b)(1). Retailers of tangible personal property other than motor vehicles, in contrast, are not required to prepare and file a return for their purchasers. 35 ILCS 105/9; 35 ILCS 120/3.

The reason why a purchaser of a motor vehicle is required to file a return to report his purchase of a motor vehicle for use in Illinois — whether the sale is at retail or not<sup>1</sup> — is based on how the Illinois Assembly has coordinated its statutory scheme for taxing purchases or other transfers of motor vehicles for use in Illinois with its scheme for regulating motor vehicles required to be titled and registered in Illinois. *Compare* 35 ILCS 105/9; 35 ILCS 105/10 *and* 625 ILCS 5/3-1001 *et seq.* (Vehicle Use Tax Act) *with* 625 ILCS 5/3-101; 625 ILCS 5/104(f); 625 ILCS 5/106(a). Illinois requires all motor vehicles used on the public way to be titled or registered. 625 ILCS 5/3-101; 625 ILCS 5/104(f); 625 ILCS 5/106(a). Before the owner of a motor vehicle may title or register a

---

<sup>1</sup> If a motor vehicle is purchased by a person for use in Illinois from a retailer located outside Illinois, the purchaser must file Illinois Form RUT 25, and pay use tax due, not later than 30 days after the motor vehicle is brought into Illinois for use. 35 ILCS 105/10; Illinois Form RUT-25 Instructions (available to view online at <http://tax.illinois.gov/TaxForms/Sales/VehicleUseTax/RUT-25-Instr.pdf>) (last viewed on September 26, 2012). If a motor vehicle is purchased from someone other than a retailer for use in Illinois, the purchaser must file Illinois Form RUT 50, and pay such tax, within 30 days from the date the vehicle was purchased in Illinois, or within 30 days from the date the vehicle was brought into Illinois, if purchased outside Illinois. 625 ILCS 5/3-1002; Illinois Form RUT-50 Instructions (available to view online at <http://tax.illinois.gov/TaxForms/Sales/VehicleUseTax/RUT-50-Instr.pdf>) (last viewed on September 26, 2012).

motor vehicle, he must show that he has paid whatever tax is due on his use of that motor vehicle, or assert that no tax was due. 625 ILCS 5/3-101; 625 ILCS 5/104(f); 625 ILCS 5/106(a). If tax is due, it must be paid *before* the Illinois Secretary of State will issue a certificate of title or registration plates for the vehicle. 625 ILCS 5/3-101; 625 ILCS 5/104(f); 625 ILCS 5/106(a).

The legislature's coordination of Illinois schemes of taxation and vehicle regulation is also why UTA § 9 and ROTA § 3 do not grant to retailers of motor vehicles the option that other retailers have to pay their ROT liability as they receive gross receipts "under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the period for which the return is filed ...." 35 ILCS 105/9; 35 ILCS 120/3. Instead, each Illinois retailer of motor vehicles is required to remit the amount of use tax collected, or the complementary amount of its own ROT due, on the date the particular return is due. 35 ILCS 105/9; 35 ILCS 120/3. In short, all applicable tax statutes require purchasers or retailers of motor vehicles to pay any and all taxes due at or about the time of sale, regardless whether the purchaser has paid all of the receipts owed to the seller for the vehicle. 35 ILCS 105/9; 35 ILCS 120/3; *see also* 625 ILCS 5/3-1002 (vehicle use tax returns).

In this case, the parties' stipulations make clear the following facts. First, ABC Business was not one of the Retailers who made any of the sales at issue. Stip. ¶ 2. Since ABC Business was not one of the Retailers, ABC Business did not remit to the Department any tax that was due from each Retailer regarding each such sale. Stip. ¶ 5. Second, instead of selling the motor vehicles at issue, ABC Business financed other Retailers' sales of motor vehicles at retail. Stip. ¶¶ 2, 5; *compare also* 815 ILCS 375/2.3 (definition of "retail seller" or "seller," under Illinois' Motor Vehicle Retail Installment Sales Act [MVRISA]) *with* 815 ILCS 375/2.11 (definition of "Sales finance agency").

Like its counterpart in the case of General Motors Acceptance Corp. v. Kettleson, ABC Business lent money for the retail sales at issue, it did not make such sales. General Motors Acceptance Corp. v. Kettleson, 219 Ill. App. 3d 871, 875-76, 580 N.E.2d 187, 190 (2d Dist. 1991) (“A ‘[r]etail installment transaction’ is ‘a credit sale of a motor vehicle by a retail seller to a retail buyer for a deferred payment price payable in \*\*\* installments.’ [citations to MVRISA omitted] Plaintiff [GMAC] is a ‘sales finance agency,’ defined as one ‘engaged \*\*\* in the business of purchasing or making loans upon the security of retail installment contracts.’ ... \*\*\* GMAC is a sales finance agency dealing with retail installment contracts as defined under the [MVRISA].”).

Finally, the stipulations show that, every time one of the Retailers filed a transaction return to report to the Department the gross receipts each Retailer received from one of the sales that ABC Business financed, the Retailer had collected from the purchaser (who obtained financing from ABC Business) the amount of the use tax that each purchaser owed regarding the purchase. Stip. ¶¶ 2, 5; 35 ILCS 105/9; 35 ILCS 120/3. Each Retailer had then remitted to the Department its own complementary ROT liability regarding each such sale. Stip. ¶¶ 2, 5; 35 ILCS 105/5; 35 ILCS 120/3. By doing so, each Retailer shifted the burden of its own ROT liability by collecting use tax from the customer regarding each sale of a motor vehicle. 35 ILCS 105/19; 35 ILCS 120/6. In this regard, ABC Business is wrong when it argues that it “indisputably bore the burden of the tax because [it] provided the funds to pay the ROT ....” Taxpayer’s Brief, p. 7. In Illinois, a person bears the burden of a tax that is imposed on an activity in which the person engages, and which the person pays without being reimbursed by another. W. F. Monroe Cigar Co. v. Department of Revenue, 50 Ill. App. 3d 161, 162, 365 N.E.2d 574, 575 (1<sup>st</sup> Dist. 1977) (“It is also clear that the only statute allowing recovery or credit for an overpayment of sales or use taxes only permits such recovery where the taxpayer himself has borne the burden of the tax, either originally or by reason of an unconditional

repayment. [citation omitted] Thus, if the taxpayer making the claim has passed the tax on to the customer by adding it to the purchase price, he is not entitled to credit although the taxes were paid in error.”).

The parties stipulate that each and every Retailer paid over to the Department the ROT that was due according to each Contract. Stip. ¶ 5. But there is nothing in the Stipulations to suggest that use tax was not, in fact, due from a purchaser in any of the Contracts. *See* Stip., *passim*. Recall, moreover, that use tax is imposed on “the exercise by any person of any right or power over tangible personal property incident to the ownership of that property ....” 35 ILCS 105/2 (“use” defined). For a purchaser of a motor vehicle at retail, use consists of simply taking delivery of the motor vehicle in Illinois. 35 ILCS 105/4 (“Evidence that tangible personal property was sold by any person for delivery to a person residing or engaged in business in [Illinois] shall be prima facie evidence that such tangible personal property was sold for use in [Illinois].”).

Under the statutory refund provisions, the only way for a retailer to obtain a refund of ROT, or for a purchaser to obtain a refund of use tax, is to show that such tax was paid but not due. 35 ILCS 105/19; 35 ILCS 120/6. Here, if use tax was due from each purchaser for which a Contract was made, then all complementary ROT payments were due. 35 ILCS 105/3-45.<sup>2</sup> If all ROT payments made by the Retailers were due, then no Retailer paid tax in error. Neither ROTA § 6 nor UTA § 19 authorize a refund to any person who has paid tax that was due. 35 ILCS 105/19; 35 ILCS 120/6.

---

<sup>2</sup> Section 3-45 of the UTA provides, in part:

\*\*\*

If a seller collects use tax measured by receipts that are not subject to use tax, or if a seller, in collecting use tax measured by receipts that are subject to tax under this Act, collects more from the purchaser than the required amount of the use tax on the transaction, the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department.

And even if ABC Business were able to show that some particular ROT payment was paid in error by a Retailer, ROTA § 6 requires any retailer seeking a refund to show that it paid back to the purchaser the use tax it had previously collected from the purchaser, in error. 35 ILCS 105/19; 35 ILCS 120/6; Snyderman v. Isaacs, 31 Ill. 2d 192, 196, 201 N.E.2d 106, 108 (1964) (“a refund procedure without safeguards might result in refunds of taxes that had not actually been remitted, or in the unjust enrichment of persons who had not themselves paid the tax, but had passed its burden on to another.”). But ABC Business has offered no evidence to show that any Retailer has paid back to a particular purchaser any amount of tax that ABC Business asserts was paid in error. *See Stip., passim*. Nor has ABC Business shown that it has paid back to any purchaser any amount of tax for which it seeks a refund here. *See id.* Keeping this last point in mind, I now address ABC Business’s arguments that it is entitled to a refund pursuant to ROTR § 130.1960.

**Whether ABC Business’s Claim Is Authorized by ROTR § 130.1960(d)**

Section § 130.1960 of the ROTR provides:

Section 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. 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. Because retailers of motor vehicles, watercraft, trailers and aircraft do not pay Retailers’ Occupation Tax to the Department on retail sales of motor vehicles,

watercraft, trailers, and aircraft with monthly returns, but remit the tax to the Department on a transaction by transaction basis, they are unable to take a deduction on the returns that they file with the Department, but may file a claim for credit with the Department, as provided in subsection (d)(3), on any transaction with respect to which they desire to receive the benefit of the repossession credit.

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).

The Department has express authority to make, promulgate and enforce reasonable rules and regulations relating to the administration and enforcement of the ROTA and the complementary UTA. 35 ILCS 120/12; 35 ILCS 105/12. Initially, I note that the Department lacks the power to create a credit that is not expressly authorized by statute (*see, e.g., Ruby Chevrolet, Inc. v. Department of Revenue*, 6 Ill. 2d 147, 151, 126 N.E.2d 617, 619 (1955)), so the bad debt regulation must be viewed against the express text of ROTA § 6 and the complementary provisions of the UTA. Notwithstanding ABC Business's assertion that it satisfies all the requirements of the regulation, it is undisputed that ABC Business fails to meet the first requirement of the regulation — that the person claiming the credit or refund be the retailer who paid ROT regarding a sale in the first place. 35 ILCS 120/6; 86 Ill. Admin. Code § 130.1960(d)(1). Again, ABC Business did not sell any of the vehicles at issue here. Stip. ¶ 2.

ABC Business asserts that “[t]he [R]etailers who made the sales that ABC Business ... financed would have been entitled to a refund or deduction under the Bad Debt Regulation if they had not assigned their rights to ABC Business ...” Taxpayer's Brief, p. 8. ABC Business next argues that credits authorized by ROTA § 6 are assignable. *Id.*, pp. 8-10. The latter point is certainly correct, but before a retailer may

assign a credit memorandum, the retailer must first prove that a credit is due. 35 ILCS 120/6.

Initially, I note that all of ABC Business's arguments regarding the effect of the assignments from the Retailers would be best measured by the actual terms of such Contracts. "The meaning of a written contract is ascertained by the contract language and is ordinarily a question of law." Kettleson, 219 Ill. App. 3d at 876, 580 N.E.2d at 191. The parties' stipulations regarding some of the Contracts' provisions simply do not allow for a sufficient examination of the effect of the Contracts.

On the other hand, both parties agree on some aspects of the assignment of the Contracts from the Retailers to ABC Business. Stip. ¶¶ 4-5. Therefore, I proceed on the basis of the parties' stipulation that "the ... [R]etailers ... assigned to ABC Business ... all of the [R]etailers' rights, titles and interests in the[ ] Contracts without recourse. These assignments included the right to enforce the debt and to repossess the collateral in the event of a default by the purchasers." Stip. ¶ 4. The Retailers' assignments of the Contracts to ABC Business were not, however, sales of tangible personal property at retail. 35 ILCS 120/1 (definition of sale at retail). The Illinois General Assembly and Illinois courts both recognize the difference between persons who sell motor vehicles at retail, and persons who finance such sales. 35 ILCS 120/1; 815 ILCS 375/2.3; 815 ILCS 375/2.11; Kettleson, 219 Ill. App. 3d at 875-76, 580 N.E.2d at 190 (noting differences being retailer sellers and sales financing agencies in context of motor vehicle retail installment sales).

Moreover, whatever agreements the Retailers might have made with ABC Business cannot bind the State on questions involving the contracting party's respective rights — or obligations — that exist under Illinois' tax laws. *See* United Airlines, Inc. v. Johnson, 84 Ill. 2d 446, 454, 419 N.E.2d 899, 903 (1981) ("The mere fact that United contracted to pay Shell's gross income tax liability does not entitle United to an

exemption from the Illinois use tax any more than if United would have contracted to pay any other of Shell's direct tax obligations or overhead charges.”). Thus, just because the Retailers assigned their rights under the Contracts to ABC Business does not require me to construe ROTA § 6’s statutory right to a refund to now belong to ABC Business. *See id.*; Stip. ¶ 5. The legislature granted that statutory right to a refund solely to persons who bore the burden of the tax and who paid it in error. 35 ILCS 105/19; 35 ILCS 120/6; Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889, 377 N.E.2d 202, 204 (5<sup>th</sup> Dist. 1978) (“the Illinois legislature has provided in the ROTA and UTA that the only person entitled to receive a refund or credit is the remitter of the tax.”). ABC Business did not bear the burden of the Retailers’ ROT liabilities, and did not remit such taxes to the Department. Stip. ¶¶ 2, 5.

And even if I were to accept the parties’ stipulations as controlling the legal effect of the assignments, the stipulated facts do not show that any of the Retailers incurred a bad debt, or repaid the amounts of tax they had previously collected from the purchasers. Specifically, none of the stipulations show that: (1) some sales of motor vehicles by a Retailer to a purchaser using financing provided by ABC Business were not subject to ROT or UT; or that (2) some specific Retailer — as opposed to ABC Business — incurred some bad debt as a result of the sales for which ABC Business extended financing. *See Stip., passim.*

The only way the Retailers would have been entitled to a bad debt credit under 86 Ill. Admin. Code § 130.1960(d) was if the customers’ defaults to ABC Business caused the Retailers to incur a bad debt. 86 Ill. Admin. Code § 130.1960(d). The regulation expresses the two circumstances under which retailers are entitled to a bad debt credit. First, the Retailers here would have been 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 incur a bad debt. 86 Ill. Admin. Code §

130.1960(d)(1) (“[The retailer] 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 ....”). But the Retailers here did not finance their retail sales; ABC Business did. Stip. ¶¶ 2, 5.

Alternatively, the Retailers would have been entitled to a bad debt credit if the assignments to ABC Business were “with recourse.” 86 Ill. Admin. Code § 130.1960(d)(1) (“[The retailer] 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 is not permitted to retain because of being required to make a repayment thereof to a lending agency under a ‘with recourse’ agreement.”). But here, ABC Business has stipulated that it took assignment of the Contracts “without recourse.” Stip. ¶ 4.

The terms, “with recourse” and “without recourse” are terms of art in commercial law. *See, e.g., Ford Motor Credit Co. v. Cenace*, 452 U.S. 155, 155-56, 101 S.Ct. 2239, 2239-40, 68 L.Ed.2d 744 (1981) (describing practice of dealers’ assignments of retail installment contracts to entity that financed sales of motor vehicles, without recourse to dealers); 810 ILCS 5/9-102(a)(72) (definition of secondary obligor as one with right of recourse against another obligor with respect to an obligation secured by collateral against the debtor, another obligor, or property of either). As the United States Supreme Court noted in *Cenace*, in a case where motor vehicle dealers assigned their retail installment contracts “without recourse” to FMCC, who financed such sales, those assignments “divested the dealer of any risk in the transaction.” *Cenace*, 452 U.S. at 158, 101 S.Ct. at 2241, 68 L.Ed.2d 744.

Again, under the plain text of the bad debt regulation, the only persons authorized to obtain a credit are the retailers who remitted ROT in the first place, and who incurred a bad debt as a result of not having collected the entire selling price for the tangible

personal property sold. 86 Ill. Admin. Code § 130.1960(d). But here, ABC Business was not one of the Retailers in any of the sales. Stip. ¶ 2. Moreover, the Retailers assigned the Contracts to ABC Business “without recourse.” Stip. ¶ 4. Because they did so, after such assignments, the Retailers no longer bore any risk of loss from purchasers who failed to pay the amounts due under the Contracts. *See Cenance, supra*. Since the assignments here were without recourse, no Retailer could have incurred a bad debt in any of the sales at issue. *Id.*; Stip. ¶ 4. The plain text of the regulation does not authorize a refund or credit to be paid to ABC Business, regardless that the Retailers assigned their rights to ABC Business. 86 Ill. Admin. Code § 130.1960(d).

**Whether ABC Business Has Shown That It Paid Any Specific Amount of Tax In Error**

Finally, even if ABC Business were, itself, one of the Retailers in the transactions for which it claims a credit, this stipulated record does not contain evidence which shows that it is entitled to a credit or refund in the amount claimed. That is because ABC Business has wholly failed to submit the detailed information required to be included on a Claim form. Stip. Ex. A; 35 ILCS 120/6a. The Claim form that ABC Business filed with the Department requires the retailer to report detailed facts and information to show that a credit is due, and in the amount claimed. Stip. Ex. A. The Claim form is divided into four numbered parts, and each part requires the retailer to provide different information. *Id.* Part 1 asks the claimant to “Identify your business[;]” Part 2 asks the claimant to “Describe your finance contract information[;]” Part 3 asks the claimant to “Figure the amount of overpaid tax[;]” and Part 4 requires the claimant to sign the return, under the following statement: “Under the penalties of perjury, I state that I have examined this claim and, to the best of my knowledge, it is true, correct and complete.” *Id.*

Part 3 of the Claim form requires the retailer to report information, described in 10 separate column headings, to identify the specific transactions, and the specific amounts of gross receipts and tax actually collected, to support the retailer’s assertion that

it paid a certain amount of tax in error. Stip. Ex. A. Graphically, Part 3 of the Claim form

looks like this:

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10
					Taxable amount financed (sale price minus trade-in minus cash down payment)	Total amount of finance contract	Unpaid balance of contract when re Possessed	Amount on which credit is claimed (divide Col 6 by Col. 7; multiply result by Col. 8.)	Over-payment (multiply Col. 9 by the tax rate)
ST-556 tax return no.	Buyer's name	Date of delivery	Date re-possessed	Amount of tax paid					
_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____	_____	_____

See Stip. Ex. A.

The detail asked for on the face of Part 3 of form ST-557 is required by the express text of ROTA § 6a. 35 ILCS 120/6a. That section provides, in pertinent part:

§ 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 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. \*\*\*

\*\*\*

35 ILCS 120/6a.

The legislature's use of the word "shall" reflects that a retailer seeking a credit for ROT claimed to have been paid in error is required to specifically identify the different amounts and items of information described in ROTA § 6a. *Id.*; Emerald Casino, Inc. v. Illinois Gaming Board, 346 Ill. App. 3d 18, 21, 803 N.E.2d 914, 916 (1<sup>st</sup> Dist. 2004) ("Generally, 'shall' indicates a mandatory intent. ... However, the word's meaning is not fixed or inflexible, and courts sometimes interpret it as directory."). It is not the Department, therefore, but the legislature that has determined that the specific items of information detailed in ROTA § 6a constitutes a material part of the retailer's claim for credit. The legislature has determined that the retailer's provision of this detailed information is the way the retailer identifies the particular gross receipts regarding which it claims to have paid tax in error, as well as the way for the Department to ensure that the refund claimed is no greater than the tax the retailer actually paid in error to the Department. 35 ILCS 120/6a; American Airlines, Inc. v. Department of Revenue, 402 Ill. App. 3d 579, 588, 931 N.E.2d 666, 682-83 (1<sup>st</sup> Dist. 2009) ("... [ROTA] sections 6 and 6a both

provide that in properly filing a refund claim, the taxpayer bears the burden of proof in establishing the exact *amount* of refund sought.”) (emphasis original).

Notwithstanding the statutory requirement to provide such specific information, on the Claim form ABC Business filed, for an entire 3 year period, it failed to identify any specific information regarding the transactions for which it claims to have paid tax in error. Stip. Ex. A. All it did was to enter a number, on page 2 of the form, on the line provided for “Grand total.” Stip. Ex. A. Instead of providing the required detailed information, in an explanatory letter attached to its Claim, ABC Business asserted that:

\*\*\*

In connection with each bad debt and repossession to which this claim relates, Claimant has on file in its corporate offices available for inspection additional information including, but not limited to, the following: (1) the customer name or loan number, (2) vehicle make, year and model, (3) vehicle identification number, (4) date tax was paid, (5) the amount of tax paid on the original purchase price, (6) the original purchase price, (7) the amount of the trade-in, (8) the amount of the cash down payment, (9) the length of the contract and (10) the charge off date. This information will be provided as additional support of the computation of the claim for refund.

\*\*\*

Stip. Ex. A (p. 2 of attachment).

A person who files a tax return must keep and maintain books and records which support the entries reported on the return. 35 ILCS 120/7. Without support from such books and records, the entries made on a return form do not provide evidence that any particular entry is correct. Bohannon v. Commissioner, T.C. Memo. 1997-153 (March 26, 1997) (“A tax return does not establish the correctness of the facts stated in it.”) (*citing Seaboard Commercial Corp. v. Commissioner*, 28 T.C. 1034, 1051 (1957)).

In this contested case, ABC Business bears the burden to show, with documentary evidence closely identified with its books and records, that it was entitled to the refund

sought. PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33, 765 N.E.2d 34, 48 (1<sup>st</sup> Dist. 2002) (agreeing that a taxpayer “had the burden of overcoming [the Department’s] *prima facie* case through documentary evidence, meaning books and records, and not mere testimony.”). That burden extends not just to the type of evidence which shows that ABC Business was, in fact, the retailer that paid ROT in error to the Department, but it also extends to ABC Business’s burden to show that it is entitled to a refund in the amount claimed. American Airlines, Inc., 402 Ill. App. 3d at 588, 931 N.E.2d at 682-83. On this point, the statement attached to ABC Business’s Claim form constitutes rank hearsay, albeit hearsay that was admitted by stipulation. Since it was offered without objection, the out-of-court statement may be assigned the weight to which it is entitled. Mahonie v. Edgar, 131 Ill. App. 3d 175, 178, 476 N.E.2d 474, 477 (1<sup>st</sup> Dist. 1985) (“The general rule is that hearsay evidence received without objection may be given its natural probative weight.”). I give it no weight at all. The Department denied ABC Business’s Claim (Stip. Ex. B), and that Denial is presumptively correct. 35 ILCS 120/6b. The way to rebut the Department’s *prima facie* case is to actually offer into evidence the books and records necessary to show that the Department’s Denial was in error. PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48. ABC Business did not do so here.

In sum, even if ABC Business were the retailer who was entitled to a refund by statute and regulation, even if it were subject to ROT on its business of extending financing to persons who used that financing to purchase motor vehicles from Retailers in Illinois, and even if it had, in fact, paid ROT to the Department in error, ABC Business would still not have shown that it was entitled to the amount of the refund identified on the Claim form it filed. This record includes no competent evidence from which a fact-finder might discern the information required by ROTA § 6a. *Compare* 35 ILCS 120/6a

*with* Stip. Ex. A. Nothing in this record shows that ABC Business's calculation of the refund claimed due is correct.

**Conclusion:**

For all of the foregoing reasons, I recommend that the Director finalize the Department's Denial as issued.

Date: October 19, 2012

John E. White, Administrative Law Judge