2012 IL App (2d) 110443-U
No. 2-11-0443
Order filed July 6, 2012
Modified upon denial of rehearing November 9, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES S. WOLANDE and PHILLIP E. CORCORAN, as successors in interest to Caesh Air, LLC,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees,	)	No. 09-CH-283
v.	)	
ILLINOIS DEPARTMENT OF REVENUE, BRIAN A. HAMER, Director,	)	Honorable Bonnie M. Wheaton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The taxpayer could not use the rolling stock exemption to the Use Tax where the subject aircraft never moved across state lines or carried passengers or goods in interstate commerce even though its certification for chartered air operations constituted a qualifying use under the rolling stock exemption, which requires both use and the movement of the rolling stock in order to come within the exemption.

¶ 1 Defendant, Illinois Department of Revenue, Brian A. Hamer, Director (the Department), appeals the order granting summary judgment in favor of plaintiffs, Charles S. Wolande and Phillip

E. Corcoran, as successors in interest to Caesh Air, LLC (the taxpayer), on the issue of whether the taxpayer was eligible to utilize the rolling stock exemption (35 ILCS 105/3-55(b) (West 2008)) to avoid paying a use tax on the subject aircraft. The Department contends that, under the properly interpreted plain language of the relevant statutory provision, along with the fact that the subject aircraft never moved in interstate commerce, the taxpayer was not eligible to claim the exemption. We reverse.

¶ 2 Caesh Air was formed by plaintiffs Wolande and Corcoran to be an asset-holding company partnering with a charter-air firm. Caesh would purchase and own aircraft, lease them to a charter-air company, who would utilize them, and then, if aircraft were sold off, the companies would split any profits. On March 4, 2004, Caesh entered into two agreements with Scott Aviation, an air-charter service based at the Du Page Airport. One agreement outlined the Caesh business model summarized above. The other provided that Scott Aviation would look for suitable aircraft for Caesh to purchase and then lease back to Scott Aviation for its use in its charter operations. If Scott Aviation discovered a suitable aircraft, Caesh could authorize Scott Aviation to negotiate the purchase on Caesh's behalf. The agreement further provided that, once Caesh purchased an aircraft, Scott Aviation would use the aircraft in its charter operations for at least 62.5 hours in the first six-month period and for 42 hours in each four-month period thereafter. The agreements further allocated maintenance and storage costs between Caesh and Scott Aviation and fixed the lease charges between the companies.

¶ 3 When Caesh and Scott Aviation executed the March 4, 2004, agreements, Scott Aviation had already located a suitable aircraft for Caesh to purchase: a Falcon 50, the aircraft at issue in this case. Also on March 4, 2004, Caesh and Scott Aviation executed a three-year lease agreement for the

Falcon 50, setting rental charges to Caesh at $2,000 per flight-hour and further specifying the parties' responsibilities regarding operating costs and maintenance.

¶ 4 On March 26, 2004, Caesh purchased the subject aircraft. The aircraft was taken to the Du Page airport, and Scott Aviation took possession of it according to the terms of the March 4, 2004, agreements.

¶ 5 The Falcon 50 was a used aircraft in need of repairs to make it airworthy for charter purposes. Charter services require a more rigorous airworthiness standard than private uses. Accordingly, before the aircraft was deemed capable of carrying passengers in Scott Aviation's charter operations, the Falcon 50 had to meet the Federal Aviation Administration's (FAA) maintenance and inspection requirements.

¶ 6 Shortly after Scott Aviation took possession of the aircraft, it requested that the aircraft be added to Scott Aviation's Part 135 air carrier certificate. Following FAA inspection, the FAA ordered certain repairs to be made before Scott Aviation could use the aircraft in its charter operations. The aircraft was repaired, tested, and approved. Scott Aviation then notified the FAA that the necessary repairs had been made and requested the issuance of the appropriate documentation. At that time, it took the FAA 30 to 60 days to issue the certificate allowing an operator to include an aircraft on its Part 135 air carrier certificate. Until the certificate from the FAA is issued, an operator may not use the aircraft for its charter operations.

¶ 7 Caesh sold the subject aircraft before the FAA certification had issued. While the certification was pending, Caesh received an inquiry to sell the aircraft for about $800,000 more than Caesh's purchase price. In connection with the sale, Caesh took the aircraft to New Jersey for a demonstration flight and returned. On June 15, 2004, Caesh sold the aircraft. Scott Aviation

informed the FAA that the subject aircraft had been sold and that it was no longer seeking its certification for charter uses.

¶ 8 The parties' agreement remained in effect, and the parties sought other aircraft for their venture. The parties located a Challenger 600 which was acquired under the same terms and conditions as the subject aircraft, and Scott Aviation used the Challenger 600 in its charter operations from 2004 to 2006. The Challenger 600 is not at issue in this appeal.

¶ 9 The Department audited Caesh and concluded that the Aircraft Use Tax had to be imposed for Caesh's use of the Falcon 50. Regarding the Challenger 600, the Department concluded that its use was exempt from the Aircraft Use Tax. The Department assessed Caesh's tax liability at over a quarter-million dollars plus penalties and interest. Caesh paid the amount assessed under protest and, eventually, filed an action under the Protest Monies Act to recover the assessed amount. On or before December 31, 2010, while the matter was pending in the trial court, Caesh ceased its operations and dissolved. Wolande and Corcoran, as successors in interest to Caesh, moved to be substituted into the action as parties plaintiff, and the trial court granted the motion.

¶ 10 The parties filed cross-motions for summary judgment. The trial court ruled in favor of the taxpayer and against the Department on the cross-motions. The trial court held that the subject aircraft was being used by a carrier for hire in interstate commerce as Scott Aviation was going through the steps to certify it for use in its charter operations. According to the trial court, the fact that the subject aircraft was being repaired pursuant to FAA regulations and could not yet carry passengers was consistent with the taxpayer's argument that it was being used in interstate commerce. The trial court stated, "The fact that it didn't actually carry passengers across state lines

doesn't negate the fact that it was subject to all of these regulations and was in the process of receiving the necessary certification."

¶ 11 The court next considered the rolling stock exemption. The parties agreed that the initial elements of the exemption had been satisfied. The court specifically commented on the provision that the exemption remained in effect "as long as so used" by the carrier for hire:

> "But I do believe that the [exempt] use continued because at the moment it was brought into Illinois, it was subject to this lease. It never left the control of Scott Aviation, and at all times up until the time that it was sold it was in the process of achieving the goal of carrying passengers in interstate commerce."

The Department timely appeals.

¶ 12 On appeal, the Department contends that the trial court erred in interpreting the rolling stock exemption. The rolling stock exemption provides:

> "To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:
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> ***
>
> (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property by interstate carriers for-hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carriers for-hire, and equipment operated by a telecommunications provider, licensed as a common carrier by the Federal Communications Commission, which is

> permanently installed in or affixed to aircraft moving in interstate commerce." 35 ILCS 105/3-55(b) (West 2008).

More specifically, the Department challenges the trial court's judgment interpreting the rolling stock exemption and granting summary judgment in favor of the taxpayer. Summary judgment is appropriate where the pleading, depositions, admissions, and affidavits in the record show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 245 (2007). We review *de novo* the trial court's decision on a summary judgment. *100 Lake, LLC v. Novak*, 2012 IL App (2d) 110708, ¶ 11.

¶ 13 In addition, the issue on appeal is one of statutory interpretation, which also proceeds under *de novo* review. *Board of Education of Marquardt School District No. 15 v. Regional Board of School Trustees of Du Page County*, 2012 IL App (2d) 110360, ¶ 10. The cardinal principle of statutory interpretation is for the court to discern and give effect to the legislature's intent. *Board of Education*, 2012 IL App (2d) 110360, ¶ 11. The language of the statute is the best indicator of the legislature's intent, and the court should consider the entirety of the statute, keeping in mind the statute's subject matter and the legislatures apparent objective in enacting the statute. *Board of Education*, 2012 IL App (2d) 110360, ¶ 11. Nevertheless, the beginning point of any inquiry into statutory interpretation is the language of the statute itself, the plain and ordinary meaning of which is the surest indicator of the legislature's intent. *Board of Education*, 2012 IL App (2d) 110360, ¶ 11. If the statutory language is clear and unambiguous, the court must apply it as written, reading into it no exceptions, limitations, or conditions the legislature did not express, and resorting to no aids or tools of interpretation. *Board of Education*, 2012 IL App (2d) 110360, ¶ 11. It is only when the meaning of the statute cannot be ascertained from its language that the court may look beyond

that language and employ the aids and tools of construction. *Board of Education*, 2012 IL App (2d) 110360, ¶ 11.

¶ 14 Finally, we are mindful that we are called to interpret a statutory tax exemption. Under Illinois law, taxation is the rule with a tax exemption being an exception to the rule. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 388 (2010). Statutes granting a tax exemption are strictly construed in favor of taxation. *Provena Covenant*, 236 Ill. 2d at 388. With these principles in mind, we consider the parties' contentions.

¶ 15 The Department focuses on the phrases, "as long as so used" and "for use as rolling stock moving in interstate commerce." According to the Department, these phrases in the rolling stock exemption statute require the subject property actually to be used in interstate commerce. The Department contends that, because the subject aircraft was admittedly never used to carry passengers from this state to another, it never was used or moved in interstate commerce, so the rolling stock exemption cannot apply.

¶ 16 By contrast, the taxpayer contends on appeal that the term "use" is extremely broad and that the subject aircraft was being used in interstate commerce as the taxpayer was negotiating the certification process. The fact that the aircraft did not actually carry passengers across state lines was irrelevant where the taxpayer was working to get the aircraft certified so it could perform the intended task of carrying passengers.

¶ 17 The taxpayer's point about the term, "use," is well taken. The Use Tax Act (35 ILCS 105/1 *et seq*. (West 2008)) broadly defines "use" to mean "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." 35 ILCS 105/2 (West 2008). The taxpayer is also correct in the assertion that the submission of the subject aircraft to the

certification procedure under Part 135 constitutes a "use" within the meaning of term for taxation purposes. Thus, the repair and maintenance of the subject aircraft to the standards specified under Part 135 also constitute "use" for purposes of the taxation statutes, including the rolling stock exemption (35 ILCS 105/3-55(b) (West 2008)).

¶ 18 The taxpayer further notes that the rolling stock exemption exempts the "use" (as defined in the statute) of rolling stock in interstate commerce by carriers for hire or by the lessors of such rolling stock to interstate carriers for hire. 35 ILCS 105/3-55(b) (West 2008). The taxpayer then makes the leap that, because the lessee controlled the subject aircraft and was attempting to get the aircraft certified as suitable for use in its charter-air operations, this action qualified as the "use ***of tangible personal property *** by lessors under a lease of one year or longer executed or in effect at the time of purchase of tangible personal property by interstate carriers for-hire for use as rolling stock moving in interstate commerce." 35 ILCS 105/3-55(b) (West 2008). The taxpayer contends that, in other words, because the aircraft was leased to Scott Aviation to be used by Scott Aviation in its air charter operations, the certification of the subject aircraft was a qualifying use under the rolling stock exemption. We believe that the contention is not without merit.

¶ 19 That, however, does not end the inquiry. The phrase, "for use as rolling stock moving in interstate commerce," is also freighted with meaning. In *National School Bus Service, Inc. v. Department of Revenue*, 302 Ill. App. 3d 820, 826-27 (1998), the court endorsed the Department's interpretation of the rolling stock exemption requiring "regular and frequent use of the rolling stock in interstate commerce." In particular, the *National School Bus* court noted that incidental use of the rolling stock in interstate commerce (*i.e.*, wholly intrastate use of the rolling stock or only irregular and infrequent interstate use) was insufficient to trigger the exemption from taxation. *National*

School Bus, 302 Ill. App. 3d at 827. Similarly, in *Chicago & Illinois Midland Ry. Co. v. Department of Revenue*, 66 Ill. App. 3d 397, 399 (1978), the court held that the plain language of the rolling stock exemption required that the rolling stock "move in interstate commerce." Of the 200 rail cars in question, 92 were used solely intrastate in Illinois, so those cars "did not 'move in interstate commerce' " and were subject to taxation under the Use Tax Act. *Chicago & Illinois Midland Ry.*, 66 Ill. App. 3d at 399. Likewise, in *Burlington Northern, Inc. v. Department of Regulation*, 32 Ill. App. 3d 166, 176 (1975), the court found that the inter- and intrastate uses of railroad cars were inseparably bound, and that the interstate movement of the railroad cars was sufficiently substantial to qualify for the exemption. Important to the court's reasoning was the fact that the railroad cars actually moved across state lines 13% of the time. *Burlington Northern*, 32 Ill. App. 3d at 176. The actual movement coupled with the intrastate transport of goods and passengers involved in interstate commerce was deemed sufficiently substantial to invoke the rolling stock exemption from taxation. *Burlington Northern*, 32 Ill. App. 3d at 176.

¶ 20 When the exemption has been applied to railroad equipment, it has involved interstate movement of the actual rolling stock. *Chicago & Illinois Midland Ry.*, 66 Ill. App. 3d at 399; *Burlington Northern*, 32 Ill. App. 3d at 176. Further, to qualify, the rolling stock must be involved in regular and frequent use in interstate commerce. *National School Bus*, 302 Ill. App. 3d at 827. Thus, the Department's counterargument, that the rolling stock must actually move across state lines, is also well grounded in longstanding authority.

¶ 21 To be sure, the phrase, "for use as rolling stock moving in interstate commerce," contains the broadly defined word "use," and this tends to harmonize the Department's and the taxpayer's views. Nevertheless, there is a significant component of actual movement of the rolling stock between states

that is incorporated into the judicial interpretation of the phrase. In our view, "use" must be interpreted in conjunction with the requirement that the rolling stock be involved in some substantial movement across state lines or in transporting items or passengers in the stream of interstate commerce (such as an out-of-state flight arriving at an in-state airport with a connection to an in-state flight with an in-state final destination). The requirement of a substantial movement-across-state-lines component in the definition of "use" for purposes of the rolling stock exemption also serves to make the determination objective. The taxpayer has consistently argued that it intended to use the subject aircraft in interstate commerce, a subjective position that was not supported by any objective indicia of intent. By requiring a substantial movement component, we require that the subjective and objective line up so that the taxpayer cannot claim only an inchoate intent, but must also provide some tangible objective support to its claim of the rolling stock exemption. We further note that the objective indicia, while corroborative of a taxpayer's subjective intent, control the determination. Based on these considerations, both the requirement of movement that attaches to the rolling stock exemption and the necessity of objective corroboration of subjective intent, we believe that the Department's position, that the subject aircraft did not qualify for the exemption because it never actually participated in moving in interstate commerce, is correct.

¶ 22 The taxpayer complains that the Department's interpretation inserts an "actual use" requirement such that to qualify for the exemption, a taxpayer must "actually use" the rolling stock in either interstate movement or in moving goods or persons already in the stream of interstate commerce. We disagree. Under *National School Bus*, *Chicago & Illinois Midland Ry.*, and *Burlington Northern*, the rolling stock exemption comes with the requirement that the rolling stock have substantial involvement in interstate commerce, either through physical movement across state

lines, or in transporting goods or people who are already involved in interstate commerce. The Department's interpretation does not engraft concepts or principles unintended by the legislature into the statute.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed.

¶ 24 Reversed.