

ST 09-12

Tax Type: Sales Tax

Issue: Bad Debt Write-Off

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

ABC LTD., et al.,)	Docket No.	08-ST-0000
)	Claim Periods	1/07 — 12/07
v.)		
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS,)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Peter Larsen, et al., Akerman Senterfitt, and Fred Marcus, Horwood Marcus & Berk, Chartered, 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 amended returns that ABC, Ltd., its subsidiaries and affiliates, and ABC Corporation, its subsidiaries and affiliates (collectively, ABC), filed to claim a credit or refund regarding bad debts ABC wrote off on its federal income tax returns for the period from January 2007 through and including December 2007.

In lieu of hearing, the parties submitted a Joint Stipulation of Facts (Stip.), which included exhibits. The issue is whether ABC 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 provided financing, and regarding which financing ABC later took a deduction for bad debt on its federal income tax returns when the vehicle purchasers failed to pay all of the amounts owed to ABC. I am including in this recommendation findings of fact and conclusions of law. I recommend the denials be finalized as issued.

Findings of Fact:

1. ABC financed the sales of motor vehicles that Illinois motor vehicle dealers (the Retailers) sold, at retail, to purchasers for use in Illinois. Stip. ¶ 1.
2. The Retailers in such transactions were subject to the tax imposed by the Illinois Retailers' Occupation Tax ACT (ROTA). Stip. ¶¶ 1-2.
3. ABC was not subject to retailers' occupation tax (ROT) regarding its business of extending credit to such purchasers. *See* Stip., *passim*; 35 ILCS 105/2 (definition of "retailer").
4. The Retailers entered into retail installment sales contracts (Contracts) with the purchasers to reflect the financing of the sales of motor vehicles. Stip. ¶ 3.
5. At the time of the sales, the Retailers assigned to ABC all of the Retailers' right, title and interest in the Contracts without recourse. Stip. ¶ 4. In exchange for the assignments, ABC paid to the Retailers the amount financed under the Contracts, including the purchase price of the motor vehicle and an amount of Illinois ROT attributable to the selling price for it. *Id.*
6. The Retailers reported and remitted the full amount of ROT due on the transactions to the Department from the proceeds received from ABC in financing the purchase of such motor vehicles. Stip. ¶ 5.
7. Subsequent to the sale and payment and remittance of the ROT, customers defaulted in payments owed on the Contracts that are the subject of this case. Stip. ¶ 6.
8. When such customers defaulted on the Contracts, ABC repossessed some of the vehicles. Stip. ¶ 7.
9. After repossession and sale of the collateral, an unpaid balance remained on all of the defaulted Contracts. Stip. ¶ 8.
10. With respect to the defaulted Contracts, ABC determined that the unpaid balances due were worthless and uncollectible for federal income tax purposes, pursuant to § 166 of the Internal Revenue Code (Code). Stip. ¶ 9.
11. ABC wrote off such bad debts on its books, and claimed such bad debts as a deduction on its federal income tax returns. Stip. ¶¶ 10-11.

12. All of the Contracts have unpaid balances remaining that include the proportional share of the ROT paid by the Retailers, using receipts the Retailers received from ABC to finance the purchased motor vehicles. Stip. ¶ 12.
13. On February 7, 2008, ABC filed two forms ST-557 (Claims for Credit for Repossession of Motor Vehicles, Watercraft, Aircraft, Trailers, and Mobile Homes) (Claims) to claim a credit or refund pursuant to Ill. Admin. Code 130.1960 for the period from January 1, 2007 through December 31, 2007. Stip. ¶ 13; Stip. Ex. 1 (copies of Claim forms and accompanying documents), pp. 4-5, 11-12 (copies of the Claim forms). The first Claim sought a refund in the amount of \$335,647.23, and the second sought a refund in the amount of \$466,754.81. Stip. ¶ 13; Stip. Ex. 1, pp. 5, 12 (page two of each Claim form).
14. Neither Claim form contains the detailed information and amounts required to be reported within Part 3 of the Claim form. *Compare* Stip. Ex. 1, pp. 4-5, 11-12 *with* 35 ILCS 120/6a and ST-557 Instructions (revised April 1997) (viewable online at the Department's web site at <http://tax.illinois.gov/TaxForms/Sales/ST-557-Instr.pdf>) (last viewed on July 23, 2009).
15. The Department denied ABC's Claims on June 13, 2008 (Stip. ¶ 14; Stip. Ex. 2), following which ABC protested that denial, and asked for an administrative hearing. Stip. ¶ 15; Stip. Ex. 3 (copy of ABC'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.

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 Use Tax Act (UTA). 35 **ILCS** 120/12; 35 **ILCS** 105/12. Here, ABC relies on retailers' occupation tax regulation (ROTR) § 130.1960(d) as the authority for its claim for refund. 86 Ill. Admin. Code § 130.1960(d). Within its brief, ABC refers to that regulation as the bad debt regulation. Taxpayer's Brief, pp. 1, 4. The applicable ROTR provides, in pertinent part:

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).

Analysis

ABC argues that the bad debt regulation allows a claimant 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. Taxpayer's Brief, p. 5. ABC claims that it meets each requirement because it is undisputed that ROT was remitted to the State of Illinois on each of the motor vehicle sales, and it is also undisputed that ABC wrote off the defaulted Contracts on its federal income tax returns and on its books and records. *Id.* (ABCng Stip. ¶¶ 5, 9-11). The Department responds that ABC is not entitled to a credit under either ROTA § 6 or ROTR § 130.1960(d) because all of the tax the Retailers paid was properly due, and because no retailer incurred a bad debt as a result of the customers failure to repay all amounts owed to ABC. Department's Response Brief (Department's Brief), pp. 7-9.

Whether ABC's Claims are Authorized by ROTA § 6

I agree with the Department that ABC is not entitled to the refunds requested. That conclusion is based on the plain text of the statutory scheme the Illinois General Assembly created to provide a remedy for retailers who, through a mistake of fact or law, paid tax to the Department that was not due. 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). Retailers’ occupation tax is imposed upon “persons engaged in the occupation of selling at retail tangible personal property” 35 ILCS 120/2. But the parties agree that ABC is not engaged in that occupation, just as they agree that ABC did not make any retail sales of motor vehicles to customers. Stip. ¶¶ 1-2.

Rather than engaging in the occupation that is taxed by the ROTA, ABC engaged in the occupation of financing others’ purchases and/or sales of motor vehicles at retail

for use in Illinois, using the credit that ABC agreed to extend regarding such sales. Stip. ¶¶ 1-5. The ROTA does not impose a tax on persons engaged in that occupation. 35 **ILCS** 120/2. Since ABC was not subject to the ROTA regarding others' sales of motor vehicles, it is not within the class of persons to whom the legislature intended to provide the special remedy authorized by ROTA § 6. 35 **ILCS** 120/6; Peoples Store of Roseland, 379 Ill. at 152, 39 N.E.2d at 998.

Further, since ABC was not engaged in the occupation that is taxed pursuant to the ROTA, it has never actually paid any tax that is imposed by the ROTA to the Department. Stip. ¶¶ 2, 5. Now, there is no dispute that ABC was the source of the money that each individual borrowed to purchase a motor vehicle, and that each individual Retailer received regarding each individual sale of a motor vehicle, including the additional amounts required to pay the Illinois use tax properly owed by each purchaser, and/or the amounts required to pay the ROT properly owed by each Retailer regarding a particular sale. Stip. ¶¶ 2, 5. But as the mere financier of such sales, ABC's act of extending credit does not mean that ABC, itself, became subject to the use tax imposed on the individual who actually used a motor vehicle purchased from a retailer. Use tax is imposed on the privilege of using, in Illinois, tangible personal property purchased at retail from a retailer. 35 **ILCS** 105/2. Similarly, simply because ABC was the source of the money each Retailer received regarding each individual retail sale of a motor vehicle, does not mean that ABC was, itself, selling the motor vehicles at retail. Stip. ¶¶ 1-2, 5; 35 **ILCS** 120/2. Nor does it mean that ABC paid the ROT it stipulates the Retailers "reported and remitted ... to the Department ... from the proceeds received from ABC in financing the purchased motor vehicles." Stip. ¶ 5. In short, ABC was not a Retailer, it never bore the burden of paying ROT, and it did not pay any ROT to the Department. Stip. ¶¶ 1-2, 5.

As the stipulations in this matter reflect, the actual Retailers from whom ABC's customers purchased motor vehicles are the persons that collected use tax, plus its selling

price for such property, from the purchasers, and then each Retailer paid *its* respective and corresponding amount of ROT liability to the Department. Stip. ¶¶ 2, 5. Since ABC never paid any ROT to the Department, it cannot have paid any such tax in error. ABC, therefore, is not entitled to any refund expressly authorized by ROTA § 6. 35 **ILCS** 120/6; Peoples Store of Roseland, 379 Ill. at 152, 39 N.E.2d at 998.

Whether ABC's Claims are Authorized by ROTR § 130.1960(d)

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 backdrop of ROTA § 6 and whatever other sections of the ROTA authorize a credit. Notwithstanding ABC's assertion that it satisfies all the requirements of the regulation, it is undisputed that ABC 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). As the court in Jones v. Department of Revenue, 60 Ill. App. 3d 886, 377 N.E.2d 202 (5th Dist. 1978) noted:

[T]he 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. (Ill.Rev.Stat.1973, ch. 120, pars. 439.19, 445.) The reason for this provision was stated by the court in Snyderman v. Isaacs, as follows:

“(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. To protect the real taxpayer and to prevent unjust enrichment of any other party, the legislature has provided both in the Use Tax Act and in the Retailers' Occupation Tax Act that the only person entitled to receive credit is the remitter of the tax.” (31 Ill. 2d at 196, 201 N.E.2d at 108.)

Jones, 60 Ill. App. 3d at 889, 377 N.E.2d at 204.

ABC also asserts that under the assignments it made with the Retailers, it “acquired any and all rights in the Contracts, including all contractual and statutory rights

of the Retailers.” Taxpayer’s Brief, p. 5. ABC then argues that “[t]he Retailers would have been entitled to a refund or deduction if the Retailers had not ceded their rights to ABC. *Id.* But that argument elides the second regulatory requirement. 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 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 did. Stip. ¶¶ 1-2, 5.

Alternatively, the Retailers here would have been entitled to a bad debt credit if the assignments to ABC were “with recourse,” that is, if ABC were contractually able to demand payment from the Retailers for the customers’ failure to pay all the amounts due under the Contracts. 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 has stipulated that it took assignment of the Contracts “without recourse.” Stip. ¶ 4; Stip. Ex. 1, pp. 4, 11 (page 1 of each Claim form, Part 2). In a nutshell, the only persons authorized to obtain a credit under the bad debt regulation 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). Since the

Retailers here do not meet the second requirement, they are *not* entitled to a refund or credit, regardless that they ceded their rights to ABC.

ABC's arguments regarding its acquisition of the rights of the Retailers, like its arguments that credits authorized by ROTA § 6 are assignable (*see* ABC's Brief, pp. 5-9), ignore the express statutory and regulatory conditions set forth within ROTA § 6 and ROTR § 130.1960(d). As ROTA § 6 provides, before a credit memorandum may be assigned, the Department must first determine that one is due to a particular retailer. 35 **ILCS** 120/6. Yet the parties' stipulations do not establish that any of the Retailers paid tax in error on any particular transaction for which ABC extended financing. 35 **ILCS** 120/6. Specifically, there is nothing to suggest that: (1) some sales of motor vehicles by a Retailer to a purchaser using financing provided by ABC were not subject to ROT or UT; or that (2) some specific Retailer — as opposed to ABC — incurred some bad debt as a result of the sales for which ABC extended financing. As the Department notes in its response, the tax the Retailers paid was due; the Retailers actually received all of the gross receipts due regarding the sale; and none of the Retailers ever incurred any bad debt from the customers' defaults to ABC because ABC did not have a "with recourse" agreement with any of the Retailers. Department's Brief, pp. 7-8; Stip. ¶¶ 1-5.

As a whole, ABC's arguments regarding its claimed right to be assigned a credit authorized by ROTA § 6 and the bad debt regulation are not at all focused on the right of assignment that is actually described within ROTA § 6. 35 **ILCS** 120/6. That is, ABC is not arguing that the Retailers are properly due a credit, and they want their respective credit memos to be issued in ABC's name. *See* Taxpayer's Brief, *passim*.

Rather, ABC's arguments must be understood as what they are — an attempt to fundamentally transform the nature and scope of the credit authorized by ROTA § 6. Section 6 authorizes a credit or refund to be made available to persons who have borne the burden of paying ROT, and who have actually paid ROT to the Department in error. 35 **ILCS** 120/6; Snyderman v. Isaacs, 31 Ill. 2d 192, 196, 201 N.E.2d 106, 108 (1964) (to

obtain a credit under ROTA § 6, tax remitter must have borne the burden of the tax); Peoples Store of Roseland, 379 Ill. at 152, 39 N.E.2d at 998. ABC, however, would expand the scope of ROTA § 6's grant of that special statutory remedy into a much broader grant of a credit that would be available — at least in this case — to financiers who were never subject to the tax imposed by the ROTA, and who never paid ROT to the Department. But no such credit is authorized by the express text of ROTA § 6. 35 ILCS 120/6; Peoples Store of Roseland, 379 Ill. at 152, 39 N.E.2d at 998.

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

Finally, even if ABC were, itself, the retailer 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 amounts claimed. That is because ABC has wholly failed to provide the detailed information required by the Claim forms, let alone the actual books and records that might support entries that were required to have been reported on those amended returns. The Claim forms that ABC filed with the Department require the retailer preparing them to report detailed facts and information to show that a credit is due, and in the amount claimed. Stip. Ex. 1, pp. 4-5, 11-12. Each 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. 1, pp. 4-5, 11-12. Graphically, Part 3 of each 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					
_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____	_____	_____	_____

Stip. Ex. 1, pp. 4-5, 11-12.

When reviewing the type of information required to be reported within the ST-557 form, it helps to recall that the form is designed for use by a retailer of motor vehicles, that is, a retailer that is required to prepare and file a separate original return to report each and every retail sale of a distinct motor vehicle. 35 ILCS 120/3; 86 Ill. Admin. Code § 130.540 (Returns on a transaction by transaction basis). Thus, on the ST-557 forms, each row of horizontal lines, viewed from left to right, allow the retailer to detail the required information for each specific transaction for which the retailer is seeking a refund of tax claimed to have been paid in error. Further, the rows of lines begin on the first page and continue onto the second page of the form. This allows a retailer to identify, on a single return, many transactions regarding which it asserts it paid tax in error. For ease, the form includes an additional line under the tenth column on each page, so that the preparer can enter a subtotal for the refund requested regarding all of the specific transactions identified on each page. *Id.*

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 (1st 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 be no greater than the tax money the retailer actually paid in error to the Department. 35 ILCS 120/6a.

But on the two Claim forms ABC filed for an entire year, it failed to identify any specific transaction for which it claims it paid tax in error, let alone every transaction that, added together, would total the amount of credit or refund ABC claimed as being due. Stip. Ex. 1, pp. 4-5, 11-12. All it did was to enter a number on the line provided for

a retailer to identify the subtotal claimed regarding all of the transactions identified on page 2 of the form, and it then repeated that number on the line provided for “Grand total.” Stip. Ex. 1, pp. 5, 12. But again, there are no transactions identified on page 2 of ABC’s Claim forms, nor are there any identified on the first page of either Claim form. *Id.* Not one transaction, on either Claim form. Stip. Ex. 1, pp. 4-5, 11-12.

In the explanatory letters accompanying ABC’s Claims, ABC 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. 1, pp. 6, 13.

ABC agreed to submit a stipulated record in lieu of holding a hearing. But even with that agreement, its burden to show its entitlement to the refund claimed remains the same as it would have been had it appeared at a hearing, and offered evidence via live witnesses who authenticated relevant documentary evidence. The parties’ stipulations include no agreement that, for example, the Department had the opportunity to review ABC’s books and records, and after that review, determined that those books and records yielded the information required to be included within the Claim forms for each and every transaction for which ABC claims a refund. *See Stip., passim.* Nor do they include the more perfunctory agreement that, if ABC met the requirements of ROTA § 6 and ROTR § 130.1960(d), ABC’s Claims accurately stated the amount of tax paid in error. *Id.* I do not view the absence of such agreements in the parties’ stipulations as an oversight.

In this contested case, ABC 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 (1st 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 was, in fact, a retailer that paid ROT in error to the Department, but it also extends to ABC’s burden to show that it is entitled to a refund in the amount claimed. *See A.R. Barnes & Co.*, 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053. On this point, the statement attached to ABC’s Claim forms 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 (1st 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, because it is the functional equivalent of testimony that is not corroborated by any documentary evidence closely associated with ABC’s books and records. For example, if a live witness had appeared at hearing and uttered the same statement, under oath, that ABC wrote within an attachment to its Claim forms, Illinois law is clear that such mere testimony would be insufficient to rebut the Department’s *prima facie* case. PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48; A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053. 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 determination, in this case, its denial, was in error. PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48.

On this point, I note that the parties’ Stipulation ¶ 12 does not obviate ABC’s burden to show that it erroneously paid tax in the amounts set forth on its Claims. Although both parties agree that “[a]ll of the Contracts have an unpaid balance remaining that includes the proportional share of the ROT paid by the Retailers ...” (Stip. ¶ 12), that agreement does not provide the detailed information required to be reported on a form

ST-557 — and proven, if the Department denies the credit claimed on such an amended return, which it did here. Stip. Ex. 2. Nothing in this record shows how ABC calculated the amount of the credit it claims is due. Because ABC never submitted any of the required information, or evidence from which such data might be discerned, I am left without any factual basis to conclude that ABC's bad debt caused it to pay some specific amount of tax in error.

In sum, even if ABC were a retailer, even if it was subject to ROT on its business of extending credit to customers who used that credit to purchase motor vehicles from retailers in Illinois, and even if it had, in fact, paid ROT to the Department, ABC would still not have shown, in this case, that it was entitled to the amount of refund claimed on the Claim forms it filed. This record includes no competent evidence from which a fact-finder might discern the information required by ROTA § 6a, and which shows that ABC's calculation of the refund claimed due is correct. Nor does this record include even the minimum information required to be reported on the Claim forms themselves. Stip. Ex. 1, pp. 4-5, 11-12.

Conclusion:

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

August 4, 2009

Date

John E. White, Administrative Law Judge