

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 SUPPLEMENTAL AUTHORITY ON
CONSTITUTIONALITY OF THE BURN-OFF RULE**

Petitioner American Aviation Supply LLC (“AAS”) files this memorandum of supplemental authority in response to the Tax Tribunal’s November 18, 2022 Order granting the parties leave to submit supplemental authority on whether construing the expanded temporary storage exemption of section 2-5(38) (the “Expanded Temporary Storage Exemption”) of the Retailer’s Occupation Tax (the “ROT”) to include a “burn-off” rule on the purchase of aviation fuel discriminates against interstate commerce because it did not apply to the purchase of aviation fuel under the temporary storage exemption in section 3-55(e) of the Use Tax Act.

Construing the Expanded Temporary Storage Exemption to include a burn-off rule does not discriminate against interstate commerce. Courts must consider the entire statutory scheme to determine if the “practical effect” of a statute is to discriminate against interstate commerce. *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 581 (1937). Aviation fuel that would be exempt from the ROT under the “burn-off” rule in the Expanded Temporary Storage Exemption if

purchased in-state would also be exempt from the use tax if purchased out-of-state. As a result, construing the Expanded Temporary Storage Exemption to include a “burn-off” rule does not discriminate against out-of-state purchases.

The ROT and Use Tax are “complementary, interlocking statutes that comprise the taxation scheme commonly referred to as the Illinois sales tax.” *Kean v. Wal-Mart Stores, Inc.*, 919 N.E.2d 926, 932 (2009); 86 Ill. Admin. Code § 150.125 (“The Use Tax Act complements the Retailers’ Occupation Tax Act.”); *id.* § 150.130(b) (The “Retailer’s Occupation Tax and Use Tax work together in a complementary manner.”); *see also id.* § 150.1201 (incorporating all ROT regulations into the Use Tax Act regulations that are not incompatible with the Use Tax); *Brown v. Zehnder*, 693 N.E.2d 1255, 1258 (Ill. App. Ct. 1998) (“The taxation scheme popularly known as the ‘sales tax’ is comprised of two complementary statutes, ROTA and UTA.”).

To ensure that the use tax never applies if the ROT would not apply and thus ensure no discrimination against interstate commerce, the Use Tax Act specifically directs that:

If the seller of tangible personal property for use would not be taxable under the Retailers’ Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act does not apply to the use of the tangible personal property in this State.

35 ILCS 105/3-65; 86 Ill. Admin. Code § 150.101(c). Illinois courts have repeatedly confirmed that this provision exempts from the use tax “out-of-State transactions that would be exempt under the ROTA if the sale had occurred in Illinois.” *Container Corp. of America v. Wagner*, 689 N.E.2d 259, 262 (Ill. App. Ct. 1997).

For example, in *Weber-Stephen Products, Inc. v. Department of Revenue*, the taxpayer purchased an airplane outside of Illinois and brought it back for use in Illinois. 324 Ill. App. 3d 893, 897 (Ill. App. Ct. 2001). The ROT did not apply, so the issue was whether the taxpayer must pay use tax. *Id.* at 898–99. Because the use tax “does not apply to out-of-state transactions that

would be exempt under the ROT if the sale occurred in Illinois,” the court looked at whether the sale would have qualified for the occasional sale exemption to the ROT if the purchase had been in-state. *Id.* at 899. By applying ROT exemptions to out-of-state purchases, the statutory scheme ensures that in-state and out-of-state purchases are treated the same.

The plain and ordinary language of the Expanded Temporary Storage Exemption exempts property that is temporarily stored in Illinois for the purpose of subsequently transporting it outside of Illinois for consumption thereafter solely outside of Illinois. The Airlines temporarily stored in Illinois 98% of the fuel they purchased in Illinois and then transported the fuel outside of Illinois for consumption thereafter 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.

Likewise, for the years during which the Expanded Temporary Storage Exemption was in effect, the same 98% of the fuel would be exempt from the use tax if purchased outside of Illinois under otherwise identical facts because the use tax does not apply to out-of-state purchases that would be exempt from the ROT. 35 ILCS 105/3-65; 86 Ill. Admin. Code § 150.101(c). Illinois law mandates that exemptions to the ROT apply to the use tax to avoid discrimination against interstate commerce, so in-state and out-of-state purchases are treated the same. Therefore, there is no discrimination against out-of-state purchases or interstate commerce.

AAS recognizes that this construction changes the result in *United Airlines v. Mahin*, 273 N.E.2d 585 (Ill. 1971), *vacated and remanded*, 410 U.S. 623 (1973), because it would apply the burn-off rule to out-of-state purchases during the period when the Expanded Temporary Storage Exemption was effective. However, this change is not because the temporary storage exemption

requires the burn-off rule.¹ Instead, it is because the subsequent enactment of the Expanded Temporary Storage Exemption to the ROT and 86 Ill. Admin. Code § 150.310 (a)(6)(D) (the “Permitting Regulation”) require the burn-off rule for in-state purchases, and that exemption is then applied to out-of-state purchases under 35 ILCS 105/3-65.

The burn-off rule is consistent with the Department’s long application of the temporary storage exemption. As the Department conceded during oral argument, the Department has long applied the percentage approach expressly allowed in the Permitting Regulation to the temporary storage exemption (effectively applying the exemption just like the Expanded Temporary Storage Exemption) in all contexts except fuel. *See, e.g.*, Ill. Priv. Ltr. Rul. No. 92-0195, 1992 WL 288552 (April 10, 1992) (allowing the temporary storage exemption to apply to the percentage of paper purchased outside of Illinois, temporarily stored in Illinois, and used entirely outside of Illinois if “from past experience, Z can estimate what portion of the paper will be used entirely outside of Illinois”); Ill. Priv. Ltr. Rul. No. 96-0233, 1996 WL 566707 (June 5, 1996) (finding the temporary storage exemption applies to the portion of pay-per-view equipment that is purchased outside of Illinois, received at an Illinois warehouse, and then delivered to hotels and motels located outside of Illinois); Ill. Priv. Ltr. Rul. 21-0003, 2021 WL 3027531 (April 8, 2021) (applying the temporary storage exemption to the portion of laptops purchased outside of Illinois, temporarily stored in Illinois, and then shipped outside of Illinois for use solely outside of Illinois; use tax was due on laptops that remained in Illinois).

¹ The temporary storage exemption allowed, but did not require, the burn-off rule. *United* addressed only the revocation of the burn-off rule and not its prior application for almost 10 years. 410 U.S. 623, 626 (1973).

Because in-state and out-of-state fuel purchases would be treated the same if the Expanded Temporary Storage Exemption is construed to include a burn-off rule, no discrimination against interstate commerce results.

Conclusion

AAS qualifies for the Expanded Temporary Storage Exemption because AAS's sales to the Airlines satisfied the plain language of the statute and Permitting Regulation. The plain language of the Expanded Temporary Storage Exemption and the Permitting Regulation require the "burn-off" rule. Applying the "burn-off" rule to the Expanded Temporary Storage Exemption does not discriminate against out-of-state purchases because the statutory scheme ensures that in-state and out-of-state purchases are treated the same.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's Supplemental Authority on Constitutionality of the Burn-Off Rule was served upon the following attorneys of record by email on the 12th day of December, 2022.

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