No. 121634

IN THE SUPREME COURT OF ILLINOIS

CITIBANK, N.A., a national banking association, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF REVENUE and CONSTANCE BEARD, Director of the Illinois Department of Revenue, Defendants-Appellants.	On Appeal from an Opinion of the Appellate Court of Illinois, First Judicial District, No. 1-13-3650 There Heard on Appeal from an Order of the Circuit Court of Cook County, Illinois, Case No. 2013-L-050072 The Honorable Patrick J. Sherlock, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE

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Whether Citibank is entitled to the statutory bad debt tax refund under section 6 of the Retailers' Occupation Tax Act ("ROTA") or whether the Department is allowed to retain excess ROTA tax paid on purchase prices that were never fully paid by the retail purchasers, when Citibank funded and paid the purchase prices including ROTA tax remitted to the Department up-front by the retailers who originally made the sales and remitted the taxes (the "Retailers") and subsequently incurred bad debts when the retail purchasers failed to pay Citibank back for the purchase prices including the ROTA tax.

ARGUMENT

There is no meaningful dispute as to the facts or procedural status of this case. This appeal presents a purely legal question, which both parties are in agreement that this Court reviews *de novo*. The only issue for the Court to decide in this appeal was already decided correctly by all four judges that have heard this case to date (the Circuit Court and the Court of Appeals): whether Citibank is entitled to a refund of ROTA tax attributable to bad debts on retail purchases financed by Citibank. Citibank is entitled to the refund for two separate and independent reasons. First, Citibank is entitled to the refund as the assignee of the Retailers' rights to obtain such refunds. Second, Citibank is entitled to a direct refund under 35 ILCS § 120/6 and 86 Ill. Admin. Code § 130.1960, the Department's corresponding bad debt regulation.

Below, the Department denied Citibank's refund claim. The Circuit Court reversed and found that Citibank was entitled to a refund as the assignee of the rights of the Retailers who originally made the sales and remitted the taxes that Citibank funded. The Court of Appeals likewise unanimously held that Citibank was entitled to a refund as the assignee of the Retailers. The Circuit Court explained that because Citibank was entitled to a refund as assignee of the Retailers, it need not reach the direct refund issue:

> We need not address the Department's contention that only retailers that remit the taxes have standing to pursue a refund, because we conclude that even if only remitting retailers have standing under the statute, the retailers in the present case effectively assigned their rights to pursue a refund to Citibank.

Citibank, N.A. v. Illinois Dept. of Revenue, 67 N.E.3d 345, 409 Ill. Dec. 133, 139 (2016). Accordingly, this appeal centers around the assignment issue only.

This is an important distinction because the Department's opening brief in this appeal and its significant reliance on *Snyderman v. Isaacs*, 31 Ill. 2d 192 (1964) are directed solely toward the direct refund issue; *i.e.*, whether Citibank is entitled to claim a refund directly under 35 ILCS § 120/6. But the direct refund issue was not the focal point of either the Circuit Court or the Court of Appeals' decisions because they both found that Citibank was entitled to a refund as the assignee of the Retailers, and therefore the courts did not need to address whether Citibank was also entitled to a direct refund under the statute. The Department's brief, therefore, sets up a strawman in the form of the direct refund argument, and then attacks that strawman with the *Snyderman* decision. By focusing on this moot issue that neither the Circuit Court nor the Court of Appeals reached, the Department highlights that it does not have a sufficient response to the courts' decisions and the well-established case law in this state permitting the assignment of claims, including tax refunds.

As the Court of Appeals correctly held, the issue of standing for a direct refund claim is not relevant to whether Citibank is entitled to a refund as the assignee of the Retailers' rights. *Citibank*, 409 Ill. Dec. at 140 ("Even if section 6 bestows the right to a tax refund solely upon the remitter of the tax, that does not mean that after the initial bestowment, the remitter is not free to do what it pleases with that right."). *Snyderman* did not address a party's ability to seek a refund as the assignee of the rights of another as there was no assignment of a refund in *Snyderman*. In addition, *Snyderman* was decided after *People ex rel. Stone v. Nudelman*, 376 Ill. 535, 34 N.E.2d 851 (1940) and did not purport to alter the common law of the state on assignment. Simply put, *Snyderman* did not consider, let alone decide, the applicability of the law of assignment to such a refund claim because Snyderman was not making a claim as the assignee of the rights of party who had originally remitted the tax. It is therefore not applicable in any respect to the issue of whether Citibank is entitled to a refund of ROTA tax as the assignee of the Retailers' rights to seek such refund claims.

The Department, in an attempt to back into a result using *Snyderman*, largely ignores the long standing and binding precedent in this State that is directly on point: *Nudelman* and the well settled law of assignment in this state. As the Court of Appeals described below:

> [t]he parties do not quibble about the law applicable to assignments. * * * Assignability is the rule in today's legal world, and nonassignability is the exception. Both common

> law and statutory rights are assignable, unless a statute or public policy clearly states otherwise.

Citibank N.A., 409 Ill. Dec. at 139 (citations omitted).

Still, the Department's brief is almost completely devoid of any discussion of the law of assignment, let alone any reason why Citibank would not be entitled to a refund as the assignee of the Retailers' rights to such refund claim. Indeed, both the Circuit Court and Court of Appeals gave thoughtful consideration to the issue and had little difficultly concluding that the Retailers had the right to assign such claims and that Citibank was entitled to a refund as the assignee. The result here should be the same.

I. Illinois Law Provides Retailers with a Right to Obtain a Refund of Retailers' Occupation Tax Attributable to Bad Debts on Financed Purchases

The Department's opening brief provides an adequate description of the operation of the ROTA and the Use Tax Act. The ROTA and the Use Tax Act are a complimentary tax system that is commonly referred to in Illinois as "sales tax." *Kean v. Wal-Mart Stores*, 235 Ill. 2d 351, 362-63 (2009). There does not appear to be any dispute as to the operation of these statutes, and Citibank provides only a brief supplemental discussion here to show that the statutes do indeed provide retailers with the right to a refund with respect to ROTA tax attributable to bad debts on financed purchases. Because the retailers possess this statutory right, they may, and did, assign that right to Citibank.

The retailer remits the ROTA tax to the Department, and the retailer also collects the use tax from the purchasing 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 ROTA tax to the state on the same transaction. *Id.* Thus, while the complementary ROTA and Use Tax Act impose two taxes on the same sale, only one of those taxes is ultimately remitted to the Department. *Id.*

When a retailer makes a sale on credit, such as all the transactions that are the underlying basis for the refund sought in this case, the retailer is required by law to report and remit to the Department the full sales tax that would be due on the expected purchase price had the purchaser paid the full purchase price in cash at the time of sale. The purpose of this upfront payment or deposit of sales tax at the time of a credit sale is for ease of administration and reporting, rather than requiring the retailer to remit every time a payment is made and the Department to monitor whether each payment of tax was remitted. In the small percentage of transactions when a purchaser defaults before repaying the entire amount of the purchase price including the sales tax, the result is that the Department has collected sales tax based on a purchase price amount that is greater than what the purchaser actually paid for the purchase.

Absent a refund of the excess sales tax paid up front on a purchase price that was not ultimately paid, sales tax would be collected at an effective rate higher than the statutory rate, in violation of the state's sale tax system. The foundation of Illinois' sales tax system, and as is true for most, if not all, other states, is that sales tax is imposed on the price that the purchaser actually pays for the item. The Department does not set the sales price or otherwise participate in the transaction. The Department just passively collects tax at the statutory rate on whatever the purchaser pays.

Illinois law contains a general refund statute that governs tax refunds and provides for refunds in the excess remittance situation described above. The refund statute states in part, that:

> 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 (the "General Refund Statute") (emphasis added).

The Department has promulgated a regulation that addresses sales taxes that are overpaid as a result of subsequent credit defaults as well.

The regulation allows a claimant who paid the full amount of the tax to the state contemporaneously with an installment sale to obtain a refund of the tax that it never subsequently collected from the purchaser as a result of a credit default, expressly in order to correct the imbalance discussed above that happens when a purchaser fails to pay the full amount financed in a credit transaction. It makes clear that the credit defaults create taxes that are "paid in error" which are refundable pursuant to the General Refund Statute.

Specifically, the Department's 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….

(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) (the "Bad Debt Regulation").

Thus, as shown by the General Refund Statute and the Bad Debt Regulation, Illinois law expressly allows a retailer to obtain a refund of ROTA tax attributable to bad debts on financed purchases. Had the Retailers not assigned and financed the purchases themselves, the Department would not have denied their statutory right to a refund of the overpaid ROTA tax. 35 ILCS § 120/6; 86 Ill. Admin. Code § 130.1960(d)(3). The Department has audited and approved such refund claims for years. The issue in this appeal arises because the Retailers worked with a lender to provide financing and assigned their rights to collect a refund to Citibank and Citibank made the claim rather than the Retailers.

II. Citibank is Entitled to Seek a ROTA Tax Refund Claim as the Assignee of the Rights of the Retailers Who Made the Sales and Are Entitled to a Refund

Because the Retailers are entitled to the ROTA tax refunds under the General Refund Statute and the Bad Debt Regulation, they therefore possessed a claim against the Department that they could assign to Citibank. 35 ILCS § 120/6; 86 Ill. Admin. Code § 130.1960. Such an assignment is permitted under Illinois law and not prohibited by any public policy in this State that prohibits assignments only in a few narrow instances, none of which apply in this case. Moreover, that assignment gives Citibank standing to seek its refund claim, and it is

irrelevant whether Citibank could seek such refunds directly under 35 ILCS § 120/6.

In its brief, the Department acknowledges that the assignment is permissible but for the Department's argument that public policy (listed as a separate issue in the Department's Brief) somehow dictates that the Department is entitled to a sales tax windfall solely because the retailers contracted with a lender to assist in funding the purchases. But as Citibank describes, the few narrow public policy exceptions to the general rule of assignability are well-settled, and the separate issue of to what extent public policy might inform the interpretation of 35 ILCS § 120/6 for direct refund claims, which is what the Department principally discusses, is irrelevant.

A. Illinois Law Recognizes a Broad Right of Parties to Assign Claims Against the Government, Including Contingent Tax Refund Claims

The lower courts correctly found that Citibank acquired all applicable rights from the Retailers, including the right to any and all payments from the retail purchasers and the right to claim ROTA tax refunds. Illinois recognizes a broad ability of parties to assign claims, including claims that are contingent on future events, and sales tax refund claims under the statute and regulation are no exception. In order for assignment to be prohibited, the legislature must clearly and unequivocally prohibit assignment in the plain language of the statute (not by mere implication).

"Today, assignability is the rule and nonassignability is the exception." *Kleinwort Benson North America, Inc. v. Quantum Financial Svc., Inc.,* 181 Ill. 2d 214, 225 (1998); *Block v. Pepper Construction Co.,* 304 Ill. App. 3d 809, 814 (1999). There are few exceptions to this rule, namely torts for personal injuries and those that involve reputation or feeling of the injured party. *People ex. rel. Stone v. Nudelman,* 376 Ill. 535, 539 (1940) ("The general rule, in the absence of language of the statute prohibiting it, is that claims against the government are assignable"); *Kleinwort,* 181 Ill. 2d at 225 ("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.")

An "assignment operates to transfer to the assignee all of the assignor's right, title, or interest in the thing assigned." *Estate of Martinek v. Martinek,* 140 Ill. App. 3d 621, 629 (1986). *See also Clark,* 38 Ill. Ct. Cl. 213 ("The Claimant, (the bank) by its assignment, acquired rights equal to those of the assignor"); *Carlyle v. Jaskiewicz,* 124 Ill. App. 3d 487, 492 (1984). "The assignee, by acquiring the same rights as the assignor, stands in the shoes of the assignor." *Id.* at 629. *See also Collins Company, Ltd. v. Carboline Co.,* 125 Ill. 2d 498, 512 (1988) ("Once made, an assignment puts the assignee into the shoes of the assignor"); *Illinois Nat'l Bank & Trust Co. v. Colwell,* 79 Ill. App. 2d 101, 106 (1967).

It is of no consequence that Citibank's claim is against the government and not a private entity. Illinois law protects the ability to assign claims against the government just as it does claims against private parties. *See People ex. rel. Stone,* 376 Ill. at 539; *Clark v. Illinois,* 38 Ill. Ct. C1. 213 (1985) ("The general rule is that claims against the government are assignable"); *University Plaza v. Illinois,* 55 Ill. Ct. C1. 380 (2000) (stating that "Claimant relies on the well-settled proposition that claims against the State are generally assignable as a matter of law," and recognizing that "[t]his court has also recognized and applied the general rule of assignability of claims against the State.")

In *People ex rel. Stone v. Nudelman,* 376 Ill. 535 (1940), the Supreme Court of Illinois specifically upheld a retailer's right to assign a tax refund. Other states' courts have recognized that refund claims are assignable as well. *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 (1940)). Indeed, many states cite favorably to *Nudelman* as the seminal case on the assignability of tax refunds, and with good reason because there could be no reasonable

public policy that would or should prohibit a taxpayer that paid its taxes in full, and then overpaid or has a valid exemption or refund, from assigning that claim to someone else. If there is, however, the legislature is free to adopt an express statutory exception to assignment for that specific tax or other issue, but in all of the many years that the statutes at issue have been in existence, the Illinois legislature has not seen any public policy need to create such an exception.

It is highly instructive that Illinois courts have also ruled on multiple occasions as to the specific types of claims that are not assignable and these rulings confirm that the refunds at issue in this case do not fall into these categories. Again, the law in this state is well settled that the only types of claims that are not assignable are personal injury claims, and those involving reputational damage or the feelings of the injured party. *Kleinwort,* 181 Ill. 2d at 225. There is nothing in Illinois law that would prohibit the assignment of tax refund claims (and the ruling in *Nudelman* confirms this), and therefore they must be assignable pursuant to the general rule of assignability.

There also is no question that the Retailers had the right to assign their refund claims to Citibank, even though the purchasers might not yet have defaulted and the Retailers might not yet have been able to seek a refund under the Bad Debt Regulation. Contingent and unvested rights are transferable under Illinois law. *See Loyola University Medical Center v. Med Care HMO,* 180 Ill. App. 3d 471, 478 (1989) (explaining

that, “a valid assignment of a conditional right is enforceable in equity.”); *Robert S. Pinzur, Ltd. v. The Hartford,* 158 Ill. App. 3d 871, 877 (1987) (a valid assignment of a conditional right is enforceable so long as it is supported by valuable consideration). In this case, the transfer of rights was supported by consideration: the payment of the purchase price and tax by Citibank and the other obligations between the parties.

B. The Department's Allegation that Citibank Lacks Standing is Irrelevant Because Snyderman Only Addresses Standing to Seek Direct Refund Claims and Does Not Address Standing as an Assignee

The Department's principal argument in opposition to Citibank's refund claim is a hyper technical and erroneous claim that Citibank allegedly lacks standing to seek a refund under section 6 of ROTA both because it incurred no tax and because it was not the party that remitted the tax to the Department. [Dept.'s Br., pgs. 15-23.] In support of this argument, the Departments points to the language of section 6 that directs that the Department "shall issue a credit memorandum or refund to the person who made the erroneous payment," and relies significantly on *Snyderman v. Isaacs*, 31 Ill. 2d 192 (1964). But the Department's argument is irrelevant because the Department is arguing against Citibank's ability to bring a direct refund claim under section 6, and that is not the issue in this appeal. In addition, the Department is really making a circular argument: that Citibank is not entitled to the refund because it lacks standing and it lacks standing because it is not entitled to the refund.

The Circuit Court and Court of Appeals both agreed that regardless of whether Citibank has standing to seek a refund claim in its own right under section 6 of ROTA, an issue the Court of Appeals found that it did not even need to address, Citibank was entitled to a refund as the assignee of the Retailers' rights to seek such claims. *Citibank*, 409 Ill. Dec. at 139 ("We need not address the Department's contention that only retailers that remit the taxes have standing to pursue a refund claim, because we conclude that even if only remitted retailers have standing under the statute, the retailers in the present case effectively assigned their rights to pursue a refund to Citibank.")

It is clear from a reading of *Snyderman* that it did not address, and has no applicability to, the standing of an assignee to bring a refund claim. The plaintiff in that case, Mr. Snyderman, rented a motor vehicle and was charged a leasing tax. *Snyderman*, 31 Ill. 2d at 193. The company that rented Mr. Snyderman the motor vehicle both collected the leasing tax from Mr. Snyderman and remitted it to the State. *Id.* at 193-94. Subsequent to Mr. Snyderman's rental, the amendment to the ROTA that imposed this leasing tax was held to be invalid. *Id.* at 193. Mr. Snyderman then brought his suit for a refund of the leasing tax on behalf of himself and those similarly situated. *Id.*

In *Snyderman*, the plaintiff brought a direct claim for a refund. *Id.* at 193. This Court found that "authority for allowing recovery of his voluntary payment must be found in the refund provisions of the

statutes." *Id.* at 195. The Court then considered whether the ROTA and the Use Tax Act permitted Mr. Snyderman's claim. *Id.* at 195-96. The Court looked to the language of the statute, which provided that "the Department shall issue a credit memorandum to the person who made the erroneous payment." *Id.* at 195. The Court therefore concluded that "the complaint makes it clear that the lessee-plaintiff did not remit the tax, and such a lessee has no statutory right to recover taxes remitted by his lessor." *Id.*

The Court's holding therefore addressed Mr. Snyderman's ability to seek a refund directly under the ROTA. There was no assignment of rights in that case, and the Department would have granted a refund to the retailers in that case had they filed the claim. In this case, the Court of Appeals did not decide whether Citibank could pursue a refund claim directly under section 6 of ROTA and found that issue moot in light of Citibank's clear right to a refund as the assignee of the Retailers.

C. None of the Extremely Narrow Public Policy Exceptions to the Broad Right of Assignment are Applicable in Citibank's Case

The last few pages of the Department's brief effectively concede that this refund right is assignable which should dispose of the issue on appeal. [*See* Dept.'s Br., pp. 23-26.] However, the Department then argues that there is a public policy based exception (since there is no statutory prohibition on assignment) although this section in the Department's brief is primarily focused on public policies that

purportedly underlie the interpretation of section 6 and who can seek direct refunds under that section. Even recasting the Department's argument in the proper context – whether public policy might prohibit the assignment of refund claims – the Department's brief does not articulate any authority to overcome the general rule of assignability.

The Department cites the single case of *Amalgamated Transit Workers' Union v. Pace Suburban Bus. Div. of Reg'l Transp. Auth.*, 407 Ill. App. 3d 55 (1st Dist. 2011). [Dept.'s Br., pg. 23.] As the Court of Appeals described in that case: "[c]ommon law and statutory rights are generally assignable, *absent a* ***clear*** *statute or public policy to the contrary*." *Id.* at 60 (emphasis added). Thus, the state of the law regarding the assignability of statutory rights is different than what the Department characterizes in its brief. The mere presence of some policy considerations against assignment is not enough to overcome the broad right to assignment and preclude an assignment. Rather, there must be a clear statute or public policy to the contrary.[1] None of the few narrow grounds on which Illinois courts have previously limited the right to assign are applicable in this case, and there is nothing in any existing Illinois law that would embody a clear policy against the assignment of these types of claims.

[1] As the Court of Appeals recognized, "[t]he language of section 6 does not discuss the assignment of the right to a tax refund, much less limit or prohibit the assignment of such a right." *Citibank*, 409 Ill. Dec. at 140. That is, there is no statutory prohibition on the assignment of tax refund claims. If there is to be any prohibition on such an assignment, it must be because of a public policy to the contrary.

Amalgamated Transit Workers' Union is not helpful in determining when a right to assign can be limited. In that case, plaintiff represented unionized bus drivers and challenged their employer's policy of imposing suspensions and fines on bus drivers whose buses were photographed running red traffic lights. *Id.* at 55. Plaintiff argued that the defendant, as the entity that owned the buses, was the only entity that was legally obligated to pay the traffic fines, and that its practice of reassigning the tickets to the bus drivers was illegal. *Id.* at 59-60. Although the court found that Illinois law embodied a broad right to assignment, it ultimately held "that defendant's policy is not an assignment." *Id.* at 60.

According to the court, "defendant's policy is that its employees must reimburse it for the citations that it is obligated to pay to municipalities due to red light camera violations." *Id.* at 60. The court went on to describe that "[t]here is consequentially no transfer of a right or an obligation from defendant to its employees, meaning that no assignment of the traffic citation has occurred." *Id.* at 60. The court therefore did not need to consider whether public policy might prohibit such an assignment, and its opinion is therefore not instructive as to the circumstances under which the broad right to assignment might be limited.

Much more instructive is this Court's decision in *Kleinwort*. In that case, the Court first noted that "assignability is the general rule and nonassignability is the exception." *Kleinwort*, 181 Ill. 2d at 225. The

Court also stated that "in determining whether an agreement violates public policy, courts determine whether the agreement is so capable of producing harm that its enforcement would be contrary to the public interest." *Id.* at 226. The Court also noted that "courts apply a strict test in determining whether an agreement violates public policy," and that "[t]he power to invalidate part or all of an agreement on the basis of public policy is used sparingly because private parties should not be needlessly hampered in their freedom to contract between themselves." *Id.* The Court ultimately concluded that public policy did not prohibit the assignment of a claim for punitive damages. *Id.* at 226-27.

In its opinion, the Court highlighted other instances in which assignment was not prohibited and some in which it was prohibited. *Id.* at 224-225. For example, the Court noted that assignment of a contribution action does not violate public policy. *Id.* (citing to *Puckett v. Empire Stove Co.*, 183 Ill. App. 3d 181, 132 Ill. Dec. 110 (1989)). With respect to what is not assignable, the Court described that generally personal injury actions and those of a personal nature are not assignable. *Id.* at 224 (citing *North Chicago Street R.R. Co. v. Ackley*, 171 Ill. 100 (1897)). For example, a legal malpractice claim is not assignable because of the personal nature of the attorney-client relationship. *Id.* (citing *Christison v. Jones*, 83 Ill. App. 3d 334, 39 Ill. Dec. 560 (1980)). In contrast, an assignment of an insurance malpractice claim is assignable because the business relationship between an insurance broker and a

client is not personal. *Id.* (citing *Daugherty v. Blaase*, 191 Ill. App. 3d 496, 138 Ill. Dec. 900 (1989)).

The Department does little to articulate a public policy that would arguably prohibit the assignment. Assignment has generally only been prohibited for claims of a personal nature, but even then courts have sanctioned assignment based on a business relationship between the assignee and the assignor, not unlike the business relationship between Citibank and the Retailers. *Id.* To sustain the Department's determination that tax refund claims are not assignable would require the creation of new law and a new basis for non-assignability where none has existed in Illinois law previously.

D. The Legislature's Amendments to the Statute During this Litigation Reflect an Acquiescence to the Retailers' Right to Assign Their Claims to Citibank

The Department also asserts that the legislature's recent amendments to the General Refund Statute (35 ILCS § 120/6) to add 35 ILCS § 120/6d are instructive and support its position that such tax refunds should not be assignable. [Dept.'s Br., pg. 24.] Ordinarily, the best indication of legislative intent is the plain language of the amendments. *Davis v. Toshiba Machine Co., America*, 186 Ill. 2d 181 (1999) ("Courts will first look to the words of the statute, for the language used by the legislature is the best indication of legislative intent.") In this case, the legislature did not include any prohibition against assignment, nor even make any other express statement as to its

motivation for amending the statute. Thus, the Department's assertions as to a purported legislative intent behind the amendments are unsupported by any sort of expression by the legislature itself.

The legislature amended the statute during the pendency of this litigation below. L. 2015, S507 (P.A. 99-0217), effective 07/31/2015. The amendments do not contain a provision that provides that they apply retroactively. The amendments expressly allow a retailer to claim a deduction or refund for unpaid balances of purchases for which the retailer previously remitted the tax but for which the purchases were financed on a private label credit card issued by a lender. 35 ILCS 120/6d (b). One thing that is clear from the amendment is that the legislature is continuing its policy of refunding excess sales tax in all credit sales so that the proper amount of sales tax is ultimately retained when bad debts occur. It is also clear that the Retailers could have assigned the ROTA refunds to Citibank if the new amendments would have been effective at the time of the assignments. Another thing that is clear is that the legislature did not take the opportunity in the amendments did not place any limitations on a retailer's ability to assign its right to a tax refund. The legislature has had decades to limit assignability in this statute and has never done so, and it did not do so in the amendments.

Moreover, the amendments were made at a time when the circuit court had already ruled that Citibank was entitled to its refund claim as

the assignee of the retailers and when this case was pending before the Court of Appeals. The legislature was undoubtedly aware of this litigation and was certainly aware of *Nudelman*. This Court has previously stated that "[w]here the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent." *Miller v. Lockett*, 98 Ill. 2d 478, 483 (1983). If the legislature's intent had been to prohibit the assignment of any such refund claims, it could have inserted a provision in the amendments that expressly prohibited such assignments. But it did not. There continues to be no statutory prohibition on the assignment of these tax refund claims. And because the legislature amended the statute after the Circuit Court had found that Citibank was entitled to its refund as the assignee of the retailers' rights, the intent that is presumed by that amendment is that the legislature acquiesces to the Circuit Court's decision and agrees that Citibank is entitled to recover because it is the assignee.

III. The ALJ's Decision Contains Numerous Legal Errors That the Department Does Not Appear to Contest in this Appeal

The posture of this appeal is unique. The Court of Appeals held that Citibank is entitled to its refund claim, and the Department sought permission for leave to appeal to this Court. However, because this case involves the review of an administrative agency's final action, this Court technically reviews the Department's decision rather than that of the Circuit Court or the Court of Appeals. *Provena Covenant Medical Center*

v. Dept. of Revenue, 236 Ill. 2d 368 (2010). Of course, the circuit court and the Court of Appeals reviewed the Department's decision and disagreed with the Department's reasoning and conclusions.

The Department's brief to this Court principally addresses only a single aspect of the Court of Appeals' decision (*i.e.*, whether Citibank has standing to pursue its refund claim). The Department's brief does not address other errors in the agency's final decision that Citibank had addressed before the Circuit Court and Court of Appeals, and for which the Circuit Court and the Court of Appeals had found in Citibank's favor. It is therefore not clear whether the Department has conceded or waived error on these issues by not addressing them in its brief to this Court, or, whether given the unique posture of this case, it is incumbent on Citibank to address these other items of error in the Department's final agency action. Therefore, Citibank will briefly address these items.

A. The ALJ Incorrectly Concluded that Citibank was not Seeking a Refund of a "Tax Paid in Error"

Initially, the ALJ asserted that the General Refund Statute, 35 ILCS § 120/6, only authorizes a refund of taxes if the claimants paid a "tax, or some portion of it, [which] was not due in the first place." *See* C 00016. He then concluded that "Citi has wholly failed to show that any of the ROT that the Retailers remitted to the Department was not due." *Id.* That is, the ALJ concluded that because the full amount of the sales tax was due upfront when the retailer paid it irrespective of any subsequent credit default, no entity (i.e., the retailer or the lender) could

ever obtain a refund on account of subsequent bad debts. *Id.* If this contention were correct, then the retailers themselves would never qualify and the statute would be meaningless.

However, the ALJ's conclusion directly contradicts the Department's Bad Debt Regulation, which expressly provides that "[i]n the case of a 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." 86 Ill. Admin. Code § 130.1960(d)(3) (emphasis added). Thus, as evidenced by its longstanding regulation, even the Department agrees that subsequent credit defaults create a tax paid in error for which Section 6 authorizes a refund. 86 Ill. Admin. Code § 130.1960(d)(3).

The Department has apparently conceded this issue as it did not advance this position in the Court of Appeals. Indeed, in its opinion, the Court of Appeals cited to the Department's regulation in its discussion of the refund scheme without so much of a pause as to whether there could possibly be an issue as to whether Illinois law permitted ROTA tax refunds based on subsequent bad debts. As the Court of Appeals directly stated: "[t]hese taxes are considered to be paid in error, and the retailer may filed a claim for their refund pursuant to section 6 of ROTA." *Citibank*, 409 Ill. Dec. at 141.

B. The ALJ Incorrectly Concluded That Citibank Was Required to Reimburse the Purchasers for Taxes that the Purchasers Did Not Pay

The ALJ also found that "[a]s a matter of law then, the Retailers here would have been entitled to a refund only if they first unconditionally repaid to their customers the use tax they had previously collected from them." *See* C 00018. This argument stems from the statutory requirement that "[n]o credit may be allowed or refund made for any amount paid 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; C 00018-19. Presumably here too the contention is that neither Citibank nor the retailers could be entitled to a refund without first reimbursing the purchasers for the taxes.

That statutory prerequisite, however, has no application in this case because the purchasers never paid the taxes to the Retailers in the first instance but instead financed the purchases, including the ROTA tax. The transactions at issue in this case are all credit transactions where the purchaser financed the purchase and promised to pay the sales tax at a later date to Citibank. The purchaser did not actually pay the part of the sales tax that is at issue in the refund claim. Citibank bore the burden of the tax until such time as the purchasers paid their

debts in full to Citibank, which never ultimately happened because the purchasers defaulted.

The ALJ's conclusion is erroneous because it equates promising to pay the tax in the future with actually paying the tax. The Court of Appeals considered this argument, and described it as "unavailing." *Citibank*, 409 Ill. Dec. at 142. As it described, "the retailers did not collect the taxes from the consumer; they collected them from Citibank." *Id.* The Court of Appeals easily concluded that if the retailers were bringing refund claims for bad debts, "the retailers would not have been required to refund to the consumers taxes that the consumers had not paid in the first place." *Id.* "Thus, Citibank is also not required to refund to the consumers taxes that the consumers have not actually paid. Instead, Citibank is simply limited to seeking a refund of those taxes that remain uncollected," which is all that its refund claim in this instance encompasses. *Id.*

C. The ALJ Incorrectly Concluded that the Retailers Could Not Assign Their Contingent Refund Claims to Citibank

The ALJ also asserts that Citibank, as the assignee, was not entitled to a refund because the Retailers were not entitled to refunds. According to the ALJ, "the only way the Retailers would have been entitled to a bad debt credit was if the customers' defaults caused *the Retailers* to incur a bad debt." *See* C 00019. Interestingly, the ALJ recognizes that "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 be unable to collect all of the selling price of the good sold." *Id.*

The crux of the ALJ's decision is that he refused to recognize the right to assign contingent claims which, as described previously, is well-settled in Illinois law. That is, the ALJ incorrectly asserts that after the assignment to Citibank, the retailers no longer possessed the right to seek a refund of sales tax on account of bad debts and therefore neither could Citibank as the assignee. The ALJ's analysis is incorrect because it is made from the wrong perspective.

The correct analysis is focused on the rights the Retailers possessed at the time they assigned their rights to Citibank and not what rights they may or may not have continued to possess after the assignment. An assignment, after all, is generally speaking a relinquishment of the assignor's rights. The assignor transfers its rights to another party and is not expected to retain them after the assignment. That is the essence of an assignment.

So, while Illinois law dictates that the assignee stands in the shoes of the assignor, this does not mean that the assignee only possesses whatever rights the assignor may have retained after the assignment. Rather, standing in the shoes of the assignor means that the assignee possesses whatever rights the assignor would have had if the assignment had never occurred. And it is undisputed that the Retailers would be

entitled to a refund under the General Refund Statute and the Department's Bad Debt Regulation if the Retailers had financed the purchases themselves and not assigned their rights to Citibank. *See e.g., Citibank*, 409 Ill. Dec. at 141 (describing that "the retailers would have been permitted to obtain a refund had they not assigned the accounts."). If the ALJ's decision on this point were not correct, then Citibank would not be able to collect on the debt when the customer defaulted because the customer was not in default at the time of the assignment.

D. The ALJ Incorrectly Concluded that Citibank had not Proven the Amount of Its Refund Claim

At the end of his recommendation, the ALJ found that even if Citibank might otherwise be entitled to a refund under the regulation, its claim omitted certain statutorily required information. *See* C 00021-25. Also, in the opinion of the ALJ, although the statute does not specify any penalty or consequence for failing to provide the requisite information, the ALJ apparently believed that the appropriate remedy was the complete denial of Citibank's refund claim rather than merely an audit by the Department as to the amount and proof underlying the claim. *See* C 00021-25.

The Court of Appeals correctly found that this was a non-issue in this case particularly because "the parties stipulated that the claimed refund amount was equal to the amount of ROTA taxes not collected from the consumers," and therefore "there was no need for Citibank to provide additional information or evidence in support of this claim."

Citibank, 409 Ill. Dec. at 143 (*citing People v. One 1999 Lexus,* 367 Ill. App. 3d at 691, 305 Ill. Dec. 303, 855 N.E.2d 194 (2006)). *See also Bridges v. Neighbors,* 32 Ill. App. 3d 704, 708 (5th Dist. 1975) (describing a stipulation as binding on the parties and the court).

Even looking past the parties' stipulation, Citibank filed a detailed refund claim that comports with the requirements of the Bad Debt Statute. The items listed in the statute make clear that the purpose of the refund claim is to put the Department on notice as to the amount, period and reason for the claim. For example, the Act requires that Citibank's claim include "(2) the period covered by the claim," "(3) the total amount of the credit or refund claimed," "(9) the reason or reasons why the amount, for which the claim is filed, is alleged to have been paid in error," and "(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." 35 ILCS § 120/6a.

There is good reason to require what is akin to "notice pleading" in the claim; since refund claims must be filed within a statutorily defined period that is typically three years, requiring that the claim include the amount and period of the refund claim ensures that the refund claim was brought within the statute of limitation and that the taxpayer cannot later assert that a vague, non-specific claim actually covers other periods or amounts. 35 ILCS § 120/6. The statute itself embodies this "notice

pleading" principle as it only requires that the claim include "a list of the evidence" that supports the claim; it does not require that the claimant provide actual supporting documentation as part of the claim itself. 35 ILCS § 120/6a.

In this case, Citibank has more than complied with the statutory requirements and there is no issue as to the amount of the claim: only legal entitlement. Citibank filed a refund claim that clearly stated the amount and period of its refund claim. *See* C 00046-47. The claim included a write-up of the legal basis for its claim and a list of the evidence that was available to support its claim. *See* C 00044-45. Citibank's refund claim also included amended sales tax returns, which detailed the specific adjustments that Citibank wanted to make through the refund claim. *See* C 00046-49. Not only did Citibank's refund claim comply with the statute, but the Department did not raise any issue with respect to the form or content of Citibank's claim. The Department accepted and processed Citibank's refund claim, and its notice of tentative denial was not based on the form or content of the claim. *See* C 00051. The parties' stipulation show the agreement on the amount of the claim that should be allowed if legal entitlement is shown.

CONCLUSION

The Department's final decision should therefore be reversed, and this Court should find that Citibank, as the assignee of the retailers, is entitled to its refund claim.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 30 pages.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument BRIEF OF PLAINTIFF-APPELLEE is true and correct. As of August 16, 2017 before 5:00 p.m., I served a copy of the above document by transmitting from my email address to all primary and secondary e-mail addresses of record designated by the persons named below:

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