

**ILLINOIS INDEPENDENT  
TAX TRIBUNAL**

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

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**ORDER ON SUMMARY JUDGMENT**

The Petitioner in this consolidated matter is a single-member limited liability company formed in Delaware, with its principal place of business in Texas, but which operates as an Illinois retailer. During the tax periods in issue, July 2011 through December 2014 and January 2015 through June 2016, the Petitioner sold aviation fuel to American Airlines, Inc. and U.S. Airways, Inc. (collectively the “Airlines”). For both tax periods, the Petitioner timely filed its Illinois sales and use tax returns and then timely filed amended returns seeking refunds for Retailer’s Occupation Tax (“ROT”) it collected, claiming that most of its fuel sales were exempt from the ROT under the expanded temporary storage exemption found at section 2-5(38) of the Retailers Occupation Tax Act (“ROTA”), 35 ILCS 120/2-5(38). The Department audited the Petitioner for the tax periods in issue, denied the refund claims, and the Petitioner challenged the refund denials in the Tax Tribunal.

The parties have filed cross-motions for summary judgment on the applicability of the expanded temporary storage exemption to the Petitioner’s aviation fuel sales. For the reasons stated below, I find that the Petitioner is not

entitled to claim the expanded temporary storage exemption on the sale of its aviation fuel, and the Department is entitled to summary judgment in its favor.

### **Background**

During the tax periods in issue, the Petitioner contracted, purchased and arranged for the shipment and delivery of aviation fuel into Illinois from various suppliers and resold that fuel to the Airlines. Joint Stipulations of Fact (“Joint Stip.”) at ¶¶ 3-5.<sup>1</sup> The fuel was delivered to the Airlines in Illinois and the fuel was temporarily stored in “consortium tanks at O’Hare International Airport.” *Id.* at ¶¶ 5, 7.

For the tax periods in question, the Petitioner also collected Use Tax from the Airlines on the fuel sales to them and remitted ROT to the Department. *Id.* at ¶ 6. The Department issued an expanded temporary storage permit in 2010 to American Airlines and an expanded temporary storage permit to U.S. Airways in 2014. *Id.* at ¶ 7. The Airlines provided the Petitioner with the Department’s form (known as the CRT-62 form), which certified that between 98% to 98.79% of the fuel sold was consumed by flights outside of Illinois and thus, according to the Airlines, was exempt from ROTA under the expanded temporary storage exemption. *Id.* at ¶ 10, Exs. 7, 8, 11, 12.

The Petitioner properly and timely filed amended sales and use tax returns for the tax periods in issue, seeking refunds based on the application of the expanded temporary storage exemption under section 2-5(38) of the ROTA. *Id.* at ¶¶ 11-13, 19-20.<sup>2</sup> The Department denied the refund claims for the 2011-14 period, and the Petitioners appealed the claim denial to the Informal Conference Board (“ICB”). *Id.* at ¶¶ 15-16. The ICB held that the claims were “contrary to the

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<sup>1</sup> The facts are taken from the party’s joint stipulation of facts and accompanying exhibits.

<sup>2</sup> The Petitioner, on its amended returns, attested to the fact that it refunded the sales taxes collected to the Airlines. *See* Joint Stip. Ex. 7, 8, 11, 12. Thus, the Petitioner had standing to assert the refund claim. *See* 35 ILCS 120/6; *see also Snyderman v. Isaacs*, 31 Ill. 2d 192, 195-96 (1964); *W. F. Monroe Cigar Co. v. Department of Revenue*, 50 Ill. App. 3d 161, 161-62 (1st Dist. 1977).

Department's interpretation of the Regulations governing the temporary storage exemption." *See id.* at ¶ 17, Ex. 18-2.

For the January 2015 to June 2016 audit period, the Petitioner also filed amended returns seeking refunds under section 2-5(38). *Id.* at 19. The refund claims were denied, the Petitioner waived its ICB review rights, and it proceeded directly to the Tribunal on the claim denial. *Id.* at ¶¶ 22-23. The 2015-16 refund claim denial was based on the Department's "interpretation of existing law, including *United Airlines v. Mahin*, 410 U.S. 623 (1973)." <sup>3</sup> *Id.* at ¶ 24.

The Petitioner timely filed petitions challenging the refund denials, and the two matters were consolidated in the Tribunal, where the parties have filed cross-motions for summary judgment on whether the Petitioner is entitled to claim the expanded temporary storage exemption under section 2-5(38) of the ROTA, 35 ILCS 120/2-5(38).

### Analysis

Summary judgment may be sought at any time after the parties have appeared. *See* 735 ILCS 5/2-1005(a)-(b). "The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that 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 parties file cross-motions for summary judgment, they mutually agree that there are no genuine issues of material fact and that only a question of law is involved." *Safety-Kleen Systems, Inc. v. Department of Revenue*, 2020 IL App (1st) 191078, ¶ 21 (internal quotation marks and citation omitted).

The Petitioners seek to take advantage of the expanded temporary storage exemption available under section 2-5(38) the ROTA, 35 ILCS 120/2-5(38), on their sales of aviation fuel to the Airlines. The facts are undisputed, and thus this case

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<sup>3</sup> The full citation of this decision is *United Airlines, Inc. v. Mahin*, 49 Ill. 2d. 45 (1971), *aff'd in part, vacated in part*, 410 U.S. 623 (1973), *aff'd on remand*, 54 Ill. 2d 431 (1973). Each segment of this decisional string has significance in this case and will be discussed separately below.

involves a matter of statutory construction, which is appropriate for consideration on a summary judgment motion. *See Oswald v. Hamer*, 2018 IL 122203, ¶ 9.

A statute should be construed as written and its plain language applied. *Horsehead Corp. v. Department of Revenue*, 2019 IL 124155, ¶ 37. Tax exemptions are, however, strictly construed against the taxpayer, and the taxpayer has the burden to prove its entitlement to the exemption. *Id.* at ¶ 33. All facts are to be understood, and all debatable questions resolved, in favor of taxation and against the exemption from taxation. *Id.*; *Safety-Kleen Systems, Inc.*, 2020 IL App (1st) 191078, ¶ 18.

The ROTA imposes a tax on the business of selling at retail in the State of Illinois measured by the retailer’s gross receipts. 35 ILCS 120/2; *see Container Corp. of America v. Wagner*, 293 Ill. App. 3d 1089, 1092 (1st Dist. 1997). The ROTA is complemented by the Use Tax Act (“UTA”), *see* 35 ILCS 105/3 *et seq.*, which imposes a tax on the privilege of using personal property in Illinois. *See Shared Imaging, LLC v. Hamer*, 2017 IL App (1st) 152817, ¶ 24. This complementary system is intended to protect Illinois retailers from losing sales to out-of-state retailers by taxing the purchases of personal property from out-of-state retailers in the same manner that personal property is taxed when purchased from Illinois retailers. *See Shared Imaging, LLC*, 2017 IL App (1st) 152817, ¶ 24; *Container Corp. of America*, 293 Ill. App. 3d at 1092.

Section 2-5(38) of the ROTA exempts from taxation:

Beginning on January 1, 2002 and through June 30, 2016, 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[.]

\* \* \* \*

The Director of Revenue shall, pursuant to rules adopted in accordance with the Illinois Administrative Procedure Act, issue a permit to any taxpayer in good standing with the Department who is eligible for the exemption under this paragraph (38). The permit issued under this

paragraph (38) shall authorize the holder, to the extent and in the manner specified in the rules adopted under this Act, to purchase tangible personal property from a retailer exempt from the taxes imposed by this Act. Taxpayers shall maintain all necessary books and records to substantiate the use and consumption of all such tangible personal property outside of the State of Illinois.

35 ILCS 120/2-5(38).

Pursuant to its statutory authority, the Department enacted a regulation to enforce the expanded temporary storage exemptions, which states in pertinent part:

A) “Centralized purchasing” means 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.

\* \* \* \*

C) Persons who wish to take advantage of this expanded temporary storage exemption must apply in writing to the Department to obtain an Expanded Temporary Storage Permit.

\* \* \* \*

D) Persons holding a valid Expanded Temporary Storage Permit may claim the expanded temporary storage exemption by providing their Illinois suppliers with a certification that the tangible personal property received in Illinois will be temporarily stored in Illinois for the purpose of being subsequently transported outside this State for use or consumption thereafter solely outside this State . . . . The certification must identify the seller, the purchaser, and the property, and include the purchaser's Expanded Temporary Storage Permit number and signature.

i) If all of an Expanded Temporary Storage Permit holder's purchases qualify for the expanded temporary storage exemption, the Expanded Temporary Storage Permit holder may provide his or her supplier a blanket certificate of expanded temporary storage.

ii) If an Expanded Temporary Storage Permit 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.

86 Ill. Adm. Code 150.310(a)(6).

The Petitioner argued that it complied with all of the statutory and regulatory requirements to obtain the expanded temporary storage exemption. It contended that it was an Illinois retailer from whom the Airlines purchased fuel as a centralized purchaser. Pet'r Mot. for Summary J. at 5. The fuel was temporarily stored in consortium tanks at O'Hare International Airport before being loaded onto airplanes to be transported out of Illinois, where approximately 98% of it was consumed. *See id.* In compliance with section 150.310(a)(6), the Airlines provided the certification that a "designated percentage" of purchases qualified for the expanded temporary storage exemption." *See id.* (citing Ill. Dep't of Revenue, Information Bulletin, *Expanded Temporary Storage Exemption*, FY 2002-25 (January 2002) (explaining certification requirement for expanded temporary storage exemption). Thus, it concluded that it qualified for the exemption.

In order to explain the shortcoming in the Petitioner's argument, it is necessary to trace the history of the expanded temporary storage exemption's language as it has been applied to the sale and purchase of aviation fuel in the ROTA and the UTA. The UTA was enacted in 1955 as a counterpart to the existing ROTA. *See Container Corp. of America*, 293 Ill. App. 3d at 1092. As noted, it complemented the ROTA by assessing tax on the user of personal property that was purchased out-of-state but used in Illinois on the same terms and rate as property purchased in Illinois from an Illinois retailer. *Id.* This arrangement assured that personal property was properly taxed regardless of where the purchase occurred and to eliminate any advantage to states that did not impose a sales tax or did not impose one at the same rate as Illinois. *See id.*

One difference between the ROTA and UTA, was that the UTA contained an exemption from taxation "for 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.” *United Air Lines v. Mahin*, 49 Ill. 2d 45, 47 (1971).<sup>4</sup> Initially, in applying this temporary storage exemption to aviation fuel, the Department applied a “burn-off rule” to fuel purchased outside of Illinois and stored here prior to being loaded onto aircraft and flown out of state. *United Airlines, Inc.*, 49 Ill. 2d at 48-49. Under the burn-off rule, the Department only considered the percentage of the fuel that was consumed by the aircraft in or over Illinois as taxable; the portion of the fuel consumed flying outside of Illinois was not taxable. *Id.* at 48.

In 1963, the Department changed its interpretation of the temporary storage exemption and determined the taxable moment occurred when the aviation fuel was off-loaded from the storage tanks and onto the aircraft. *Id.* at 48. Under this new interpretation of the exemption, all of the fuel loaded into the airplanes’ fuel tanks was taxable and not just that portion burned-off flying over Illinois. *Id.* at 48-49.

The Illinois Supreme Court upheld the Department’s elimination of the burn-off rule:

In language which we find to be plain, simple and unambiguous, the Act has granted exemption to “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.*” (Emphasis added.) Exemption is thus granted only as to tangible personal property which is stored here temporarily and which, upon withdrawal from storage, is to be used solely outside Illinois. To put it another way, the legislature has stated that the temporary storage and the withdrawal therefrom are

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<sup>4</sup> Currently, the Use Tax Act exempts:

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* or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside this State.

35 ILCS 105/3-55(e). Thus, the operative language of the temporary storage exemption has not substantially changed.

not taxable uses, if the property in question is to be used solely outside the State.

*Id.* at 55 (emphasis in original).

The United State Supreme Court upheld the Illinois Supreme Court’s construction of the statute against a constitutional challenge, holding that taxing all of the fuel and not just the portion consumed over Illinois did not violate the Commerce Clause. *See United Airlines, Inc. v. Mahin*, 410 U.S. 623, 629-32 (1973). The Court remanded to the case back to the Illinois Supreme Court to reconsider its construction of the statute exclusively under state law, and the Illinois Supreme Court again upheld the Department’s construction of the exemption, holding that it did not make an allowance for a burn-off rule. *See United Air Lines, Inc. v. Mahin*, 54 Ill. 2d 431 (1973) (per curiam)

There things stood until 2001, when the General Assembly added the expanded temporary storage exemption to the ROTA. *See* Public Act 92-488 (eff. Aug. 23, 2001) (adding 35 ILCS 120/2-5(38)).<sup>5</sup> The language of section 2-5(38) of the ROTA mirrored much of the language of the UTA’s temporary storage exemption but applied it to purchases from an Illinois retailer rather than to purchases from out-of-state. *Compare* 35 ILC 120/2-5(38) & 35 ILCS 105/3-55(e). The new provision added a requirement that the taxpaying retailer be engaged in “centralized purchasing activities in Illinois.” 35 ILCS 120/2-5(38). Central to the dispute in this case, the expanded temporary storage exemption applied to property temporarily stored in Illinois not just for “use” solely outside the state but also “for the purpose of subsequently transporting it outside this State for . . . consumption thereafter solely outside this State.” *Id.*

According to the bill’s sponsor:

What we’re trying to do is put Illinois businesses on the same footing as out-of-state businesses. Currently, we have a disincentive inherent in our tax structure which is an incentive for Illinois companies to

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<sup>5</sup> Public Act 92-488 also added identical language to the UTA. *See* Public Act 92-488 (eff. Aug. 23, 2001) (codified at 35 ILCS 105/3-55(j)). The language of section 3-55(j) of the UTA applies to Illinois retailers just as does section 2-5(38) of the ROTA. The new section 3-55(j) of the UTA thus does not affect the reasoning or result in this case.



purchase from out-of-state corporations and retailers in order to take advantage of the Illinois temporary storage -- storage exemption. What this bill says is, 'Look, you can take advantage of that if you're buying from an Illinois company as well.'

92nd Gen. Ass., Senate Proceedings, March 30, 2001, pp. 70-71 (remarks of Sen. Roskam).

The Petitioner here has focused on the term “consumption,” which has a different meaning than the term “use,” to argue that the legislature intended to broaden the ROTA exemption’s application beyond that found in the UTA to include a burn-off rule for aviation fuel purchased in-state. *See* Pet’r Mot. for Summ. J. at 8-11; Pet’r Resp. to Resp’t Cross-Mot. for Summ. J. & Reply in Supp. of Pet’r Mot. for Summ. J. at 2-8. The terms “consumption” and “use” may have different meanings, but as the Department points out, the term “solely” was not changed in the expanded temporary storage exemption. *See* Dep’t Br. in Supp. of Cross-Mot. for Summ. J. & Resp. to Pet’r Mot. for Summ. J. at 9-10. And it is the term “solely” that controls this case.

In *United Airlines*, the Illinois Supreme Court construed the term solely as applied to the temporary storage exemption to mean only or exclusively, *see* 49 Ill. 2d at 55, which is the plain and ordinary meaning of the term, *see* <https://www.dictionary.com/browse/solely>. The parties here have stipulated that a portion of the fuel loaded onto the Airlines aircraft was consumed in or over of Illinois in the course taking off from Illinois airports and flying out-of-state. *See* Jt. Stip. at 10, Exs. 7, 8, 11, 12. Thus, under *United Airlines*, the aviation fuel was not consumed “solely” outside the state, and the Petitioner is not entitled to claim the expanded temporary storage exemption for the tax years in issue under the provision’s plain language.

The Petitioner’s further argument that the addition of the term “thereafter” to the expanded temporary storage exemption’s language alters the analysis, *see* Pet’r Summ. J. Mot. at 6-8, is equally unpersuasive. Even applying this temporal

limitation, the aviation fuel was still partially (not solely) consumed in Illinois after it was removed from storage and loaded onto the aircraft.

Likewise, the Petitioner's reliance on the language of the governing regulation and the Department's Information Bulletin that allowed or instructed a taxpayer to certify that a certain percentage of sales are consumed outside Illinois, *see* Pet'r Resp. to Resp't Cross-Mot. for Summ. J. & Reply in Supp. of Pet'r Mot. for Summ. J. at 5-7 (referencing 86 Ill. Adm Code 150.310(a)(6) and Ill. Dep't of Revenue, Information Bulletin, *Expanded Temporary Storage Exemption*, FY 2002-25 (January 2002)), is misplaced. The interpretive language cannot be read more expansively than the governing statute. *See Hartney Oil Corp. v. Hamer*, 2013 IL 115130, ¶ 61. If the Petitioner's reading of the regulatory language and information bulletin as applied to aviation fuel were accepted it would do just that – expand the exemption beyond the exemption's plain statutory language.

Further, the Petitioner's construction of the expanded temporary storage exemption does more than create parity between Illinois and out-of-state retailers, it gives an advantage to in-state retailers because an in-state retailer of aviation fuel could take advantage of a burn-off rule, while an out-of-state retailer could not. To accept the Petitioner's construction of the expanded temporary storage exemption would thus likely result in unconstitutional economic discrimination under the Commerce Clause. *See Russell Stewart Oil Co. v. State*, 124 Ill. 2d 116, 122-28 (1988) (striking down sales tax preference for in-state distillers of ethanol) (citing *e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)); *see also New Energy Co. v. Limbach*, 269, 278 (1988) (“Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]; discriminatory taxation of out-of-state manufacturers does.”). Such a construction should be avoided, if possible. *See Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986); *Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill. 2d 353, 363 (1980).

The Petitioner argued that there should not be any discriminatory effect here because Illinois law provides that a transaction not taxable under the ROTA, is also not a taxable use under the UTA. *See* Pet'r Supplemental Authority at 2 (citing

*Container Corp. of America*, 293 Ill. App. 3d at 1092; 35 ILCS 105/3-65). Further, the Petitioner contended that outside of aviation fuel sales, the Department has permitted a percentage approach to the UTA's temporary storage exemption's application. See Pet'r Supplemental Authority at 4 (citing e.g., Private Letter Ruling No. ST-21-0003 (April 8, 2021) (computers); Private Letter Ruling No. ST-96-2033 (June 5, 1996) (electronic equipment); Private Letter Ruling No. ST-92-0195 (April 10, 1992) (paper)). Thus, there should be no discriminatory effect in taxing a percentage of the aviation fuel sales under the expanded temporary storage exemption. Pet'r Supplemental Authority at 4-5.

Putting aside the limited precedential value of the private letter rulings, see *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 370 (2009), the Petitioner acknowledges, that using this reasoning to apply a percentage approach for aviation fuel sales "changes the result" in *United Airlines*, see Pet'r Supplemental Authority at 3. Of course, such a ruling is beyond this court's purview. See *People ex rel. Department of Human Rights v. Oakridge Healthcare Center, LLC*, 2020 IL 124753, ¶ 30.

In sum, the plain language of section 2-5(38) supports the Department's rather than the Petitioner's construction of expanded temporary storage exemption. If there is any doubt as to this interpretation, constitutional avoidance also cautions against the Petitioner's interpretation of the statute. In construing a tax exemption, all debatable questions must be resolved in favor of taxation and against the exemption from taxation. See *Horsehead Corp.*, 2019 IL 123155, ¶ 33; *Safety-Kleen Systems, Inc.*, 2020 IL App (1st) 191078, ¶ 18. Under these principles, the Petitioner is not entitled to the expanded temporary storage exemption on the sale of aviation fuel to the Airlines during the tax periods in issue.

### **Conclusion**

The Petitioner's motion for summary judgment is DENIED, the Department's cross-motion for summary judgment is GRANTED and the Notices of Proposed Claim Denial involved in this consolidated action are affirmed.

This is a final order subject to appeal under section 3-113 of the Administrative Review Law, 735 ILCS 5/3-113, and service by email is service under section 3-113(a), *see* 35 ILCS 1010/1-90; 86 Ill. Adm. Code 5000.330. The Tribunal is a necessary party to this appeal.

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

Date: January 3, 2023