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.	)	

THE ILLINOIS DEPARTMENT OF REVENUE'S SUPPLEMENTAL AUTHORITY 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, and at the request of the Administrative Law Judge, files the following supplemental authority on the issue of whether construing the expanded temporary storage exemption of section 2-5(38) of the Retailers' Occupation Tax Act to include a "burn-off" rule on the purchase of aviation fuel would discriminate against interstate commerce because the "burn-off" rule's application is not permitted for the purchase of aviation fuel under the temporary storage exemption found at section 3-55(e) of the Use Tax Act.

1. The Commerce Clause

Under the Commerce Clause of the United States Constitution, the United States Congress has the authority to "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." (U.S. Const., art. I, § 8, cl. 3.) This language has been interpreted to include a "dormant commerce clause" limiting the ability of states to tax interstate commerce. (*Oklahoma Tax Comm 'n v. Jefferson Lines, Inc*., 514 U.S. 175 (1995);

Irwin Indus. Tool Co. v. Ill. Dep't of Revenue, 238 Ill. 2d 332, 334 (2010).) The dormant commerce clause serves the purpose of preventing states from placing burdens on the flow of commerce across its borders that commerce wholly within its borders would not bear. (*Oklahoma Tax Comm'n*, 514 U.S. at 179-80; *Irwin Indus. Tool Co.*, 238 Ill. 2d at 341.) Interpreting the Expanded Temporary Storage Exemption to include a burn-off rule for fuel purchased by in-state retailers would constitute a violation of the dormant commerce clause.

Under section 2-60 of the Retailers' Occupation Tax Act (35 ILCS 120/2-60), Illinois may not impose a tax upon the privilege of engaging in a business in interstate commerce "when the business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State." This does not mean that the state may not tax any business engaged in interstate commerce. (*See Eastern Air Transport, Inc. v. South Carolina Tax Comm.*, 285 U.S. 147 (1932); *American Airlines, Inc. v. Department of Revenue*, 58 Ill. 2d 251 (1974); *Sinclair Refining Co. v. Department of Revenue*, 50 Ill. 2d 201 (1971).) In *Eastern Air Transport*, the United States Supreme Court held that the purchase of supplies or equipment for use in conducting a business that constitutes interstate commerce is not so identified with interstate commerce as to prevent taxation of those purchases if the tax is fairly applied. The court stated "[a] non-discriminatory tax upon local sales *** has never been regarded as imposing a direct burden upon interstate commerce." (258 U.S. at 150.) Allowing the application of a burn-off rule to purchases from in-state retailers while prohibiting it for purchases from out-of-state retailers amounts to a discriminatory tax treatment that places out of state retailers at a substantial commercial disadvantage. *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

2. Applying a burn-off rule to section 2-5(38) of the ROTA discriminates against out-of-state retailers.

In *United Airlines v. Mahin*, 49 Ill. 2d 45 (1971), the Illinois Supreme Court upheld the Department's decision to eliminate the burn-off rule. Under that rule, airlines that purchased fuel outside of Illinois and temporarily stored it here were taxed only on the portion of fuel used in Illinois. After elimination of the burn-off rule, all of the fuel purchased from out of state retailers and stored in Illinois was taxed once it was taken out of storage and placed into the fuel tanks of the airplanes flying out of Illinois.

The essence of the arguments set forth in the petitioner's brief is that the Expanded Temporary Storage Exemption reinstates the burn-off rule for purchases of fuel from Illinois retailers. This was not the intention of the statute and would violate the Commerce Clause.[1]

Under the Temporary Storage Exemption of the Use Tax Act (35 ILCS 110/3-55(e), purchases from an out-of-state retailer that are brought into Illinois, temporarily stored here, and then used solely outside of Illinois are exempt from taxation. The elimination of the burn-off rule means that this exemption is not available for fuel purchased from out-of-state retailers loaded into planes flying out of Illinois after temporary storage here. As a result, had the petitioner's fuel been purchased from out-of-state retailers, 100 percent of those purchases would have been subject to taxation. Yet, under the petitioner's interpretation of the Expanded Temporary Storage Exemption, because the fuel was purchased from an Illinois retailer, only one

[1] The legislative history of the Expanded Temporary Storage Exemption establishes that the Illinois General Assembly did not intend to provide an advantage to in-state retailers. Rather, the legislative history of the Expanded Temporary Storage Exemption clearly establishes that the General Assembly intended to place in-state retailers on an equal footing with out-of-state retailers. Department's Brief in Support of its Cross-Motion for Summary Judgement, pp. 10-11; Department's Reply Brief in Support of its Cross-Motion for Summary Judgment, pp. 7-8.

to two percent of the purchases (Stip. ¶ 10, Exs. 7- 8, 11- 12) would be subject to taxation notwithstanding a greater nexus to Illinois than purchases from an out-of-state retailer.

The United States Supreme Court has long held that states may not give preferential treatment to in state commerce to the detriment of out-of-state commerce. In *Walling v. Michigan*, 116 U.S. 446 (1886), the court held "[a] discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

More recently, in *Maryland v. Louisiana*, 451 U.S. 725 (1981) the court stated:

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra*. See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

The Court reiterated this principle in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), saying a State "may not discriminate between transactions on the basis of some interstate element. *Boston Stock Exchange, supra*, at 332, n. 12. That is, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc*., 467 U.S. at 642.

In determining the validity of a taxing statute under the commerce clause, a court will consider whether the statute will, in its practical operation work discrimination against interstate commerce. (*Maryland v. Louisiana*, 451 U.S. at 756.) The petitioner's interpretation of the

Expanded Temporary Storage Exemption clearly works to discriminate against interstate commerce.

Because the Department's elimination of the burn-off rule was upheld and has been followed for over 50 years, out-of-state retailers are taxed on 100 percent of their fuel sales when the fuel is purchased outside of Illinois, temporarily stored here, and then loaded into planes and used it to fly those planes out of Illinois. Under the petitioner's interpretation of the Expanded Temporary Storage Exemption, in-state retailers who sold fuel in Illinois, temporarily stored it in Illinois and then loaded the fuel into planes and used it to fly the planes out of Illinois would be taxed only on the one to two percent of fuel used before the purchasers' planes left Illinois. Thus, the practical operation of applying the petitioner's interpretation of the statute is to discriminate against out-of-state retailers while providing favorable treatment for in-state retailers.

In *International Harvester Co. v. Department of Revenue*, 322 U.S. 340 (1944), the Supreme Court addressed the constitutionality of an Indiana statute taxing three classes of sales by corporations authorized to do business in Indiana but incorporated under the laws of other states. The first class was sales by branches located outside Indiana to dealers and users in Indiana. These sales were solicited outside of Indiana and customers took delivery at factories located in Indiana. The second class was sales by branches in Indiana to dealers and users outside of the state who came into Indiana to accept delivery. The third class was sales by branches in Indiana to dealers and users residing in Indiana in which the goods were shipped from outside of the state to the users residing in Indiana. The Supreme Court upheld the taxation of all three classes of sales.

In addressing the third class of sales, the Court pointed out that in two prior cases it upheld California and New York's taxation of sales by an out-of-state retailer to residents of those states where agents in California or New York solicited the sales and took receipt of products before delivering them to the buyers. (*See McGoldrick v. Felt & Tarrant Co.*, 309 U.S. 70 (1940); *Felt & Tarrant v. Gallagher*, 306 U.S. 62.) The Court noted that the third class of sales had fewer interstate attributes than the sales in the *Felt & Tarrant* cases since the agreements to sell were made in Indiana, both the buyer and seller were in Indiana, and the payments were made in Indiana. (*International Harvester Co.*, 322 U.S. at 347.) The Court held that in light of its decisions in those cases, "it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions." *International Harvester Co.*, 322 U.S. at 348.

In the present case, the petitioner's fuel sales were made in Illinois, the fuel was delivered to the buyers in Illinois, and payments for the fuel were made in Illinois. Under the petitioner's interpretation of the Expanded Temporary Storage Exemption, 98 to 99 percent of these sales would be exempt from taxation. In contrast, similar sales made outside of Illinois by out-of-state retailers would be taxed at 100 percent even though, as in *International Harvester*, the petitioner's sales had fewer interstate attributes than the sales by out-of-state retailers. Construing the exemption in this manner discriminates against out-of-state retailers while allowing an advantage to in-state retailers and is impermissible under the Commerce Clause.

A basic rule of statutory construction is that a court begins with the presumption that the statute is constitutional and interprets it in a way that renders the statute constitutional if it can do so reasonably. (*Quinn v. Bd of Educ.*, 2018 IL App (1st) 170834.) If the petitioner's interpretation of the Expanded Temporary Storage Exemption is accepted the statute would

result in the unconstitutional discrimination against out-of-state retailers in violation of the commerce clause. Such an interpretation should be avoided. (*Sayles v. Thompson,* 99 Ill. 2d 122 (1983); *Morton Grove Park District v. American National Bank & Trust Co.* , 78 Ill. 2d 353 (1980).) If there is doubt as to the construction to be given a legislative enactment, the doubt must be resolved in favor of an interpretation which supports the statute's validity. (*See In re Judgment & Sale of Delinquent Properties for the Tax Year 1989,* 167 Ill. 2d 161 (1995).) Because the petitioner's interpretation of the Expanded Temporary Storage Exemption would render the statute unconstitutional, its interpretation must be rejected.

V. CONCLUSION

The Administrative Law Judge correctly questioned the constitutionality of the petitioner's interpretation of the Expanded Temporary Storage Exemption. The petitioner's interpretation would improperly discriminate against interstate commerce and would render the statute unconstitutional.

Wherefore the Department respectfully request that this tribunal deny the petitioner's cross-motion for summary judgment and enter summary judgment in favor of the Department.

Respectfully submitted,

DATE: December 12, 2022

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CERTIFICATE OF SERVICE

Undersigned counsel for the Department, certify and state that a copy of the foregoing Department's Supplemental Authority in Support of Its Cross-Motion for Summary Judgment and, was served on this 12th day of December , 2022 by email to the individuals listed below:

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