

UT 04-2

Tax Type: Use Tax

Issue: Temporary Rate Reduction of Fuel at Retail

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

ABC, INC.,)	Docket No.	02-ST-0000
)	IBT No.	0000-0000
v.)	Claim Period	6/1/00 to 10/31/00
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 ABC, 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 ABC, Inc.'s ("ABC") claim for refund of Illinois Use Tax ("UT"). ABC's claim is 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 ABC'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. ABC is a corporation organized under the laws of the State of Delaware. ABC is a wholly owned subsidiary of ABC Corporation (“ABC CORPORATION”). Stip. ¶ 2.
2. On December 9, 2002, ABC, along with ABC CORPORATION and certain related corporations, filed voluntary petitions, pursuant to Chapter 11 of the Bankruptcy Code, in the ABC States Bankruptcy Court for the Northern District of Illinois. Stip. ¶ 3.
3. ABC is in the business of providing air transportation, cargo and other transportation-related services. Stip. ¶ 4.
4. In order to supply airplanes and ground vehicles at its Chicago hub with fuel during the months at issue, ABC purchased kerosene-type jet fuel (hereinafter, “KT jet fuel”) at a facility near the Gulf of Mexico and transported the fuel by pipeline to a facility in East Chicago, Indiana. Stip. ¶ 5.
5. ABC stored the KT jet fuel in East Chicago until needed, at which time the fuel was transported by pipeline to tanks leased by ABC in Des Plaines, Illinois. Stip. ¶ 6.
6. From Des Plaines, the fuel was transported by pipeline to ABC’s Chicago hub at O’Hare International Airport (“O’Hare”). Stip. ¶ 7.
7. ABC used KT jet fuel during the months at issue principally to operate its airplanes. Stip. ¶ 8.
8. KT jet fuel is:
 - a volatile and inflammable liquid. Stip. ¶ 9.

- capable of being used for the generation of power in an internal combustion engine. Stip. ¶ 10.
 - not the same as any product commonly or commercially known or sold as gasoline. Stip. ¶ 11.
 - not a combustible gas that exists in a gaseous state at 60 degrees Fahrenheit. Stip. ¶ 12.
9. The American Society for Testing and Materials (“ASTM”) issued specification D 1655 as the standard classification for KT jet fuel. Stip. ¶ 13.
 10. The KT jet fuel ABC used at O’Hare met ASTM specification D 1655 and military specifications MIL-T-5624R and MIL-T-83133D (Grades JP-5 and JP-8). Stip. ¶ 14.
 11. The engines on the airplanes ABC operates at O’Hare are internal combustion engines. Stip. ¶ 15.
 12. 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. ¶ 16.
 13. A diesel engine is an internal combustion engine. Stip. ¶ 17.
 14. Certain motor vehicles have diesel engines. Stip. ¶ 18.
 15. ABC’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. ¶ 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. ¶ 35; 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. ¶ 34.

16. ABC 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. ¶ 20. ABC paid the use tax shown on such returns at the time the returns were filed. *Id.*
17. For July 2000 through October 2000, ABC reported and paid use tax on the KT jet fuel it imported into Illinois at a rate of 6.25%. Stip. ¶ 28.
18. On January 4, 2001, ABC filed amended use tax returns to report changes regarding the months of July, August, September, and October 2000. Stip. ¶ 29.
19. On those amended returns, ABC stated that it overpaid its Illinois use tax liabilities regarding its use of KT jet fuel during the months of July 1, 2000 through October 31, 2000 in the aggregate amount of \$8,926,174.00, and requested a refund of that amount. Stip. ¶ 30.
20. After the Department reviewed ABC's amended returns in October 2001, it found an error in ABC's calculations and reduced the amount of claimed overpayment to \$4,502,885. Stip. ¶ 31. ABC does not challenge the reduction, and that is the amount at issue in this dispute. *See id.*
21. On December 11, 2001, the Department rejected ABC's request for a refund, issued a Notice of Tentative Denial of Claim for Use Tax ("denial") to ABC, and informed ABC of its right to file a protest and request an administrative hearing within 60 days. Stip. ¶ 32.
22. On February 6, 2002, ABC timely protested the Department's denial and asked for an administrative hearing. Stip. ¶ 33.
23. In August 2002, ABC entered into a settlement agreement with the U.S. Environmental Protection Agency ("EPA"), pursuant to which ABC agreed that:

During 2000, 2001 and 2002, [ABC] 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, [ABC] reported that at seventy (70) airport facilities it may have used fuel with a possible sulfur content greater than 0.05 weight percent to fuel five hundred twenty (520) airport ground support vehicles which may be classified as motor vehicles. EPA contends that the use of such fuel in motor vehicles constitutes a violation of section 211(g) of the [Clean Air] Act and 40 C.F.R. § 80.29.

Respondent took prompt action to remedy the potential violations and prevent future violations. Respondent changed its practices for fueling its motor vehicles to ensure that proper diesel fuel is used. Respondent 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 ABC, No. AED/MSEB – 6076, Settlement Agreement (accompanying exhibit to Stipulation of Facts), ¶ 7a (hereinafter, Stip. Ex. 1).

24. The settlement agreement between ABC 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 percent (by weight). 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 \$27,000 per day for each violation plus the amount of economic benefit or savings resulting from the violation.

Stip. Ex. 1, ¶ 2.

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

36.

26. As a result of ABC's use of fuel with a possible sulfur content greater than 0.05 weight percent in five hundred twenty (520) airport ground support vehicles which may be classified as motor vehicles, the EPA agreed to "mitigate the civil penalty to \$750,000 subject to [ABC's] successful completion of the terms of [Stip. Ex. 1]." Stip. Ex. 1 ¶ 8.
27. To successfully complete the terms of the settlement agreement between ABC and the EPA, ABC agreed to:

... pay \$750,000 to the ABC States of America in twelve (12) consecutive quarterly payments of \$62,500.

Within one (1) year from the date that this Agreement has been executed by the parties, ... to implement a Supplemental Environmental Project ("SEP") to offset any potential environmental harm caused by the improper use of diesel fuel in motor vehicles. The SEP shall consist of the replacement, at Washington Dulles International Airport, of at least six (6) older model diesel powered tractors with new electric powered tractors. [ABC] agreed to operate each electric tractor for at least five years from the date the tractor is placed into service.

Stip. Ex. 1 ¶¶ 8a, 9a.

Conclusions of Law:

Description of Statutes and Regulations Relied Upon

This dispute involves the effect of P.A. 91-872 on ABC's use of KT jet fuel at O'Hare airport 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). Since § 2a's tax was imposed

upon one's receipt of fuel, and not just upon one's receipt of motor fuel, the General Assembly 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 liquified petroleum gases.

35 ILCS 505/1.19 (Smith-Hurd) (Historical and Statutory Notes) (emphasis added); P.A. 86-125.

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 liquified 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 ABC 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, which created the tax imposed by § 2a and added the statutory definition of fuel, 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 ABC 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.

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** (emphasis added) (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., liquified 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 Issue and Arguments

The parties agreed that “[t]he issue presented by this proceeding is whether kerosene-type jet fuel utilized by the taxpayer during the period of July 2000 through October 2000 constituted ‘motor fuel’ as defined in Section 1.1 of the Illinois [MFTL].” Stip. ¶ 1. The answer to that question, however, is best addressed by asking whether the legislature intended the temporary rate reduction on use tax paid for “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.”). Both parties, moreover, directly addressed the question of legislative intent in their briefs.

ABC presents three fundamental arguments why its refund claims should be granted. First, it argues that the reduction applied because KT jet fuel meets the definition of motor fuel set forth in § 1.1 of the MFTL. Taxpayer’s Initial Brief (“ABC’s Brief”), pp. 5-10. 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. 11-16. Finally, ABC 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. 16.

The Department responds, first, that since the applicable and properly adopted emergency ROT regulation provides that motor fuel does not include KT jet fuel, ABC’s claim must be denied. Department’s Reply [*sic*] Brief (“Department’s Brief”), pp. 4-8. The Department next contends that KT jet fuel is neither motor fuel nor special fuel. *Id.*, pp. 8-9. Finally, it argues that the emergency regulation effectuates the Illinois General Assembly’s intent that a person’s use of KT jet fuel not be subject to the temporary use tax rate reduction. *Id.*, p. 10.

Analysis:

By statute, the Department establishes the *prima facie* correctness of its action when it introduces its denial of ABC’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, ABC will succeed if it establishes that the Illinois General Assembly intended KT jet fuel to constitute motor fuel and, thereby, that the applicable regulation is invalid. *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]”?

This dispute requires that I interpret whether the phrase “ ‘motor fuel’ as defined by Section 1.1 of [the MFTL],” as used in the amendment to § 3-10 of the UTA, includes KT jet fuel. That is a question of statutory interpretation. 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. *Id.*; *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 infra*, pp. 28-39 (reviewing and discussing the legislative history of P.A. 91-872). 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.

ABC focuses its primary 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. ABC argues that KT jet fuel is motor fuel because it is special fuel. ABC’s Brief, pp. 6-7. ABC 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. ABC’s Brief, pp. 6-7 (*citing* Stip. ¶¶ 9-12, 15). ABC 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].” ABC’s Brief,

p. 7 (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, meets 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 other sections of P.A. 86-125, which added MFTL § 2a and amended § 17, § 1.19 reflects the legislature’s intent that aviation fuels constitute a specific type of fuel, and that they are fuels that are 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 American 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 understanding of the 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 (emphasis added). 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*, p. 12).

The legislature's intent that, following the passage of P.A. 86-125 in 1989, aviation fuels were excluded from the statutory definition of motor fuel is made even more clearly by the plain text of §§ 2a and 17 of the MFTL. Additionally, the record here reveals the importance that § 2a has to this dispute, since the parties stipulate that § 2a is applicable to ABC's receipt of KT jet fuel for use in Illinois. Stip. ¶ 35.

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. ¶ 35. The tax imposed by § 2a 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). 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 ABC, receive “aviation fuels and kerosene at airports with 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 ABC States Department of Transportation” 35 ILCS 505/2a. The parties stipulate that ABC is such a receiver, and that, pursuant to this particular exception, ABC 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. ¶ 35.

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]” *Id.* Instead, it applies only to the receipt of “aviation fuels and kerosene ...” by such persons. 35 ILCS 505/2a. In its reply, ABC concedes, as it must, that receivers of KT jet fuel at airports that do not meet the criteria detailed within § 2a’s first exception

¹ Section 2a’s three remaining exceptions apply to: “... [1] ... the importation or receipt of diesel fuel sold to or used by a rail carrier ... to the extent used directly in railroad operations. [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, if the diesel fuel is delivered by a licensed receiver to the purchaser’s barge, ship, or vessel while it is afloat upon that bordering river.” 35 ILCS 505/2a.

are subject to the tax imposed by § 2a. *See* ABC’s Reply Brief, p. 10 n.9. But that only forces me to ask, are they taxed because they receive motor fuel, or because they receive a different type of fuel, namely, aviation fuel [or] kerosene? 35 **ILCS** 505/2a. The plain text of § 2a provides the answer — such persons are taxed as receivers of aviation fuels or kerosene. 35 **ILCS** 505/2a.² For the same reason, § 2a’s first exception would not apply to ABC’s, or any other person’s, receipt of, for example, gasohol, because gasohol is not “aviation fuel[or] kerosene” *Id.*

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. 20 n.1. If ABC’s argument here is correct, and KT jet fuel is

² In footnote 1 of its brief, ABC asserts that “[u]nder petroleum industry standards, jet fuel is generally considered to be a type of kerosene. ABC’s Brief, p. 13 n.1. ABC never cites to any petroleum industry standards, however, and it instead cites to how jet fuel is treated by a ABC States Treasury Regulation and by the State of Michigan. *Id.* The National Petrochemicals & Refiners Association (“NPRA”) is a member organization that “include[s] more than 450 companies, including virtually all U.S. refiners and petrochemical manufacturers,” and which “speaks for the petrochemical and refining industries on issues important to their business.” (<http://www.npradc.org/about/>) (web page titled “Info on NPRA”) (site accessible as of 3-17-04). Contrary to ABC’s assertion, jet fuel is not treated by that petroleum industry group as a type of kerosene. Rather, the NPRA classifies jet fuel as falling into one of two different types, kerosene type and naptha type. (<http://www.npradc.org/news/facts/fuels.cfm>) (web page titled “Fuels Facts”) (site accessible as of 3-17-04). The NPRA, moreover, identifies both jet fuels as being distinct from kerosene. *Id.*

It is clear, however, that *KT* jet fuel is, as its name clearly indicates, a kerosene-based type of jet fuel. But regardless how other sovereigns or the petroleum industry may classify *KT* jet fuel, the Illinois General Assembly, pursuant to §§ 1.19, 1.25, and 2a of the MFTL, has decided to treat *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”). The General Assembly’s treatment of *KT* jet fuel, given the petroleum industry’s similar treatment, can hardly be viewed as unreasonable or irrational. ABC, finally, never argues that the Illinois General Assembly has classified, or should be deemed to have classified, *KT* jet fuel as kerosene; instead, it argues that the General Assembly has classified *KT* jet fuel as motor fuel (*see* ABC’s Brief, *passim*), and that the Department’s regulation to the contrary is invalid. *Id.*, pp. 11-16. Based on MFTL §§ 1.19, 1.25, 2a, and 17, I reject those arguments.

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 ABC receives and uses at O'Hare. 35 ILCS 505/2a.

Again, ABC stipulates that it does not pay the fuel tax created by MFTL § 2a on its KT jet fuel. Stip. ¶ 35. I will assume, moreover, that it has not paid the § 2a tax for all prior years that the applicable exception has been in effect — that is, since 1989. *See* 35 ILCS 505/2a (Smith-Hurd) (Historical and Statutory Notes). Thus, ABC has received considerable benefits as a direct result of a longstanding acceptance that § 2a's first exception for "aviation fuels ..." applies to the KT jet fuel it uses at O'Hare, and that aviation fuels, including KT jet fuel, are not included within the phrase " 'motor fuel' as defined by Section 1.1 of [the MFTL]" Stip. ¶ 35; 35 ILCS 505/1.19, 2a; *see also* 35 ILCS 505/17. ABC's stipulation number 35, in fact, constitutes an admission that, during the temporary rate reduction period (at least), ABC *acted* as though § 2a reflected the Illinois General Assembly's exclusion of aviation fuels, including KT jet fuel, from the definition of motor fuel. To now accept ABC'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).

I conclude that, at a minimum, the text of MFTL §§ 1.1, 1.13, 1.19, 2a and 17 create an ambiguity as to whether KT jet fuel is included within the phrase “ ‘motor fuel as defined by Section 1.1 of [the MFTL].” Even though KT jet fuel meets each element of the statutory definition of special fuel, and the second sentence of MFTL § 1.1 expressly provides that motor fuel includes special fuel, the legislature has manifested its intent that aviation fuels are excluded from § 1.1’s statutory definition of motor fuel. 35 **ILCS** 505/1.1, 1.13, 1.19, 2a, 17.

On this particular point, I must reject the Department’s argument that KT jet fuel does not constitute special fuel. *See* Department’s Response, pp. 8-9. First, that argument is substantively unwarranted in light of the facts to which the Department stipulated in this case. Stip. ¶¶ 9-12, 14-15. Stipulations of fact are judicial admissions that preclude a party from asserting a contrary position. Dayan v. McDonald’s Corp., 125 Ill. App. 3d 972, 983, 466 N.E.2d 958, 967 (1st Dist. 1984). Since the Department here agreed that the KT jet fuel ABC used meets each of the elements of the statutory definition of special fuel, it cannot argue that KT jet fuel does not constitute special fuel. Stip. ¶¶ 9-12, 15; Dayan, 125 Ill. App. 3d at 983, 466 N.E.2d at 967. Additionally, ABC is quite correct that the plain language of ¶ 4d of the MFTL describes KT jet fuel as a species of “special fuel [that is] sold or used for non-highway purposes.” 35 **ILCS** 505/4d. KT jet fuel cannot be “special fuel sold or used for non-highway purposes,” without first being special fuel in the first place.

But that does not mean that I am obliged to conclude that KT jet fuel constitutes “ ‘motor fuel’ as defined by Section 1.1 of the MFTL.” That is because, generally, where two statutory provisions are in apparent conflict, one way to resolve the conflict or reconcile the two sections is to have the more specific provision, or the more recently enacted one, take precedence over the more general or earlier enacted provision. *See Williams v. Illinois State Scholarship Com’n*, 139 Ill.2d 24, 58, 563 N.E.2d 465, 480 (1990). Here, amendments to the MFTL reveal a clear legislative intent that aviation fuels are specifically distinguishable from, and not included 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). On the other hand, if I accept ABC’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 ABC’s receipt of KT jet fuel is exempt from the tax imposed by MFTL § 2a. 35 ILCS 505/2a.

Finally, I presume, as I must, that when it passed P.A. 91-872, the legislature knew of its own longstanding exclusion of 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). Thus, when the General Assembly used the phrase “ ‘motor fuel’ as defined by Section 1.1 of the MFTL” in P.A. 91-872, it knew that it had previously excluded aviation fuels from that statutory definition. 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, where the legislature used the same phrase to describe the property to which the temporary use tax rate reduction would apply. *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?

ABC next argues that KT jet fuel is motor fuel because it is a “volatile and inflammable liquid [that is] ... suitable or practicable for ... operating motor vehicles.” *Id.*, pp. 9-11. ABC argues that there can be no dispute that KT jet fuel is suitable or practicable for operating motor vehicles, since the Department has stipulated that 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).” ABC’s Brief, pp. 9-10; Stip. ¶¶ 16, 18. It asserts, 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.*” ABC’s Brief, p. 9 (emphasis added); *but see* Stip. ¶¶ 5, 36-37; Stip. Ex. 1, *passim*. ABC 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 ABC’s view is correct, any inflammable liquid that may power a motor vehicle. *See* ABC’s Brief, p. 11.

If the MFTL had remained unchanged from the way it was written when Pascal v. Lyons was decided, ABC’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 those amendments had the effect of carving out aviation fuels from the MFTL’s definition of motor fuel. Moreover, 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, 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”). Read together, MFTL §§ 1.19, 1.25 and 2a strongly militate against such a construction. Again, §§ 1.19 and 2a of the MFTL excluded aviation fuels from the whole statutory definition of motor fuel, and not just from the second sentence of § 1.1.

ABC’s reliance on the Department’s stipulations that KT jet fuel can be used to power motor vehicles (Stip. ¶¶ 16, 18), similarly misses the point.³ The General Assembly defined KT jet fuel, and created a scheme that taxes, and exempts 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. ABC, however, 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. It ignores the effect that the legislature’s 1979 exemption of avgas from the definition of motor fuel had on the continuing validity of the Court’s holding in Pascal. Similarly, it ignores the legislature’s

³ And even if ABC’s argument did not miss the point, I am not so willing to accept ABC’s argument that, in this case, “suitable or practicable ...” means “possible.” ABC’s Brief, pp. 8-10. Here, for example, when ABC apparently used KT jet fuel (which has a sulfur content greater than is allowed for fuels that are legally usable in diesel powered motor vehicles, *see* Stip. ¶ 36) in its ground vehicles, it subjected itself to considerable penalties for potentially violating the Clean Air Act. Stip. Ex. 1, *passim*. I cannot agree with ABC’s argument that a fuel that may not legally be used in a motor vehicle nevertheless meets the legislature’s description of fuel that is either suitable or practicable for use in motor vehicles.

later 1989 creation of a tax imposed on receivers of fuel for sale or use, as well as the legislature's decision to define and treat KT jet fuel as a type of aviation fuel, and not as a subcategory of motor fuel. 35 **ILCS** 505/1.25, 2a, 17.

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 and effect of only § 1.1 of the MFTL, yet ignore the significant changes the General Assembly made to that Act after the second sentence was added to that particular section, and well after Pascal was decided.

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.⁴ 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. Ten years after that, 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 1989 amendment, it created a definition for the word "fuel," in which it distinguished "aviation fuels" from " 'motor fuel' as defined in Section 1.1 of [the MFTL]" It simultaneously manifested its

⁴ The Court in Pascal held that: "If the legislature had wished to provide a system of granting exemptions in the first instance, it would have so provided." Pascal, 15 Ill. 2d at 46, 153 N.E.2d at 820.

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. ABC 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.

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.”); *see also* Order, dated 10/23/03 (advising parties that ALJ would take notice of the legislative history of P.A. 91-872).

Public Act 91-872 was enacted after the Governor called the Illinois General Assembly into special session pursuant to proclamation number 2000-323, which provided:

WHEREAS, During the month of June, 2000, retail gasoline prices have increased dramatically and

disproportionately throughout Illinois and other Midwestern states and in some portions of Illinois now exceed \$2 per gallon; and

WHEREAS, These price increases are causing hardships on the citizens of Illinois, especially those on fixed incomes; and

WHEREAS, **High retail gasoline prices could jeopardize Illinois' future economic growth** and estimates show that high gasoline prices could drain approximately 1 billion from Illinois' robust economy through increased consumer prices in added transportation costs; and

WHEREAS, **The ABC States Environmental Protection Agency has not responded to repeated requests to suspend new gasoline production rules**, an action that the ABC States House of Representatives Committee on Science indicates would lower retail gasoline prices in Illinois by 25 cents to 50 cents per gallon; and

WHEREAS, Federal action to determine the cause of these apparent unjustified retail price increases or an increase in oil production output by oil producing nations will come too late to help Illinois consumers cope with the current energy emergency; and

WHEREAS, Energy experts cannot predict with any certainty whether **retail gasoline prices** will increase or decrease in the foreseeable future; and

WHEREAS, It is essential that some relief be granted to Illinois consumers immediately.

WHEREAS, **Our bordering sister state of Indiana has acted to reduce retail prices by temporarily suspending some taxes on gasoline sales** which raises the possibility of similar action by our other sister states in the Midwest and threatens the competitiveness of Illinois retailers.

WHEREAS, The 91st Illinois General Assembly is not scheduled to convene until prior to November, 2000.

Therefore, pursuant to Article IV, Section 5(b) of the Illinois Constitution of 1970, I, George H. Ryan, Governor of the State of Illinois, hereby call and convene the 91st General Assembly in Special Session to commence on June 28, 2000, at 5:00 p.m. to address the fuel price emergency by considering Senate Bill 1310 for the sole purpose of temporarily suspending the State Government's portion of the occupation and use taxes on motor fuel and gasohol for the period of July 1, 2000 until January 1, 2001."

Illinois House of Representatives, 91st General Assembly, Fourth Special Session, Transcription Debates for June 28, 2000 (hereinafter, "House Debates, [date]"), pp. 7-9 (emphasis added).

Public Act 91-872 began as Senate Bill 1310, and the first version of that bill was introduced in the regular session of the Illinois Senate on January 12, 2000. In its log, the legislature provides the following description of that bill:

Amends the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act, and the Retailers' Occupation Tax Act. Provides that beginning October 1, 2000, the tax imposed by the Acts on the sale of motor fuel and gasohol shall be at the rate of 1.25% (now, imposed at the rate of 6.25% on everything except certain food, medicines, and medical equipment). Provides for the reversion of the rate to 6.25% if a certain tax revenue growth is not attained.

<http://www.legis.state.il.us/legislation/legisnet91/status/910SB1310.html> (accessible as of 2/2/04).

The final version of the bill took shape after both chambers adopted House Amendment 2 to SB 1310, which was introduced at the late June special session. The legislature's log provides the following description of that amendment:

HOUSE AMENDMENT NO. 2. Adds reference to: 30 ILCS 105/6z-18 from Ch. 127, par. 142z-18 30 ILCS 105/6z-20 from Ch. 127, par. 142z-20 Deletes everything. Amends the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act, and the Retailers' Occupation Tax Act. Provides that beginning July 1, 2000 and through December 31, 2000, the tax with respect to motor fuel and gasohol is imposed under these Acts at the rate of 1.25% (eliminating the State's portion of the tax). Requires retailers to post a notice on pumps that the State's share of tax has been eliminated through December 31, 2000 and imposes a fine of \$500 per day per each retail premises where a violation occurs. Reduces for the same period from \$0.04 to \$0.01 the amount per gallon of motor fuel and from \$0.03 to \$0.01

the amount per gallon of gasohol that a motor fuel retailer shall prepay in taxes to a registered distributor, supplier, or other reseller of motor fuel. Amends the State Finance Act to provide for the distribution of the 1.25% tax on motor fuel and gasohol. **Amends the Motor Fuel Tax Law to provide that the part (b) rate of the tax imposed upon the use of motor fuel upon highways of this State by commercial motor vehicles shall be determined using a 1.25% rate rather than a 6.25% rate from July 1, 2000 through December 31, 2000.** Effective July 1, 2000.

<http://www.legis.state.il.us/legislation/legisnet91/status/910SB1310.html> (accessible as of 2/2/04) (emphasis added).

House Amendment 2 reflects the legislature's desire to provide tax relief to retailers of motor fuel and gasohol, and, more importantly, it reflects the legislature's attempt to induce such retailers to pass that tax savings on to their Illinois retail customers. The means of accomplishing this latter legislative purpose was to require retailers to post a notice on each pump at which they sold motor fuel and gasohol stating that the tax rate reduction was in effect. *Id.* The fine imposed on retailers was not premised on a retailer's failure to pass the tax savings along to its customers, but upon its failure to post the notices. *Id.*

On June 28, 2000, the Speaker of the Illinois House of Representatives, Lee Daniels, introduced House Amendment 2 with the following statements:

[Rep. Daniels:] Thank you, Mr. Speaker, Ladies and Gentlemen of the House. **I'd like to thank each of my colleagues who are here today for giving up a couple of days of your summer to provide Illinois citizens and drivers within Illinois with sorely needed tax relief for the price of gasoline.**

Senate Bill 1310 temporarily suspends, this is Amendment #2 to Senate Bill 1310, temporarily suspends the state portion of the use and occupation taxes, or as commonly called the sales taxes, on motor fuel and gasohol

from July 1, 2000 to December 31, 2000. Senate Bill 1310 provides that of the remaining 1.25% of the sales tax, 20% shall be distributed to the State and Local Sales Tax Reform Fund. This distribution is the same as the current formula for the local share of the use tax. Senate Bill 1310 also provides that of the remaining 1.25% of the occupation tax, 20% shall be distributed to the County and Mass Transit District Fund and 80% shall be distributed into the Local Government Tax Fund. This distribution is the same as the current formula for the local share of the occupation tax.

Senate Bill 1310, Amendment #2, lowers the rate to be prepaid by motor fuel retailers to one cent per gallon for both motor fuel and for ethanol. The current prepaid tax of four cents per gallon for motor fuel and three cents per gallon for ethanol is reinstated as of January 1, 2001.

Amendment #2 also provides that a sign should be placed on each pump by the motor fuel retailer that states and I quote, 'As of July 1, 2000, the State of Illinois has eliminated the state share of sales tax on motor fuel and gasohol through December 31, 2000. The price on this pump should reflect the elimination of this tax', unquote. This sign shall be at least 4 inches by 8 inches and any retailer failing to display the sign shall be guilty of a petty offense and shall be fined \$500 for each retail premises violating the sign requirements. Section 22 ensures that truckers paying Illinois tax through the international fuel tax arrangement will also be subject to 1.25% rate. This proposal does not amend any local tax Acts.

House Debates, 6/29/00, pp. 7-9 (emphasis added).

Fielding questions regarding House Amendment number 2, Speaker Daniels was asked, and responded to, the following questions from Representative Novak:

[Rep. Novak:] Mr. Daniels, there was some talk the other day about these stickers and trying to, I guess, provide some appropriate language **so we could really hit the message home to the marketers, the petroleum people, that this savings will be passed off to the consumers.** There was some discussion about fines, I think that was a proposition of yours. What happened to that idea?

[Rep. Daniels:] Well, your Leadership rejected it, for one. We proposed this in the ... “

[Rep. Novak:] Were the fines too high, Lee, or what, I don't know?”

[Rep. Daniels:] Apparently. House Republicans had suggested, as you know, a 1-800 number. They had also suggested a \$10 thousand fine per day, if it was shown that there was an intentional refusal to pass along those savings to taxpayers. There were a number of other suggestions that were brought up yesterday in the meeting, but they were rejected. And the Bill you have in front of us, is the Bill that ultimately was agreed upon for your consideration and to the committee earlier this morning.

[Rep. Novak:] So, as a consequence then, **so, if a motorist pulls into a gas station after the adoption of this Bill, when it becomes law, and he or she feels that that particular gas station owner is not passing off, let's say, 7.2 cents per gallon as a result of this legislation, what is their remedy?**

[Rep. Daniels:] Well, one of the things that I would do, is I would write the Attorney General's Office, I'd write the Department of Revenue.

[Rep. Novak:] One other question, Mr. Daniels. I didn't get a chance to go through all the language here, but this 6-month suspension, does the Legislature have to act again to put the tax back on?

[Rep. Daniels:] No, it automatically goes back on. **This is for a temporary period of time to get us through the summer driving months, the holiday period, and to afford some relief to our drivers in the summertime when most people are driving a little bit more. Also, to see whether or not some of the theories that people have advocated that if we reduce our tax there'll be an increase Illinois consumption or people will buy gasoline in Illinois increasing our gallonage here. Let's see if that works ...**

Representative Franks, speaking in favor of House Amendment 2 stated:

[Rep. Franks:] Thank you. I wish to speak in favor of the Amendment to this Bill. I think it's important that we temporarily relieve the 5% tax burden for our citizens in this state. ***

*** Now, today after we vote to reduce the taxes 5%, what we're basically giving back is a dime per gallon. **So, if somebody has a 20 gallon car, when you fill it up, you're gonna save two bucks. And if you fill up once a week, your gonna save about \$105 a year.** Now, that's very significant and it is very necessary, and that's why I'm glad we're doing that. ***

House Debates, 6/29/00, pp. 12-13

Representative Currie, in cautioning against the passage of House Amendment 2, stated:

[Rep. Currie:] *** In the first place, there is no guarantee, **there can be no guarantee that this reduction in taxes will actually reach the pockets of the motoring public,** ***

*** I would have to say, that although this is certainly politically popular, some might call it, the incumbent reelection plan of the year 2000, I would have to say, that as policy, it really doesn't work. **This measure lets big oil off the hook and cannot guarantee the benefits it promises the motoring public** and will definitely cut a substantial hole in the state's revenue program coming from what programs and what services, we don't even know. So, I know this Bill will pass, but I would urge you all to take a careful look at the policy, not the political implications. Thank you.

House Debates, 6/29/00, pp. 19-20 (emphasis added).

Speaking in favor of House Amendment 2, Representative Reitz stated:

[Rep. Reitz:] Thank you, Mr. Speaker. I'd like to applaud the Sponsors of this Amendment and thank them for passing on and working on this tax relief measure. It's one

we had actually been pushing this in the Metro East for quite a while, trying to get this repeal through. A temporary repeal is a good start, I believe. But, I would like to, I guess, ask Leader Daniels, and everyone else to look at this and let's try to generate the numbers and let's come back here in November and try to make this permanent. I mean, I believe that this is one the most regressive taxes that we have [It's a] tax on top of a tax and it's also one of the few taxes, I believe, that we can repeal and actually make money on. **I mean, truckers in Illinois just simply do not ... or throughout the country do not buy gas in Illinois. You know, they... we are a high gas tax state.** This will help in dealing with that. But we need to look at this. Hopefully, we'll be able to generate enough numbers so that we can act on this and make this repeal permanent. So, thanks for your help."

House Debates, 6/29/00, p. 21 (emphasis added).

The transcript of the Illinois Senate's debates regarding House Amendment 2, and SB 1310 similarly reflect the Illinois General Assembly's desire to provide relief to retailers — and more importantly, to retail purchasers — of gasoline, diesel fuel and gasohol for use in motor vehicles on the public way. For example, Senator Watson, the first to speak on behalf of the bill after it introduced by Senate President Phillip on June 29, 2000, stated:

... [W]hat brings us back here today, obviously, is the same reason that most of us were concerned about it then, and that's the high price of gasoline. *** One thing we have in Illinois and what we've tried to do is have a good tax policy, and the policy in regard to sales tax on gasoline is not good public policy. We are actually having a tax on tax. Our sales tax in Illinois is on tax. And that's not the right thing to do. We are one of the few states. **Eight states have a sales tax on gasoline and there are only two in the Midwest. It's a regressive tax. And we all know what that means, is obviously people at the lower end of the spectrum — the senior citizens and those people on fixed incomes, the working poor — pay a better — a bigger percentage. And that's a concern we should all have.** It's a quality of life issue. And I think

that's — that's something that most of us would agree that many decisions are being made right now on what you're going to do this summer. **This — this particular summer vacation, whatever it might be, some people are making a determination now whether they're going to go or not because of the price of gasoline. *****

Illinois Senate, 91st General Assembly, Fourth Special Session, Transcription Debates for June 29, 2000 (“Senate Debates, [date]”), pp. 3-4 (emphasis added).

Senator Hendon then posed the following questions and concerns to Senator Watson:

[Sen. Hendon:] Senator Watson, when we discussed this issue previously, ... **we tried to have a clause in the legislation that would make sure that the savings would get to the consumer. Are there any provisions in this legislation that will guarantee that this savings will get to the consumer?**

[Sen. Watson:] Well, that's hard to do. *** **We're not establishing pump police that go out and check to make sure things are happening out in the retail industry, but I think public awareness is a — is — is an issue here. And what we are doing is making the public aware of what we've done, and this — and this sticker or sign on the pump will do that, and they hopefully can police this themselves. And I think also, certainly competition. There's nothing more competitive in this State that the sale of gasoline. I mean, you can actually shop for gasoline from the windshield of your car. Very few purchases you can make [—] can you do that. And it's a very competitive industry, and I think that will drive the price down and make sure that this gets passed on.**

[Sen. Hendon:] Well, Senator, I don't trust the oil companies, I guess, as — as much as you do. Senator Jones raised this issue repeatedly while we were here, before we went on vacation. **I think if we're going to be here doing this, we should at least makes sure that the savings go to the people that you referred to, those who cannot afford to pay what we're paying right now. *****

Senate Debates, June 29, 2000, pp. 5-6 (emphasis added).

The debates regarding House Amendment 2 and SB 1310 reflect an unambiguous and near unanimous intent that the temporary rate reduction on “motor fuel ... and gasohol” was enacted to provide tax relief to retailers and, even more importantly, to retail purchasers of gasoline, diesel fuel and gasohol for use in motor vehicles on Illinois roadways. The history shows that the General Assembly was called into special session to address a perceived crisis involving the high retail cost of gasoline. House Debates, June 28, 2000, pp. 7-9. Along with temporarily lowering the use tax rate for “motor fuel ... and gasohol ...” the legislature simultaneously (and by the same amount) lowered the tax imposed by § 2(b) of the MFTL, which is applicable to sales and purchases of diesel fuel for use in commercial motor vehicles on Illinois public highways, in the same amount as the use tax rate. See <http://www.legis.state.il.us/legislation/legisnet91/status/910SB1310.html> (accessible as of 2/2/04) (*quoted supra*, p. 22). When discussing the proposed amendments to these different tax acts, the individual legislators almost uniformly articulated their understanding that their actions were intended to temporarily reduce the retail cost of gasoline, diesel fuel and gasohol for use in private or commercial motor vehicles on Illinois’ highways. See House Debates, June 29,2 2000, *passim*; Senate Debates, June 29,2 2000, *passim*.

That history, therefore, also reflects that the temporary use tax rate reduction was *not* intended to apply to persons who, like ABC, purchased aviation fuels, including KT jet fuel, for use in jet aircraft in Illinois. Thus, I agree with the Department’s argument that the emergency ROT regulation faithfully and correctly effectuates the legislature’s intent that aviation fuels, specifically, KT jet fuel and avgas, are excluded from the MFTL’s definition of motor fuel. Further, I reject ABC’s argument that the applicable

emergency ROT regulation is invalid. Regulation § 130.101(b) takes into account and accurately reflects the legislature's 1989 exclusion of aviation fuels from the definition of motor fuel, for purposes of the MFTL. In that regard, the regulation properly applies the MFTL's statutory definition of motor fuel to the amendment to UTA § 3-10, created by P.A. 91-872.

As a final note on this issue, ABC contends that the applicable ROT regulation is invalid because of the way it treats fuels other than KT jet fuel. ABC'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 ABC stipulates is at issue, viz. "whether kerosene-type 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, ABC 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).

More importantly, even if the sections of the regulation that address combustible gases and kerosene were declared invalid, that does not mean that ABC is entitled to a refund for its KT jet fuel. Courts do not automatically throw out the baby with the bath

water. That is to say, upon a finding of invalidity or unconstitutionality, a court will, if 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.

ABC sets up another straw man when it contends that “the Department is taking a 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” ABC’s Brief, p. 12. 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). ABC apparently treats the Department’s 1958 success in Pascal as binding it forever to the position that avgas constitutes motor fuel, no matter how many amendments the General Assembly makes to the MFTL. ABC, in that regard, encourages the wholly false

impression that, during the claim period, anything and everything taxed pursuant to the MFTL was taxed as motor fuel. *But see* 35 ILCS 505/1.19, 2a, 17.

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

I conclude that ABC 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. For more than a decade, ABC 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. ABC 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, ABC cites no legal authority for such an argument (ABC’s Brief, p. 16), 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).

Conclusion:

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

Date: 4/27/2004

John E. White
Administrative Law Judge