

**MF 04-9**

**Tax Type: Motor Fuel Use Tax**

**Issue: Whether Kerosene Based Jet Fuel Constitutes Motor Fuel**

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

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**ABC AIRLINES CO.,  
Taxpayer**

**No. 04-ST-0000  
IBT No. 0000-0000  
Claim Period 7/1/00 – 1/31/01**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General John Alshuler on behalf of the Illinois Department of Revenue; Gregory W. Gallagher, Esq. of Kirkland & Ellis LLP on behalf of ABC Airlines Co.

**Synopsis:**

This matter concerns the propriety of the Department of Revenue's ("Department[s]") denial of a claim for refund filed by ABC Airlines Co. ("ABC") for Illinois Use Tax ("UT") paid during the period July, 2000 through January, 2001. 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 in this case is whether kerosene-type jet fuel utilized by the taxpayer during the period P.A. 91-872 was in effect constituted "motor fuel" as defined in Section 1.1 of the Illinois Motor Fuel Tax Law. A finding that kerosene-type jet fuel constituted motor fuel would

make the temporary rate reduction applicable to ABC's use of kerosene-type jet fuel in jet aircraft in Illinois since the rate reduction is applicable to "motor fuel."

In lieu of a hearing, the parties have submitted a stipulated record, consisting of a stipulation of facts and a single stipulated exhibit. After reviewing the record herein, comprised of the stipulated record and memoranda of law submitted by the parties, it is my recommendation that this matter be resolved in favor of the Department.

**Findings of Fact:**

1. ABC Airlines Co. ("ABC") is a corporation organized under the laws of the state of Texas. Stip. ¶ 2.
2. ABC is in the business of providing air transportation, cargo and other transportation-related services. Stip. ¶ 3.
3. ABC conducts aircraft operations from Midway Airport in Chicago, Illinois. In order to supply airplanes and ground vehicles at Midway Airport with fuel during the tax period 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 facilities in Hammond, IN and Whiting, IN. From Hammond and Whiting, the fuel was transported by pipeline or truck to ABC's Chicago location at Midway Airport. Stip. ¶¶ 4, 5.
4. ABC used the KT jet fuel during the months at issue principally to operate its airplanes. Stip. ¶ 6. KT jet fuel is: a volatile and inflammable liquid; capable of being used for the generation of power in an internal combustion engine; not the same as any product commonly or commercially known or sold as gasoline; not a combustible gas that exists in a gaseous state at 60 degrees Fahrenheit. Stip. ¶ 7 – 10.

5. The American Society for Testing and Materials (“ASTM”) has issued ASTM specification D 1655 as the standard classification for KT jet fuel. Stip. ¶ 11.
6. The KT jet fuel ABC used at Midway Airport met ASTM specification D 1655 and military specifications MIL-T-5624R and MIL-T-83133D (Grades JP-5 and JP-8). Stip. ¶ 12.
7. The engines on airplanes ABC operates are internal combustion engines. Stip. ¶ 13.
8. 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. ¶ 14.
9. A diesel engine is an internal combustion engine. Stip. ¶ 15.
10. Certain motor vehicles utilize diesel engines to operate. Stip. ¶ 16.
11. 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.*), hereinafter the “UTA” (Stip. ¶ 17), but its receipt of KT jet fuel for use in Illinois was not subject to the tax imposed by § 2a of the Illinois Motor Fuel Tax Law (“MFTL”). Stip. ¶ 32; 35 ILCS 505/2a.
12. ABC reported the value of the KT jet fuel it imported into Illinois for use in this state on monthly sales and use tax returns filed with the Department. Stip. ¶ 18. ABC paid the use tax shown on such returns at the time the returns were filed. *Id.*
13. For the period July, 2000 through December, 2000, ABC reported and paid use tax on the KT jet fuel it imported into Illinois at a rate of 6.25%. Stip. ¶ 26.
14. On April 7, 2003, ABC filed amended use tax returns on Illinois Department of Revenue Form ST-1-X to report changes regarding the months of July, August, September, October, November and December, 2000 and January, 2001. Stip. ¶ 27.

15. On these amended returns, ABC stated that it overpaid its Illinois use tax liabilities regarding the use of KT jet fuel during the months of July 1, 2000 through December 31, 2000 in the aggregate amount of \$1,040,022 and requested a refund of that amount. Stip. ¶ 28.
16. On November 12, 2003, the Department rejected ABC's request for a refund, issued a Notice of Tentative Denial of Claim for Use Tax (the "Tentative Denial") to ABC, and informed ABC of its right to file a protest and request an administrative hearing within 60 days. Stip. ¶ 29.
17. On January 7, 2004, ABC timely protested the Department's Tentative Denial and asked for an administrative hearing. Stip. ¶ 30.

**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 Midway Airport in Chicago, Illinois. Stip. ¶ 1. Section 3-10 of the UTA establishes the rate of tax imposed on the use of tangible personal property purchased at retail from a retailer. 35 ILCS 105/3-10. Public Act 91-872 authorizes a temporary (six month) rate reduction for a particular type of tangible personal property, namely motor fuel and gasohol by adding 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

The issue presented is whether KT jet fuel<sup>1</sup> is included in “motor fuel, as defined in Section 1.1 of the Motor Fuel Tax Law ...” under P.A. 91-872, and thus constitutes a type of fuel to which the temporary rate reduction would apply.

The Motor Fuel Tax Law (“MFTL”) imposes a tax on the privilege of operating motor vehicles and recreational-type watercraft upon the public highways or waterways of Illinois. 35 ILCS 505/2. During the period covered by P.A. 91-872 (July 1, 2000 through December 31, 2000), the operative provisions of the MFTL provided as follows:

§ 2. 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 petroleum 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.

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<sup>1</sup> KT jet fuel is defined in the Motor Fuel Tax Law 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). See 35 ILCS 505/1.25, effective January 1, 2000.

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 used 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, eff. Jan. 1, 2000.

As the foregoing indicates, the motor fuel tax was imposed, during the tax period in controversy, at the rate of 19 cents per gallon for using motor fuel, and at the rate of 21 ½ cents per gallon for using diesel fuel. 35 **ILCS** 505/2 (a)-(b).

As a consequence of legislation passed in 1989<sup>2</sup>, the MFTL is also imposed upon the privilege of being a receiver in Illinois of fuel for sale or use. 35 **ILCS** 505/2a.

Specifically, section 2a of the MFTL provides as follows:

§ 2a. 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.

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<sup>2</sup> Section 2a of the MFTL was added to the MFTL in 1989, when the General Assembly passed P.A. 86-125. See 35 **ILCS** 505/2a (Smith-Hurd) (Historical and Statutory Notes); P.A. 80-125 (effective July 28, 1989).

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 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. In addition, no such tax shall be imposed upon the importation or receipt of diesel fuel by a rail carrier, registered pursuant to Section 18c-7201 of the Illinois Vehicle Code and used directly in railroad operations. In addition, no such tax shall be imposed when the sale is 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. In addition, no tax shall be imposed upon diesel fuel consumed or used in the operation of ships, barges, or vessels, that are 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. A specific notation thereof shall be made on the invoices or sales slips covering each sale.

35 **ILCS** 505/2a

Unlike section 2 of the MFTL, section 2a imposes tax upon the receipt of fuel, rather than upon the receipt of motor fuel. 35 **ILCS** 505/17. Consequently, the General Assembly also amended § 1 of the MFTL (the MFTL’s definition section), to add a definition of the term “fuel” when it enacted 35 **ILCS** 505/1.19 (P.A. 86-125) in 1989 which added section 2a. 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 (emphasis added)

As noted above, the temporary use tax reduction defines motor fuel to which the rate reduction applies by reference to section 1.1 of the MFTL. Section 1.1 of the MFTL, as in effect during the period covered by the UTA's temporary rate reduction, defines motor fuel as:

... all volatile and inflammable liquids produced, blended or compounded for the purpose 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

Section 1.13 of the MFTL, as in effect during the period covered by the UTA's temporary rate reduction, defines "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

The Department of Revenue, acting in accordance with its powers pursuant to 35 **ILCS** 120/12, has promulgated a regulation implementing the UTA's temporary tax rate reduction for motor fuel and gasohol which interpret the scope of the terms "motor fuel" and "special fuel" contained in the MFTL for purposes of applying the temporary use tax rate reduction. Specifically, 86 Ill. Admin. Code, ch. I, § 130.101 (effective July 12, 2000, see 24 Ill. Reg. 11324, July 28, 2000) provides, in pertinent part, as follows:

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.

86 Ill. Admin. Code, ch. I, sec. 130.101(b)

As is clear from the above, these regulations construe “jet fuel” as falling outside of the terms “motor fuel” and “special fuel” for purposes of applying the temporary tax rate reduction authorized by P.A. 91-872.

### **Summary of Issue and Arguments**

The issue presented in this case is whether the temporary rate reduction authorized by P.A. 91-872 applies to the taxpayer’s purchases of kerosene-type jet fuel during the period of July, 2000 through December, 2000. As indicated above, the reduced rate is applicable only if the taxpayer’s KT jet fuel constitutes ‘motor fuel’ as defined in Section 1.1 of the Illinois Motor Fuel Tax Law. Stip. ¶ 1. To determine this, one must establish whether the legislature intended the temporary rate reduction on use tax paid for “motor fuel ... and gashol” to extend to KT jet fuel. See Chicago Tribune v. Johnson, 106 Ill. 2d 63, 69 (1985) (“It is of course fundamental that in statutory construction a court will seek to determine the legislative intendment.”).

ABC presents three arguments in support of its refund claims. First, it argues that the UTA rate reduction at issue applies because KT jet fuel meets the definition of motor

fuel set forth in § 1.1 of the MFTL. Taxpayer's Brief, pp. 5 - 11. Next, it argues that 86 Ill. Admin. Code, ch. I, § 130.101(b), the emergency regulation, providing that jet fuel, including KT jet fuel, does not constitute motor fuel, is invalid. *Id.* at 11 - 18. 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, before the adoption of the Department's emergency regulation. *Id.* at 18.

The Department responds, first, that since the applicable and properly adopted emergency regulation provides that motor fuel does not include KT jet fuel, ABC's claim must be denied. Department Brief at pp. 4 - 8. The Department next contends that KT jet fuel is neither motor fuel nor special fuel. *Id.* at 8 - 10. 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.* at 10 - 16.

#### **ANALYSIS:**

By statute, the Department established the *prima facie* correctness of its action through the submission of evidence of its denial of ABC's claim into the record. Stip. ¶¶ 29; 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 determination is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156 - 57 (1968); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832 (1<sup>st</sup> Dist. 1988). Accordingly, ABC will succeed only if it establishes that the Illinois General Assembly intended KT jet fuel to constitute motor fuel and, thereby shows that the applicable regulation is invalid.

**ISSUE 1: WHETHER KT JET FUEL CONSTITUTES “MOTOR FUEL” AS DEFINED BY SECTION 1.1 OF THE MOTOR FUEL TAX LAW**

The fundamental question presented in this case is whether the phrase ‘motor fuel’ as defined by Section 1.1 of the MFTL and used in P.A. 91-872’s amendments to § 310 of the UTA includes KT jet fuel. The resolution of this question is a matter of statutory interpretation. Costello v. Governing Board of Lee County Special Education Association, 252 Ill. App. 3d 547, 557 (2d Dist. 1993). 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 (1990). The primary evidence of legislative intent is the text of the statutory provision itself. Van’s Material Co., Inc. v. Department of Revenue, 131 Ill. 2d 196, 202 (1989).

ABC focuses its primary argument on the second sentence of the MFTL’s definition of motor fuel, which provides that, “[A]mong 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. Taxpayer’s Brief, pp. 5 - 11. ABC supports its argument by citing pertinent stipulations of fact it believes demonstrate the KT jet fuel it purchased and used in Illinois met each of the elements identified within the statutory definition of special fuel. *Id.* at 6, 7 (citing Stip. ¶¶ 7 - 10). Implicit in ABC’s claim is the contention that all special fuels are motor fuels within the meaning of the MFTL. Taxpayer’s Brief p. 7. It argues that, under the MFTL, special fuel is nothing more than a sub-category of motor fuel – i.e. that all special fuels are motor fuels, even though not all motor fuels are special fuels.

The Department counters this contention by arguing that KT jet fuel does not constitute motor fuel or special fuel. Department Brief pp. 8 – 10. While, for reasons indicated in my analysis of Issue 2, below, I find the Department’s argument that KT jet fuel is not motor fuel persuasive, I find the argument that it is not special fuel unconvincing. First, this argument is substantively unwarranted in light of the facts to which the Department stipulated in this case agreeing that KT jet fuel meets each of the elements of the statutory definition of special fuel. Stip. ¶¶ 7 – 10, 13. 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 (1<sup>st</sup> Dist. 1984). Having agreed that the KT jet fuel ABC uses meets each of the elements of “special fuel” enumerated in section 1.13 of the MFTL, it cannot argue that KT jet fuel does not constitute special fuel. Dayan at 983. Additionally, ABC is correct in asserting that the plain language of section 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 being special fuel in the first place. However, a finding that KT jet fuel is special fuel does not compel one to conclude that it therefore constitutes motor fuel as defined by Section 1.1 of the MFTL. This conclusion would logically follow only if the MFTL evidenced an intent to treat all special fuels as a species of motor fuel. However, for the reasons enumerated below, the MFTL expressly refutes this proposition.

ABC vigorously asserts that all special fuels constitute a species of potentially taxable motor fuel as a consequence of the broad definition of motor fuel implied by section 1.13 of the MFTL. It posits this assertion even though motor fuel is defined in §

1.1 of the MFTL as fuel produced “for the purpose of, or which [is] suitable or practicable for, operating motor vehicles” and, logically, would not encompass special fuels that do not meet these criteria.<sup>3</sup> It contends that the trier of fact must glean the intent of section 1.1 of the MFTL by narrowly focusing on only one sentence, the second sentence of this section. (“Among other things, ‘Motor Fuel’ includes ‘Special Fuel’ as defined in Section 1.13 of this Act.”). However, the courts have admonished against attempts to discern the legislature’s intent solely by reviewing one sentence of a broad statutory scheme. Antunes v. Sookhakitch, 146 Ill. 2d 477 (1992). Rather, a court must review the text of a specific statutory provision in the context of the act as a whole, giving due consideration to the other inter-related provisions within the act. Id. at 484; see also Kraft at 189 (“Further, in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered.”). In the instant case, such a more comprehensive review of the related provisions of the MFTL reveals that, in 1989, the Illinois General Assembly amended the MFTL to exclude “aviation fuels” from the MFTL’s definition of “motor fuel.” This is so even though some aviation fuel, including KT jet fuel as defined in the MFTL, meets all of the listed elements within the statutory definition of “special fuel.”

In 1989, the General Assembly passed P.A. 86-125, which amends the MFTL to define the term “fuel.” 35 ILCS 505/1.19 (Smith-Hurd) (Historical and Statutory

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<sup>3</sup> For example, liquid fuel used for industrial purposes with a boiling range higher than the boiling range for diesel distillate (above 700 degrees Fahrenheit) would constitute “special fuel” if capable of igniting an internal combustion engine. However, such a fuel would not be sufficiently refined for practical use in powering motor vehicle diesel engines and therefore would not meet the criteria for classification as “motor fuel” indicated in section 1.13 of the MFTL. See <http://science.howstuffworks.com/oil-refining2.htm>

Notes); P.A. 86-125, (effective July 28, 1989). 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 (emphasis added). This statutory change, (and changes made to Section 2a of the MFTL, discussed below), reflects the legislature’s intent that aviation fuels constitute a specific type of fuel, and that they be considered fuels that are distinct from, and not embraced within the statutory definition of motor fuel. Had the legislature viewed aviation fuels and kerosene as being included within the statutory definition of motor fuel, there would have been no need for it to include, in § 1.19 anything more than the words “all liquids defined as ‘Motor Fuel’ in Section 1.1 of this Act ...” Caveney v. Bower, 207 Ill. 2d 82, 90 (2003) (“[I]t 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.”).

The legislature’s intent to exclude aviation fuels from the statutory definition of motor fuel is made even clearer by 1989 MFTL changes effected by P.A. 86-125 adding section 2a to this law. 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. Specifically, this provision states 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.” *Id.* (emphasis added) This section enumerates several exemptions from the tax it imposes. *Id.* One such exemption covers aviation fuels and kerosene received “at airports with over ... 170,000 operations

per year beginning in 1991, located in a city of more than 1,000,000 inhabitants for ... use by holders of certificates of public convenience ... issued by the United States Department of Transportation.” 35 ILCS 505/2a. While ABC is a receiver of aviation fuels, it is not subject to the tax imposed by section 2a because all of the aviation fuel it purchases for use in Illinois is used at Midway Airport in Chicago. Stip. ¶ 32.

Significantly, the exemption from the tax imposed by section 2a of the MFTL upon which ABC relies does not apply to the receipt of “motor fuel” as defined in section 1.1 of the MFTL. It only applies to the receipt of “aviation fuels and kerosene.” Indeed, recipients of KT jet fuel aviation fuel at airports outside of Chicago are subject to this tax, since such airports do not meet the criteria enumerated in section 2a. However, this tax is imposed not because recipients of aviation fuel are receiving “motor fuel” but because they are receiving aviation fuel at a location that does not qualify for exemption. For the same reason, the aforementioned exemption 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 exemption, moreover, is not a coincidence. Each of the other exemptions from section 2a’s tax similarly detail whether the particular exemption applies to fuels in general or to specific fuels. *Id.*<sup>4</sup> If ABC’s argument that KT jet fuel is a species of motor fuel were correct, section 2a’s exemption for fuel used at Chicago airports would not apply to ABC because

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<sup>4</sup> The three remaining exceptions enumerated at 35 ILCS 505/2a apply to: “...[1] ... the imporation 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 the 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.

this exemption, by its own terms, is not applicable to motor fuel as defined in section 1.1 of the MFTL. It only applies to “aviation fuel and kerosene.” However, ABC stipulates that it does not pay the fuel tax created by MFTL §2a on its KT jet fuel. Stip. ¶ 32.

Moreover, it is reasonable to assume that it has not paid the MFTL §2a tax for all prior years since 1989, the year that the exemption for aviation fuel received in Chicago went into effect. See 35 **ILCS** 505/2a (Smith-Hurd) (Historical and Statutory Notes). Thus, ABC has received considerable benefits as a direct result of its longstanding acceptance that § 2a’s exemption for “aviation fuels ...” applies to KT jet fuel it uses at Midway Airport, 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. 35 **ILCS** 505/1.19, 2a.

Indeed, ABC’s stip. ¶ 32 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 (“motor fuel”) 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 270, 274 (1<sup>st</sup> 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

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Retailers' Occupation Tax Act may be applied to define that same term in the Use Tax Act.”); *aff'd* 106 Ill. 2d 63 (1985).

ABC's argument that KT jet fuel constitutes “motor fuel” as defined in section 1.1 of the MFTL is completely inconsistent with its claim that its receipt of KT jet fuel is exempt from the tax imposed by MFTL section 2a. Even if this were not the case, where two statutory provisions are in apparent conflict, generally the more specific provision, or the more recently enacted one, takes precedence over the more general or earlier enacted measure. See Williams v. Illinois State Scholarship Commission, 139 Ill. 2d 24, 57 - 58 (1990). The definition of the term “special fuel” contained in § 1.13 of the MFTL, (and the related amendment to § 1.1 of the MFTL referencing “special fuel”), was enacted in 1963. See 35 **ILCS** 505/1.1, 1.13 (Smith-Hurd) (Historical and Statutory Notes). However, subsequent amendments to the MFTL in 1989 plainly reveal a clear legislative intent that aviation fuels, although special fuels, be distinguished from, and not included within, the statutory definition of motor fuel.

The propriety of classifying KT jet fuel as aviation fuel for purposes of applying the special exemption from the MFTL for aviation fuel upon which ABC relies, cannot be disputed. 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 (4<sup>th</sup> Ed. 2000)(Houghton Mifflin Company)(online version available at [www.dictionary.com](http://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 "used for the propulsion of aircraft." 35 ILCS 505/2(d); see also Texaco-Cities Services Pipeline Co. v. McGaw, 182 Ill. 2d 262, 270 (1998) ("Each undefined word in the statute must be ascribed its ordinary and popularly understood meaning.").

The definition of KT jet fuel, which was enacted and became effective six months before the effective date of P.A. 91-872, is certainly consistent with this understanding of the definition of the term aviation fuels. Compare 35 ILCS 505/1.25 (Smith-Hurd) with 35 ILCS 505/1.19 (Smith-Hurd). 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-8133D (Grades JP-5 and JP-8).*" 35 ILCS 5/1.25 (emphasis added). Thus, the commonly understood meaning of aviation fuels would embrace both aviation gasoline (also known as "avgas") and KT jet fuel.

Notably, the legislature expressly 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). Significantly, the Department published two bulletins after the passage of this exclusion, each of which contain the following 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.

IL. Dept. of Rev. Information Bulletin FY 84-26; IL. Dept. of Rev. Information Bulletin FY 84-27 (emphasis added)

The Department clearly interpreted the legislature's 1979 exemption of avgas from tax imposed by section 2 of the MFTL as exempting avgas from the definition of motor fuel. This construction of the MFTL is certainly consistent with the legislature's subsequent exclusion of aviation fuels from the definition of motor fuel. It is also consistent with the fact that the emergency regulation adopted shortly after the passage of P.A. 91-872 excluded both avgas and KT jet fuel from the definition of motor fuel. See 86 Ill. Admin. Code, ch. I, § 130.101(b).

It must be presumed that when it passed P.A. 91-872, the temporary motor fuel use tax rate reduction, the legislature knew of its own longstanding exclusion of aviation fuels from the MFTL's definition of motor fuel. Christ Hospital and Medical Center v. Ill. Comprehensive Health Insurance Plan, 295 Ill. App. 3d 956, 961 (1<sup>st</sup> 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 the statutory definition. The foregoing considerations compel the conclusion 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. This is true because the legislature has used the same phrase used in MFTL § 2a, the 1989 exclusion, " 'motor fuel' as defined by Section 1.1", 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 (1<sup>st</sup> 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 (1947)).

Based on the foregoing, I conclude that KT jet fuel is not motor fuel eligible for the temporary use tax rate reduction authorized by P.A. 91-872. 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 MFTL, read as a whole, clearly manifests an intent that aviation fuels be excluded from the statutory definition of motor fuel at § 1.1 of the MFTL.

## **ISSUE 2: WHETHER KT JET FUEL IS SUITABLE OR PRACTICABLE FOR OPERATING MOTOR VEHICLES**

In order to qualify as “motor fuel” a fuel must either be “produced, blended or compounded for the purpose of ... operating motor vehicles”, or be “suitable or practicable for, operating motor vehicles.” 35 ILCS 505/1.1. KT jet fuel clearly is not produced for the purpose of operating motor vehicles. See 35 ILCS 505/4d classifying it as a fuel intended for “non-highway purposes.” However, ABC argues, KT jet fuel is a motor fuel because it is a “volatile and inflammable liquid ... which is suitable or practicable for ... operating a motor vehicle.” Taxpayer’s Brief p. 8. It contends that the Department cannot dispute the suitability or practicality of using KT jet fuel to operate motor vehicles since the Department has stipulated that KT jet fuel is capable of being used to generate power in a motor vehicle diesel engine (i.e., an engine in which fuel is injected into the combustion chamber and ignited by pressure without electric spark). Taxpayer’s Brief pp. 8–10. It asserts, moreover, that: “(T)he United States Environmental Protection Agency (“EPA”) regulates and restricts such use in many types of motor vehicles because of the high sulfur content of jet fuel ... (I)n jurisdictions where similar restrictions do not exist, jet fuel is used by airlines to operate diesel-powered

motor vehicles.” Taxpayer’s Brief p. 2. However, this argument completely ignores the fact that KT jet fuel has a sulfur content greater than is allowed for fuels that are legally usable in diesel powered motor vehicles. Department’s Brief pp. 7, 8; Stip. ¶ 33. As a consequence, ABC’s use of KT jet fuel in its ground vehicles would subject it to considerable penalties for violating the Clean Air Act (42 U.S.C.A. § 7401 *et seq.*) and apparently, for this reason, has never been undertaken by ABC.<sup>5</sup> Accordingly, 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. Thus it must be concluded that, even though KT jet fuel is a “special fuel”, it is not “motor fuel” because it does not fall within the scope of MFTL section 1.1 (covering fuels “compounded for the purpose of, or which are suitable or practicable for, operating motor vehicles.”).

ABC cites the Illinois Supreme Court’s holding in Pascal v. Lyons, 15 Ill. 2d 41 (1958) to support its claim that the term “motor fuel” must be given broad enough scope to include any inflammable liquid usable to power a motor vehicle including aviation fuels. Taxpayer’s Brief pp. 10, 11. In this case, the Illinois Supreme Court held that Motor Fuel Tax must be collected on all motor fuel sold by distributors, including gasoline sold for non-highway use as aircraft fuel. If the MFTL had remained as it was when Pascal v. Lyons was decided, ABC’s argument might be persuasive. However, the Illinois General Assembly has made significant changes to the MFTL after the Supreme

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<sup>5</sup> 42 U.S.C.A. § 7545(g) provides that no person may 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. Kerosene-type jet fuel exceeds this limitation. Stip. ¶ 33. The record contains no evidence that ABC actually used jet fuel in any of its motor vehicles.

Court's decision in Pascal, and those amendments have carved out aviation fuels from the MFTL's definition of motor fuels. Immediately after the Pacal decision, the Illinois General Assembly barred the collection of tax on aviation gasoline, effective October, 1979. See 35 **ILCS** 2(d) (Smith-Hurd) (Historical and Statutory Notes); P.A. 81-471 (effective October 1, 1979). Subsequently, the General Assembly created its own definition of KT jet fuel. 35 **ILCS** 505/1.25 (Smith-Hurd) (Historical and Statutory Notes); P.A. 91-173 (effective January 1, 2000).

The legislature's choice of words in § 1.25 of the MFTL is instructive. Section 1.25 defines 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. Jet fuel is not ordinarily understood to mean fuel used to propel highway vehicles. Moran Transportation Corp. v. Stroger, 303 Ill. App. 3d 459 (1<sup>st</sup> Dist. 1999). It would be incongruous for the legislature to intend the words "any jet fuel ... described in ASTM specification 1655 ..." to mean "motor fuel", a term clearly associated with highway use. See 35 **ILCS** 505/2 (imposing the motor fuel tax "on the privilege of operating motor vehicles upon public highways" ...). See also Hicks v. Industrial Commission, 251 Ill. App. 3d 320, 325 (5<sup>th</sup> 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") (quoting Goodson v. The Industrial Commission, 190 Ill. App. 3d 16, 18 (1<sup>st</sup> Dist. 1989)). Moreover, section 1.25, when read together with sections 1.19 and 2a, strongly militates against such a construction since sections 1.19 and 2a exclude aviation fuels from the whole statutory definition of motor fuel.

The taxpayer's claim that jet fuel is suitable or practicable for highway use is predicated upon the factual stipulation that KT jet fuel can be used to power motor vehicles. Stip. ¶¶ 14 – 16. However, even if jet fuel were deemed suitable or practicable for highway use for this reason alone, it would not constitute motor fuel because aviation fuel falls into a category of fuels that the legislature has delineated as distinct and separate from motor fuels in § 1.19 and 2a of the MFTL. In narrowly focusing on the theoretical possibility of using jet fuel in motor vehicles as proof of its claim, ABC blindly ignores the fact that the General Assembly has defined KT jet fuel, and has created a scheme that taxes, and in some cases exempts from taxation, persons who receive KT jet fuel because it is an aviation fuel, and because it is not motor fuel as defined by Section 1.1 of the MFTL. ABC would have this tribunal simply ignore the legislature's later 1989 creation of a tax imposed on receivers of fuel for sale or use, and its decision to define and treat KT jet fuel as a type of aviation fuel, and not as a subcategory of motor fuel. 35 ILCS 505/1.19, 1.25, 2a.

The Illinois Supreme Court, in Pascal, 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 only one or two provisions of this law. Pascal at 44, 45. Similarly, it would be inappropriate here to ignore the significant changes the General Assembly has made to the MFTL subsequent to the decision in Pascal.

In ruling that the motor fuel tax applied to aviation gasoline 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 at 46. In 1979, the General Assembly did just what the Illinois Supreme Court in Pascal said it could have done originally.

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, eff. Oct. 1, 1979. Ten years after that, the General Assembly amended the MFTL again. 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,” which distinguished “aviation fuels” from “motor fuel” as defined in Section 1.1 of the MFTL. It simultaneously manifested its unequivocal intent, in newly created sections 1.19 and 2a of the MFTL 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. ABC provides no good reason why the trier of fact should now conclude that KT jet fuel is more properly classified as “motor fuel” as defined in Section 1.1 of the MFTL where ABC has admittedly received considerable benefits from acting as though MFTL section 2a classified KT jet fuel as an “aviation fuel” and not as “motor fuel.” Such a finding would be completely implausible since it would treat “aviation fuel” as “motor fuel” for purposes of the temporary use tax rate reduction, but not for purposes of § 2a of the MFTL.

**ISSUE 3: WHETHER LEGISLATIVE HISTORY SUPPORTS THE VALIDITY OF 86 ILL. ADMIN. CODE, CH. I, § 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 in Section 1.1 of [the MFTL] ...” as prescribed by P.A. 91-872, 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 the

trier of fact may take official notice. Hyatt Corp. v. Sweet, 230 Ill. App. 3d 423, 430 (1<sup>st</sup> 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.”).

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 United States Environmental Protection Agency has not responded to repeated requests to suspend new gasoline production rules**, an action that the United 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, Ninety First General Assembly, 4<sup>th</sup> 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 final version of that bill was introduced in the regular session of the Illinois Senate on January 12, 2000. In its logs, the legislature provides the following description of the 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 attained.

See <http://www.legis.state.il.us/legislation/legisnet91/status/910SB1310.html>

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>  
(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.

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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.

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[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 ...**

House Debates, 6/29/00, pp. 10-11 (emphasis added).

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. \*\*\*

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\*\*\* 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,** .... \*\*\*

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\*\*\* 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 public highways. For example, Senator Watson, the first to speak on behalf of the bill after it was 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, 91<sup>st</sup> 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 than 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.

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[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” be 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>. 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, 2000, *passim*; Senate Debates, June 29, 2000, *passim*.

This legislative 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 regulation 86 Ill. Admin. Code, ch. I, § 130.101(b) faithfully and correctly effectuates the legislature's intent that aviation fuels, specifically, KT jet fuel and avgas, be excluded from the MFTL's definition of motor fuel. Accordingly, I must reject ABC's argument that the applicable emergency regulation is invalid. Moreover, 86 Ill. Admin. Code, ch. I, § 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.

ABC also contends that the applicable emergency regulation is invalid because of the way it treats fuels other than KT jet fuel. Taxpayer's Brief, pp. 13, 14. Specifically, it argues that the regulation is invalid because it classifies combustible gases and kerosene as constituting motor fuel only if they are delivered into the fuel supply tanks of motor vehicles. *Id.* However, this 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. Admin. Code, ch. I, § 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 (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.*”) (emphasis in original) (*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. 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 (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 also 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 ....” Taxpayer’s Brief p. 12. The Department, however, never once argues here that avgas constitutes motor fuel. *See* Department Brief, *passim*. That, no doubt, is because § 2(d) of the MFTL 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 (IL Dept. of Rev. Information Bulletins FY 84-26, FY 84-27), and because the regulation itself provides that avgas is *not* motor fuel. 86 Ill. Admin. Code, ch. I, § 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 ever taxed pursuant to the MFTL was taxed as motor fuel. This argument ignores the clear import of 35 **ILCS** 505/1.19, 2(d) and 2a.

Lastly, ABC contends that administrative regulation 86 Ill. Admin. Code, ch. I, § 130.101(b) is not applicable to the period July 1, 2000 through July 11, 2000 because it was adopted as an emergency regulation effective July 12, 2000. Taxpayer's Brief p. 18. This contention is based upon the assumption that this regulation is the primary, if not exclusive legal basis for denying to jet fuel the temporary rate reduction authorized by P.A. 91-872. See Taxpayer's Brief p. 18 ("[T]he Department's argument that jet fuel does not constitute motor fuel rests principally, if not exclusively on the existence of the emergency amendment to the ROT Act regulations."). However, for the reasons indicated in this recommendation, the primary basis for the exclusion of jet fuel from the benefits of P.A. 91-872 is the text of the Motor Fuel Tax Law itself, which the regulation merely implements.

Moreover, even if this regulation were the principal authority for application of the full Use Tax Rate to jet fuel, the taxpayer's arguments would be unconvincing.

Regulation 130.101(b) expressly provides that it is applicable to the period “(B)eginning on July 1, 2000 through December 31, 2000.” 86 Ill. Admin. Code, ch. I, § 130.101(b). Under Illinois law, administrative regulations enjoy a presumption of validity. People ex rel. Colletti v. Pate, 31 Ill. 2d 354, 359 (1964). When promulgated pursuant to legislative authority, rules and regulations of administrative agencies have the force and effect of statutes. Du-Mont Ventilating Co. v. Department of Revenue, 52 Ill. App. 3d 59, 63 (3d Dist. 1977), and should be set aside only when shown by the taxpayer to be arbitrary, capricious or unreasonable. Illinois State Chamber of Commerce v. Pollution Control Board, 49 Ill. App. 3d 954, 959-60 (1<sup>st</sup> Dist. 1977). Accordingly, the Illinois courts have barred the Department of Revenue from retroactively applying a revised regulation where the taxpayers acted in reliance upon the former enactment (Pressed Steel Car Co. v. Lyons, 7 Ill. 2d 95, 106 (1955)), and have precluded the retroactive enforcement of a revised interpretation of the statute when prior rules and regulations expressly provided to the contrary. Illinois Bell Telephone v. Allphin, 95 Ill. App. 3d 115, 124 (1<sup>st</sup> Dist. 1981).

In the instant case, ABC has presented no rationale explaining why the application of regulation 130.101 retroactively to the period July 1, 2000 through July 11, 2000 in accordance with subdivision (b) of this regulation, is arbitrary or capricious. Therefore, the taxpayer has failed to sustain its burden to rebut the presumed validity of this regulation. Frederick G. Acker v. Department of Revenue, 116 Ill. App. 3d 1080, 1084 (1<sup>st</sup> Dist. 1983).

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Department's denial of the taxpayer's claim for refund be upheld.

Ted Sherrod  
Administrative Law Judge

Date: September 10, 2004