

UT 05-1

Tax Type: Use Tax

Issue: Whether Kerosene Based Jet Fuel Constitutes Motor Fuel

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

<i>ABC AIRLINES, INC.</i>)	Docket No.	03-ST-0000
<i>and XYZ AIRLINES, INC.,</i>)	IBT Nos.	0000-0000
Taxpayers)		0000-0000
v.)		
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Gregory W. Gallagher, Kirkland & Ellis, LLP, appeared for XYZ Airlines, Inc. and ABC Airlines, Inc.; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: This matter involves the Illinois Department of Revenue's ("Department['s]") denial of claims for refund of Illinois use tax ("UT") filed by ABC Airlines, Inc. and XYZ Airlines, Inc. Taxpayers and the Department agreed to consolidate the cases for hearing. For convenience, I will use the singular, "XYZ," to refer to both taxpayers, unless otherwise indicated. XYZ's claims are based on Public Act 91-872, which temporarily reduced the use tax rate imposed on the privilege of using, in Illinois, motor fuel or gasohol purchased at retail. The issue is whether that temporary rate reduction applied to XYZ's purchase and use of kerosene-type jet fuel in jet aircraft in Illinois.

In lieu of hearing, the parties submitted a stipulated record, consisting of a stipulation of facts and a single stipulated exhibit. I am including in this recommendation

findings of fact and conclusions of law. I recommend that the matter be resolved in favor of the Department, and that the denial be finalized as issued.

Findings and/or Stipulations of Fact:

1. Taxpayers are both corporations organized under the laws of the State of Delaware. Taxpayers are both wholly owned subsidiaries of XXX Corporation (“XXX”). Stip. ¶ 2.
2. XYZ is in the business of providing air transportation, cargo and other transportation-related services. Stip. ¶ 3.
3. In order to supply airplanes and ground vehicles at O’Hare International Airport (“O’Hare”) with fuel during the months at issue, XYZ purchased kerosene-type jet fuel (hereinafter, “KT jet fuel”) at a facility in East Chicago, Indiana and transported the fuel by pipeline to a facility in Des Plaines, Illinois. Stip. ¶ 4. XYZ stored the KT jet fuel in Des Plaines, Illinois until needed, at which time the fuel was transported by pipeline to O’Hare. *Id.*
4. In order to supply airplanes and ground vehicles at Midway International Airport (“Midway”) with fuel during the months at issue, XYZ purchased KT jet fuel from suppliers into airport terminal storage located at Midway. Stip. ¶ 5. XYZ stored the KT jet fuel at Midway until needed, at which time the fuel was transported by pipeline to the aircraft fueling stations. *Id.*
5. XYZ used KT jet fuel during the months at issue principally to operate its airplanes. Stip. ¶ 7.
6. KT jet fuel is:
 - a volatile and inflammable liquid. Stip. ¶ 8.

- capable of being used for the generation of power in an internal combustion engine. Stip. ¶ 9.
 - not the same as any product commonly or commercially known or sold as gasoline. Stip. ¶ 10.
 - not a combustible gas that exists in a gaseous state at 60 degrees Fahrenheit. Stip. ¶ 11.
7. The XYZ Society for Testing and Materials (“ASTM”) issued specification D 1655 as the standard classification for KT jet fuel. Stip. ¶ 12.
 8. The KT jet fuel XYZ used at O’Hare and Midway met ASTM specification D 1655 and military specifications MIL-T-5624R and MIL-T-83133D (Grades JP-5 and JP-8). Stip. ¶ 13.
 9. The engines on the airplanes XYZ operates are internal combustion engines. Stip. ¶ 14.
 10. KT jet fuel is capable of being used to generate power in a diesel engine (i.e., an engine in which the fuel is injected into the combustion chamber and ignited by pressure without electric spark). Stip. ¶ 15.
 11. A diesel engine is an internal combustion engine. Stip. ¶ 16.
 12. Certain motor vehicles have diesel engines. Stip. ¶ 17.
 13. XYZ’s use of KT jet fuel in Illinois was subject to tax imposed by Illinois’ Use Tax Act (“UTA”) (35 ILCS 105/1 *et seq.*; Stip. ¶¶ 18-19), but its receipt of KT jet fuel for use in Illinois was not subject to the tax imposed by § 2a of Illinois’ Motor Fuel Tax Law (“MFTL”). Stip. ¶ 37; 35 ILCS 505/2a. Nor was its purchase of such fuel subject to the tax imposed by § 2 of the MFTL. 35 ILCS 505/2; *see also* Stip. ¶ 36.

14. XYZ reported the value of the KT jet fuel it imported into Illinois for use on monthly sales and use tax returns filed with the Department. Stip. ¶ 19. XYZ paid the use tax shown on such returns at the time the returns were filed. *Id.*
15. For July 2000 through December 2000, XYZ reported and paid use tax on the KT jet fuel it imported into Illinois at a rate of 6.25%. Stip. ¶ 27.
16. In February 2003, XYZ filed amended use tax returns to report changes regarding the months of July through December 2000. Stip. ¶ 28. In May 2003, ABC filed amended use tax returns to report changes regarding the months of July through December 2000. Stip. ¶ 29.
17. On those amended returns, taxpayers stated that they overpaid their Illinois use tax liabilities regarding its use of KT jet fuel during the months of July through December 2000 in the aggregate amount of \$5,804,437 (\$5,339,053 for XYZ, and \$465,384 by ABC), and requested refunds of those amounts. Stip. ¶¶ 30-31.
18. The Department rejected taxpayers' requests for refund, and issued Notices of Tentative Denial of Claim for Use Tax ("denials") to them. Stip. ¶¶ 32-33.
19. Taxpayers timely protested the Department's denials and asked for an administrative hearing. Stip. ¶¶ 34-35.
20. In July 1999, XXX, on behalf of itself and certain subsidiaries including taxpayers here, entered into a settlement agreement with the U.S. Environmental Protection Agency ("EPA"). Stip. ¶ 39. Pursuant to that settlement agreement, XYZ agreed that:

During the last quarter of 1998, [XXX] conducted a self-audit of all its domestic airport facilities and reported to EPA that it potentially had violated the federal diesel fuels regulations at 40 C.F.R. § 80.29. In summary, [XXX]

reported using Jet fuel A to fuel eighty-one motor vehicles located at ten airports, and selling approximately 1.3 million gallons of jet fuel A to customers who used the fuel to operate motor vehicles. Jet fuel A, a fuel primarily intended for use in jet aircraft, has a sulfur content greater than 0.05 weight percent. As a result, use of jet fuel A to fuel motor vehicles constitutes a violation of section 211(g) of the [Clean Air] Act and 40 C.F.R. § 80.29.

[XXX] took prompt action to remedy the violations and prevent future violations. [XXX] changed its practices for fueling its motor vehicles to ensure proper diesel fuel is used, and stopped supplying jet fuel A to others for use in motor vehicles. [XXX] certifies that it is now in full compliance with the diesel fuel provision of section 211(g) of the [Clean Air] Act and 40 C.F.R. § 80.29.

In Re XXX Corporation, No. AED/MSEB – 5045, Settlement Agreement (accompanying exhibit to Stipulation of Facts), ¶¶ 7a-7b (hereinafter, Stip. Ex. 1).

21. The settlement agreement between XXX and the EPA also provides:

The diesel misfueling provision of the [Clean Air] Act provides that no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 weight percent. In addition, the diesel fuel regulations prohibit any person from dispensing, selling, supplying, offering for sale or supply, transporting, or introducing into commerce diesel fuel for use in motor vehicles unless the diesel fuel has a sulfur concentration no greater than 0.05 weight percent. The Act also subjects violators to a civil penalty of up to \$27,500 per day for each violation plus the amount of economic benefit or savings resulting from the violation.

Stip. Ex. 1, ¶ 2.

22. KT jet fuel has a sulfur percentage, by weight, greater than 0.05 percent. Stip. ¶

38.

23. As a result of XYZ's admitted violations of the diesel provisions of the Clean Air Act, the EPA agreed to "mitigate the civil penalty to \$95,000 subject to [XXX's] successful completion of the terms of [Stip. Ex. 1]." Stip. Ex. 1, ¶ 8.

Conclusions of Law:

Description of Statutes and Regulations Relied Upon

This dispute involves the effect of P.A. 91-872 on XYZ's use of KT jet fuel at O'Hare and Midway airports in Illinois. Stip. ¶ 1. Public Act 91-872 added the following paragraph to § 3-10 of the UTA:

Beginning on July 1, 2000 and through December 31, 2000, with respect to motor fuel, as defined in Section 1.1 of the Motor Fuel Tax Law, and gasohol, as defined in Section 3-40 of the Use Tax Act, the tax is imposed at a rate of 1.25%.

35 ILCS 105/3-10. Section 3-10 of the UTA sets the rate of tax imposed on a person's use of tangible personal property purchased at retail from a retailer. *Id.* The question here is whether KT jet fuel is included within the phrase, " ' motor fuel, as defined in Section 1.1 of the Motor Fuel Tax Law" *Id.*; P.A. 91-872.

During the period the UTA's temporary rate reduction was in effect, § 1.1 of the MFTL defined motor fuel as:

... all volatile and inflammable liquids produced, blended or compounded for the purposes of, or which are suitable or practicable for, operating motor vehicles. Among other things, "Motor Fuel" includes "Special Fuel" as defined in Section 1.13 of this Act.

35 ILCS 505/1.1. The second sentence of § 1.1 was added to § 1.1 in 1963. 35 ILCS 505/1.1 (Smith-Hurd) (Historical and Statutory Notes).

During the claim period, § 1.13 of the MFTL defined “special fuel” as:

... all volatile and inflammable liquids capable of being used for the generation of power in an internal combustion engine except that it does not include gasoline as defined in Section 5, example (A), of this Act, or combustible gases as defined in Section 5, example (B), of this Act. “Special Fuel” includes diesel fuel as defined in paragraph (b) of Section 2 of this Act.

35 ILCS 505/1.13.

To better understand the General Assembly’s definitions of terms used in the MFTL, and which are relevant to this dispute, I also describe here other significant provisions within the MFTL.

Section 2 of the MFTL imposes a tax on the privilege of operating motor vehicles and recreational-type watercraft upon the public highways and waters of Illinois. **35 ILCS 505/2.** In summary, § 2 imposes tax at different rates for using motor fuel (at the rate of 13¢ per gallon) and diesel fuel (at the rate of 15½¢ per gallon) in motor vehicles or recreational type watercraft on Illinois’ public highways or waterways. **35 ILCS 505/2(a)-(b).** It also imposes a tax on the privilege of being a retailer or reseller of all motor fuel used in motor vehicles and recreational type watercraft operating on Illinois’ public highways or waterways. **35 ILCS 505/2(c).**

During the claim period, § 2 provided:

A tax is imposed on the privilege of operating motor vehicles upon the public highways and recreational-type watercraft upon the waters of this State.

(a) Prior to August 1, 1989, the tax is imposed at the rate of 13 cents per gallon on all motor fuel used in motor vehicles operating on the public highways and recreational type watercraft operating upon the waters of this State. Beginning on August 1, 1989 and until January 1, 1990, the rate of the tax imposed in this paragraph shall be 16 cents

per gallon. Beginning January 1, 1990, the rate of tax imposed in this paragraph shall be 19 cents per gallon.

(b) The tax on the privilege of operating motor vehicles which use diesel fuel shall be the rate according to paragraph (a) plus an additional 2 ½ cents per gallon. "Diesel fuel" is defined as any product intended for use or offered for sale as a fuel for engines in which the fuel is injected into the combustion chamber and ignited by pressure without electric spark.

(c) A tax is imposed upon the privilege of engaging in the business of selling motor fuel as a retailer or reseller on all motor fuel used in motor vehicles operating on the public highways and recreational type watercraft operating upon the waters of this State: (1) at the rate of 3 cents per gallon on motor fuel owned or possessed by such retailer or reseller at 12:01 a.m. on August 1, 1989; and (2) at the rate of 3 cents per gallon on motor fuel owned or possessed by such retailer or reseller at 12:01 A.M. on January 1, 1990.

Retailers and resellers who are subject to this additional tax shall be required to inventory such motor fuel and pay this additional tax in a manner prescribed by the Department of Revenue.

The tax imposed in this paragraph (c) shall be in addition to all other taxes imposed by the State of Illinois or any unit of local government in this State.

(d) Except as provided in Section 2a, the collection of a tax based on gallonage of gasoline used for the propulsion of any aircraft is prohibited on and after October 1, 1979.

(e) The collection of a tax, based on gallonage of all products commonly or commercially known or sold as 1-K kerosene, regardless of its classification or uses, is prohibited (i) on and after July 1, 1992 until December 31, 1999, except when the 1-K kerosene is either: (1) delivered into bulk storage facilities of a bulk user, or (2) delivered directly into the fuel supply tanks of motor vehicles and (ii) on and after January 1, 2000. Beginning on January 1, 2000, the collection of a tax, based on gallonage of all products commonly or commercially known or sold as 1-K kerosene, regardless of its classification or uses, is prohibited except when the 1-K kerosene is delivered directly into a storage tank that is located at a facility that has withdrawal facilities that are readily accessible to and are capable of dispensing 1-K kerosene into the fuel supply tanks of motor vehicles.

Any person who sells or uses 1-K kerosene for use in motor vehicles upon which the tax imposed by this Law

has not been paid shall be liable for any tax due on the sales or use of 1-K kerosene.

35 **ILCS** 505/2 (Smith-Hurd) (Historical and Statutory Notes).

The original version of subparagraph 2(d), which exempts aviation gasoline from the different taxes imposed by § 2 of the MFTL, was added in 1979. *Id.*; P.A. 81-471 (effective October 1, 1979). Subparagraph 2(e), relating to 1-K kerosene, was added by P.A. 87-149 in 1992. 35 **ILCS** 505/2 (Smith-Hurd) (Historical and Statutory Notes); P.A. 87-149 (effective July 1, 1992).

Section 2a of the MFTL imposes a tax that is distinct from the tax imposed by § 2. Section 2a's tax is imposed on the privilege of being a receiver in Illinois of fuel for sale or use. 35 **ILCS** 505/2a. Section 2a of the MFTL was added to the MFTL in 1989, when the General Assembly passed P.A. 86-125. 35 **ILCS** 505/2a (Smith-Hurd) (Historical and Statutory Notes); P.A. 86-125 (effective July 28, 1989). The Act that created § 2a also amended § 1 of the MFTL (the MFTL's definition section), to add a definition of the term "fuel." 35 **ILCS** 505/1.19; P.A. 86-125. Section 1.19 of the MFTL defines fuel as:

... all liquids defined as 'Motor Fuel' in Section 1.1 of this Act *and* aviation fuels and kerosene, but excluding liquefied petroleum gases.

35 **ILCS** 505/1.19 (Smith-Hurd) (Historical and Statutory Notes) (emphasis added); P.A. 86-125. In a nutshell, P.A. 86-125, which created the tax imposed by § 2a and added the statutory definition of fuel, made " 'Motor Fuel' [as defined] in Section 1.1 of this Act" a subcategory of fuel.

During the claim period, § 2a of the MFTL provided:

Except as hereinafter provided, on and after January 1, 1990 and before January 1, 2013, a tax of three-tenths of

a cent per gallon is imposed upon the privilege of being a receiver in this State of fuel for sale or use.

The tax shall be paid by the receiver in this State who first sells or uses fuel. In the case of a sale, the tax shall be stated as a separate item on the invoice.

For the purpose of the tax imposed by this Section, being a receiver of “motor fuel” as defined by Section 1.1 of this Act, and aviation fuels, home heating oil and kerosene, but excluding liquefied petroleum gases, is subject to tax without regard to whether the fuel is intended to be used for operation of motor vehicles on the public highways and waters. However, no such tax shall be imposed upon the importation or receipt of aviation fuels and kerosene at airports with over 300,000 operations per year, for years prior to 1991, and over 170,000 operations per year beginning in 1991, located in a city of more than 1,000,000 inhabitants for sale to or use by holders of certificates of public convenience and necessity or foreign air carrier permits, issued by the United States Department of Transportation, and their air carrier affiliates, or upon the importation or receipt of aviation fuels and kerosene at facilities owned or leased by those certificate or permit holders and used in their activities at an airport described above. ***

35 ILCS 505/2a (Smith-Hurd) (Historical and Statutory Notes).

When it passed P.A. 86-125, the General Assembly also amended § 17 of the MFTL. 35 ILCS 505/17 (Smith-Hurd) (Historical and Statutory Notes); P.A. 86-125. Section 17 identifies the purposes underlying the different taxes imposed by §§ 2 and 2a of the MFTL. 35 ILCS 505/17. During the claim period, § 17 provided:

It is the purpose of Sections 2 and 13a of this Act to impose a tax upon the privilege of operating each motor vehicle as defined in this Act upon the public highways and the waters of this State, such tax to be based upon the consumption of motor fuel in such motor vehicle, so far as the same may be done, under the Constitution and statutes of the United States, and the Constitution of the State of Illinois. It is the purpose of Section 2a of this Act to impose a tax upon the privilege of importing or receiving in this State fuel for sale or use, such tax to be used to fund the Underground Storage Tank Fund. If any of the

provisions of this Act include transactions which are not taxable or are in any other respect unconstitutional, it is the intent of the General Assembly that, so far as possible, the remaining provisions of the Act be given effect.

35 **ILCS** 505/17; P.A. 86-125. Amended § 17 makes clear that not everything taxed under the MFTL is taxed as motor fuel.

Six months before the claim period began, the General Assembly amended the MFTL again, to add a definition of the term, “[KT] jet fuel.” 35 **ILCS** 505/1.25 (Smith-Hurd) (Historical and Statutory Notes); P.A. 91-872 (effective January 1, 2000). Thus, before, during and after the claim period, § 1.25 of the MFTL defined KT jet fuel as

... any jet fuel as described in ASTM specification D 1655 and military specifications MIL-T-5624R and MIL-T-83133D (Grades JP-5 and JP-8).

35 **ILCS** 505/1.25 (Smith-Hurd) (Historical and Statutory Notes).

Finally, and after the legislature passed the UTA’s temporary tax reduction for motor fuel and gasohol, the Department adopted an emergency Retailers’ Occupation Tax (“ROT”) regulation to reflect the changes made by P.A. 91-872. 24 Ill. Reg. 11324 (July 28, 2000) (amending 86 Ill. Adm. Code 130.101(b)); Stip. ¶ 27; *see also* 35 **ILCS** 120/12 (authorizing the Department to “make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of [the Retailers’ Occupation Tax Act (“ROTA”)] as may be deemed expedient”). Effective July 12, 2000, ROT regulation § 130.101(b) provided, in pertinent part:

By way of illustration and not limitation, the following are considered motor fuel:

- 1) Gasoline
- 2) Diesel fuel
- 3) Combustible gases (e.g., liquefied petroleum gas and compressed natural gas) delivered directly into the fuel supply tanks of motor vehicles

4) Gasohol.

By way of illustration and not limitation, the following are not considered motor fuel:

- 1) Avgas
- 2) Jet fuel
- 3) 1-K kerosene
- 4) Combustible gases unless delivered directly into the fuel supply tanks of motor vehicles
- 5) Heating oil (e.g., kerosene and fuel oil) unless delivered directly into the fuel supply tanks of motor vehicles, in which case it is considered diesel fuel.

24 Ill. Reg. 11324 (July 28, 2000); 86 Ill. Adm. Code 130.101(b).

Summary of Arguments

XYZ presents three fundamental arguments why its refund claims should be granted. First, it argues that the temporary rate reduction applies because KT jet fuel meets the definition of motor fuel set forth in § 1.1 of the MFTL. Taxpayer’s Initial Brief (“Taxpayer’s Brief”), pp. 6-11. Next, it argues that the emergency Illinois Retailers Occupation Tax (“ROT”) regulation, which provides that KT jet fuel does not constitute motor fuel, is invalid. *Id.*, pp. 11-17. Finally, *XYZ* asserts that, even if motor fuel does not include KT jet fuel, it is still entitled to a refund regarding the jet fuel it used between July 1 and July 11, 2000, when the Department adopted the emergency regulation. *Id.*, p. 17.

The Department responds, first, that since the applicable and properly adopted emergency ROT regulation provides that motor fuel does not include KT jet fuel, *XYZ*’s claim must be denied. *See* Department’s Response Brief (“Department’s Brief”), pp. 4-8. The Department next contends that KT jet fuel is neither motor fuel nor special fuel. *Id.*, pp. 8-10. Finally, it argues that the emergency regulation effectuates the Illinois General

Assembly’s intent that the phrase “ ‘motor fuel, as defined in Section 1.1 of the [MFTL] ...” not include KT jet fuel. *Id.*, pp. 10-16.

Analysis:

By statute, the Department establishes the *prima facie* correctness of its action when it introduces its denial of XYZ’s claim into evidence, under the Director’s certification. 35 ILCS 105/20. The Department’s *prima facie* case is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department’s determinations are wrong. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156-57, 242 N.E.2d 205, 206-07 (1968); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832, 527 N.E.2d 1048, 1052 (1st Dist. 1988). Here, therefore, XYZ will succeed if it establishes that the Illinois General Assembly, when it passed the temporary rate reduction, intended the phrase “motor fuel, as defined in Section 1.1 of the [MFTL] ...” to include KT jet fuel. 35 ILCS 105/3-10; *but see* Pre-School Owners Association of Illinois, Inc. v. Department of Children and Family Services, 119 Ill. 2d 268, 518 N.E.2d 1018 (1988) (administrative regulations are presumed valid).

Whether KT Jet Fuel Constitutes “ ‘Motor Fuel’ As Defined By Section 1.1 of [the MFTL]”?

The parties agreed that “[t]he issue presented by this proceeding is whether [KT] jet fuel utilized by the taxpayers during the period of July 2000 through [December] 2000 constituted ‘motor fuel’ as defined in Section 1.1 of the Illinois [MFTL].” Stip. ¶ 1. This is a question of legislative intent — did the legislature intend the temporary rate reduction for use tax on “motor fuel ... and gasohol” to extend to KT jet fuel? *See* Chicago Tribune

Co. v. Johnson, 106 Ill. 2d 63, 69, 477 N.E.2d 482, 484 (1985) (“It is of course fundamental that in statutory construction a court will seek to determine the legislative intent.”); *see also* Costello v. Governing Bd. Of Lee Co. Special Ed. Assoc., 252 Ill. App. 3d 547, 557, 623 N.E.2d 966, 974 (2d Dist. 1993) (“Resolution of this question [of “interpret[ing] the phrase ‘termination of the program’ as it appears in the final paragraph of section 24-11 [of the School Code]”] is a matter of statutory interpretation.”). In interpreting a statute, the primary rule, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. Kraft v. Edgar, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990). The best place to look for legislative intent is the text of the statutory provision itself. Van’s Material Co., Inc. v. Department of Revenue, 131 Ill. 2d 196, 202, 545 N.E.2d 695, 698 (1989).

The plain text of P.A. 91-872 shows that the Illinois General Assembly intended the temporary use tax rate reduction to apply to the privilege of using, in Illinois, only two closely related types of tangible personal property purchased at retail. 35 **ILCS** 105/3-10; *see also* 35 **ILCS** 105/3 (“tax is imposed on the privilege of using in this State tangible personal property purchased at retail from a retailer”). Specifically, the legislature intended the temporary rate reduction to be applicable to “motor fuel, as defined in Section 1.1 of the [MFTL], and gasohol, as defined in Section 3-40 of the [UTA]” 35 **ILCS** 105/3-10. Neither party argues that KT jet fuel is gasohol, so the UTA’s definition of gasohol is not in question here. By saying that, however, I do not mean to suggest that the legislature’s coupling of the two specific types of tangible personal property to which the rate reduction was applicable is irrelevant to an analysis of what it did intend. *See* Department’s Brief, pp. 11-16 n.11 (quoting a prior agency

decision’s discussion of P.A. 91-872’s legislative history). If the rate reduction extended to KT jet fuel, it is because the legislature intended the “motor fuel” half of the property targeted by P.A. 91-872 to include KT jet fuel.

XYZ focuses its initial argument on the second sentence of the MFTL’s definition of motor fuel, which provides that, “Among other things, ‘Motor Fuel’ includes ‘Special Fuel’ as defined in Section 1.13 of this Act.” 35 **ILCS** 505/1.1. *XYZ* argues that KT jet fuel is motor fuel because it is special fuel. Taxpayer’s Brief, pp. 6-8. *XYZ* supports its argument by citing the pertinent stipulations of fact that it avers shows that the KT jet fuel it purchased and used in Illinois meets each of the elements identified within the statutory definition of special fuel. Taxpayer’s Brief, p. 7 (*citing* Stip. ¶¶ 8-11, 14). *XYZ* contends that the second sentence of the definition of motor fuel means that “[a]ll ‘special fuels’ are ‘motor fuels’ within the meaning of the [MFTL].” Taxpayer’s Brief, p. 8 (emphasis added). It asserts that, under the MFTL, special fuel is “simply a sub-category of motor fuel (i.e., all special fuels are motor fuels, though not all motor fuels are special fuels).” *Id.*

And at first blush, the second sentence of § 1.1 seems to do just that. That is to say, were one to look solely at the second sentence of the MFTL’s definition of motor fuel, that sentence may be understood as evincing the legislative intent that all special fuels are motor fuel. 35 **ILCS** 505/1.13. But it would be a mistake here — and it is generally *always* a mistake — to attempt to glean legislative intent by reviewing only one sentence in a single section of a broad statutory scheme. Antunes v. Sookhakitch, 146 Ill. 2d 477, 588 N.E.2d 1111 (1992). Rather, a court must review the text of a specific statutory provision and consider that text together with the act as a whole, giving due

consideration to the other inter-related provisions within the act. *Id.* at 484, 588 N.E.2d at 1114; *see also*, Kraft v. Edgar, 138 Ill. 2d at 189, 561 N.E.2d at 661 (“in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered.”). Here, a more comprehensive review of the related provisions of the MFTL shows that, in 1989, the Illinois General Assembly amended the MFTL so as to exclude “aviation fuels” from the MFTL’s definition of “motor fuel.” This is so even though some aviation fuel, including what was later defined as KT jet fuel, may well meet all of the listed elements within the statutory definition of “special fuel.” That comprehensive review begins, once again, with the text of the definition section of the MFTL.

In 1989, the General Assembly passed P.A. 86-125, and one part of that amendment added a definition of “fuel” to the MFTL. 35 **ILCS** 505/1.19 (Smith-Hurd) (Historical and Statutory Notes); P.A. 86-125 (effective July 28, 1989). Section 1.19 defined “fuel” as “all liquids defined as ‘Motor Fuel’ in Section 1.1 of this Act *and* aviation fuels and kerosene, but excluding liquified petroleum gases.” 35 **ILCS** 505/1.19 (emphasis added). Read together with the other parts of P.A. 86-125, which added § 2a and amended § 17, § 1.19 reflects the legislature’s intent that aviation fuels constitute a specific class of fuels, and that that class is distinct from, and not embraced within, the statutory definition of motor fuel. Had the legislature viewed aviation fuels as being included within the statutory definition of motor fuel, there would have been no need for it to include, in § 1.19, the text that follows the words “all liquids defined as ‘Motor Fuel’ in Section 1.1 of this Act ...” Caveney v. Bower, 207 Ill. 2d 82, 90, 797 N.E.2d 596, 600 (2003) (“it is well established that, when the legislature uses certain language in

one part of a statute and different language in another, this court will presume that different results were intended.”).

Moreover, one can be secure that the Illinois General Assembly meant “aviation fuels” to include what later came to be defined as “KT jet fuel.” The phrase “aviation fuels” is not defined within the MFTL, but the common, ordinary meaning of the word “aviation” means, “1. The operation of aircraft. 2. The design, development, and production of aircraft. 3. Military aircraft.” The *XYZ Heritage Dictionary of the English Language* (4th ed. 2000) (Houghton Mifflin Company) (online version available at www.dictionary.com). Taking into consideration the definition of aviation, then, the phrase “aviation fuels” may be understood to mean all volatile and inflammable liquids sold or used to operate aircraft. Or, to trace the legislature’s own words used in MFTL § 2(d), the phrase may be understood to mean all volatile and inflammable liquids sold or “used for the propulsion of aircraft.” 35 **ILCS** 505/2(d); *see also* Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 270, 695 N.E.2d 481, 485 (1998) (“Each undefined word in the statute must be ascribed its ordinary and popularly understood meaning.”).

The definition of KT jet fuel, which became effective six months before the effective date of P.A. 91-872, is certainly consistent with that definition of the term “aviation fuels.” *Compare* 35 **ILCS** 505/1.25 (Smith-Hurd) (Historical and Statutory Notes) *with* 35 **ILCS** 35 **ILCS** 505/1.19 (Smith-Hurd) (Historical and Statutory Notes). The General Assembly defined KT jet fuel as “any jet fuel as described in ASTM specification D 1655 and military specifications MIL-T-5624R and MIL-T-83133D (Grades JP-5 and JP-8).” 35 **ILCS** 505/1.25. Thus, the commonly understood meaning

of aviation fuels would embrace both aviation gasoline (also known as “avgas”) and KT jet fuel.

In fact, after the legislature excluded aviation gasoline from the tax imposed on motor fuel in 1979 (*see* 35 ILCS 505/2(d) (Smith-Hurd) (Historical and Statutory Notes); P.A. 81-471 (effective Oct. 1, 1979)), the Department published two bulletins that each contained the following identical language:

Motor fuel is defined as all volatile and inflammable liquids produced, blended or compounded for the purpose of, or which are suitable or practicable for operating motor vehicles. Motor fuel includes fuel such as, but not limited to gasoline, diesel fuel*, kerosene, liquified petroleum gas (LPG), liquified natural gas (LNG), or compressed natural gas (CNG). **Aviation gasoline is exempt from the definition of motor fuel (see Chapter 120, paragraph 418).** Retailers must continue to remit sales tax on their aviation gasoline receipts on their RR-1-A tax return.

Informational Bulletin FY 84-26; Informational Bulletin FY 84-27 (emphasis added). That the Department viewed — and declared that — the legislature’s 1979 exemption of avgas from the tax imposed by § 2 of the MFTL constituted its exemption of avgas from the definition of motor fuel is certainly consistent with the legislature’s later exclusion of aviation fuels from the definition of motor fuel. It is also consistent with the fact that the emergency ROT regulation adopted shortly after the passage of 91-872 excluded both avgas and KT jet fuel from the definition of motor fuel. *See* 86 Ill. Admin. Code § 130.101(b) (*quoted supra*, pp. 11-12).

The plain text of § 2a reveals the legislature’s intent to exclude aviation fuels from the statutory definition of motor fuel. Additionally, the record reveals the effect § 2a has on this disputed issue, since the parties stipulate that § 2a is applicable to XYZ’s receipt of KT jet fuel for use in Illinois. Stip. ¶ 37.

Section 2a imposes a tax “upon the privilege of being a receiver in this State of fuel for sale or use.” 35 **ILCS** 505/2a; Stip. ¶ 37. The tax imposed by § 2a in 1989 was a brand new tax, and that tax was distinct from the taxes otherwise imposed by MFTL § 2. 35 **ILCS** 505/2a (Smith-Hurd) (Historical and Statutory Notes); P.A. 86-125. In § 17 of the MFTL, which was also amended by P.A. 86-125, the General Assembly expressly declares that the different taxes imposed by §§ 2 and 2a have different objects and different purposes. 35 **ILCS** 505/17 (Smith-Hurd) (Historical and Statutory Notes); P.A. 86-125. The tax created by § 2a is imposed on receivers of “fuel,” whereas § 2’s tax is imposed on users and sellers of “motor fuel” 35 **ILCS** 505/2, 2a. The tax § 2a imposes on the privilege of receiving fuel for sale or use in Illinois is expressly applicable to persons who receive: (1) motor fuel as defined by § 1.1 of the MFTL; (2) aviation fuels; (3) home heating oil; and (4) kerosene. 35 **ILCS** 505/2a.

Section 2a then provides that “[f]or the purpose of the tax imposed by this Section, being a receiver of “ ‘motor fuel’ as defined by Section 1.1 of this Act, *and* aviation fuels, home heating oil *and* kerosene, ... is subject to tax without regard to whether the fuel is intended to be used for operation of motor vehicles on the public highways and waters.” 35 **ILCS** 505/2a (emphasis added). Finally, § 2a sets out four separate exceptions from the tax imposed on receivers of fuel. 35 **ILCS** 505/2a. The first such exception is the only one relevant to this dispute,¹ and it extends to persons who, like XYZ, receive “aviation fuels and kerosene at airports with over ... 170,000 operations

¹ Section 2a’s three remaining exceptions apply, with limitations, to: “... [1] ... the importation or receipt of diesel fuel sold to or used by a rail carrier ... [2] ... sale[s of fuel] ... made with delivery to a purchaser outside this State or when the sale is made to a person holding a valid license as a receiver ... [and] [3] ... diesel fuel consumed or used in the operation of ships, barges, or vessels, ... used primarily in or for the transportation of property in interstate commerce for hire on rivers bordering on this State” 35 **ILCS** 505/2a.

per year beginning in 1991, located in a city of more than 1,000,000 inhabitants for sale to or use by holders of certificates of public convenience and necessity or foreign air carrier permits, issued by the United States Department of Transportation” 35 ILCS 505/2a. The parties stipulate that XYZ is such a receiver, and that, pursuant to this particular exception, XYZ is not subject to the tax imposed by § 2a for the KT jet fuel it receives for use at its O’Hare airport facilities. Stip. ¶ 37.

The significant aspect of this first exception to § 2a’s tax on receivers of fuel is that it does *not* apply to the receipt of “ ‘motor fuel’ as defined in section 1.1 of [the MFTL]” 35 ILCS 505/2a. For example, the first exception would not apply to XYZ’s, or any other person’s, receipt of gasohol or diesel fuel for use at a Chicago-based airport, because those fuels are not “aviation fuel[or] kerosene” *Id.* Instead, the exception applies only to the receipt of “aviation fuels and kerosene ...” by such persons. *Id.*; *see also* Stip. ¶ 37.

The legislature’s clarity as to which fuels are subject to this particular exception, moreover, is not a mistake. Each of the other exceptions from § 2a’s tax similarly detail whether the particular exception applies to fuels in general or to specific fuels. 35 ILCS 505/2a; *see also supra*, p. 19 n.1. If XYZ’s argument here is correct, and KT jet fuel is not a species of aviation fuel, but is instead a species of motor fuel, then by its own terms, § 2a’s exception does not apply to the KT jet fuel that XYZ receives and uses at O’Hare. 35 ILCS 505/2a.

Again, XYZ stipulates that it does not pay the fuel tax created by MFTL § 2a on its KT jet fuel. *See* Stip. ¶ 37. I will assume, moreover, that it has not paid the § 2a tax for all prior years that the applicable exception as been in effect — that is, since 1989. *See* 35

ILCS 505/2a (Smith-Hurd) (Historical and Statutory Notes). Thus, XYZ has received considerable benefits as a direct result of a longstanding acceptance that § 2a’s first exception — which exempts its receipt of aviation fuel for use but *not* its receipt of “motor fuel as defined in Section 1.1 of [the MFTL]” applies to the KT jet fuel it uses at O’Hare. Stip. ¶ 35; 35 **ILCS 505/1.19, 2a**; *see also* 35 **ILCS 505/17**.

XYZ’s stipulation number 37, in fact, constitutes an admission that, during the temporary rate reduction period (at least), XYZ *acted* as though § 2a reflected the Illinois General Assembly’s exclusion of aviation fuels, including KT jet fuel, from the MFTL’s definition of motor fuel. To now accept XYZ’s current, and wholly contrary, argument that KT jet fuel constitutes “ ‘motor fuel’ as defined by Section 1.1 of [the MFTL],” would create a patently illogical result. That is, the identical phrase that the legislature chose to use in two related tax acts would be understood to mean one thing for purposes of § 3-10 of the UTA, yet something different for purposes of § 2a of the MFTL. *See Chicago Tribune Co. v. Johnson*, 119 Ill. App. 3d 356, 359, 456 N.E.2d 854, 857 (1st Dist. 1983) (“Construing the two statutes [i.e., the UTA and the ROTA] together, we conclude that the legislative exclusion of newspapers from the definition of tangible personal property in the Retailers’ Occupation Tax Act may be applied to define that same term in the Use Tax Act.”); *aff’d* 106 Ill.2d 63, 477 N.E.2d 482 (1985).

Finally, I presume, as I must, that when it passed P.A. 91-872 in 2000, the legislature knew that it had previously excluded aviation fuels from the MFTL’s definition of motor fuel. *Christ Hospital & Medical Center v. Ill. Comprehensive Health Ins. Plan*, 295 Ill. App. 3d 956, 961, 693 N.E.2d 1237, 1241 (1st Dist. 1998); P.A. 86-125

(1989).² Thus, it could not have intended the temporary use tax rate reduction to apply to aviation fuels, including KT jet fuel. I conclude, therefore, that the legislature’s 1989 exclusion of aviation fuels from “ ‘motor fuel as defined by Section 1.1 of [the MFTL],” similarly applies to P.A. 91-872. *See Schawk, Inc. v. Zehnder*, 326 Ill. App. 3d 752, 756 n.1, 761 N.E.2d 192, 196 (1st Dist. 2001) (“It is proper ... to consider statutes upon related subjects though not strictly *in pari materia*”) (*quoting Anderson v. City of Park Ridge*, 396 Ill. 235, 244, 72 N.E.2d 210, 215 (1947)).

Whether KT Jet Fuel Is Suitable Or Practicable For Operating Motor Vehicles?

XYZ also argues that KT jet fuel meets the definition set forth in the first sentence of the MFTL’s definition of motor fuel. Taxpayer’s Brief, p. 8. That first sentence, again, provides that “ ‘[m]otor fuel’ means all volatile and inflammable liquids produced, blended or compounded for the purposes of, or which are suitable or practicable for, operating motor vehicles.” 35 ILCS 505/1.1. XYZ declines to argue that KT jet fuel is suitable for use in a motor vehicle. Taxpayer’s Brief, p. 10. Rather, it asserts that KT jet fuel is practicable for operating motor vehicles, since it “is capable of being used to generate power in diesel engines that operate motor vehicles.” *Id.*, p. 10; Stip. ¶¶ 15, 17.

² At a minimum, MFTL §§ 1.1, 1.13, 1.19, 2a and 17 create an ambiguity or an internal conflict as to whether KT jet fuel is included within the phrase “ ‘motor fuel as defined by Section 1.1 of [the MFTL].” On one hand, the second sentence of MFTL § 1.1 expressly provides that motor fuel includes special fuel, and the record here establishes that KT jet fuel meets each element of the statutory definition of special fuel. On the other hand, amendments to the MFTL reveal a clear legislative intent to distinguish aviation fuels from, and to not include them within, the statutory definition of motor fuel. 35 ILCS 505/1.19, 2(d), 2a; *see also* Informational Bulletins FY 84-26, FY 84-27 (*partially quoted, supra*, p. 18). Where sections within the same act are in apparent conflict, one way to resolve the conflict or reconcile them is to have the more specific provisions, or the more recently enacted ones, take precedence over the more general or earlier enacted provisions. *See Williams v. Illinois State Scholarship Com’n*, 139 Ill.2d 24, 58, 563 N.E.2d 465, 480 (1990). Moreover, if I accept XYZ’s argument that KT jet fuel constitutes “ ‘motor fuel as defined in Section 1.1 of [the MFTL]” because it is a special fuel, then I cannot reconcile how XYZ’s receipt of KT jet fuel is exempt from the tax imposed by MFTL § 2a. 35 ILCS 505/2a.

It contends, moreover, that it, “as well as other commercial airlines, use jet fuel to operate airport trucks and other ground equipment *where such use is not prohibited by law.*” Taxpayer’s Brief, p. 9 (emphasis added); *but see* Stip. ¶¶ 38-39; Stip. Ex. 1, *passim*. XYZ cites to the Illinois Supreme Court’s holding in Pascal v. Lyons, 15 Ill. 2d 41, 46, 153 N.E.2d 817 (1958), to support its argument that motor fuel must be given a “broad scope” to include, if XYZ’s view is correct, any inflammable liquid that may power a motor vehicle. *See* Taxpayer’s Brief, pp. 10-11.

If the MFTL had remained unchanged from the way it was written when Pascal v. Lyons was decided, XYZ’s arguments may well persuade. But, again, the Illinois General Assembly made significant changes to the MFTL after the decision in Pascal v. Lyons, and one of those amendments carved out aviation fuels from the definition of motor fuel. 35 ILCS 505/1.19, 2a, 17 (Smith-Hurd) (Historical and Statutory Notes) (cited sections created or amended by P.A. 86-125, effective 1989). Further, the General Assembly created its own definition of KT jet fuel after making those significant changes to the MFTL. 35 ILCS 505/1.25 (Smith-Hurd) (Historical and Statutory Notes); P.A. 91-173 (effective January 1, 2000). The legislature’s choice of definition for KT jet fuel, in fact, begs the question — could the legislature really have intended the words “any *jet* fuel ... described in ASTM specification 1655 ...” to mean *motor* fuel? *See* Hicks v. Industrial Comm., 251 Ill. App. 3d 320, 325, 621 N.E.2d 293, 296 (5th Dist. 1993) (“[d]ifferent sections of the same statute should be considered as *in pari materia* and should be construed so as to avoid an illogical result”). Reading § 1.25 together with the sections amended by P.A. 86-125 strongly militate against such a construction. Those sections

clearly reflect the legislature's conscious decision to exclude aviation fuels from the statutory definition of motor fuel.

XYZ's reliance on the Department's stipulations that KT jet fuel can be used to power motor vehicles (Stip. ¶¶ 16, 18), similarly ignores the effect of the 1989 amendments to the MFTL. The General Assembly defined KT jet fuel, and created a scheme that taxes, and excepts from taxation (depending on the person who receives it for sale or use in Illinois), persons who receive *that* particular fuel because it is an aviation fuel, and not because it is " 'motor fuel' as defined by Section 1.1 of [the MFTL]" 35 ILCS 505/1.19, 1.15, 2a. But XYZ would have one read the MFTL as though no amendment to it was ever passed after 1963, when the second sentence was added to § 1.1. In fact, XYZ advances the wholly false impression that, during the claim period, anything and everything taxed pursuant to the MFTL was taxed as motor fuel. Taxpayer's Reply, p. 12 ("The provisions of the [MFTL] which actually impose a tax (e.g., Section 2, Section 2a Section 2b) do not purport to tax all motor fuels; rather, they impose a tax on certain categories of motor fuels (e.g., Section 2 imposes a tax only on 'motor fuels used in motor vehicles operating on the public highways')."). But this is demonstrably untrue. When it enacted P.A. 86-125 in 1989, the legislature created the broadest category under the MFTL with its definition of "fuel," and it made motor fuel, aviation fuels, kerosene, etc., distinct subcategories of fuel. 35 ILCS 505/1.19, 2a, 17 (Smith-Hurd) (Historical and Statutory Notes).

The Illinois Supreme Court, in Pascal v. Lyons, recognized that, to decide the issue before it, it had to review all of the related provisions of the MFTL, and not make its decision based on a reading of one or two provisions. Pascal, 15 Ill. 2d at 44-45, 153

N.E.2d at 819. Similarly, it would be inappropriate here to consider the text of § 1.1 and the structure of the MFTL at the time Pascal was decided, yet ignore the significant structural amendments the General Assembly had made to the MFTL by the time Illinois General Assembly passed the temporary rate reduction.

The rule to heed here is that the Illinois Supreme Court's interpretation of a particular statute becomes part of the Act itself, until such time as the Illinois General Assembly amends the statute. Mitchell v. Mahin, 511 Ill. 2d 452, 456, 283 N.E.2d 465, 466 (1972). In 1979, the General Assembly did just what the Illinois Supreme Court in Pascal said it could have done originally. Pascal, 15 Ill. 2d at 46, 153 N.E.2d at 820 (“If the legislature had wished to provide a system of granting exemptions in the first instance, it would have so provided.”). That is, the General Assembly made a policy decision to exempt aviation gasoline from the tax imposed on motor fuel. 35 **ILCS** 505/2(d) (Smith-Hurd) (Historical and Statutory Notes); P.A. 81-471. The Department, shortly thereafter, interpreted that amendment as the legislature's exemption of aviation gasoline from the definition of motor fuel. Informational Bulletins FY 84-26, 84-27. In 1989, the General Assembly amended the MFTL again. *See* 35 **ILCS** 505/2a (Smith-Hurd 1991) (Historical and Statutory Notes); P.A. 86-125. In that amendment, the legislature created a definition for the word “fuel,” which expressly distinguished “aviation fuels” from “ ‘motor fuel’ as defined in Section 1.1 of [the MFTL]” It simultaneously manifested its unequivocal intent, in newly created §§ 1.19 and 2a, and in amended § 17, that the distinction between “aviation fuels” and “ ‘motor fuel’ as defined in Section 1.1 of [the MFTL] ...” was not merely nominal, but substantive. 35 **ILCS** 505/1.19, 2a, 17. XYZ provides no good reason why, in this case, and where it has

admittedly received considerable benefits from acting as though MFTL § 2a classified KT jet fuel as an “aviation fuel[]” and not as “ ‘motor fuel’ as defined in Section 1.1 of [the MFTL],” I should now conclude that KT jet fuel is more properly classified as “ ‘motor fuel’ as defined in Section 1.1 of [the MFTL],” but *only* for purposes of the temporary use tax rate reduction.

Considering the effect of the amendments the Illinois General Assembly made to the MFTL after Pascal, I am not so willing to accept XYZ’s argument that “practicable,” as used in the first sentence of MFTL § 1.1, should be understood here to mean possible. *See* Taxpayer’s Brief, pp. 8-10. As Taxpayer’s Brief reflects, different dictionaries include “feasible” as a synonym for practicable. Taxpayer’s Brief, p. 9 (summarizing definitions of practicable). The XYZ Heritage Dictionary of the English Language, whose definition of “practicable” XYZ partially quotes, includes a particularly appropriate usage note that provides:

Usage Note. It is easy to confuse *practicable* and *practical* because they look so much alike and overlap in meaning. ***Practicable* means “feasible” as well as “usable,” and it cannot be applied to persons. *Practical* has at least eight meanings, including the sense “capable of being put into effect, useful,” wherein the confusion with *practicable* arises. But there is a subtle distinction between these words that is worth keeping. Someone with a practical knowledge of French may be able to order coffee in a café, though it may not be practicable to learn the language of every country in Europe.**

The XYZ Heritage Dictionary, Houghton Mifflin Co. (4th ed. 2000) (boldface emphasis added) (entry defines “practicable” as “1. Capable of being effected, done, or put into practice; feasible. See Synonyms at possible. 2. Usable for a specified purpose: *a practicable way of entry.*”) (online version available at www.dictionary.com).

That practicable means not just useable but also feasible tends to undercut XYZ's assertion that KT jet fuel is practicable for use in motor vehicles because it is possible to use it in diesel-powered motor vehicles. Throughout the temporary rate reduction period, it was — and remains — impossible to *legally* use KT jet fuel in a diesel-powered motor vehicle. That is because KT jet fuel has a sulfur content greater than 0.05 weight percent (Stip. Ex. 1, ¶ 2), and because § 211(g) of the Clean Air Act prohibits any person from knowingly introducing into any motor vehicle fuel which contains a concentration of sulfur in excess of 0.05 weight percent. 42 U.S.C. § 7545(g)(2);³ 40 C.F.R. § 80.29. In short, it may have been, and it may remain, *physically* possible to use KT jet fuel in a diesel-powered motor vehicle, but since 1993 it has not been *legally* possible to do so. 42 U.S.C. § 7545(g)(2).

Moreover, XYZ knows full well that it is this illegality which makes KT jet fuel *not* practicable for use in motor vehicles. When XYZ previously (i.e., before the applicable period) admitted using KT jet fuel in diesel powered ground motor vehicles, it paid considerable penalties to the Environmental Protection Agency for violating the diesel misfueling provisions of the Clean Air Act. Stip. Ex. 1, *passim*. Thus, this record shows that XYZ agreed, at least in 1999, that any further use of KT jet fuel in motor vehicles could subject it to fines of up to \$27,000 per day for violations of the Clean Air Act. Stip. Ex. 1. In contrast with its argument here, the record shows that XYZ has made a knowing and conscious decision that, because of applicable federal law, it is *not*

³ Section 211(g)(2) of the Clean Air Act provides, in part, as follows:
(2) Beginning October 1, 1993, no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 percent (by weight)
42 U.S.C. § 7545(g)(2).

feasible — and *not* practicable — to use KT jet fuel in its diesel-powered ground vehicles. *Id.* I reject, therefore, XYZ’s argument that KT jet fuel, a fuel that may not legally be used in a motor vehicle, nevertheless meets the legislature’s description of a fuel that is practicable for use in motor vehicles.

Legislative History Supports The Validity of ROT Regulation 130.101(b)

The conclusion that aviation fuels, including KT jet fuel, were not intended to be included within the temporary use tax rate reduction for persons using “ ‘motor fuel’ as defined by Section 1.1 of [the MFTL] ...” is further supported by a thorough review of the legislative history regarding the temporary rate reduction. The legislative history of P.A. 91-872 is part of the public record, of which I may take official notice. Hyatt Corp. v. Sweet, 230 Ill. App. 3d 423, 430, 594 N.E.2d 1243, 1248 (1st Dist. 1992) (a court “may properly consider the debates, at least, to determine the history of the legislation and the evil it was intended to remedy.”).

The Department quotes a substantial portion of a recent agency decision, currently on Administrative Review, involving the same issue as the one presented here, adopting a recommended decision written by this ALJ. Department’s Brief, pp. 11-16. n.11. That portion itself quotes and discusses the legislative history of P.A. 91-872. *Id.* In its reply, XYZ claims that the Department’s quotation of that legislative history “provide[s] no logical support for the Department’s position.” Taxpayer’s Reply, p. 8. XYZ further asserts that resort to the legislative history is unauthorized in the first place, since the express text of the amendment added by the temporary rate reduction is clear on its face. *Id.*

But the text of the amendment added by P.A. 91-872 does not clearly address whether the temporary use tax rate reduction applies to retail purchases of KT jet fuel. That is because the amendment never once mentions KT jet fuel, or aviation fuels, at all. Before the legislative history quoted by the Department is discussed in the prior agency decision, moreover, the ALJ made a considerable attempt to identify how the Illinois General Assembly's amendments to the MFTL worked to exclude aviation fuels, including KT jet fuel, from the statutory definition of motor fuel.

Additionally, P.A. 91-872's legislative history provides considerable logical support for upholding the validity of the Department's emergency regulation. First, the legislative history itself contains no statement by any individual member of the legislature who manifested any indication that the intended class of beneficiaries for the temporary rate reduction for "motor fuel ... and gasohol ..." was meant to include air carriers and/or air passengers. Next, it is not illogical to conclude that, were the converse true — that is, if the Illinois General Assembly *did* intend the temporary reduction to benefit air carriers and passengers — there might be some evidence of that intent in the legislative history. Instead, the legislators who spoke during the special legislative session almost uniformly manifested a mutual understanding that the temporary rate reduction was meant to benefit people who either purchased or sold motor fuel and gasohol for use in motor vehicles on Illinois' public highways. That uniformly expressed legislative intent has more logical consistency with only one of the two possible answers to the question whether KT jet fuel was, at the time the temporary rate reduction was passed, included within the MFTL's definition of motor fuel. For purposes of this matter, I hereby adopt and incorporate as part of this recommendation the analysis and

conclusions quoted in footnote 11 of the Department’s brief. I conclude that the legislative history provides considerable logical support for the emergency regulation’s determination that “ ‘motor fuel’ as defined by Section 1.1 of [the MFTL] ...” does not include KT jet fuel.

As a final note on this issue, XYZ contends that the applicable ROT regulation is invalid because of the way it treats fuels other than KT jet fuel. Taxpayer’s Brief, pp. 12-13. Specifically, it argues that the regulation is invalid because it classifies combustible gases and kerosene as constituting motor fuel only if they delivered into the fuel supply tanks of motor vehicles. *Id.* But that argument is wholly irrelevant to the question that XYZ stipulates is at issue, viz. “whether [KT] jet fuel utilized by the taxpayer ... constituted ‘motor fuel’ as defined in Section 1.1 of the Illinois [MFTL].” Stip. ¶ 1. The applicable regulation, moreover, does not condition *KT jet fuel’s* status on whether it is delivered into the fuel supply tanks of motor vehicles. 86 Ill. Adm. Code 130.101(b). Thus, XYZ suffers no injury-in-fact from the regulation’s treatment of combustible gases and kerosene. *See, e.g., Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 488, 524 N.E.2d 561, 573 (1988) (“One who is adversely affected in fact by governmental action has standing to challenge its legality, and one who is not adversely affected in fact lacks standing.”) (*quoting* 4 K. Davis, *Administrative Law Treatise* § 24:2, at 212 (2d ed. 1983) (internal quotation marks omitted)).

In footnote 1 of its brief, however, XYZ asserts “[u]nder petroleum industry standards, ... jet fuel is generally considered to be a type of kerosene. Taxpayer’s Brief, p. 13 n.1. XYZ also attached to its brief a document bearing the name of U.S. Oil & Refining Co., and which was, XYZ alleges, issued by that company as a material safety

data sheet for jet fuel. Taxpayer's Brief, p. 13, n.1. That document includes kerosene as another name for jet fuel. Taxpayer's Brief, Ex. B. While the Department's response does not address XYZ's attachment of this document to its brief, the document itself is not part of the stipulated evidence the parties submitted in this matter.

What is missing, moreover, is any explanation of how U.S. Oil & Refining Co.'s description of kerosene as a synonym for jet fuel might be relevant to this dispute. XYZ does not suggest, for example, that the MFTL treats KT jet fuel and kerosene as the same exact species of tangible personal property. Nor does XYZ assert that KT jet fuel is subject to the temporary rate reduction because it is kerosene. Rather, it asserts KT jet fuel is motor fuel (*see* Taxpayer's Brief, *passim*), and that the Department's regulation to the contrary is invalid. *Id.*, pp. 11-16. Neither proposition, moreover, is supported by the text of the MFTL, which treats KT jet fuel as an aviation fuel, a type of fuel that is distinct from both kerosene *and* motor fuel. 35 ILCS 505/1.19, 1.25, 2(d)-(e), 2a; *see also* 35 ILCS 505/4(d) (KT jet fuel, but not kerosene, is exempt from the dying requirement for "special fuel sold or used for non-highway purposes"). Regardless whether others may casually or even purposefully refer to KT jet fuel and kerosene interchangeably, the important thing to recall here is that the Illinois General Assembly has not done so.

Further, even if the regulation sections that address combustible gases and kerosene were declared invalid, that does not mean that XYZ is entitled to a refund for its KT jet fuel. Upon a finding of invalidity or unconstitutionality, a court will, where possible, excise the offending portions of a statute or regulation, while allowing the other portions to remain in effect. *See, e.g., City of Carbondale v. Van Natta*, 61 Ill. 2d 483,

490, 338 N.E. 2d 19, 23 (1975) (“Clearly this invalid provision may be severed from the balance of [the statutory provision].”). Here, after 1989, the legislature made a policy decision to amend the MFTL so as to treat and tax aviation fuels as a distinct category of fuel, and not as a category of motor fuel. 35 ILCS 505/1.19, 2a. There is nothing arbitrary or invalid about the Department’s decision to treat KT jet fuel, for purposes of the temporary use tax rate reduction, the same way the MFTL does — as a type of aviation fuel, and not as “ ‘motor fuel as defined in Section 1.1 of [the MFTL].” 35 ILCS 505/1.19, 2a.

XYZ sets up another straw man when it contends that “the Department is taking the position that a given fuel, e.g., avgas, is a motor fuel for purposes of the ... Act (in accordance with Pascal), but not a motor fuel for purposes of the Temporary Rate Reduction” Taxpayer’s Brief, pp. 12-13. The Department, however, never once argues here that avgas constitutes motor fuel. *See* Department’s Brief, *passim*. That, no doubt, is because § 2(d) exempts avgas from the tax imposed by the MFTL on motor fuel (35 ILCS 505/2(d)), because the Department has long treated § 2(d) as exempting avgas from the definition of motor fuel (Information Bulletins FY 84-26, FY 84-27), and because the regulation itself provides that avgas is *not* motor fuel. 86 Ill. Admin. Code § 130.101(b). XYZ apparently treats the Department’s success in Pascal — in 1958 — as binding it forever to the position that avgas constitutes motor fuel, no matter how many amendments the General Assembly makes to the MFTL.

Is XYZ Entitled to a Credit for Tax Paid Before The Emergency ROT Regulation Was Adopted?

For more than a decade, XYZ knew that its receipt and use of KT jet fuel was excepted from the MFTL’s fuel tax. *See* Stip. ¶ 35; 35 ILCS 505/2a (Smith-Hurd)

(Historical and Statutory Notes). It knew that its use of such fuel was excepted from fuel tax because the legislature had classified KT jet fuel as an aviation fuel, and not as “ ‘motor fuel’ as defined in Section 1.1 of [the MFTL]” 35 ILCS 505/2a. XYZ cannot now complain that, until the applicable emergency regulation was adopted, the legislature’s intent that aviation fuels were excluded from the MFTL’s statutory definition of motor fuel — and from the same term when used in P.A. 91-872 — should not apply to it. More to the point, XYZ cites no legal authority for such an argument (Taxpayer’s Brief, p. 17), and that alone is sufficient to reject it. 35 ILCS 105/12 (incorporating applicable sections of the ROTA, including ROT § 7); 35 ILCS 120/7 (placing burden on taxpayer to prove entitlement to deduction, and/or to show that transactions were not subject to tax). I conclude that XYZ should not be granted a refund regarding the difference between the full use tax rate and the temporarily reduced rate for the period from July 1, 2000 until the date the applicable emergency ROT regulation was adopted.

Conclusion:

For the reasons already discussed, I recommend that the Director finalize its denial of XYZ’s amended return/claim for refund.

Date: 12/16/2004

John E. White
Administrative Law Judge