

ILLINOIS INDEPENDENT  
TAX TRIBUNAL

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

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**PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

Petitioner American Aviation Supply LLC (“AAS”) files this motion for summary judgment on its tax-refund claims for overpayments of the Retailer’s Occupation Tax (the “ROT”) against the Illinois Department of Revenue (“IDOR” or the “Department”). There are no material facts in dispute, and the Tribunal should decide this issue as a matter of law.

**Introduction**

This case involves a claim for refund of approximately \$162.7 million of the ROT paid during 2011–2016 on sales of aviation fuel that was temporarily stored in Illinois and consumed solely outside of Illinois. The seller and taxpayer in this case is AAS, an Illinois retailer. The purchasers are American Airlines and U.S. Airways (the “Airlines”).

The legal issue in this case is whether the expanded temporary storage exemption in 35 ILCS 120/2-5(38) (the “Expanded Temporary Storage Exemption”) applies to AAS’s sales of fuel to the Airlines. The Expanded Temporary Storage Exemption exempts from the ROT gross receipts from the sale of “tangible personal property purchased from an Illinois retailer by a

taxpayer engaged in centralized purchasing activities in Illinois 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.” 35 ILCS 120/2-5(38).

The Airlines (a) purchased the fuel in Illinois as centralized purchasers from AAS, an Illinois retailer; (b) temporarily stored the fuel in Illinois in the consortium tanks at O’Hare International Airport for the purpose of subsequently transporting the fuel outside of Illinois; (c) subsequently transported the fuel outside of Illinois; and (d) thereafter consumed the fuel solely outside of Illinois. Under the plain language of the statute, AAS’s sales to the Airlines satisfied the requirements of the Expanded Temporary Storage Exemption. Therefore, AAS was not liable for the ROT and, due to the same expanded temporary storage exemption to the use tax, AAS was not obligated to collect use tax from the Airlines. 35 ILCS § 110/3-45(f).

The Department erroneously relies on *United Air Lines v. Mahin* to deny AAS’s refund claims. 273 N.E.2d 585 (Ill. 1971) *aff’d* 410 U.S. 623 (1973) (“*United*”). However, *United* involved the temporary storage exemption and not the Expanded Temporary Storage Exemption, which contains fundamentally different language. Therefore, *United* cannot control.

The material facts are undisputed and establish that AAS’s sales of fuel to the Airlines are exempt from the ROT under the Expanded Temporary Storage Exemption. Accordingly, summary judgment in AAS’s favor is proper.

### **Undisputed Facts**<sup>1</sup>

During the tax periods at issue, AAS was an Illinois retailer that sold aviation fuel to the Airlines and delivered the fuel to the Airlines in Illinois. Stip. of Facts ¶¶ 3–5, Ex. 2–10; Defs.’ Resps. To Pl.’s First Reqs. For Admiss. (Ex. A - 4). The Airlines then temporarily stored the fuel in consortium tanks at O’Hare International Airport and transported between 98% to 98.79% of the fuel outside of Illinois where it was then consumed solely outside of Illinois. Stip. of Facts ¶¶ 7, 10; Ex. 5–12. AAS paid ROT on its sales of fuel to the Airlines. Stip. of Facts ¶ 6; Ex. 5–12.

The Department issued American Airlines Expanded Temporary Storage Permit No. 4011-3450 (Form ST-50) effective November 1, 2010, and the Department issued U.S. Airways Expanded Temporary Storage Permit No. 0252-2845 (Form ST-50) effective May 1, 2014. Stip. of Facts ¶¶ 8–9; Ex. 13–14; Defs.’ Resps. To Pl.’s First Reqs. For Admiss. (Ex. A - 6). The Airlines provided AAS with the permits and Forms CRT-62, *Certificate of Purchase for Expanded Temporary Storage*, for the tax periods at issue. Stip. of Facts ¶¶ 8–10; Ex. 7–8, 11–12. The Forms CRT-62 certified that 98% to 98.79% of the Airlines’ fuel purchases are consumed solely outside of Illinois. Stip. of Facts ¶ 10; Ex. 7–8, 11–12.

AAS timely filed refund claims for the tax periods from July 1, 2011 through June 30, 2016 seeking a refund of the \$162,689,976 of ROT paid on the fuel that was temporarily stored in Illinois and then transported outside of Illinois for consumption solely outside of Illinois. Stip. of Facts ¶¶ 11–13, 19; Ex. 7–8, 11–12, 15; Defs.’ Resps. To Pl.’s First Reqs. For Admiss. (Ex. A - 7). The Department issued a Notice of Proposed Claim Denial proposing to deny the refund claims for the July 2011 – December 2014 tax period (the “2011 – 2014 Refund Claims”), and AAS timely filed a Request for Informal Conference Board (“ICB”) Review. Stip. of Facts ¶¶ 15–16; Ex. 6, 17. The

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<sup>1</sup> The parties are filing a Stipulation of Facts (“Stip. of Facts”) and Exhibits (Ex.”) simultaneously with this motion.

ICB issued an Action Decision stating that “[t]he basis of the claim is contrary to the Department’s interpretation of the Regulations governing the expanded temporary storage exemption.” Stip. of Facts ¶ 17; Ex. 18; Defs.’ Resps. To Pl.’s First Set of Interrogs (Ex. B - 7). On February 4, 2021, the Department issued a Notice of Tentative Audit Denial of Claim to AAS denying the 2011 – 2014 Refund Claims. Stip. of Facts ¶ 18; Ex. 19. AAS timely petitioned the denial of the 2011 – 2014 Refund Claims on March 15, 2021. Stip. of Facts ¶ 25.

On January 8, 2021, the Department issued a Notice of Proposed Claim Denial denying the refund claims for the January 2015 – June 2016 period (the “2015 – 2016 Refund Claims”). Stip. of Facts ¶ 21; Ex. 21. AAS waived its right to seek review of the proposed claim denial by the ICB, and on April 26, 2021, the Department issued a Notice of Tentative Audit Denial of Claim. Stip. of Facts ¶ 22–23; Ex. 22–23. AAS timely petitioned the denial of the 2015 – 2016 Refund Claims on June 1, 2021. Stip. of Facts ¶ 25. The Tribunal consolidated the cases by its June 8, 2021 Order.

### **Standard of Review**

Summary judgment should be granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c). Questions of statutory interpretation are properly decided by summary judgment. *Lake County Grading Co. v. Village of Antioch*, 19 N.E.3d 615, 619 (Ill. 2014); *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 837 N.E.2d 48, 54 (Ill. 2005). There is no genuine issue of material fact in this case. The issue is purely one of statutory interpretation, and therefore summary judgment is appropriate.

## Argument and Authorities

### **A. AAS's fuel sales qualify for the Expanded Temporary Storage Exemption.**

The sales at issue qualify for the Expanded Temporary Storage Exemption under the plain language of the statute. The primary goal of statutory construction is to “ascertain and effectuate the legislature’s intent.” *Estate of Alford v. Shelton*, 89 N.E.3d 391, 400 (Ill. 2017). The best indicator of legislative intent “is the statutory language itself, given its plain and ordinary meaning.” *Id.*

The Expanded Temporary Storage Exemption exempts from the ROT gross receipts from the sale of “tangible personal property purchased from an Illinois retailer by a taxpayer engaged in centralized purchasing activities in Illinois 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.” 35 ILCS 120/2-5(38). A taxpayer is engaged in “centralized purchasing” if the taxpayer purchases the property in compliance with the statutory requirements for the Expanded Temporary Storage Exemption.<sup>2</sup>

The Airlines (a) purchased the fuel in Illinois as centralized purchasers from AAS, an Illinois retailer; (b) temporarily stored the fuel in Illinois in the consortium tanks at O’Hare International Airport for the purpose of subsequently transporting the fuel outside of Illinois; (c) subsequently transported the fuel outside of Illinois; and (d) thereafter consumed the fuel solely outside of Illinois. Stip. of Facts ¶ 5, 7, 10; Ex. 5–12. Therefore, under the plain language of the statute, AAS’s sales to the Airlines satisfied the requirements of the Expanded Temporary Storage Exemption.

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<sup>2</sup> The regulations define “centralized purchasing” as “the procurement of tangible personal property by persons who purchase tangible personal property solely for use or consumption outside Illinois, who take delivery of that tangible personal property in Illinois and who temporarily store that tangible personal property in Illinois prior to transporting it outside the State for use or consumption solely outside Illinois.” 86 Ill. Admin. Code § 150.310(a)(6)(A).

As required by statute, the Director of Revenue adopted rules for issuing permits to a taxpayer eligible for the Expanded Temporary Storage Exemption (the “Permitting Regulation”).<sup>3</sup> 35 ILCS 120/2-5(38). The Permitting Regulation required a taxpayer who wished to take advantage of the Expanded Temporary Storage Exemption to obtain a permit and provide its Illinois suppliers with a certification (Form CRT-62) stating that it meets the requirements of the Expanded Temporary Storage Exemption. 86 Ill. Admin. Code §§ 150.310(a)(6)(C), (a)(6)(D).

Importantly, the Permitting Regulation provided that if the “holder knows that a *certain percentage* of all his or her purchases from a given seller will qualify for the expanded temporary storage exemption, he or she may provide a blanket certificate of expanded temporary storage stating that a *designated percentage* of purchases qualify for the expanded temporary storage exemption.” *Id.* § 150.310(a)(6)(D) (emphasis added); *see also id.* § 150.310(a)(6)(F) (providing that if property is returned to Illinois, tax is due only on the returned property and does not disqualify the exemption for the other units). Thus, the Permitting Regulation did not require a purchaser to purchase *all* property solely for use or consumption outside of Illinois.

The Department has repeatedly confirmed that the Expanded Temporary Storage Exemption applies on a per unit or percentage basis to the purchases that qualify for the exemption. Defs.’ Resps. To Pl.’s First Set of Interrogs (Ex. B - 8); Defs.’ Resps. To Pl.’s First Reqs. For Admiss. (Ex. A - 10). Step 4 of IDOR Form CRT-62, *Certificate of Expanded Temporary Storage*, (1/02) stated: “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.” The General Information portion of this form explained: “A blanket certificate can also specify that a percentage of the purchases made from the identified seller will

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<sup>3</sup> 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.

be stored temporarily in Illinois before transfer to an out-of-state location for use or consumption solely outside this state.” IDOR Information Bulletin FY 2002-25, Expanded Temporary Storage Exemption, similarly advised: “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.” ST-51, Information for Expanded Temporary Storage Applicants and Permit Holders (Jan. 2007), also explained: “If you know that a certain percentage of the purchases you make from an Illinois retailer will qualify for this exemption, you may provide the retailer with a blanket certificate of expanded temporary storage stating the percentage of the purchases that will qualify. You must pay tax to the retailer on the remaining non-exempt percentage of your purchases.” Lastly, IDOR Information Bulletin FY 2016-12 (June 2016) explained how to discontinue the expanded temporary storage account when the exemption expired on June 30, 2016 and stated: “Once a permit holder has shipped all previously purchased tangible personal property out of Illinois and has satisfied its sales tax liability on any tangible personal property used by the permit holder in Illinois, then the permit holder should contact the Department to discontinue the expanded temporary storage tax account.”

Consistent with the Permitting Regulation and the Department’s guidance, the Airlines each obtained an expanded temporary storage permit from the Director of Revenue and provided the permit and Forms CRT-62 to AAS. Stip. of Facts ¶ 8–10; Ex. 13–14. The Forms CRT-62 certified the percentage of fuel purchased that qualified for the Expanded Temporary Storage Exemption. Stip. of Facts ¶ 10; Ex. 7–8, 11–12.<sup>4</sup> The Permitting Regulation and Department guidance expressly allowed the specified percentage of the Airlines’ fuel purchases to qualify for the exemption when *all* of the Airlines’ fuel purchases do not qualify. The Department does not

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<sup>4</sup> AAS paid the ROT on the sales of fuel consumed in Illinois, and those sales are not included in AAS’s refund claims.

dispute the percentage of fuel that was consumed solely outside of Illinois and therefore qualified for the Expanded Temporary Storage Exemption, if it applies in this case. Stip. of Facts ¶ 10.

**B. *United* did not address the Expanded Temporary Storage Exemption and does not control.**

The Department erroneously relies on *United* in opposing AAS's refund claims. Stip. of Facts ¶ 24, Ex. 6; 273 N.E.2d 585 (Ill. 1971); 410 U.S. 623 (1973). *United* involved a different exemption and does not control this case.

*United* addressed the temporary storage exemption, which provided:

To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances: \*\*\* (d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this state.<sup>5</sup>

*United* purchased fuel in Indiana, stored the fuel in Des Plaines, Illinois, transported the fuel to O'Hare and Midway where it loaded the fuel in an aircraft, and consumed a portion of the fuel in Illinois and a portion of the fuel outside of Illinois. 273 N.E. 2d at 586. The Illinois Supreme Court held that *United*'s use of the fuel did not qualify for the temporary storage exemption. *Id.* at 590. The different language in the Expanded Temporary Storage Exemption renders the holdings in *United* irrelevant to this case.

*First*, the Expanded Temporary Storage Exemption expressly provides that the relevant use that must occur solely outside of Illinois for the exemption to apply is "consumption." By contrast, the temporary storage exemption in *United* did not define consumption as the relevant use that

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<sup>5</sup> Ill. Rev. Stat. ch. 120 par. 439.3 (1955). The temporary storage exemption as in effect for the Airlines' taxable periods remained substantially the same as the temporary storage exemption at issue in *United*. 35 ILCS 105/3-45(d) ("the temporary storage, in this State, of [tangible personal] property that is acquired outside this State and that after being brought into this State and stored here temporarily, is used solely outside this state"). This temporary storage exemption is not at issue in this case.



must occur outside of Illinois but vaguely required the property to be “used” solely outside of Illinois. As a result, *United* involved whether various “uses” of the fuel within Illinois—withdrawal from storage, loading, or transporting the fuel—were a “use” of the fuel that caused the fuel to be ineligible for the temporary storage exemption. *Id.* at 589–90. This issue is irrelevant under the Expanded Temporary Storage Exemption because the relevant use is specifically defined as “consumption.”

Second, unlike the Expanded Temporary Storage Exemption and the Permitting Regulation which make clear that the exemption applies on a per unit or percentage basis, the Illinois Supreme Court did not apply the temporary storage exemption on a per unit or percentage basis. The Illinois Supreme Court explained that the exemption would apply if “United was to withdraw its fuel from storage at Des Plaines [and] transport it outside the State for use elsewhere, as for example at an airport in nearby Wisconsin.” *Id.* at 590. However, where United consumes a portion of the fuel in Illinois, “United does not store in Illinois with any intention that the fuel will be used solely outside this State.” *Id.* To reach this holding, the Illinois Supreme Court necessarily viewed the “fuel” collectively rather than on a per gallon basis because—if looking only to the gallons consumed solely outside Illinois—United did store the fuel in Illinois with the intention that the fuel be used solely outside this State.<sup>6</sup>

Here, however, the Expanded Temporary Storage Exemption expressly authorized the issuance of the Permitting Regulation, which allowed the Airlines to apply the exemption to the percentage of fuel that qualifies. 86 Ill. Admin. Code §§ 130.120(uu), 150.310(a)(6)(D); *see also*

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<sup>6</sup> The Illinois Supreme Court’s decision may also have turned on its holding that taxing only the fuel consumed in Illinois (referred to as the burn-off rule) was unconstitutional. 273 N.E. 2d at 587. The U.S. Supreme Court subsequently determined that the burn-off rule was constitutional because it was a tax on storage (not consumption) even though measured by the fuel consumed over Illinois. 410 U.S. at 632. Therefore, the Permitting Regulation, which effectively applies the burn-off rule, is constitutional.

*Shared Imaging, LLC v. Hamer*, 84 N.E.3d 398, 413–14 (Ill. App. 3d 2017) (analyzing the Expanded Temporary Storage Exemption for medical devices on a per unit basis). The temporary storage exemption at issue in *United* did not authorize permitting regulations, and the Permitting Regulation that applies here had not been promulgated at the time of *United*.

Because the statute expressly directed the Director of Revenue to issue the Permitting Regulation, it is a legislative regulation that carries more weight in statutory interpretation than an interpretive regulation. A legislative regulation is one that is adopted pursuant to the express delegation of authority in the statute, whereas an interpretive regulation is issued without such delegated authority. *United Consumers Club Inc. v. Attorney General*, 456 N.E.2d 856, 858 (Ill. App. 1983) (“A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules.”). A legislative regulation “has the force of law and its language is 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) (order granting motion for summary judgment) (citing *CBS Outdoor, Inc. v. Dep’t of Transp.*, 970 N.E.2d 509, 514 (Ill. App. 2012)). The primary rule of construction is to apply the plain regulatory language of the statute. *See Biekert v. Maram*, 388 Ill. App. 3d 1114, 1119 (5th Dist. 2009).

The Permitting Regulation is consistent with the unique language of the Expanded Temporary Storage Exemption, which applies when the fuel is “consumed” outside of Illinois. 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

transported outside of Illinois be consumed thereafter solely outside Illinois.<sup>7</sup> Thus, the legislative regulation carries out the statutory language of the Expanded Temporary Storage Exemption.

Because of the statutory differences in the two exemptions, *United* cannot control. If the Illinois Legislature intended the provisions to operate identically, the exemptions would contain identical language. As this Tax Tribunal has recognized, the use of different language in a statute indicates that the legislature intended different results. *Bernstein Trust v. Ill. Dep't of Rev.*, 16 TT 59 (Ill. Tax Tribunal July 31, 2017) (order denying motion for summary judgment) (*citing Estate of Alford*, 89 N.E.3d at 402 (use of one term in one part of a statute and a differing term in another indicates different meanings intended); *Julie Q. v. Dep't of Children & Family Serv.*, 995 N.E.2d 977, 985 (2013) (“The legislature’s decision to use certain language in one instance and different language in another indicates that the legislature intended different results.”)). As the name suggests, the legislature intended the Expanded Temporary Storage Exemption to be an expansion of the temporary storage exemption, and it applies by its plain language to this case.

### **Conclusion**

There is no genuine question of material fact that AAS should qualify for the Expanded Temporary Storage Exemption under the ROT. As shown by the plain language of the statute and regulations, AAS satisfied the requirements under Illinois law to exempt its fuel sales from ROT. *United* does not control because it addressed a materially different exemption that did not define the relevant use as “consumption” outside of Illinois and did not require the adoption of rules that expressly adopt a unit or percentage approach. Therefore, AAS respectfully asks that the Tribunal grant its motion for summary judgment and direct the Department to allow AAS’ refund claims

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<sup>7</sup> If the airplane had flown back to Illinois, the exemption would have been lost. *Shared Imaging, LLC v. Hamer*, 84 N.E.3d 398 (Ill. App. 3d 2017) (exemption lost when taxpayer temporarily stored medical devices in Illinois, leased some units outside of Illinois, and then returned those units to the state for storage until leased again); *see also* 86 Ill. Admin. Code § 150.310(a)(6)(F).

for the tax periods in question. Granting this motion for summary judgment fully resolves this case.

DATED: April 22, 2022

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Taxpayer's Motion for Summary Judgment was served upon the following attorneys of record by electronic mail on the 22nd day of April, 2022.

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