ILLINOIS INDEPENDENT

TAX TRIBUNAL

AMERICAN AVIATION SUPPLY LLC,	)	
	)	
Petitioner,	)	
	)	
	)	**21 TT 27**
v.	)	**21 TT 54**
	)	**Judge Brian F. Barov**
ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
	)	
Respondent.	)	

DEPARTMENT'S REPLY BRIEF IN SUPPORT OF ITS

CROSS MOTION FOR SUMMARY JUDGMENT

The Department of Revenue of the State of Illinois, by and through its attorney, Kwame Raoul, Attorney General of the State of Illinois, files this reply in support of its Cross Motion for Summary Judgment and in response to the Petitioner's Response to the Department's Cross-Motion for Summary Judgment.

In its response to the Department's Cross-Motion for Summary Judgment, the Petitioner states that it qualifies for the Expanded Temporary Storage Exemption, that the Illinois Supreme Court's decision in *United Airlines v. Mahin* is inapplicable, and that the legislative history of the statute does not support the Department's position. All of these statements are incorrect.

The Petitioner's purchases of fuel were not used or consumed solely outside of Illinois and therefore do not qualify for the Expanded Temporary Storage Exemption. The supreme court's decision in *United Airlines* must be taken into consideration in interpreting the statute,

and the legislative history clearly demonstrates the purpose of the statute was not to extend the application of the statute to the types of sales at issue in these proceedings.

ARGUMENTS

1. The Decision in *United Airlines v. Mahin* Is Controlling.

The Petitioner is seeking exemption for fuel it purchased in Illinois, stored in Illinois, and then sold to the Airlines. After the purchase, the Airlines loaded the fuel into the tanks of their planes and used that fuel to fly the planes out of Illinois. While conceding that all of the fuel in question was loaded into the fuel tanks of the Airlines' planes in Illinois, the Petitioner argues that only the percentage of fuel used or consumed in Illinois is subject to Illinois tax. The rest, it argues, is exempt pursuant to the Expanded Temporary Storage Exemption. The Petitioner's position, essentially, is that the Expanded Temporary Storage Exemption reinstated the "burn-off rule."

The burn-off rule as applied to the Temporary Storage Exemption set forth in section 439.3 of the Use Tax Act (UTA) was the subject of the Illinois Supreme Court's decision in *United Airlines v. Mahin*, 49 Ill. 2d 45 (1971). Under the burn-off rule, railroads, airlines, and trucking companies that purchased fuel in Illinois, stored it here, and then used it in fueling their flights out of Illinois were taxed only on the portion of the fuel consumed in or over Illinois. The Department applied the burn-off rule to the Temporary Storage Exemption for the first eight years following the enactment of section 439.3 in 1955. In 1963, the Department changed its interpretation of the Temporary Storage Exemption, announcing that the taxable use began when the fuel was taken out of storage and placed into the tanks of the airplane, railroad engine, or truck. *United Airlines* upheld the Department's rejection of the burn-off rule and concluded that

United did not qualify for exemption under the Temporary Storage Exemption because its fuel was not used solely outside of Illinois.

The Petitioner's response to the Department's Cross-Motion for Summary Judgment repeats the claim that *United Airlines* is not applicable. The Petitioner asserts that the statute at issue in these proceedings is the Expanded Temporary Storage Exemption set forth in section 2-5(38) of the Retailers' Occupation Tax Act (ROTA), while the statute at issue in the *United Airlines* decision is the Temporary Storage Exemption set forth in section 439.3 of the UTA. The Petitioner argues, therefore, that *United Airlines* is not controlling. This argument ignores the fact that the Expanded Temporary Storage Exemption amended both the UTA and the ROTA.

In *United Airlines*, the Illinois Supreme Court held that fuel loaded into a plane and used to fly that plane out of Illinois did not qualify for the Temporary Storage Exemption. In reaching this conclusion the supreme court stated that the language of the UTA was plain and unambiguous in granting the exemption to property which is stored in Illinois temporarily and used *solely* outside of the state. This interpretation of the UTA by the court has acquired a settled meaning and become a part of the Act. *Karbin v. Karbin*, 2012 IL112815; *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397 (2005).

As the Department explained in its brief in support of its Cross-Motion for Summary Judgment, thirty years after the supreme court's decision in *United Airlines*, the legislature amended the UTA and the ROTA by adding the Expanded Temporary Storage Exemption to both statutes. Section 3-55(j), which amended the UTA, retained the language of the Temporary Storage Exemption requiring use solely outside of the state. Where terms in a statute that have acquired a settled meaning through judicial construction are retained in subsequent amendments

to that statute, they are to be understood and interpreted in the same sense attributed to them by the court, unless a contrary intention of the legislature is made clear. (See *Karbin*, 2012 IL112815 at ¶ 47; *R.D. Masonry, Inc.*, 215 Ill. 2d at 404.) Thus, the terms "use" and "solely outside of the state" must be understood and interpreted in light of the supreme court's decision *in United Airlines*.

This interpretation must also be applied to section 2-5(38) of the ROTA. The language used in section 3-55(j) of the UTA is identical to that used in section 2-5(38) of the ROTA. To interpret the Expanded Temporary Storage Exemption of the UTA in a manner that takes the *United Airlines* case into consideration while interpreting the Expanded Temporary Storage Exemption of the ROTA in a manner that does not, would lead to the absurd result of the identical statutory language being given differing and conflicting interpretations. (See *Dawkins v. Fitness Int'l LLC*, 2022 IL 127561, holding that statutes must be construed to avoid absurd results.) Accordingly, the language of the Expanded Temporary Storage Exemption in both the UTA and the ROTA that requires the use or consumption to occur solely outside of Illinois must be interpreted in the same sense attributed to it by the supreme court, unless a contrary interpretation was made clear by the legislature. Nothing in the statute, its legislative history, or the regulations demonstrates a clear intention by the legislature to reject the Illinois Supreme Court's long-standing decision in *United Airlines* and reinstate the burn-off rule.

In support of its position that the Expanded Temporary Storage Exemption should be interpreted to apply to its purchases, the Petitioner points to the language in the Permitting Regulation that allows a certificate to be issued stating that a certain percentage of a purchaser's sales qualify for the Expanded Temporary Storage Exemption. The inclusion of language in the Permitting Regulation allowing a purchaser to submit a form stating percentages cannot be

considered a clear indication by the legislature of an intention to abandon the supreme court's decision and thirty years of settled law. The language of the Expanded Temporary Storage Exemption itself gives no indication that this was the legislature's purpose, and the regulation cannot be construed in a manner that would broaden the scope of the exemption. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130; *Craftmaster, Inc. v. Illinois Department of Revenue*, 269 Ill. App. 3d 934 (1995).

In arguing in its Brief in Response that the percentage language of the Permitting Regulation should be interpreted to exempt its purchases, the Petitioner gives an example of a trucking company that purchases 100 batteries in Illinois and loads one into the engine of a truck that drives the other 99 batteries outside of Illinois for use or consumption. The Petitioner states that, under these circumstances, 99 percent of the batteries would qualify for the Expanded Temporary Storage Exemption. The Petitioner is correct, as this is precisely the situation to which the permitting regulation applies.

However, this is not the Petitioner's situation. The Petitioner's situation is more akin to that of a trucking company that purchases a battery, places it into a truck that drives out of Illinois and then claims that it should be taxed only for the percentage of battery usage or consumption that occurred in Illinois. Such usage and consumption does not occur solely outside of Illinois and, like the purchase of the Petitioner's fuel, the purchase of the battery would be subject to taxation in Illinois.

The Petitioner's hypothetical is further distinguishable by the fact that the 99 batteries it discusses are separate and identifiable units, capable of being stored in Illinois and transported outside of the state without any portion of them being used or consumed in the state. In the present case, the Airlines did not load two percent of the fuel into the fuel tanks of their planes

for the purpose of transporting 98 separate, identifiable containers of fuel out of Illinois. They loaded all the fuel into the fuel tanks of their planes and used and consumed that fuel to fly the planes out of the state. Under these circumstances, the fuel purchases do not qualify for the Expanded Temporary Storage Exemption.

2. The Fuel Purchased by the Petitioner Was Not Used or Consumed Solely Outside of Illinois.

The Expanded Temporary Storage Exemption exempts property sold by a retailer to a purchaser "who will upon receipt of the property in Illinois, temporarily store the property in Illinois (i) for the purpose of subsequently transporting it outside this State for use or consumption thereafter solely outside this State." As stated above, the Petitioner purchased fuel, stored it in Illinois, and then sold it to the Airlines. After purchasing the fuel, the Airlines loaded it into the tanks of their planes and used that fuel to fly their planes out of Illinois.

In arguing that it qualifies for the Expanded Temporary Storage Exemption, the Petitioner asserts the Expanded Temporary Storage Exemption differs from the Temporary Storage Exemption because it contains a "temporal component" that requires the use or consumption outside of Illinois to occur after the property is transported. It is the Department's position that the plain language of the statute looks primarily to the purchaser's purpose in storing the property in Illinois and grants the exemption when that purpose is to transport the property outside of the state for use or consumption. Here, the property was not stored in Illinois for the purpose of transporting it out of Illinois for use and consumption solely outside of Illinois. Rather the fuel was stored in Illinois for the purpose of allowing the Airlines to use it and consume it in Illinois to fly the Airlines' planes from Illinois airports to locations outside of the State. As in *United Airlines* case, the Petitioner in this case did not store the fuel in Illinois with

any intention that it would be used solely outside of Illinois. In both cases, the fuel was stored in Illinois to facilitate the purchaser's operation from Illinois airports. This purpose does not qualify for exemption. See *United Airlines*, 49 Ill. 2d 45, 55.

3. The Legislative History of Public Act 92-488 Does Not Support the Reinstatement of the Burn-off Rule.

The legislative history of Public Act 92-488 clearly demonstrates that the General Assembly's purpose in enacting the Expanded Temporary Storage Exemption was to "expand" the Temporary Storage Exemption to include Illinois retailers. There is nothing in the language of the statute or its legislative history that would lead to the conclusion that it was the intention of the General Assembly to restore the burn-off rule. As discussed above, such an intention would need to be clearly indicated by the legislature. (*Karbin*, 2012 IL112815 at ¶ 47; *R.D. Masonry, Inc.*, 215 Ill. 2d at 404.) The Petitioner has not pointed to anything in the legislative history that demonstrates that reinstating the burn-off rule was the purpose behind the enactment of the Expanded Temporary Storage Exemption. The only language the Petitioner points to as supporting its position is the provision of the Permitting Regulation that allows a certificate to be issued for a percentage of a retailers' purchases. This language does not constitute a clear indication that the legislature disagreed with the *United Airlines* decision and as discussed above it does not support the Petitioner's position.

The legislative history of the exemption clearly establishes that the term "expanded" as used in the exemption refers to the fact that the amendment broadened the scope of the exemption to include purchases from Illinois retailers. It does not support the Petitioner's interpretation of "expansion," nor does it support the Petitioner's view that the issuance of a certificate by the Department establishes that the recipient qualifies for the exemption.

The Petitioner states in its brief that Department's interpretation defeats the legislative purpose of incentivizing purchases from Illinois business because "[i]f the withdrawal from storage or use or consumption of 2 batteries or 2 gallons of fuel within Illinois rendered the other 98 taxable, that is a disincentive to purchase the items in Illinois and defeats the legislature's intent to promote in-state purchases." This argument is incorrect.

As the Department has repeatedly pointed out, the Expanded Temporary Storage Exemption amended both the UTA and the ROTA. The language in both amendments is identical and the same interpretation must be applied to the language of both. Therefore, under the Department's interpretation of the statute, the retailer in the scenario put forth by the Petitioner would be taxable on 98 percent of its purchases whether purchased from an in-state retailer or out-of- state retailer. This interpretation is entirely in keeping with the legislative purpose of creating parity for in-state and out-of-state retailers by expanding the Temporary Storage Exemption to cover purchases from Illinois retailers that were not eligible under the existing exemption. (See State of Illinois 92nd General Assembly Regular Session Senate Transcript 20th Legislative Day March 30, 2001, pp. 70-71, stating that the purpose of the amendment was to "put Illinois businesses on the same footing as out-of-state businesses" and that "[w]hat this bill says is, 'Look, you can take advantage of that if you're buying from an Illinois company as well.'") The Department's interpretation of the statute supports the legislature's stated purpose of expanding the exemption to include in-state retailers.

CONCLUSION

While the facts in this case are not in dispute, the Petitioner still has the burden of proving, by clear and convincing evidence, that it meets the requirements for exemption.

(*Horsehead Corp. v. Department of Revenue,* 2019 IL 124155*; Safety-Kleen Sys. v. Department of Revenue*, 2020 IL App (1st) 191078.) The Petitioner has not done this.

Under the plain language of the statute, the fuel purchased by the Petitioner does not qualify for exemption because it was not used or consumed solely outside of Illinois. The evidence in this case, *i.e*, the stipulated facts, do not establish that the Petitioner meets the requirements for exemption. Therefore, the Department's denial of the Petitioner's claim for refund should be upheld.

DATE: October 17, 2022

/s/Paula M. Hunter
Paula M. Hunter
Konstantina J. Tsatsoulis
Illinois Department of Revenue
555 West Monroe Street
10th Floor
Chicago, IL 60606
312-814-1633

CERTIFICATE OF SERVICE

Undersigned counsel for the Department, certify and state that a copy of the foregoing Department's Brief in Support of Its Cross-Motion for Summary Judgment and Response to the Petitioner's Motion for Summary Judgment, was served on this 17th day of October, 2022 by email to the individuals listed below:

Mary A. McNulty
HOLLAND & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, TX 75201
214-969-1187
Mary.McNulty@hklaw.com

Lee S. Meyercord
HOLLAND & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, TX 75201
214-969-1315
Lee.Meyercord@hklaw.com

Thomas J. Kinasz
HOLLAND & KNIGHT LLP
150 North Riverside Plaza, Suite 2700
Chicago, IL 60606
312-715-5719
Tom.Kinasz@hklaw.com

/s/Paula M. Hunter
Paula M. Hunter
Konstantina J. Tsatsoulis
Illinois Department of Revenue
555 W. Monroe, Suite1100
Chicago, IL 60661
312-814-1633 (direct)
312-814-1533 (direct)