STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-AP-09-28

VICTOR BRAVO AVIATION, LLC,

Petitioner

v.

DECISION AND ORDER

STATE TAX ASSESSOR,

Respondent

Before the court is the motion of Petitioner Victor Bravo Aviation, LLC ("Victor Bravo") for partial summary judgment on Counts I through V of its Petition for Judicial Review of an assessment of use tax imposed by Respondent State Tax Assessor ("State" or "Assessor"). Also before the court is the Assessor's motion for summary judgment on all counts (I-VII) of Victor Bravo's Petition.

FACTUAL BACKGROUND

Except where noted, the following facts are undisputed for the purposes of the instant Motions:

Victor Bravo is a Connecticut limited liability company. Petitioner's Supporting Statement of Material Facts ("Pl.'s Supp. S.M.F.") ¶ 1; Respondent's Opposing Statement of Material Fact ("Def.'s Opp. S.M.F.") ¶ 1. According to Victor Bravo, in December of 2004 it purchased a 2005 EADS Socata TBM 700 aircraft (the "Aircraft") from Columbia Aircraft Sales, which is located in Connecticut. Pl.'s Supp. S.M.F. ¶ 2. Victor Bravo asserts that the Aircraft was delivered in May 2005 at the EADS factory in France and final inspection and acceptance took place in Connecticut. *Id.* The State, however, contends that although certain of the sales

documents were dated in December 2004, Victor Bravo claims that it has owned the Aircraft since May 20, 2005. Def.'s Opp. S.M.F. ¶ 2. The State further contends that, after delivery took place in France, the Aircraft was brought to Maine before being transported to Connecticut. *Id.* Notwithstanding these objections and observations, however, it would appear that the parties agree that the Aircraft was, indeed, purchased outside of Maine and delivered in France. *See* Pl.'s Supp. S.M.F. ¶¶ 2 & 3; Def.'s Opp. S.M.F. ¶¶ 2 & 3; and Def.'s A.S.M.F. ¶ 53.[1]

The Aircraft was never registered with the State of Maine while Victor Bravo owned it. Pl.'s Supp. S.M.F. ¶ 4; Def.'s Opp. S.M.F. ¶ 4. According to Victor Bravo, the Aircraft was "based" in Connecticut for the entire time that Victor Bravo owned it. Pl.'s Supp. S.M.F. ¶ 6. The State objects to Victor Bravo's use of the word "based" on the grounds that it is an ambiguous and vague term. *See* Def.'s Opp. S.M.F. ¶ 6. The State denies that the Aircraft was based in Connecticut and contends, instead, that it was frequently "based" in Maine because Victor Bravo maintained a hangar in Bethel, Maine and the Aircraft made frequent trips to Bethel for extended periods of time on a regular and systematic basis. Def.'s Opp. S.M.F. ¶ 6. According to Victor Bravo, "[t]he Hourly Rental Agreements that Victor Bravo entered [into] with the entities renting the aircraft all specify that the aircraft was based in Connecticut and had to be returned there after each use." Pl.'s Supp. S.M.F. ¶ 8. The State denies this assertion and contends that, under the Hourly Rental Agreements, the location for the return of the Aircraft was subject to negotiation. *See* Def.'s Opp. S.M.F. ¶ 8.

With respect to the purported "use" or "storage" of the Aircraft in Maine, Victor Bravo asserts that "[t]he aircraft was used outside of Maine for more than 12 months while it was

[1] According to the State, the point of delivery is a legal question and, on that basis, the State objects to Pl.'s Supp. S.M.F. ¶¶ 2 & 3 to the extent those statements of fact purport to characterize the point of delivery.

owned by Victor Bravo, but was not used solely outside of Maine." Pl.'s Supp. S.M.F. ¶ 5. Victor Bravo further contends that, according to the Aircraft's flight logs, "between May 30, 2005 and May 20, 2006, the aircraft was never in Maine for more than 11 days in a row. For the majority of this period, it was in Maine for 5 days in a row or less." Pl.'s Supp. S.M.F. ¶ 9. The State denies this assertion and contends that the Aircraft was in Maine for 12 consecutive days in October, 2005. Def.'s Opp. S.M.F. ¶ 9.

The State further asserts that, "between May 20, 2005 and May 30, 2006, the Aircraft was in Maine for 5 or more consecutive days on 13 separate occasions – accounting for a total of 87 days." Def.'s Opp. S.M.F. ¶ 9. There is no dispute that "[t]he Aircraft was in Maine on part or all of one hundred sixty-five (165) days during the period May 20, 2005 through May 20, 2006" and remained overnight in Bethel, Maine on at least one hundred twenty one (121) occasions during that same time period. Respondent's Additional Statement of Material Facts (hereinafter "Def.'s A.S.M.F.") ¶¶ 134-136. *See also* Petitioner's Reply to Respondent's Additional Statement of Material Facts (hereinafter "Pl.'s Reply A.S.M.F.") ¶¶ 134-136.[2]

There is no dispute that Victor Bravo derived income in 2005 and 2006 from hourly rental ($190 per hour) of the Aircraft for trips to and from Maine. Def.'s Supp. S.M.F. ¶ 171; Pl.'s Opp. S.M.F. ¶ 171. According to the State, "[t]he Aircraft's original flight log information created by . . . Victor Bravo [and E. Brian Cleary and his wife, Vicki Cleary][3] indicates that Victor Bravo was the entity 'using' the Aircraft for Victor Bravo's business purposes in Maine on over ten (10) trips totaling over forty (40) days." Def.'s Supp. S.M.F. ¶ 139. Victor Bravo contends that the "original flight logs" were actually "draft logs" that contained incorrect

[2] Victor Bravo does not dispute that the Aircraft was in Maine but does contend that the facts outlined in Def.'s A.S.M.F. ¶¶ 134-136 are not material.

[3] The Clearys were the only members of the LLC, Victor Bravo, from November 20, 2002 through January 5, 2005. On January 5, 2005, Victor Bravo's ownership structure changed and the sole member of the LLC from that point on was Cleary Benefits Group, Inc. Def.'s Supp. S.M.F. ¶¶ 3-4.

information. Pl.'s Opp. S.M.F. ¶ 139. According to Victor Bravo and its later-corrected flight logs, Victor Bravo never made any flights to Maine on the Aircraft. *Id*.

There is no dispute that Mr. Cleary was the primary pilot of the Aircraft at all times while it was owned by Victor Bravo nor is there a dispute that the entities that entered into "Aircraft Rental Agreements" with Victor Bravo regarding the Aircraft were companies with which Mr. Cleary was associated. Def.'s Supp. S.M.F. ¶¶ 27-29 & 163; Pl.'s Opp. S.M.F. ¶¶ 27-29 & 163. The "Aircraft Rental Agreements" were signed by Mr. Cleary on behalf of Victor Bravo as well as on behalf of the entities purporting to rent the Aircraft from Victor Bravo. Def.'s Supp. S.M.F. ¶ 163; Pl.'s Opp. S.M.F. 163.

No sales or use tax related to the purchase of the Aircraft has been paid to any jurisdiction at any time. Def.'s Supp. S.M.F. ¶ 30; Pl.'s Opp. S.M.F. ¶ 30. On February 2, 2007, Victor Bravo was assessed Maine use tax, interest and penalties related to its use of the Aircraft in Maine (the "Assessment"). Following Victor Bravo's request, the State reconsidered the Assessment but ultimately upheld it in full by letter dated January 3, 2008. This action followed.

DISCUSSION

36 M.R.S. § 151 governs judicial review of decisions by the Assessor and "provides that the Superior Court 'shall conduct a de novo hearing and make a de novo determination of the merits of the case.'" *Foster v. State Tax Assessor*, 1998 ME 205, ¶ 7, 715 A.2d 1012, 1014 (quoting 36 M.R.S. § 151). Victor Bravo bears the burden of proof in this regard. *Id.*

Summary judgment is proper where there exists no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *see also Levine v. R.B.K. Caly Corp*., 2001 ME 77, ¶ 4, 770 A.2d 653, 655. A genuine issue is raised "when sufficient evidence requires a fact-finder to choose between competing versions of the

truth at trial." *Parrish v. Wright*, 2003 ME 90, ¶ 8, 828 A.2d 778, 781. A material fact is a fact that has "the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "If material facts are disputed, the dispute must be resolved through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18, 22. A party wishing to avoid summary judgment must present a prima facie case for the claim or defense that is asserted. *Reliance National Indemnity v. Knowles Industrial Services*, 2005 ME 29, ¶ 9, 868 A.2d 220, 224-25. At this stage, the facts are reviewed "in the light most favorable to the nonmoving party." *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63, 65.

I. Statutory Framework and Overview of the Issues Presented

The tax involved in this case was assessed pursuant to 36 M.R.S. § 1861, which imposes a tax "on the storage, use or other consumption in this State of tangible property or a service, the sale of which would be subject to tax under section . . . 1811." *Id*. Section 1811, in turn, provides for the imposition of sales tax "on the value of all tangible personal property and taxable services sold at retail in this State." 36 M.R.S. § 1811. The term "use," as defined under the statute in 2004 and 2005:

> includes the exercise in this State of any right or power over tangible personal property incident to its ownership, including the derivation of income, whether received in money or in the form of other benefits, by a lessor from the rental of tangible personal property located in this State.

36 M.R.S. §1752(21) (2004).

Victor Bravo takes issue with the use tax imposed on it on several grounds. First, Victor Bravo maintains that it did not "use" or "store" the Aircraft in Maine and, therefore, a use tax may not be applied to it. Second, even if it did "use" or "store" the Aircraft in Maine, Victor Bravo contends that it is nevertheless exempt from taxation pursuant to the statutory exemptions in 36 M.R.S. § 1760(23-C)(C), (82) & 45(B). Finally, Victor Bravo argues that the imposition of

a use tax based upon the statutory interpretation adopted by the Assessor violates the Commerce Clause of the Constitution of the United States because it constitutes an unfair tariff on goods purchased and delivered out of State.

II. Whether the Aircraft was "Located" in Maine (Count I)

The term "use", as applied to this case, means the exercise of power or rights of ownership or the derivation of income "by a lessor from the rental of tangible property *located* in this State." 36 M.R.S. § 1752(21) (emphasis added). Thus, according to Victor Bravo, leased property must be "located in this State" in order to be subject to Maine's use tax. Citing *Realco Servs., Inc. v. Halperin*, 355 A.2d 743 (Me. 1976)), in which the Law Court analyzed the phrase "located in this State," Victor Bravo argues that the Aircraft's contact with Maine was too transitory to be taxable. After a review of the statute, the *Realco* case, and analogous case law from other jurisdictions, the court disagrees.

As Victor Bravo notes, in *Realco* the Law Court considered for the first time the meaning of the phrase "located in this State." *Realco*, 355 A.2d at 745.[4] After examining the history of the use tax and the definition of "use" both under the statute and Maine decisional law, the Law

[4] In *Realco*, a foreign corporation operated "what is known as the National Railroad Trailer Pool (Pool), with which most of the major railroads in the United States and Canada are affiliated." *Id.* at 744. In connection with its operation of the Pool, Realco purchased so-called "piggyback" trailers "which can be loaded on a railroad car and moved into the stream of commerce, thus providing long haul transportation for shippers or receivers who do not ordinarily utilize railroad siding terminals." *Id.* Members of the Pool could use any of the trailers as they became available. *Id.* Member railroads could also lease a particular trailer that would bear its markings. *Id.* Under the agreements attendant to Pool membership, "when an empty trailer comes into the possession of a railroad it becomes incumbent upon that railroad to route the trailer in the direction of the subscribing railroad, but any intervening railroad has the right to utilize the services of that particular trailer if it needs it at any point prior to its arrival on the line of the subscribing railroad." *Id.*

Two Maine railroads had entered into leases for 250 piggyback trailers. "Of the 250 trailers assigned to the Maine railroads, 210 found their way into the State of Maine within seventy-three days of the initial delivery (to Realco) from the manufacturer. Having once arrived in Maine, however, all of these were rerouted into the flow of interstate commerce within a short time," where they remained. *Id.* At issue in *Realco* was whether the piggyback trailers were ever "located in this State" such that Maine could appropriately assess a use tax.

Court ultimately concluded that "the words 'located in this State' … relate to personal property which, in fact, had come to rest within the State with a corresponding loss of all transient characteristics." *Id.* at 747. The Court then examined the leasing agreements of the trailers in *Realco*, which "anticipated nothing but a temporary presence of these trailers in the State of Maine" and noted that they "were routed into Maine for the purely transient purpose of reshipment to destinations outside the State, which was the underlying purpose of the pooling arrangement." *Id.* Based, therefore, on the transient character of the trailers' contacts with Maine, the Law Court concluded that they had not acquired a sufficient "taxable status within the statutory definition of 'use'" and deemed the imposition of use tax invalid. *Id.*

In this court's view, Victor Bravo's "use" of the Aircraft – in the form of rents derived in connection with its lessees' near-monthly flights to Maine – and the Aircraft's prolonged presence in Maine are fundamentally different than the truly transitory nature of the piggyback trailers' in-state presence in *Realco*. In this case, there is no factual dispute that the Aircraft was in Maine on part or all of 165 days during the time period May 20, 2005 through May 20, 2006. As such, it is undisputed that the Aircraft was in Maine for nearly half of the first full year that Victor Bravo owned it. Further, Victor Bravo does not dispute that the Aircraft remained overnight in Maine on at least one hundred twenty one (121) occasions during that same year. Those overnight stays averaged 5 nights in length but stretched to 13 nights on one occasion. Contrary to Victor Bravo's contentions, the Aircraft's routine and extended presence in Maine is not merely "transitory," or peripheral to a broader arrangement, particularly in light of the inherently transitory purposes of the property at issue. As at least one court has noted:

> [t]he phrase 'finally come to rest' must necessarily be considered in relation to the object to which it applies. Were this Court to adopt [the taxpayer's] construction of the statute, no aircraft, motor vehicle or other transitory object could ever finally come to rest [in the taxing state] until it 'finally' entered the junkyard or

> scrap heap, for until then such objects always have the capability of leaving the state.

Fall Creek Constr. Co., Inc. v. Dir. of Revenue, 109 S.W.3d 165 (Mo. 2003).

In light of the foregoing, this court concludes that Victor Bravo did "use" the Aircraft in Maine, as that term is defined under the statute. For that reason, as to Count I of the Petition, the court grants the State's motion for summary judgment and denies Victor Bravo's motion.

III. Whether Victor Bravo is Exempt Under 36 M.R.S. § 1760(23-C) (Count II)

Victor Bravo contends that any use of the Aircraft in Maine is exempt from taxation under various provisions of 36 M.R.S. § 1760, beginning with subsection (23-C), which provides in pertinent part:

> Subject to the provisions of section 1760-C, no tax on sales, storage or use may be collected upon or in connection with:
> . . .
>
> 23-C. CERTAIN VEHICLES PURCHASED OR LEASED BY NONRESIDENTS. Sales or leases of the following vehicles to a person that is not a resident of this State, if the vehicle is intended to be driven or transported outside the State immediately upon delivery:
>
> C. Aircraft*;*
> . . .
>
> If the vehicles are registered for use in the State within 12 months of the date of purchase, the person seeking registration is liable for use tax on the basis of the original purchase price.

36 M.R.S. § 1760(23-C). Victor Bravo argues that Section 1760(23-C) applies because (1) Victor Bravo is a non-resident[5]; (2) the Aircraft was outside of Maine immediately after it was delivered; and (3) the Aircraft has never been registered for use in Maine.

The court agrees with the State's contrary argument that Section 1760(23-C) only applies to property originally sold in Maine because it "exempts only property 'intended to be driven or

[5] There is no dispute that Victor Bravo is a Connecticut corporation and therefore not a resident of Maine.

transported outside the State.'" Def.'s Mot. at 8. "Absent a Maine sale, this [statutory] language would be rendered meaningless." *Id.*

Our Law Court has repeatedly explained that "[a]n exemption from taxation, while entitled to reasonable interpretation in accordance with its purpose, is not to be extended by application to situations not clearly coming within the scope of the exemption provisions." *J & E Air, Inc. v. State Tax Assessor*, 2001 ME 95, ¶ 10, 773 A.2d 452, 455-56 (quoting *Harold MacQuinn, Inc. v. Halperin*, 415 A.2d 818, 821, 822 (Me. 1980) and citing *Brent Leasing Co., Inc. v. State Tax Assessor*, 2001 ME 90, PP12, 15, 773 A.2d 457 (reiterating narrow construction of tax exemptions)). Further, under general rules of statutory construction, "[n]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." *Struck v. Hackett*, 668 A.2d 411, 417 (Me. 1995) (quoting *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979)).

Under the plain language of subsection 23-C, the sale or lease of an aircraft to a non-resident is exempt from taxation "if the vehicle is driven or transported outside the State immediately upon delivery[.]" In the court's view, the only reasonable interpretation of this language, and the clear import of the condition that immediate transport *out of* the State be made, is that the initial sale or lease must occur within the State. Petitioner's interpretation of Section 1760(23-C), which would exempt any sale or lease of property immediately delivered outside of Maine, even those sales and leases taking place entirely outside of and with no connection to the State of Maine, would, in effect, render the whole of subsection 23-C surplusage. Petitioner's interpretation would purport to exempt sales and leases occurring beyond Maine's borders – sales over which Maine has no taxing authority in the first place. *Hanbro, Inc. v. Johnson,* 181 A.2d 249, 251 (Me. 1962) (Maine "is without authority to tax sales beyond its territorial

limits."). Neither the language of the statute nor the larger purpose and context of Maine's tax code support such an interpretation. Instead, the only reasonable interpretation, and the interpretation this court will apply, is that aircraft sold or leased in Maine, and also delivered in Maine, are exempt from sales taxation[6] so long as the aircraft is intended to be immediately transported out of Maine after its delivery. Aircraft sold and delivered in Maine but immediately transported out of Maine are similarly exempt from Maine use tax so long as the property is not returned to Maine and registered within the first 12 months after purchase.

In this case, there is no dispute that the sale of the Aircraft to Victor Bravo took place outside of Maine such that Section 1760(23-C) was not triggered. For that reason, Petitioner's use of the Aircraft in Maine is not exempt from taxation under Section 1760(23-C)(C)).

Accordingly, as to Count II, Petitioner's motion for summary judgment is denied and Respondent's motion is granted.

IV. Whether Victor Bravo is Exempt Under 36 M.R.S. § 1760(82) (Count III)

Victor Bravo also contends that Section 1760(82) exempts the Aircraft from Maine's use tax. The applicable version of subsection 82 provides:

> 82. SALES OF PROPERTY DELIVERED OUTSIDE THIS STATE. Sales of tangible personal property when the seller delivers the property to a location outside this State or to the United States Postal Service, a common carrier or a contract carrier hired by the seller for delivery to a location outside this State, regardless of whether the property is purchased F.O.B. shipping point or other point in this State and regardless of whether passage of title occurs in this State.

36 M.R.S. § 1760(82)(2004), *amended by* P.L. 2007, ch. 627, § 49.[7]

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[6] *See* 36 M.R.S. § 1811 (providing that the "sales tax" applies to the rental/lease of certain property).

[7] As a result of the 2007 amendment to 36 M.R.S. § 1760, subsection 82 provides as follows:

> 82. SALES OF PROPERTY DELIVERED OUTSIDE THIS STATE. Sales of tangible personal property when the seller delivers the property to a location outside this State or to the United States Postal Service, a common carrier or a contract carrier hired by the seller for delivery to a location outside this State, regardless of whether the property is purchased F.O.B. shipping point or other point in this State and regardless of whether

In this case, Victor Bravo maintains that its use of the Aircraft is exempt because it was delivered outside of Maine, namely in France, following the sale. According to Victor Bravo, although the Aircraft stopped at the Bangor Airport during its "delivery flight" from France, that stopover did not constitute "delivery" in Maine such that subsection 82 would not apply. The State counters that subsection 82, like subsection 23-C, applies only to Maine sales and does not exempt Victor Bravo from use tax associated with its use of the Aircraft in Maine.

Notwithstanding the prefatory language to Section 1760, which Victor Bravo contends provides that the exemptions contained in that section apply to sales *and* use tax, the court concludes that, when read in the context of Section 1760 and Maine's tax statutes as a whole, the individual provisions of Section 1760 have varying applicability to sales and use tax depending on the language of each individual subsection. Just as the language of subsection 23-C, when read in the context of the complimentary purposes of the sales and use tax, makes clear that it applies to property originally sold in Maine – the language of subsection 82 demonstrates that the exemption is predicated on a sale first taking place in Maine. Otherwise, given that the State of Maine is without authority to tax sales that take place outside of its borders, the interpretation of subsection 82 urged by Victor Bravo would render that subsection entirely without purpose.

Because there is no dispute that the sale of the Aircraft originally took place outside of Maine, and because this court concludes that 36 M.R.S. § 1760(82) only applies to Maine sales, Count III of Victor Bravo's Petition fails as a matter of law. Accordingly, as to Count II, Petitioner's motion for summary judgment is denied and Respondent's motion is granted.

> passage of title occurs in this State. *This exemption does not apply to any subsequent use of the property in this State*.

36 M.R.S. § 1760(82)(2009) (emphasis added).

V. Whether the Assessment and Reconsideration Decision Violate the Commerce Clause of the United States Constitution (Count IV)

Victor Bravo also alleges that the Assessor's interpretation of 36 M.R.S. § 1760(23-C) & (82) violates the Commerce Clause of the United States Constitution because it effectively creates an impermissible tariff on goods purchased out of State and then brought into Maine.

Victor Bravo correctly notes that the Commerce Clause grants to the U.S. Congress the authority to "regulate Commerce with foreign nations, and among the several States . . .." U.S. CONST. art. I, § 8, cl. 3. This provision "not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). In keeping with the limitations placed on the States by the "Dormant Commerce Clause,"[8] the United States Supreme Court has held that a state tax that discriminates against interstate commerce is unconstitutional. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *See also Brent Leasing Co. v. State Tax Assessor*, 2001 ME 90, ¶ 12 n.6, 773 A.2d 457, 461. Under the four-part test developed in the *Complete Auto Transit* case, a tax affecting interstate commerce is valid if it: "(1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State." *Id.*

[8] The "Dormant Commerce Clause" has been described as follows:

> The United States Constitution gives to Congress the power to regulate commerce among the several states and this express grant to Congress of power contains a further, negative command, known as the dormant commerce clause, prohibiting certain state taxation. On its face, the commerce clause is an affirmative grant of power to Congress; however, the negative implication of the clause, that the states cannot exercise power reserved to Congress, is the source of constitutional limits on state regulation and taxation of interstate commerce. The commerce clause limits a state's ability to tax out-of-state entities when such taxation would burden interstate commerce even when Congress has failed to legislate on the subject.

71 Am. Jur.2d State and Local Taxation § 175. *See also John T. Cyr & Sons, Inc. v. State Tax Assessor*, 2009 ME 52, ¶ 25, 970 A.2d 299, 306-07.

Victor Bravo contends that the Assessor's interpretation of Section 1760(23-C) & (82), the interpretation that this court has adopted, violates the Commerce Clause because it renders those exemptions applicable only to sales that take place in Maine. In doing so, Victor Bravo appears to argue that, as so interpreted, Sections 1760(23-C) & (82) result in a disparate apportionment of taxes between in-state and out-of-state purchases and, as a result, discriminate against interstate commerce.

With respect to the "fair apportionment" prong, the court is not persuaded by Victor Bravo's argument. As the Assessor correctly notes, the United States Supreme Court has explained that "fair apportionment" exists where a state tax code provides a credit for any sales tax paid to another state with respect to the same purchase, thereby avoiding double taxation. *See* Def.'s Mot. at 18 (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)) *See also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); and *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989). Because Maine's statute does provide a credit for any sales tax paid to another state, *i.e.* 36 M.R.S. § 1862, there does not appear to be any real dispute that Maine's use tax is fairly apportioned.

What remains is Victor Bravo's contention that the Assessor's interpretation of Sections 1760(23-C) & (82) renders Maine's use tax discriminatory against interstate commerce. According to Victor Bravo, any exemption that is applicable only to in-state sales but not to out-of-state sales necessarily and impermissibly discriminates against interstate commerce because, in Victor Bravo's words, it:

> essentially create[s] a tariff on goods brought into Maine that had been both purchased and delivered outside the state, with no corresponding tariff on goods brought into Maine that had been purchased in the state but delivered outside the state. The effect would be to benefit in-state sellers over out-of-state sellers by encouraging people to purchase aircraft from Maine sellers, even when both types of sellers were delivering their aircraft outside of Maine.

Pl.'s Mot. at 13 n.5.

The court concludes that its interpretation of Sections 1760(23-C) & (82) as applying only to property originally purchased in Maine does not discriminate against interstate commerce. As noted above, and as expressly explained by the United States Supreme Court in the context of similar Commerce Clause challenges, when determining whether an individual tax provision is discriminatory, courts must not look at the provision in isolation. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963). Instead, "a proper analysis must take 'the whole scheme of taxation into account.'" *Id.* (quoting *Galveston, H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 227 (1908)). In this case, the context of Section 1760, subsections (23-C) and (82) make clear that neither discriminates against interstate commerce.

First, in addition to applying only to property purchased in Maine in the first instance, subsection 82 only applies to Maine sales tax. Nothing in the body of subsection 82 itself indicates that it constitutes an exemption to the use tax. Rather, the language makes clear that it is the "sales of tangible personal property . . .deliver[ed] to a location outside" of Maine that is exempt from taxation. *See* 36 M.R.S. § 1760(82).[9] Accordingly, the combination of Section 1760(82) and the fact that Maine has no authority to impose Maine sales tax on out-of-state sales, results in the same exemption for in-state and out-of-state sales meeting the criteria of Section 1760(82). Further, those sales, whether in-state or out-of-state, would be subject to use

[9] In the alternative, to the extent that the prefatory language of Section 1760 may be read to suggest that the exemptions enumerated in that section apply equally to both sales and use tax, despite the contradictory, limiting language contained in the individual exemptions themselves, the court concludes that such a reading would render Section 1760 ambiguous. In the face of such an ambiguity, the court may look to the 2007 amendment to Section 1760(82) in order to clarify the scope of that section. *See Mundy v. Simmons*, 424 A.2d 135, 137 (Me. 1980) ("at times, when there is an ambiguity in prior legislative terminology, enactments by a subsequent legislature may throw light on the legislative intent underlying previously enacted legislation and may be taken into consideration in dissipating the uncertainty of a foundational statute") (citations omitted). That 2007 amendment makes clear that the exemption contained in Section 1760(82) does not apply to Maine use tax and is, therefore, solely a sales tax exemption. *See* 36 M.R.S. § 1760(82)(2007).

tax should the property be re-located to Maine. Consequently, the court's interpretation of that subsection does not result in an unconstitutional interference with interstate commerce.

Second, under this court's interpretation of Section 1760(23-C), aircraft sold in Maine and immediately transported out of the Maine is exempt from Maine sales tax in the same way that property that is sold outside of Maine are exempt from Maine sales tax. Further, pursuant to that portion of Section 1760(23-C) that addresses the use tax, aircraft sold in Maine, transported out of Maine, and then returned to Maine for use substantial enough to require registration is subject to the Maine use tax in the same way that aircraft purchased out-of-state but brought into Maine for substantial use is subject to the Maine use tax. *See* 36 M.R.S. §§ 1861, 1862 & 1760(45)(B)(2004). As such, there is no disparate tax treatment of property sold in Maine and property sold outside of Maine.

Therefore, the court concludes that Victor Bravo's constitutional challenge fails as a matter of law and the Assessor is entitled to summary judgment in its favor on Count IV of the Petition.[10]

VI. Whether Victor Bravo is Exempt Under 36 M.R.S. § 1760(45) (Count V)

In Count V, Victor Bravo alleges that it is exempt from taxation pursuant to 36 M.R.S. § 1760(45). Section 1760(45), as it existed in 2004, provided:

[10] Victor Bravo relies heavily on *Boyd Bros. Transp. v. State Dep't of Rev.*, 976 So.2d 471, 476-79 (Ala. Civ. App. 2007) in which the Alabama court reiterated the rule that: "if no sales tax is due on a transaction that occurs in Alabama, then no use tax is due on a similar transaction that occurs outside Alabama"). Pl.'s Opp. at 5-6. In this case, the court notes that subsection 23-C effectively imposes a use tax on Maine sales, in the same way that subsection 45 effectively imposes a use tax on out-of-state sales when certain property is brought into Maine within the first 12 months after its purchase. Moreover, to the extent Maine's statute does exempt Maine purchases to a greater degree than similar out-of-state purchases, Maine's statute provides for the reduction of tax on property imported to Maine based on tax previously paid in another jurisdiction. *See* 36 M.R.S. § 1862; and *Halliburton*, 373 U.S. at 74 n.8. Accordingly, there is no disparate tax treatment.

> 45. CERTAIN PROPERTY PURCHASED OUTSIDE THE STATE. Sales of property purchased and used by the present owner outside the State:
>
> > A. If the property is an automobile, as defined in Title 29-A, section 101, subsection 7, and if the owner was, at the time of purchase, a resident of the other state and either employed or registered to vote there;
> >
> > A-1. If the property is a watercraft or all-terrain vehicle that is registered outside the State by an owner who at the time of purchase was a resident of another state and the watercraft or all-terrain vehicle is present in the State not more than 30 days during the 12 months following its purchase for a purpose other than temporary storage; or
> >
> > B. For more than 12 months in all other cases.
>
> For purposes of this subsection, "use" does not include storage, but means actual utilization of the property for a purpose consistent with its design. Property, other than automobiles, watercraft and all-terrain vehicles, that is required to be registered for use in this State does not qualify for exemption unless it was registered by its present owner outside this State more than 12 months prior to its registration in this State.

Id.

According to Victor Bravo, because it not only purchased the Aircraft outside of Maine but also used it outside of Maine during the first 12 months of ownership, it is exempt from use tax pursuant to subsection 45(B). Victor Bravo argues that the express language of the statute does not require that the Aircraft be used *solely* outside of Maine in order to be entitled to the exemption.

In opposition, the Assessor contends that, when read in the context of subsection 45 as a whole, 45(B) plainly requires that an aircraft must be used outside of Maine *exclusively* for the first twelve months after purchase in order to be exempt from taxation. The court agrees with the Assessor. The context of subsection 45, and the exemption it provides for property purchased outside of Maine, makes clear that while watercraft, for example, will not be subject to a use tax

if not used in Maine for more than 30 days during the first *12 months following purchase*, all other non-enumerated property, including aircraft, will be subject to taxation if used in Maine during the first 12 months following purchase. That is, because subsection 45(A) & (A-1) set the predicate from which the exemption in 45(B) for "all other cases" flows, the only reasonable interpretation of 45(B) is that it applies only to property purchased outside of Maine and used exclusively outside the State for the first 12 months following that purchase.

Moreover, the court does not agree with Victor Bravo's argument that the Aircraft was never "used" in Maine as that term is defined under the statute and as it is used in subsection 45. As discussed above, Victor Bravo's derivation of rental income from frequent and extended flights into Maine by its lessees constituted sufficient use within Maine to subject Victor Bravo to taxation.

In light of the foregoing, the court concludes that, as to Count V, Victor Bravo's motion for summary judgment is denied and the Assessor's motion is granted.

VII. Whether Victor Bravo is Entitled to an Abatement of Penalties and Interest.

In Counts VI and VII, Victor Bravo seeks to abate all interest and penalties assessed against it. In support, Victor Bravo points to the prefatory language of Section 1760, which it maintains suggests that all of the exemptions apply to both sales and use tax, and to various published materials from the Assessor's office, which expressly indicate that the section 1760 exemptions apply uniformly to sales and use taxes. According to Victor Bravo, these sources constitute substantial authority for its tax position (namely, that the Aircraft was exempt from use tax) and warrant a waiver of interest and penalties.

(a) Abatement of Interest

The court first turns to 36 M.R.S. § 186, which governs the imposition and abatement of interest.

> Any person who fails to pay any tax, other than a tax imposed pursuant to chapter 105, on or before the last date prescribed for payment is liable for interest on the tax, calculated from that date and compounded monthly. . . . *If the failure to pay a tax when required is explained to the satisfaction of the assessor, the assessor may abate or waive the payment of all or any part of that interest*.

Id. (emphasis added). Based on the language of this statute and the undisputed material facts, the court concludes that Victor Bravo has failed to demonstrate that the Assessor erred in the exercise of the discretion afforded by Section 186. Accordingly, the court upholds the Assessor's decision regarding interest.

(b) Abatement of Penalties

As to Victor Bravo's claim that the penalties should be abated, the court looks to Section 187-B(7), which provides:

> REASONABLE CAUSE. For reasonable cause, the State Tax Assessor *shall* waive or abate any penalty imposed by subsection 1; subsection 1-A; subsection 2; subsections 4-A, 4-B, 5-A and 5-B; or by the terms of the International Fuel Tax Agreement. Reasonable cause includes, but is not limited to, the following:
> . . .
>
> F. The taxpayer has supplied *substantial authority justifying the failure to file or pay*;
>
> . . .
>
> The burden of establishing grounds for waiver or abatement is on the taxpayer.

Id. (emphasis added). In the context of Section 187-B(7)(F), the Law Court has previously explained that "substantial authority" has been defined under federal tax law to mean:

> an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the "more likely than not" standard . . . but more stringent than the reasonable basis standard . . . . There is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.

John Swenson Granite, Inc. v. State Tax Assessor, 685 A.2d 425, 429 n.3 (Me. 1996) (quoting 26 C.F.R. §§ 1.6662-4(d)(2), (3) (1996)). Under the federal regulations, that analysis of the law includes an evaluation of the weight, nature and type of authority dealing with a particular tax treatment. See 26 C.F.R. §§ 1.6662-4(d)(2), (3) (1996).

Victor Bravo claims that it has met its burden based on the Assessor's own published materials, which Victor Bravo asserts unequivocally indicate that the Section 1760 exemptions apply uniformly to both the sales tax and the use tax. *See* Creamer Aff. at Exhs. A & B.

Among the authorities relied upon by Victor Bravo for its substantial authority argument, are online and hardcopy publications by the Maine Revenue Service. The online publication that appears on the website of the Maine Revenue Service includes a page that explains use taxes. It also describes the exemptions to use taxes, to wit: "The same exemptions that apply to sales tax apply to use tax." http://maine.gov/revenue/salesuse/usetax.pdf. In addition, the home page of that website explains the overall purpose of the online information.

> *This site was created to give you easy, convenient access to Maine tax information* whenever you need it. As you browse through our homepage, you will find we have grouped the bureau information by tax divisions. Although each division has unique duties in the services and information it provides to the citizens of Maine, they all share the Department's goal of ensuring efficient administration of tax laws and to *providing quality taxpayer assistance*.

http://maine.gov/revenue/homepage.html (emphasis added).

The hardcopy publication is titled "A Reference Guide To The Sales And Use Tax Law", 12th ed, November 2008, which includes the following explanation of its purpose:

> The information contained in this booklet is *intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges*. It contains general and specific information of interest as well as *Maine Revenue Service interpretations and determinations regarding issues commonly faced by businesses*. It is not intended to be all inclusive.

Using the same language as the online publication, the Reference Guide also describes the Section 1760 exemptions, as follows: "The same exemptions that apply to sales tax apply to use tax." *Id*. at 8.

In unequivocal language, Maine's taxing authority tells the taxpayer that its publications are designed to provide "tax information", "advice", "Maine Revenue Service interpretations and determinations" and "quality taxpayer assistance". With these purposes as a backdrop, the revenue service also unequivocally tells taxpayers that "[t]he same exemptions that apply to sales tax apply to use tax". Thus, it would appear that the only published explanation of the prefatory words of 36 M.R.S. § 1760 that "no tax on sales, storage or use may be collected upon or in connection with" all of the exemptions enumerated in that section is the unambiguous explanation of the Maine Revenue Service. Under the circumstances of this case, the court considers this authority to be sufficiently weighty and persuasive – meaning, substantial – for the purposes of 36 M.R.S. § 187-B(7)(F). And, that authority supports Victor Bravo's assertion that there is reasonable cause to waive the penalty assessment in this case because Victor Bravo's understanding that all of the exemptions in 36 M.R.S. § 1760 apply with equal force to sales and use tax, an understanding that underlies its non-payment of the use tax in this case, is the same as that articulated by the Maine Revenue Service.

Accordingly, the court concludes that it is appropriate to render summary judgment against the moving party as to Count VII of the Petition, enter judgment in favor of the Petitioner

and vacate that portion of the Assessor's Reconsideration Decision that denied Victor Bravo's request for an abatement of penalties. *See* M.R. Civ. P. 56(c).

DECISION

Pursuant to Rule 79(a) M.R. Civ. P., the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

A. Petitioner's Motion for Partial Summary Judgment on Counts I through V of the Petition is DENIED;

B. Respondent's Motion for Summary Judgment on Counts I through VI of the Petition is GRANTED, and Judgment is entered in favor of Respondent on Counts I through VI of the Petition;

C. Respondent's Motion for Summary Judgment on Count VII of the Petition is DENIED; and

D. Pursuant to M.R. Civ. P. 56(c), summary judgment is rendered against Respondent and Judgment is entered in favor of Petitioner on Count VII of the Petition; and this matter is remanded to the State Tax Assessor for further proceedings consistent with this Order, including the waiver or abatement of the penalties imposed against Petitioner for the years 2004 and 2005.

Date: December 14, 2009

s/Thomas E. Humphrey
Chief Justice, Superior Court