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.	)	

PETITIONER'S RESPONSE TO RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner American Aviation Supply LLC ("AAS") files this response to the Illinois Department of Revenue's (the "Department") Cross-Motion for Summary Judgment and reply in support of Petitioner's Motion for Summary Judgment. The parties agree on the material facts, and the sole issue to be decided is whether the expanded temporary storage exemption in 35 ILCS 120/2-5(38) (the "Expanded Temporary Storage Exemption") to the Retailer's Occupation Tax applies to AAS's sales of fuel to American Airlines and U.S. Airways (the "Airlines").[1] The parties agree that the issue is one of statutory interpretation properly decided by summary judgment. *See* Pl.'s Mot. For Summ. J. at 1; Respondent's Brief in Support of its Cross-Motion

[1] The Department's argument that AAS has not presented competent evidence to "overcome the prima facie correctness" of the Department's determination under Section 6b of the Retailer's Occupation Tax Act misses the mark. Resp. Br. at 4; 35 ILCS 120/6b. Section 6b allows a taxpayer to protest the Department's determination, as AAS properly did, and the Tribunal has jurisdiction over this matter. Stip. of Facts ¶¶ 11-25. The Department readily concedes that this case involves purely a legal issue as to whether the Expanded Temporary Storage Exemption applies to the undisputed facts. Resp. Br. at 1-2. Thus, there is no issue as to whether AAS has carried its factual burden with competent evidence.

for Summary Judgment and Response to the Petitioner's Motion for Summary Judgment ("Resp.'s Br.") at 2.

AAS qualifies for the Expanded Temporary Storage Exemption because AAS's sales to the Airlines satisfied the plain language of the statute. In denying AAS's refund claims, the Department invokes extrinsic aids of statutory construction in an attempt to change the statute as written. *United Air Lines v. Mahin* involved a different exemption, under a different statute, with materially different language and cannot control. 273 N.E.2d 585 (Ill. 1971), *vacated and remanded*, 410 U.S. 623 (1973) ("*United*"). The legislative history does not support the Department's position and cannot change the result dictated by the plain language of the statute. Therefore, AAS's motion for summary judgment should be granted.

ARGUMENTS AND AUTHORITIES

I. AAS's sales qualify for the Expanded Temporary Storage Exemption because they satisfied the plain language of the statute.

The parties agree that the goal of statutory construction is to ascertain the legislature's intent and that the best indicator of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning. The parties also agree that the statutory language in this case is clear and unambiguous, so the Tribunal should apply it as written and not resort to extrinsic aids of statutory construction. Resp. Br. at 8 (citing *Bd. of Educ. v. Moore*, 2021 IL 125785; *Beggs v. Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186,* 2016 IL 120236); *see also Estate of Alford v. Shelton*, 2017 IL 121199, ¶ 36.

AAS agrees with the Department that the "plain and ordinary language of the Expanded Temporary Storage Exemption" exempts "property that after being stored in Illinois, is then transported outside of Illinois for use solely outside of Illinois or for consumption solely outside of Illinois." Resp. Br. at 8. The Airlines temporarily stored in Illinois 98% (98 out of every 100

gallons) of the fuel they purchased in Illinois and then transported the fuel outside of Illinois for consumption solely outside of Illinois. Stip. of Facts ¶¶ 5, 7, 10; Ex. 5–12. Therefore, under the plain language of the statute, 98% of AAS's sales to the Airlines satisfied the requirements of the Expanded Temporary Storage Exemption and are exempt. The Airlines do not claim that the fuel consumed in Illinois is exempt, and this fuel does not jeopardize the exemption of the other 98%.

The additional provisions of the Expanded Temporary Storage Exemption not discussed in the Department's brief—namely, the Permitting Regulation (defined below) adopted in accordance with the statute's mandate and the purpose and timing rule—make this clear.

II. *United* does not apply to the Expanded Temporary Storage Exemption and cannot control this case.

Despite agreeing that the plain language of the statute controls, the Department invokes statutory construction principles to argue that the Expanded Temporary Storage Exemption has the same meaning as the statute interpreted in the *United* case (Ill. Rev. Stat. c. 120 par. 439.3 (1955) (the "Temporary Storage Exemption")). Resp. Br. at 5, 8-9. But the Department admits that the Expanded Temporary Storage Exemption is a different statute with different terms than the Temporary Storage Exemption and that the Temporary Storage Exemption is not at issue in this case. *Id.* at 5, 8-9.

The differences between the Expanded Temporary Storage Exemption and the Temporary Storage Exemption are material and dictate a different result than the *United* case. As the Illinois Supreme Court and the Tribunal have repeatedly recognized, "[t]he legislature's decision to use certain language in one instance and different language in another indicates that the legislature intended different results." *Julie Q. v. Dep't of Children & Family Serv.*, 2013 IL 113783, ¶ 41; *see also Bernstein Trust v. Ill. Dep't of .Rev*., 16 TT 59 (Ill. Tax Tribunal July 31, 2017) (citing

Estate of Alford, 2017 IL 121199, ¶ 36 (use of one term in one part of a statute and a differing term in another indicates different meanings intended)).

A. Unlike the statute at issue in *United*, the Expanded Temporary Storage Exemption expressly allows for only some of the purchased fuel to qualify for the exemption.

The Temporary Storage Exemption at issue in *United* did not allow a percentage or per unit approach. If some property was used in Illinois, none of the rest of the property could qualify for the exemption. 273 N.E. 2d at 590. Defendant relies on *United* to argue that the same rule applies to the Expanded Temporary Storage Exemption. Resp. Br. at 6–7. But Defendant's position is contrary to the plain language of the Expanded Temporary Storage Exemption and the Permitting Regulation.

The Expanded Temporary Storage Exemption charged the Director of Revenue "pursuant to rules adopted in accordance with the Illinois Administrative Procedure Act, [to] issue a permit to any taxpayer…who is eligible for the exemption." 35 ILCS 120/2-5(38). In accordance with the statute, the Director of Revenue adopted rules for issuing permits to taxpayers eligible for the Expanded Temporary Storage Exemption. 86 Ill. Admin. Code 130.120(uu), 150.310(a)(6)(D) (the "Permitting Regulation").[2] Under the Permitting Regulation, a taxpayer who knows "that a certain percentage of all his or her purchases from a given seller will qualify […] may provide a blanket certificate of expanded temporary storage stating that a designated percentage of purchases qualify for the expanded temporary storage exemption." 86 Ill. Admin. Code 150.310(a)(6)(D)(ii). As a legislative regulation, the Permitting Regulation "has the force of law and its language is

[2] 86 Ill. Admin. Code 130.120(uu) restates the statutory Expanded Temporary Storage Exemption and cross-references 86 Ill. Admin. Code 150.310, which contains the Permitting Regulation.

construed in the same manner as a statute." *Water's Edge Golf Mgmt., LLC v. Ill. Dep't of Rev.*, 17 TT 13 (Ill. Tax Tribunal Oct. 25, 2018).

The Permitting Regulation expressly allows a purchaser to designate the percentage of purchases that qualify for the Expanded Temporary Storage Exemption, which means that some portion will not. Here, the Airlines designated 98% of its fuel purchases as qualifying for the Expanded Temporary Storage Exemption because that percentage of its fuel purchased and temporarily stored in Illinois would be transported outside of Illinois and thereafter consumed solely outside the state.

The Department conspicuously fails to mention the percentage portion of the Permitting Regulation in its brief. However, the Department has repeatedly confirmed that the exemption applies on a percentage or per unit basis. Defs.' Resps. To Pl.'s First Set of Interrogs (Ex. B - 8); Defs.' Resps. To Pl.'s First Reqs. For Admiss. (Ex. A - 10). For example, Step 4 of IDOR Form CRT-62, *Certificate of Expanded Temporary Storage*, (1/02) states: "I certify that the following percentage, __%, of all of the purchases that I make from this seller qualify to be made tax-free under the expanded temporary storage exemption." IDOR Information Bulletin FY 2002-25, *Expanded Temporary Storage Exemption*, includes similar language: "the purchaser's certification must explain that either all purchases made from you, or a specified percentage of the purchases made from you will be made under this exemption." *See also* ST-51, Information for Expanded Temporary Storage Applicants and Permit Holders (Jan. 2007); IDOR Information Bulletin FY 2016-12 (June 2016).

United rejected a percentage or unit approach. Consequently, the fuel would have qualified for the exemption only if it were "transported out of the state for use elsewhere by some means other than placing it in equipment which would consume it." 273 N.E.2d at 587. The Department

similarly argues that only "purchasers who acquire property from retailers in Illinois and store it in Illinois" until "it is '*shipped*' out of state" qualify for the exemption, and that the "fuel at issue in this case was not *shipped* anywhere."[3] Resp. Br. at 12 (emphasis added). But the Permitting Regulation, enacted under the mandate of the Expanded Temporary Storage Exemption, expressly allows only a portion of the fuel purchased in Illinois to be temporarily stored in Illinois for the purpose of subsequently transporting it outside of Illinois for use or consumption thereafter solely outside of Illinois—i.e., 98% of the Airlines' fuel purchases. Therefore, the 98% consumed solely outside of Illinois qualifies for the exemption, regardless of how it was transported outside of Illinois—whether by plane or otherwise.

Consider another example of consumable property—truck batteries. A trucking company purchases 100 truck batteries in Illinois and loads one of the batteries into the engine of the truck that transports the other 99 batteries outside of Illinois. Under the Permitting Regulation, the purchaser certifies that 99% of the batteries purchased in Illinois will be "stored temporarily in Illinois before transfer to an out-of-state location for use or consumption solely outside this state." IDOR Form CRT-62, *Certificate of Expanded Temporary Storage*, General Information (1/02). The purchase of those 99 batteries surely qualifies for the Expanded Temporary Storage Exemption, even though all of the batteries were removed from storage in Illinois and one battery was consumed in Illinois. The jet fuel in this case is no different.

The Department argues that regulations promulgated under the statute "cannot broaden" the application of an exemption. Resp. Br. at 13. But the Permitting Regulation is entirely

[3] Further, the Department is wrong to suggest that the illustrative examples in the regulation somehow limit the exemption to situations in which the property is "shipped" outside of Illinois. Both the statute and regulation use the term "transport" rather than "ship," and the examples cannot narrow the exemption allowed by statute. 35 ILCS 120/2-5(38); Ill. Admin. Code 150.310(a)(6); *Hartney Fuel Oil Co. v. Hamer,* 2013 IL 115130, ¶ 38.

consistent with the statute. The inclusion of the "or consumption" language in the statute makes clear that the statute applies on a per unit basis, as fuel is not "consumed" all at once but on a per gallon (unit) basis. In addition, the Expanded Temporary Storage Exemption does not require that *all* of the purchased fuel must be transported outside of Illinois for the exemption to apply. Instead, it requires only that the fuel that is purchased in Illinois for the purpose of subsequently transporting it outside of Illinois be consumed thereafter solely outside Illinois. Thus, the Permitting Regulation does not broaden the exemption in the statute.

B. Neither withdrawing the fuel from storage nor placing it on a plane is a "taxable use" in Illinois that causes the fuel to be non-exempt.

Defendant also argues that under *United* the fuel was used "when the fuel was removed from storage in Illinois and placed into the fuel tanks of planes in Illinois." Resp. Br. at 6–7, 10, 13. But the statutory changes refute the Department's position that these are taxable uses in Illinois that cause a loss of the exemption. By expressly including "or consumption" after use, the legislature made clear that consumption is something separate from "use" and, for consumable property like fuel, is the relevant use that must occur solely outside of Illinois. Otherwise, the phrase "or consumption" is rendered meaningless because "use" would already encompass consumption. 35 ILCS 105/2. A court must "construe the statute so that each word … is given a reasonable meaning and not rendered superfluous." *Sylvester v. Indus. Comm'n*, 756 N.E.2d 822, 827 (2001). Importantly, the statute does not require that the property be used *and* consumed solely outside of Illinois but only requires that the fuel be used *or* consumed solely outside of Illinois. As long as the fuel is consumed solely outside of Illinois after being transported outside of Illinois, it satisfies the statutory exemption, even though it was removed from storage in Illinois.

In addition, the Expanded Temporary Storage Exemption provides a purpose and timing rule. The exemption applies to property that is temporarily stored in Illinois "for the purpose of

subsequently transporting" it outside of Illinois "for use or consumption thereafter" solely outside of Illinois. Thus, the relevant time to test whether fuel is used or consumed solely outside of Illinois is after transportation. The timing rule coupled with the purpose requirement make clear that the pre-transportation uses at issue in *United*—withdrawing the fuel from storage and loading the fuel on a plane—do not jeopardize the exemption. The Temporary Storage Exemption did not contain the purpose language or temporal component.

Together with the Permitting Regulation, these differences in the statute rebut the Department's argument (Resp. Br. at 7-8 n.3.) that "once the property was used in Illinois, the storage became a taxable use and no longer qualified for the exemption." The Airlines could remove the fuel from storage and load it onto the planes and still qualify for the Expanded Temporary Storage Exemption, so long as the Airlines stored the fuel temporarily in Illinois before transfer to an out-of-state location for use or consumption thereafter solely outside of Illinois. The Airlines temporarily stored 98%—or 98 out of every 100 gallons—of fuel that it purchased in Illinois for the purpose of subsequently transporting it outside of Illinois for consumption thereafter solely outside of Illinois. The Airlines did not purchase the other 2%—or 2 gallons—for the purpose of subsequently transporting it outside of Illinois and does not claim it is exempt.

III. The legislative history does not support the Department's position and cannot change the result dictated by the plain language of the statute.

Recognizing the clear differences in the statutory language, the Department resorts to the Senate and House debate transcripts to argue that the legislature intended the exemptions to apply identically. Resp. Br. at 10–11. Because the Expanded Temporary Storage Exemption statute is clear and unambiguous, "the court must give it effect without resort to other tools of interpretation." *Beggs*, 2016 IL 120236, ¶ 52. A court "must not depart from the plain meaning of the statutory language by reading into it exceptions, limitations, or conditions not expressed by

the legislature." *Estate of Alford v. Shelton*, 2017 IL 121199, ¶ 36; *see also Kunkel v. Walton*, 689 N.E.2d 1047, 1054 (Ill. 1997) (court did not consider legislative history as urged by the Attorney General because the statute was clear).

Even if the legislative history were legally relevant, the Department misleadingly quotes from the legislative history before Senate Amendment No. 1, which added the purpose and timing rule and the mandate to issue permitting regulations to the statute. *See* Resp. Br. at 11; 92nd General Assembly, SB 730 Bill Summary. These are the material differences that make clear the legislature did not intend the same result as in *United* and dictate a different result in this case. In the wake of *United*, the interpretation of the Temporary Storage Exemption was settled law. If the legislature intended the Expanded Temporary Storage Exemption to apply exactly like the Temporary Storage Exemption, it would have used identical language. *Cf. Karbin v. Karbin*, 2012 IL 112815, ¶ 47 (the legislature was presumed to acquiesce in a judicial interpretation of a statute when it did not amend the statute after the decision).

Furthermore, the Department's interpretation defeats the legislature's stated purpose of incentivizing purchases from Illinois businesses. State of Illinois 92nd General Assembly Regular Session Senate Transcript 20th Legislative Day March 30, 2001, pp. 70.71. If 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.

CONCLUSION

AAS's sales to the Airlines satisfied the requirements of the Expanded Temporary Storage Exemption, and there is no genuine question of material fact in this case. The Department's extrinsic aids of statutory construction—*United* and the legislative history—do not change the

result dictated by the plain language of the statute. Therefore, AAS respectfully asks that the Tribunal grant its motion for summary judgment, deny the Department's cross-motion for summary judgment, and direct the Department to allow AAS's refunds for the tax periods in question.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Response to Respondent's Cross Motion for Summary Judgment and Reply in Support of Petitioner's Motion for Summary Judgment was served upon the following attorneys of record by electronic mail on the 21st day of September, 2022.

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