ILLINOIS INDEPENDENT

TAX TRIBUNAL

GOLDEN TRIANGLE WHITETAILS, INC., Petitioner,	)	
v.	)	20 TT 34
	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

ORDER ON SUMMARY JUDGMENT MOTION

The Petitioner is a hunting outfitter licensed under the Illinois Wildlife Code, 520 ILCS 5/1.1 *et seq*. It provides guiding and hunting access to hunters for a flat fee. Pet. at ¶ 3.[1] In addition, the Petitioner owns and operates a hunting lodge, which provides overnight accommodations for hunters who choose to use it. *Id.* Hunters that use the lodge are not charged separately and pay the same rate for Petitioner's hunting and guiding services regardless of whether they stay at the lodge. *Id.* at ¶¶ 3-5.

After an audit, the Department determined that the lodge was a hotel within the meaning of section 2(1) of the Hotel Operators' Occupation Tax Act ("HOOT"), 35 ILCS 145/2(1), and issued a Notice of Tax Liability assessing hotel operators' occupation tax against the Petitioner for the period from January 1, 2013 to August 31, 2018. Pet., Notice of Tax Liability. The Petitioner has challenged this Notice in the Tribunal. *Id.*

The parties agree that a threshold issue in this matter is whether Petitioner's hunting lodge qualified as a taxable hotel for the period before August 18, 2017, the

[1] The factual citations are to the Petitioner's Petition ("Pet.").

effective date of certain amendments to the HOOT. They have filed cross-motions for partial summary judgment to determine whether section 2(1)'s statutory language included hunting lodges within the definition of "hotels" subject to HOOT for that period.

The HOOT imposes a tax "upon persons engaged in the business of renting, leasing or letting rooms in a hotel." 35 ILCS 145/3. Before August 18, 2017, the Act defined a hotel as:

> "Hotel" means *any* building or buildings in which the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations. The term *includes* inns, motels, tourist homes or courts, lodging houses, rooming houses and apartment houses.

See 1993 Ill. Legis. Serv. P.A. 88-480 (S.B. 553) (eff. Jan. 1, 1994) (West) (codified at 35 ILCS 145/2(1) (emphasis added).

> Effective August 18, 2017, the definition was changed to read:
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> "Hotel" means any building or buildings in which the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations. The term includes, *but is not limited to*, inns, motels, tourist homes or courts, lodging houses, rooming houses and apartment houses, retreat centers, conference centers, and *hunting lodges*.

2017 Ill. Legis. Serv. P.A. 100-213 (S.B. 587) (eff. Aug. 18, 2017) (West) (codified at 35 ILCS 145/2)(1) (emphasis added).

The Petitioner contends that the amendatory language expressly adding the term "hunting lodges" to section 2(1)'s definition of a hotel was a substantive change to the HOOT that can only be applied prospectively and not retroactively to the tax period before August 18, 2017. Pet'r Mot. for Summary J. at ¶¶ 7-13. The Petitioner thus concluded that it could not be assessed hotel tax until after the effective date of the change.

The Department contends that the August 18, 2017 amendatory language did not change the law but merely clarified it. Dep't Mot. for Summary J. at 5-8. The Department reasons that the language in the pre-August 18, 2017 definition stating that the term hotel "includes inns, motels, tourist homes or courts, lodging houses,

rooming houses and apartment houses" was illustrative and not restrictive. *Id.* at 5-7. The pre-amendment language did not exclude hunting lodges from the HOOT's reach, and thus the amendatory language did not change the law and is not limited to prospective application.

Both parties cite the legislative debate on Senate Bill 587, which contained the amended language at issue, to support their positions. There, Representative Breen stated:

> Senate Bill 587 is a clean-up Bill to really reverse something the Department had recently changed. What they have done is try to apply the hotel operators' tax to small religious retreat houses, who had previously not been treated as subject to that. . . that tax. And so, what we've done here is, through an agreed process, gotten a Bill together to both *settle the dispute as to what a hotel is*, but then also to exempt those who are, for solely religious purposes, using their facilities to advance those religious purposes.

Dep't Motion for Partial Summary J. at 8-9 (citing 100th Ill. Gen. Assem., House Proceedings, May 25, 2017, at 24) (statements of Representative Breen) (emphasis added). The Petitioner cites this language as support for its view that the adding the term "hunting lodges" to the definition of a hotel was a substantive change expanding tax liability that can only be applied prospectively from August 18, 2017. Pet'r Mot. for Summary J. at 1-2.

According to the Department, prior to the enactment of section 2(1)'s amendatory language, it had issued general information letters and a compliance alert, in which it found that hunting lodges were subject to the HOOT. Dep't Mot. for Partial Summary J. at 7 (citing ST 02-0042-GIL (2002), ST 06-0011-GIL (2006), and CA-2016-015). It argues that Representative Breen's reference to settling a "dispute as to what a hotel is" is a reference to these Department rulings and that Representative Breen's statement indicated an intent to clarify rather than change the statutory language in the August 18, 2017 amendment. Dep't Mot. for Summary J. at 9. As the statute was clarified, not changed, the term "hunting lodge" could

be applied to the entire tax period in issue, and the Petitioner was subject to the HOOT before August 18, 2017. *Id.* at 9-10.

Analysis

Summary judgment should be granted when "the pleadings, depositions and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). When both parties file motions for summary judgment, they agree that no material facts are in dispute and invite a decision as a matter of law. *See Oswald v. Hamer*, 2018 IL 122203, ¶ 9.

The parties dispute the retroactive impact of the August 18, 2017 changes to the definition of the term "hotel" in section 2(1) of the HOOT. The temporal reach of a statutory change is provided in section 4 of the Statute on Statutes. This provision states, in relevant part:

> No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.
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> This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

5 ILCS 70/4.

Section 4 has been construed to mean that substantive changes to statutes are applied prospectively, while procedural changes may be applied retroactively, unless clearly stated otherwise. *Caveney v. Bower*, 207 Ill. 2d 82, 92-95 (2003). When amendatory language establishes a new liability, unavailable under the previous version of the law, that new liability is a substantive change and will be

applied prospectively, not retroactively. *See People ex. rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 36.

To determine the temporal effect of the August 18, 2017 amendment then requires the construction of its statutory language to determine whether it established a new tax liability. The rules of statutory construction are well-known: the fundamental rule is to effectuate the legislature's intent, and the best indication of that intent is the plain and ordinary statutory language. *Caveney*, 207 Ill. 2d at 87-88.

The first sentence of the pre-August 18, 2017 language of section 2(1) defined a hotel as "*any* building or buildings in which the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations." *See* 1993 Ill. Legis. Serv. P.A. 88-480 (S.B. 553) (eff. Jan. 1, 1994) (West) (codified at 35 ILCS 145/2(1) (emphasis added). The term "any" is ordinarily used to express a lack of restriction in selecting one of a specified class. *See* "Any." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/any. (Last Accessed Jan. 11, 2021). A synonym of the term "any" is "every." *See* "Any." *Merriam-Webster.com Thesaurus*, Merriam-Webster, https://www.merriam-webster.com/thesaurus/any. (Last accessed Jan. 11, 2021). Thus, the first sentence of the pre-August 18, 2017 language includes hunting lodges within its scope, so long as the lodge met the remaining statutory criteria. *See* 35 ILCS 145/2(1).

The second sentence of the pre-August 18, 2017 definition states that a hotel "includes inns, motels, tourist homes or courts, lodging houses, rooming houses and apartment houses." As a general rule the term "includes" is illustrative and not exhaustive. *See Julie Q. v. Dep't of Children & Family Servs.*, 2013 IL 113783, ¶ 27; *People v. Perry*, 224 Ill. 2d 312, 328-31 (2007); *Gem Elecs. of Monmouth, Inc. v. Department of Revenue*, 286 Ill. App. 3d 660, 667 (4th Dist. 1997), *aff'd,* 183 Ill. 2d 470 (1998); *Paxson v. Bd. of Educ. of Sch. Dist. No. 87*, 276 Ill. App. 3d 912, 920 (2d Dist. 1995). Thus, before August 18, 2017, the plain language of the second sentence of section 2(1) did not exclude hunting lodges from the enumerated list of hotels.

The amendatory language did not change section 2(1)'s meaning. The terms "including" and "including but not limited to," are considered synonymous. *See Julie Q.*, 2013 IL 113783, ¶ 27; *Perry*, 224 Ill. 2d at 330-31. Adding "hunting lodges" to the list of buildings qualifying as hotels did not add a new type of entity not previously taxable under the HOOT.

At oral argument, the Petitioner contended that the change from "including" to "including, but not limited to" must indicate the legislature's intent to change the definition of "hotel." The Tribunal provided Petitioner with opportunity to submit supplemental authority supporting that argument. It responded by arguing the general rule that laws extending taxation should be construed against the government. *See* Pet'r Supp. Auth. & Discussion at 1. But that canon does not permit ignoring the statute's plain language. *See Panhandle E. Pipeline Co. v. Hamer*, 2012 IL App (1st) 113559, ¶¶ 25, 29. Rather, where statutory language is unambiguous statutes "must be given a reasonable construction, without bias or prejudice against either the State or the taxpayer." *Panhandle E. Pipeline Co.*, 2012 IL App (1st) 113559 at ¶ 25 (internal quotation marks omitted).

The Tribunal's own research uncovered one case in which the term "include" was given a restrictive meaning. *See Board of Trustees of Univ. of Ill. v. Illinois Educ. Labor Relations Bd.*, 2012 IL App (4th) 110836, ¶ 34, and the parties were provided an opportunity to comment on that case. There, the statutory language included both the restrictive phrase "comprised of" and the non-restrictive term "including" in two relative clauses in a single sentence. *See* 2012 IL App (4th) 110836 ¶ 14. The court found the sentence ambiguous, so it looked to the legislative history and structure for meaning, and concluded that the restrictive phrase applied. *See id.* at ¶¶ 22-34.

There is no such ambiguity here. As noted above, the original plain language of section 2(1) "including" and the amendatory plain language "including, but not limited to" both have the same meaning. The addition of hunting lodges to the non-exclusive listing of types of hotels in the post-August 18, 2017 statute does not alter

the prior meaning of section 2(1). Under both provisions, hunting lodges could be taxed under the HOOT.

Next, the legislative history does not support either party's construction of the August 18, 2017 amendatory language. Representative Breen stated that the purpose of the amendatory language was "settle the dispute as to what a hotel is." *See* Dep't Motion for Partial Summary J at 8-9 (citing 100th Ill. Gen. Assem., House Proceedings, May 25, 2017, at 24) (statements of Representative Breen). The Department argues that the dispute Representative Breen referred to was over the inclusion of hunting lodges in the definition of hotel under the HOOT in the general information letters and the compliance alert that it had issued. *See* Dep't Mot. for Partial Summary J. at 7 (citing ST 02-0042-GIL (2002), ST 06-0011-GIL (2006), CA-2016-015). But Representative Breen's comment was made in the context of providing a hotel room tax exemption for religious retreats. The Department has not connected its interpretation of the statute with a controversy that would have generated Representative Breen's remarks.

On the other hand, Representative Breen's comments do not support Petitioner's argument that the statute was intended to expand the category of hotels under the HOOT and change the definition of hotel from one in which hunting lodges were excluded to one in which they were included as taxable under the HOOT. Thus, Petitioner's suggestion that these comments support its reading of the statute is unavailing.

The other cases cited by the Petitioner do not support its case. The *J.T. Einoder, Inc.*, decision, 2015 IL 117193, ¶ 36, applied a new mandatory injunction penalty for violating environmental laws prospectively because it added a new liability. In *Weatherguard Constr. Co.*, 2015 IL App 142785, ¶ 73, an action for unpaid wages, the court did not limit a new attorney fee provision's application prospectively, where attorney fees were available under a different prior provision, *id.* at ¶ 73, but applied another new provision adding interest on unpaid wages prospectively because it was not previously available, *id.* at ¶ 75. These two cases support the conclusion reached here.

The remaining cases that the Petitioner cites are inapposite. In *Alwan v. Kickapoo-Edwards Land Trust*, 2018 IL App (3d) 170165, ¶ 15, and *People v. Hunter*, 2016 IL App (1st) 141904, ¶¶ 43-46, the courts applied those statutes' temporal reach as expressly stated in the statutory language. In *Doe v. Dep't of Public Health*, 2017 IL App (1st) 162548, ¶¶ 35-37, the court held that changing the standard on how medical marijuana was evaluated was a substantive change that applied prospectively.

Finally, it must be noted that this decision here is not a finding that the Petitioner was properly assessed hotel tax. It simply holds that it was not excluded from the definition of a hotel as a matter of law for the tax period before August 18, 2017. There remain fact questions as to whether and the degree to which the hunting lodge meets the definition of a building in which "the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations," 35 ILCS 145/2(1), and whether the hotel tax was assessed against the Petitioner in the proper amount.

Conclusion

The Petitioner's motion for partial summary judgment is DENIED and the Department's motion for partial summary judgment is GRANTED. The matter is set for a status conference on January 26, 2021, at 10:30 a.m., by telephone.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: January 11, 2021