No. 124155

IN THE
SUPREME COURT OF ILLINOIS

HORSEHEAD CORPORATION, Petitioner-Appellant, v. ILLINOIS DEPARTMENT OF REVENUE and ILLINOIS INDEPENDENT TAX TRIBUNAL, Respondents-Appellees.	)	Appeal from the Illinois Appellate Court, First Judicial District, No. 1-17-2802 There Heard on Appeal from the Illinois Independent Tax Tribunal, No. 14 TT 227

BRIEF OF RESPONDENT-APPELLEE ILLINOIS DEPARTMENT OF REVENUE

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

This is an action for direct administrative review of a final decision of the Illinois Independent Tax Tribunal ("Tribunal"). The petitioner, Horsehead Corporation, sought relief from two notices of tax liability issued to it by the Illinois Department of Revenue ("Department") for failure to pay use tax on purchases of metallurgical coke between January 2007 and June 2011. Following a hearing, the Tribunal entered judgment in the Department's favor, determining that Horsehead was not entitled to an exemption for metallurgical coke used in its manufacturing process. The Tribunal also found that Horsehead was not entitled to abatement of penalties.

ISSUES PRESENTED FOR REVIEW

1. Whether the clearly erroneous standard of review applies to the mixed question of law and fact concerning Horsehead's entitlement to a use tax exemption.

2. Whether the Tribunal's determination that Horsehead was not entitled to a use tax exemption was not clearly erroneous.

3. Whether the Tribunal's finding that Horsehead was not entitled to an abatement of penalties was not against the manifest weight of the evidence.

STATEMENT OF FACTS

I. Background

Horsehead is a manufacturing company with a facility in Calumet City, Illinois. (E4).[*] In October 2014, following an earlier audit, the Department issued two notices of tax liability seeking recovery of use tax for purchases of metallurgical coke used by Horsehead in its manufacturing process. (E6, C11, C13). The notices sought use tax, interest, and penalties in the amounts of $925,051.13 and $595,989.98 for the periods of January 2007 through June 2009 and July 2009 to June 2011. (C11, C13).

Horsehead filed a petition for hearing with the Tribunal, asserting that the coke qualified as a chemical exempt from use taxation under the Use Tax Act ("Act"), 35 ILCS 105/1 *et seq*. (2018). (C4-6). Specifically, the Act exempts "machinery and equipment used primarily in the process of manufacturing or assembling tangible personal property for wholesale or retail sale or lease." 35 ILCS 105/3-5(18) (2018). The Act further provides that "equipment" includes chemicals, "but only if [they] effect a direct and immediate change upon a product being manufactured or assembled for wholesale or retail sale or lease." 35 ILCS 105/3-50(4) (2018).

[*] The three-volume administrative record on appeal is cited as follows: Common Law Record, (C_); Report of Proceedings, (R_); Exhibits, (E_). Petitioner-Appellant's Brief is cited as (Br. at _) and the Amicus Brief as (Amicus Br. at _).

II. Proceedings Before The Tribunal

The Tribunal is an independent administrative tribunal created by the Illinois General Assembly in 2012. *See* 35 ILCS 1010/1-5 (2018). Its function is to resolve disputes between the Department and taxpayers for specified tax liability, including use tax, above $15,000. 35 ILCS 1010/1-45 (2018). Because Horsehead's liability exceeded this amount, its tax challenge proceeded before the Tribunal, rather than the Department. (*See* C11, C13).

The Administrative Hearing

At the hearing before the Tribunal's Administrative Law Judge, Horsehead presented three witnesses: Dr. Mark Edward Schlesinger, a professor of metallurgical engineering at Missouri University of Science and Technology (R7-13); John Pusateri, a materials engineer and Director of Technology at Horsehead (R13-24); and Regis J. Zagrocki, a metallurgical process engineer at Horsehead (R24-30). Horsehead also submitted hearing exhibits that included diagrams of its manufacturing process, as well as stipulated facts regarding the process. (E2-40).

All three witnesses testified primarily regarding the Waelzing manufacturing process. (R7, R15, R25). Horsehead uses that process to recover zinc and iron oxides from electric arc furnace ("EAF") dust, a byproduct of steel scrap processing. (R7-8). To do so, Horsehead first combines EAF dust with metallurgical coke — a powdery material containing carbon created from the distillation of coal — to create quarter-inch "feed"

pellets. (R7, R15-16, R25). These pellets are added to the left side of a large kiln, while air is introduced on the right side. (R8, R17, R26).

After the pellets enter the kiln, the process of extracting zinc and iron oxides from the EAF dust occurs over four stages, or "zones." (R8-11, R20). From start to finish, the process takes approximately two to two-and-a-half hours. (R24). In the first zone, a gas burner is used to heat the kiln to dry the pellets and bring them to a reaction temperature. (R8, R17).

At the second zone, the pellets have been heated to a reaction temperature of approximately 1,000 degrees Celsius. (R8-9, R17-18). At this stage, carbon dioxide in the oxygen-poor kiln reacts with carbon from the metallurgical coke to form carbon monoxide. (R9-10) ([Dr. Schlesinger:] "[C]arbon dioxide reacts with the carbon to produce carbon monoxide. CO2 plus C goes to CO. So there's two carbons on both sides, two oxygens on both sides.") (*see also* R19, E5 at ¶ 9). The created carbon monoxide is able to diffuse into the pellets to reduce iron oxide into metallic iron and zinc oxide into zinc vapor. (R9). The reductions themselves generate more carbon dioxide, which again reacts with the carbon in the coke, to produce more carbon monoxide. (R10). In this way, the process of reducing the EAF dust with carbon monoxide is self-sustaining. (*Id.*).

In the third zone, the metallic iron reacts with oxygen to produce heat that continues to heat the kiln to the reactive temperature. (*Id.*). In the fourth and final zone, the zinc vapor oxidizes, also generating heat, leaving

small particles of zinc oxide that can be collected from the top of the kiln. (R11). Horsehead refines this zinc oxide and sells it to customers, along with the metallic iron created during the process. (*Id.*; R20).

During direct examination, Dr. Schlesinger testified that the carbon from the coke does not itself react with the pellets. (R9). He explained that it is the created carbon monoxide that acts as the reducing agent:

> [I]f I were to take a hunk of solid iron oxide and place it next to a hunk of solid carbon, nothing would happen because that then would be a solid state reaction. So what actually happens in this process is that this reaction generates CO2, it reacts with the carbon to produce two carbon monoxides. The carbon monoxide is a gas and can diffuse into the solid feed pellets; and when that happens, the carbon monoxide actually reduces the iron oxide to metallic iron and reduce[s] the zinc oxide to zinc vapor.

(*Id.*).

On cross-examination, all three witnesses testified that carbon monoxide, not carbon from the coke, is the agent reducing EAF dust to zinc oxide and iron oxide. (R13; R23; R28-29). During direct examination, Dr. Schlesinger denied that heated carbon alone creates carbon monoxide and testified that carbon reacts with carbon dioxide to produce carbon monoxide. (R10). Zagrocki also confirmed during cross-examination that carbon monoxide is not "gaseous carbon" (R28).

The Tribunal's Decision

The Tribunal noted that, under Illinois law, Horsehead had the burden of proving it was entitled to an exemption. (C112). The Tribunal further

noted that exemptions must be construed narrowly in favor of taxation, with all doubts resolved against entitlement to the exemption. (*Id.*). It also stated that the fundamental rule of statutory interpretation is to give language its plain meaning. (C113).

The Tribunal then focused on whether Horsehead's coke effected a "direct and immediate" change on the product being manufactured, as the chemical exemption requires. (*Id.*). It noted the Oxford dictionary definitions of direct and immediate are as follows: "direct" means (1) "[e]xtending or moving from one place to another without changing direction or stopping" and (2) "[w]ithout intervening factors or intermediaries," (*id.*) (citing https://en.oxforddictionaries.com/definition/direct), and "immediate" means "[o]ccurring or done at once: instant," (*id.*) (citing https://en.oxford dictionaries.com/definition/immediate). The Tribunal also set forth two examples of "direct and immediate" changes provided by Department rule, including a chemical acid used to etch copper from a circuit board, and an aluminum oxide catalyst used to refine heavy gas oil into gasoline. (*Id.*) (citing 86 Ill. Admin. Code 130.330(c)(6)).

Based on these dictionary definitions and the examples provided by Department rule, the Tribunal determined that Horsehead's coke did not directly and immediately effect a change on the zinc oxide or metallic iron produced by Horsehead. (C114). It noted that, as Horsehead's witnesses testified, simply placing coke next to zinc or iron oxide does not create any

chemical reaction. (*Id.*). Instead, in an hours-long process, carbon must first be formed through the heating and burning of coke. (*Id.*). Then, the carbon must chemically react with carbon dioxide to form carbon monoxide. (*Id.*). Only after this reaction occurs does carbon monoxide, and not coke, diffuse into the pellets to react with the zinc and iron oxides. (*Id.*).

To accept Horsehead's argument that coke has a direct and immediate effect on the zinc and iron products, the Tribunal held, would "collapse[e] and conflat[e] all steps within the Waelz process into one continuous and singular chemical reaction" and allow for "any chemical which is used for any reason at any time during a manufacturing process [to] qualify for the exemption despite not causing a direction and immediate change on the final product." (*Id.*). Thus, the Tribunal stated, the interpretation urged by Horsehead would impermissibly fail to give effect to the "direct and immediate" limiting language used by the legislature. (*Id.*).

Here, the Tribunal noted that all three of Horsehead's witnesses testified that it was the carbon monoxide, and not the coke or carbon within the coke, that diffuses into the pellets to react with the iron and zinc oxides in the EAF dust. (C115). In addition, each witness acknowledged that charts admitted during the hearing — indicating that it was carbon causing the reactions — were not accurate. (C115-16).

The Tribunal next rejected Horsehead's reliance on a circuit court order, *PPG Indus., Inc. v. Dep't of Revenue*, No. 13 L 050140 (Ill. Cir. Ct. Sept.

9, 2014) (C117-18). It determined that in addition to being non-precedential, the order was not persuasive. (*Id.*). In that case, a Department ALJ had found that nitrogen and hydrogen, used to cool machinery before the machinery's use to manufacture glass, did not effect a direct and immediate change on the final product. (C117). The circuit court reversed, concluding that while the chemicals did not react with the gas, they were a "proximate" cause of an event, which, in the court's view, was sufficient to satisfy the chemical exemption. (C117-18).

In declining to follow the circuit court's decision, the Tribunal rejected the court's invocation of the legal concept of "proximate cause." (C118). To accept this reasoning, the court determined, "would, once again, turn the chemical statute on its head." (*Id.*). Specifically, it would mean that any chemical used in a manufacturing process must be entitled to the exemption, despite the clear intent of the legislature to exempt only chemicals effecting a direct and immediate change on the final manufactured product. (*Id.*). Finally, the Tribunal determined that even if "direct" were interpreted to encompass the concept of proximate causation, Horsehead's analysis failed to address the term "immediate," also required by the statute. (C118-19).

Lastly, the Tribunal found that Horsehead was not entitled to an abatement of penalties under section 12 of the Uniform Penalty and Interest Act ("UPIA"), 35 ILCS 105/12 (2018). (C119-20). Noting that the UPIA requires reasonable cause to avoid penalties, including a good faith effort by

the taxpayer to determine liability, the Tribunal concluded that Horsehead could not make this showing. (C120). Specifically, Horsehead, despite having the opportunity to do so, had not presented any witnesses or evidence to support its claim of good faith. (*Id.*). Thus, the record was silent as to what or whom Horsehead relied on when deciding that it was entitled to the exemption. (*Id.*).

Moreover, the Tribunal noted, despite a lack of statutory definition, the terms "direct" and "immediate" were clear from their simple, everyday meaning. (C121). Additionally, Horsehead's decision not to pay the tax predated the circuit court's decision in *PPG Industries* and, as such, Horsehead's reliance on the case did not support a claim of good faith. (*Id.*). Lastly, although the Tribunal acknowledged Horsehead's history of prior compliance, it noted that compliance with tax laws is expected and therefore declined to assign significant weight to this fact. (C120).

Based on these findings and conclusions, the Tribunal affirmed the two Notices of Tax Liability in their entirety, including the assessments of use tax, interest, and penalties for late filing and late payment. (C122).

III. The Appellate Court Decision

The appellate court affirmed the Tribunal's decision. *See Horsehead Corp. v. Dep't of Revenue*, 2018 IL App (1st) 172802, ¶ 1. First, the court concluded that Horsehead's entitlement to the exemption presented a mixed question of law and fact subject to the clearly erroneous standard of review.

Id. at ¶ 15. In so holding, the court rejected Horsehead's argument that courts should not defer to decisions of the Tribunal. *Id.* at ¶ 16. It noted that the declared purpose of the Tribunal was to possess and employ tax expertise in resolving tax disputes. *Id.* (citing 35 ILCS 1010/1-5(a) (2018)). It also observed that the Illinois Supreme Court has "frequently acknowledged the wisdom of judicial deference to an agency's experience and expertise." *Id.* (quoting *AFM Messenger Serv., Inc. v. Dep't of Emp't Sec.*, 198 Ill. 2d 380, 394-95 (2001)).

The appellate court next held that the Tribunal's holding that metallurgical coke did not qualify for the chemical exemption was not clearly erroneous. *Id.* at ¶ 24. The court affirmed the Tribunal's determination that, to effect a direct and immediate change, the coke "must effect a change on the zinc and iron in the EAF dust that occurs at once without an intermediate step." *Id.* at ¶ 19. But it noted that the coke first must react with carbon dioxide to form carbon monoxide, which in turn reduces the zinc and iron oxides in the EAF dust to zinc vapor and metallic iron. *Id.* at ¶ 20. Thus, the court explained, while coke was integral to the manufacturing process, it did not directly and immediately change the products being manufactured — zinc and iron. *Id.* The court also rejected Horsehead's argument that it should construe the exemption broadly to attract new manufacturing facilities, explaining that it could not extend the chemical exemption beyond the plain and ordinary meaning of the terms used by the General Assembly. *Id.* at ¶ 23.

Finally, the appellate court held that the Tribunal's conclusion that Horsehead had not established reasonable cause to justify an abatement of penalties was not against the manifest weight of the evidence. *Id.* at ¶ 29. Despite the absence of statutory definitions or guiding case law, the court held that the terms nevertheless had their "simple every day meaning as used in the statute." *Id.* at ¶ 28. The court found that the language was clear and that Horsehead could not rely on its own erroneous interpretation to argue it exercised ordinary business care. *Id.* The court noted that Horsehead presented no evidence to support its claim of good faith, such as evidence of professional guidance that it had sought or testimony explaining how it had decided that it was entitled to the exemption. *Id.* at ¶ 29. The court also noted that Horsehead's own employees had testified that coke and carbon do not react directly with either zinc oxide or iron oxide. *Id.*

This Court allowed Horsehead's petition for leave to appeal.

ARGUMENT

I. Because Whether Horsehead's Use Of Metallurgical Coke Qualifies For The Chemical Exemption Raises A Mixed Question Of Law And Fact, Clear Error Review Applies.

It is well established that whether a taxpayer is entitled to a tax exemption presents a mixed question of law and fact. *See, e.g., Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 387 (2010) (entitlement to tax exemption "presents a mixed question of law and fact"). Entitlement to the exemption involves determining whether the particular circumstances of the taxpayer (the facts) qualify for the statutory exemption (the law). *See id.* That was precisely the ultimate question before the Tribunal: whether the metallurgical coke used in Horsehead's manufacturing process (the unique facts of this case) qualified for the chemical exemption (the law at issue). *See AFM Messenger Serv., Inc.*, 198 Ill. 2d at 391 (applying clear error standard when "historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard").

It is also well established that agency determinations of mixed questions are subject to the clear error standard of review. *See, e.g., Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 273 (2009). The clear error standard is "significantly deferential," and a decision will be set aside "only when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Provena*, 236 Ill. 2d at 387-88.

As an initial matter, the Tribunal's determination that the chemical exemption's "direct and immediate" effect requirement does not allow for the *intermediate* steps involved in Horsehead's process should be upheld under any standard of review. In any event, this Court should reject Horsehead's three arguments against applying the clear error standard: (1) that this case, involving examination of the unique facts concerning the role of metallurgical coke in Horsehead's manufacturing process, presents a purely legal question of statutory interpretation; (2) that the Tribunal, an expert tax body, is owed no deference because it does not administer the Act; and (3) that affording no deference to Tribunal determinations involving tax liability over $15,000 is necessary to avoid disparate treatment of taxpayers. (Br. at 9, 13, 16).

A. Even When A Threshold Legal Question Exists, Courts Still Review The Ultimate Mixed Question For Clear Error.

Horsehead and its amicus, Taxpayers Federation of Illinois ("TFI"), argue that the Tribunal's holding that the chemical exemption does not apply should be reviewed *de novo* simply because it involves a threshold question of statutory interpretation. (Br. at 11; Amicus Br. at 4). That is incorrect. This Court has held that, when reviewing mixed questions of fact and law, although the initial statutory interpretation question is reviewed *de novo*, that does not alter the deferential review of the ultimate question before the court: whether the facts of the case satisfy the statutory standard. *See Elementary Sch. Dist. 159 v. Schiller*, 221 Ill. 2d 130, 144 (2006) ("Before we can decide whether the

Superintendent's decision that Ohlhausen's petition satisfied this requirement was clearly erroneous, we must first decide the plain meaning of section 7–2c."); *see also Bd. of Educ. of Glen Ellyn Comm. Consol. Sch. Dist. No. 89 v. Dep't of Revenue*, 356 Ill. App. 3d 165, 170 (2d Dist. 2005) (explaining its approach in prior tax case of interpreting statutory language *de novo*, but applying clear error standard to "ultimate issue of whether the plaintiffs were entitled to receive property tax exemptions") (citing *Swank v. Dep't of Revenue*, 336 Ill. App. 3d 851, 859-60 (2d Dist. 2003)).

Indeed, if merely challenging the threshold statutory interpretation were sufficient to convert the entire inquiry into a *de novo* question, parties in tax exemption cases (and other cases involving mixed questions) would always challenge the statutory language to avoid application of the clear error standard. This is not, and should not be, the law. *See Schiller*, 221 Ill. 2d at 144; *see also Clerk of the Circuit Ct. of Lake Cty. v. Ill. Labor Relations Bd.*, 2016 IL App (2d) 150849, ¶ 38 (reviewing interpretation of Board rules *de novo* but applying those rules to record facts under clear error analysis).

And while Horsehead argues that the only inquiry before this Court is one of statutory interpretation, this assertion is belied by its own brief. Throughout its argument, Horsehead relies on the particular facts of its case to argue that it satisfied the statutory standard. (*See, e.g.,* 18, 25, 26, 27, 42). Thus, Horsehead's own argument shows that the facts of this case are an integral part of the inquiry into whether it was entitled to the chemical

exemption. In this way, the case is different from *Goodman v. Ward*, 241 Ill. 2d 406 (2011), on which Horsehead relies. (Br. at 8, 9, 12). *Goodman* involved the purely legal question of whether the Election Code required a candidate to meet a residency requirement at a certain time. *See* 241 Ill. 2d at 407-08. In contrast, this case presents the mixed question of whether a particular set of facts meets the chemical exemption.

For its part, TFI largely ignores that this case presents a mixed question — *i.e.*, whether Horsehead's facts satisfy the exemption — and presumes that the only question is the threshold legal matter of statutory interpretation. (Amicus Br. at 4-19). While this Court has recognized that "substantial weight and deference" is owed to agency determinations even on legal questions, *see*, *e.g., Ill. Landowners All., NFP v. Ill. Commerce Comm'n*, 2017 IL 121302, ¶ 46, this agency deference is distinct from the clear error deference applicable to the ultimate question here. Regardless of whether this Court affords some deference to the Tribunal's threshold statutory interpretation, it should defer to its resolution of the mixed question of whether Horsehead's use of metallurgical coke qualifies for the chemical exemption.

Rather than address the application of the clear error standard in this case, TFI instead asks that this Court no longer apply the standard to mixed questions in any case, arguing that "[m]uch confusion has been sowed since [its] adoption." (Amicus Br. at 19-20). This Court should decline that invitation. As TFI acknowledges, application of the clear error standard to

mixed questions on administrative review has been the law in Illinois for over two decades. (*Id.* at 19-20) (citing *Belvidere v. Ill. State Labor Relations Bd.*, 181 Ill. 2d 191, 204 (1998)). Despite that, TFI asks this Court to "reexamine" *Belvidere*, as well as this Court's holding in *AFM Messenger*, 198 Ill. 2d at 395.

But absent from TFI's request is this Court's reaffirmation of *Belvidere* and *AFM Messenger* over a decade ago in *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200 (2008). *See id.* at 211-12 ("[W]e reaffirm *City of Belvidere's* distinction between the three standards of review, as well as *AFM Messenger*'s elucidation of the 'clearly erroneous' standard of review."). Several cases cited by TFI predate *Cinkus* and thus should not be followed. (Amicus Br. at 21). In fact, one of them, *Blessing/White, Inc. v. Zehnder*, 329 Ill. App. 3d 714 (1st Dist. 2002), not only predates *Cinkus* but also was later deemed "suspect" by the appellate court, which suggested that the case was "inconsistent" with *AFM Messenger*. *See Dow Chem. Co. v. Dep't of Revenue*, 359 Ill. App. 3d 1, 21-22 (1st Dist. 2005).

In short, the clear error standard has been a foundational part of administrative review law for over 20 years, one reaffirmed by this Court and employed numerous times in the last two decades. TFI has presented no compelling basis to depart from it. *See, e.g., People v. Sharpe*, 216 Ill. 2d 481, 519 (2005) (addressing stare decisis and explaining "when a rule of law has once been settled, contravening no statute or constitutional principle, such rule ought to be followed unless it can be shown that serious detriment is

thereby likely to arise prejudicial to public interests") (quoting *Maki v. Frelk*, 40 Ill. 2d 193, 196 (1968)). Consistent with this Court's precedent, the deferential clear error standard of review should apply to the mixed question of Horsehead's entitlement to a tax exemption.

B. Courts Should Defer To Determinations Of The Tribunal For The Same Reason That They Defer To All Agency Determinations: Agency Expertise.

Next, Horsehead argues that the Tribunal's determinations are not entitled to deference because the Tribunal purportedly is not charged with administering a statute. (Br. at 14). In support, Horsehead selectively cites case law that regards an agency's administration of a statute as the basis for deference to the agency's determinations. (*Id.*).

But Horsehead overlooks that the underlying reason for courts' deference to agency decisions is agency expertise. *See Bonaguro v. Cty. Officers Electoral Bd.*, 158 Ill. 2d 391, 398 (1994) (explaining "significant reason" for deference to agency "is that an agency can make informed judgment upon the issues, based on its experience and expertise"); *see also AFM Messenger Serv.,* 198 Ill. 2d at 394-95 (noting this Court has "frequently acknowledged the wisdom of judicial deference to an agency's experience and expertise"). Agencies certainly do gain expertise through the administration of statutes. But the administration of a statute — such as through substantive rulemaking, enforcement, and collection — is not the only way to have expertise. Here, the Tribunal has expertise by way of a statutory mandate.

Indeed, the Illinois Independent Tax Tribunal Act of 2012, in its "statement of purpose," defines the Tribunal as an independent administrative body "with tax expertise" that acts as a "tax-expert forum." 35 ILCS 1010/1-5 (2018). The Act requires that administrative law judges have "substantial knowledge of State tax laws and the making of a record in a tax case suitable for judicial review." 35 ILCS 1010/1-30 (2018).

Given this expertise mandated by law, there is no support for Horsehead's argument that deference should not be paid to the Tribunal simply because it solely performs an adjudicative role. (Br. at 13-14). Both this Court and the appellate court have consistently afforded deference to decisions from analogous agency review boards and commissions whose sole function is to adjudicate. *See, e.g.*, *Sangamon Cty. Sheriff's Dep't v. Ill. Human Rights Comm'n*, 233 Ill. 2d 125, 136 (2009) ("interpretation of a statute by involved administrative bodies constitutes an informed source for guidance when seeking to ascertain the legislature's intention when the statute was enacted") (internal quotations omitted); *Perez v. Ill. Concealed Carry Licensing Review Bd.*, 2016 IL App (1st)152087, ¶ 22 (applying clearly erroneous standard to review board determination); *Jones v. Lockard*, 2011 IL App (3d) 100535 ¶ 43 (applying clearly erroneous standard of review to determination by Illinois Human Rights Commission). *See also* 430 ILCS 66/20(a) (2018) (setting forth expertise requirements for Concealed Carry Licensing Review Board); 775 ILCS 5/8-101(F), (G) (2018) (setting forth

training and background requirements for Human Rights Commission commissioners). Just like other agencies, the Tribunal is an administrative body whose determinations on mixed questions are entitled to deference because of its statutorily mandated tax law expertise.

C. Failing To Afford Deference To The Tribunal Would Ensure The "Two-Track System" That Horsehead Purportedly Seeks To Avoid.

Horsehead next argues that deference to the Tribunal's determinations of mixed questions would encourage wealthy taxpayers to bypass the Tribunal by pursuing actions in the circuit court through the Protest Monies Act, 30 ILCS 230/1 *et seq*. (2018). (Br. at 11, 16). Under that provision, a taxpayer can pay its liability in full into the protest monies fund and, with that security against an adverse judgment, initiate a circuit court action seeking a refund. 30 ILCS 230/2, 2a (2018). This option, Horsehead argues, will create a two-track system purportedly allowing wealthy taxpayers to avoid agency deference, and leaving other taxpayers vulnerable to Tribunal decisions subject to greater deferential review on appeal.

Horsehead is incorrect. Its assumption that wealthier taxpayers will gravitate toward the Protest Monies Act merely to avoid deference to the Tribunal's determinations overlooks the opportunity costs that such taxpayers will incur. Among these are the immediate (though potentially temporary) loss of the liability amount through payment, as well as the risk of loss of interest in the event the taxpayer loses its challenge. Even if such a taxpayer

prevails, the interest accrued on protest monies funds during the pendency of the challenge is dictated by the U.S. Treasury Bill Rate, *see* 30 ILCS 230/2a (2018), which may be less than what could be earned through another investment vehicle. In light of these economic realities, there is no reason to assume that wealthier taxpayers would necessarily choose a protest action over the Tribunal. Moreover, Horsehead neglects the fact that clear error deference to Tribunal determinations *in favor* of the taxpayer would equally apply in appeals by the Department.

And, in any event, the risk that some taxpayers might choose to proceed by a protest action is an insufficient basis to eliminate deference to the Tribunal. Just as the Protest Monies Act is available to those who might otherwise choose the Tribunal, it is also an alternative for those taxpayers whose challenges would proceed to the Department (*i.e.*, for certain tax liabilities less than $15,000). *See* 30 ILCS 230/2, 2a (2018). Yet Horsehead does not suggest that the Department's determinations on mixed questions should not be reviewed for clear error on administrative review. And Horsehead cannot make this claim because, as noted, this Court has endorsed clear error review of such determinations for more than two decades. *See, supra*, pp. 16-17.

Horsehead also argues that requiring deference to Tribunal determinations but not circuit court decisions under the Protest Monies Act raises the specter of producing inconsistent judicial decisions. But erasing

deference to the Tribunal would not avoid this supposed threat of inconsistency. That is because under Horsehead's proposal, while both the Tribunal and circuit court's determinations on exemptions would be reviewed *de novo*, Department determinations would still be reviewed for clear error. Horsehead fails to explain how, if this threat of inconsistency is legitimate, applying a different standard of review to determinations on tax exemptions exceeding $15,000 would increase consistency.

Finally, *failing* to defer to the Tribunal would indeed create a two-track system — precisely what Horsehead purportedly seeks to avoid. Individuals with higher tax liabilities (that is, more than $15,000) would have the benefit of a deference-free Tribunal from which to appeal adverse decisions. By contrast, those with a lower tax liability, but still perhaps a significant tax burden relative to such taxpayers' wealth, would have to proceed via administrative review through the Department, with a final decision subject to the clear error standard.

Avoiding this disparity is important in and of itself, but it is particularly vital given the legislative history surrounding the Tribunal's creation. That history demonstrates that the General Assembly was not concerned about disparities between the Protest Monies Act and the Tribunal (contrary to Horsehead's argument); rather, it was concerned about potential disparities between the Tribunal and the Department.

In 2011, during the House debates on the bill to create the Tribunal, one sponsor acknowledged the risk of disparate treatment caused by the $15,000 threshold:

> The one issue that came up which I think is valid but one which we really couldn't get over is the threshold is $15 thousand. So, if a . . . if a problem is less than $15 thousand, it perhaps disadvantages a smaller taxpayer but it is generally those larger taxpayer[s] especially in the business level that need this sort of independent advice.

Transcription Debate, H.R. 97, 144th Legislative Day (IL 2012), (available at http://www.ilga.gov/house/transcripts/htrans 97/09700144.pdf, at p. 63). During these debates, another representative questioned the possible disadvantages to taxpayers with lower tax liabilities:

> Okay. What consideration that was . . . I mean, how did that threshold . . . how was it determined? You know, why not people with a lower threshold, who you know, maybe more aggrieved with their situation?
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> [D]on't you think this could be viewed as, you know, another . . . another out or another resort for businesses to appeal their, you know, their problems with revenue rather than an individual?

Id. at 63-64. Another bill sponsor acknowledged it was an "excellent question," noted that the threshold exists to avoid inundating a then-new agency, and said that the monetary threshold could be revisited in the future. *Id.*

These discussions make clear that the General Assembly sought to avoid disparate treatment of taxpayers who proceed in the Department rather than at the Tribunal. Affording the same deference to both agencies is consistent with that intent.

In sum, Horsehead has failed to demonstrate any basis in law or policy for subjecting Tribunal determinations regarding mixed questions to *de novo* review. To the contrary, adopting Horsehead's suggestion for revamping standards of review would guarantee disparate treatment between adjudications by the Department and the Tribunal, something that the General Assembly sought to avoid.

II. Metallurgical Coke Does Not Effect A Direct And Immediate Change On Horsehead's Zinc And Iron Products Because The Reducing Agent Is Carbon Monoxide Alone.

In Illinois, "taxation is the rule," and "[t]ax exemption is the exception." *Oswald v. Hamer*, 2018 IL 122203, ¶ 12. Thus, exemptions "must be strictly construed in favor of taxation," and "courts have no power to create exemption from taxation by judicial construction." *Provena*, 236 Ill. 2d at 388; *see also Swank*, 336 Ill. App. 3d at 855 ("[T]he court must construe the statutory tax exemption narrowly and strictly in favor of taxation."). The burden of demonstrating an entitlement to an exemption rests with the taxpayer and is a "very heavy one." *Provena*, 236 Ill. 2d at 388. "[A]ll facts are to be construed and all debatable questions resolved in favor of taxation." *Id.*

In addition, whether in the tax context or more broadly, courts must give statutory language its "plain and ordinary meaning" and "are not free to construe a statute in a manner that alters the plain meaning of the language adopted by the legislature." *Murray v. Chi. Youth Ctr.*, 224 Ill. 2d 213, 235 (2007). When possible, every word should be given effect, and language should be read to avoid rendering any part "inoperative, superfluous, or insignificant." *People v. Ellis*, 199 Ill. 2d 28, 39 (2002). Moreover, courts may not read into statutory language "exceptions, limitations, or conditions the legislature did not express." *Id.*

Here, by affording the words "direct" and "immediate" their plain meaning, the Tribunal properly construed those terms to require that the coke itself effect a change Horsehead's products, without intervening steps or factors. (C114); 35 ILCS 105/3-50(4) (2018). It correctly determined that because carbon monoxide — rather than metallurgical coke — reacted with its products, the coke did not qualify for the exemption.

A. Metallurgical Coke Acts Neither Directly Nor Immediately With Horsehead's Zinc And Iron Products.

As Horsehead's own witness testimony established, metallurgical coke acts neither directly nor immediately on the metallic iron and zinc oxide produced by Horsehead. (R13; R23; R28-29). Instead, the coke must first be heated and burned, with carbon from the coke then reacting with carbon dioxide to form carbon monoxide. (R8-10, R19). It is carbon monoxide, which is different from coke or the carbon within the coke, that diffuses into the

pellets to reduce the iron and zinc oxides contained in the EAF dust to produce the products Horsehead sells. (R13; R23; R28-29).

Horsehead does not dispute that coke must undergo heating and that the carbon from the coke is part of a chemical reaction to form carbon monoxide. (Br. at 18). Nor does it deny that it is carbon monoxide that diffuses into the pellets to react with the zinc and iron oxides to produce its zinc and iron products. (*Id.*). But Horsehead argues that the coke nevertheless has a "direct and immediate" effect because: (1) carbon monoxide is simply a "modified form" of coke, and (2) the definition of "direct and immediate" should allow for "intervening factors or intermediate steps." (Br. at 22-23; Br at 21). Both contentions lack merit.

1. Carbon Monoxide Is Not A Naturally Modified "Form" Of Coke.

First, Horsehead repeatedly asserts that the coke "naturally" and "without any human or mechanical intervention" turns to carbon monoxide. (*See, e.g.*, Br. at 18, 42) ("Subject only to the requirement that it must first be heated to its reactive temperature, coke (solid carbon) naturally turns from solid carbon to gaseous carbon monoxide that retains the original carbon component."); (*see also id.* at 1-2, 6, 9, 18-23, 25, 27-30, 32, 36, 41-42). Horsehead even suggests that carbon monoxide is a "naturally modified form" of carbon. (*Id*. at 22-23).

But nothing in the statutory language deems chemicals exempt if they "naturally or without human intervention" help form the chemicals that *do*

directly and immediately effect the final product, even though they themselves do not have that effect. And, in any event, none of Horsehead's witnesses testified that carbon monoxide is a "form" of carbon, or that it is created "naturally" during the Waelzing process.

Indeed, during cross-examination, one of Horsehead's employees confirmed that carbon monoxide is not simply "gaseous carbon." (R28). Rather, to create carbon monoxide, the coke must be placed in an extremely *un*natural environment — one that is both oxygen-poor and super-heated to several hundred degrees above the boiling point of water. (R8-10, R17-19, E5). After the coke is heated, the carbon from the coke must react with carbon dioxide to form a distinct product, carbon monoxide. (R9-10, R19). Thus, Horsehead's repeated suggestion that coke reacts with zinc and iron oxides "subject only to the requirement that it must first be heated," (Br. at 18, 42), is incorrect. As the appellate court noted, the fact that coke must be heated was not alone determinative —instead, the Tribunal also highlighted that carbon must undergo a chemical reaction to form carbon monoxide. It is this distinct gas product, and not metallurgical coke, that effects changes on the zinc and iron oxides. As such, Horsehead's attempt to meet the "direct and immediate" requirement by arguing that carbon monoxide is a purportedly naturally modified form of coke should be rejected because it is neither consistent with the statutory language nor accurately describes the manufacturing process.

2. The Statute Does Not Allow For Intermediate Steps, Or Exempt Chemicals That Are Merely Part Of The Manufacturing Process.

Horsehead also asserts that its coke qualifies as exempt because the definition of "direct and immediate" should allow for "intervening factors and intermediate steps that do not either disrupt the natural sequence of events or terminate the chemical's involvement." (Br. at 21). In other words, Horsehead argues that a requirement of a direct and *im*mediate effect allows for *inter*mediate steps. By the very terms of the exemption, this argument is wrong.

Horsehead seeks a reading of the statute that would exempt a chemical if it is part of a "continuous sequence of events" and remains "an active and essential part" of the manufacturing process. (Br. at 22-23, 25, 32, 36). But, presumably, every chemical used by a manufacturer is essential to the manufacturing process. The General Assembly, however, determined that only chemicals that effect a "direct and immediate" change upon a product qualify for the exemption. As the Tribunal correctly concluded, allowing chemicals that merely play a role in the process would make the "direct and immediate" requirement meaningless.

Authority from other States confirms that "direct effect" exemptions do not include items that are merely necessary or essential to the manufacturing process. For example, in *Comm'r of Revenue v. V.H. Blackinton & Co., Inc.*, 649 N.E.2d 160 (Mass. 1995), Massachusetts' highest court reversed an

appellate tax board's decision overturning the tax commissioner's decision to impose sales tax on certain pollution control equipment. *Id.* at 160. The court held that the appellate tax board improperly "focuse[d] only on whether the equipment is necessary and essential to manufacturing process," and "failed to consider the added language of the statute, which require[d] the machinery . . . 'to effect a direct and immediate physical change upon the tangible personal property to be sold.'" *Id.* at 162.

Similarly, the Texas appellate court in *Sabine Mining Co. v. Strayhorn*, No. 13-06330, 2007 WL 2390686 (Tex. App. Ct. Aug. 23, 2007), held that it must construe "very narrowly" the tax statute "limiting tax-exempt property to that which '*directly* makes or causes a chemical or physical change.'" *Id.* at *3 (emphasis in the original); *see also Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 408 (Tex. 2016) (citing *Sabine* with approval). The court noted that the state legislature had incorporated the "directly makes or causes a chemical or physical change" language to address two earlier appellate decisions that exempted equipment merely used in "step[s]" or "stages" of the manufacturing process. 2007 WL 2390686, * 3. The court further noted that the Texas legislature, "presumably concerned with the revenue loss which might occur if the . . . exemption were interpreted to apply to virtually all stages of the manufacturing process, rebuked the reasoning of both [cases]." *Id.*

Importantly, *Sabine* recognized that while some States did exempt equipment that was part of an "integrated and complementary chain of procedures" or simply "used" in production, such exemptions were broader than the Texas exemption, which requires a "direct" change. *Id.* at *3, n.2. Like Texas and Massachusetts, Illinois has chosen not to exempt chemicals that were merely used in, or a part of, a manufacturing process.

And while Horsehead attempts to rely on a decision of the Indiana Supreme Court interpreting that State's tax exemption for certain equipment, the language of the Indiana provision and Illinois's chemical exemption are not identical or even analogous. (Br. at 30) (citing *Ind. Dep't of State Revenue v. Cave Stone*, 457 N.E.2d 520 (Ind. 1983)). In particular, the Indiana Supreme Court interpreted the statutory phrase "directly used . . . in the direct production." *Id.* at 523. But here, the chemical exemption does not exempt chemicals that are "directly used," making *Cave Stone* inapposite.

3. Neither Horsehead's Dictionary Definitions Nor Its Non-Precedential Authorities Favor Its Overly Expansive Interpretation Of The Chemical Exemption.

Although Horsehead's construction of "direct and immediate" to allow for "intervening factors or intermediate steps" has no basis in the plain language of the statute, Horsehead attempts to support its proposed interpretation by resort to legal dictionary definitions, as well as non-precedential and inapposite authorities. Neither demonstrate that the terms "direct" and "immediate" allow for intermediate steps.

a. Horsehead's Reliance On The Distinct Tort Law Concepts Of "Direct Cause" And "Proximate Cause" Is Misplaced.

Horsehead first argues that the Tribunal should have looked to the definition of "direct cause" in legal dictionaries, which, according to Horsehead, includes "proximate cause." (Br. at 22). In making this claim, Horsehead asserts that the Tribunal's analysis was not "thorough" and "fulsome" because it did not consider this definition. (Br. at 19). In support, Horsehead describes a Westlaw search history that it claims shows that this Court has relied on legal dictionaries more often than the Oxford dictionary. (Br. at 23). But the results of Horsehead's search do not establish that the Court "overwhelmingly favors" legal dictionaries (*id.*) — if anything, they merely establish that the Court has relied on legal dictionaries more often than the Oxford dictionary. Importantly, the results fail to account for the myriad other general usage dictionaries beyond Oxford, such as Webster's.

But even if resort to a legal dictionary were appropriate, Horsehead inappropriately asks this Court to consider legal phrases ("direct cause" and "proximate cause") that are terms of art and appear nowhere in the chemical exemption. Instead, the plain language exempts chemicals that have a "direct and immediate effect" on the manufactured product. *Id.* There is no mention of the tort concept of causation. For this same reason, the Tribunal correctly rejected the reasoning of the non-precedential circuit court order in *PPG*

Industries, which adopted the misguided approach Horsehead urges here. (C118).

And while Horsehead attempts to meet the alternative Oxford definition of "direct" cited by the Tribunal, that is, "extending or moving from one place to another without changing direction or stopping," that attempt fails. (C113). Specifically, despite the definitional requirement of movement "without changing direction," Horsehead claims that the definition "allows for changes." (Br. at 21). By its terms, it does not. And, as the Tribunal concluded, this definition does not describe Horsehead's process, during which carbon from metallurgical coke reacts with carbon dioxide to form a distinct gas product, carbon monoxide.

In the end, though, even if Horsehead were successful in persuading this Court to redefine "direct" to include indirect and intervening steps, it fails to account for the statutory requirement that the change be "immediate." Here, Horsehead cites Black's Law Dictionary, which defines "immediate" as "not separated by other persons or things." (Br. at 22). Coke is separated from the iron and zinc products that Horsehead produces both by the heating process of coke and by the chemical reaction between carbon and carbon dioxide that produces carbon monoxide. Accordingly, Horsehead also fails to show how coke effects an "immediate" change on its products under this definition.

b. Horsehead's Cited Authorities And Its Own Examples Are Inapposite.

Outside of legal dictionary definitions, Horsehead also relies on authorities that are either inapposite, non-precedential, or both. First, Horsehead's reliance on this Court's decisions in *Am. Can Co. v. Dep't of Revenue*, 47 Ill. 2d 531 (1971), and *Mobil Oil Corp. v. Johnson*, 93 Ill. 2d 126 (1982), is misplaced. As Horsehead acknowledges, these cases do not involve exemptions, which are construed narrowly, but instead whether the taxpayers at issue were subject to use tax. (Br. at 29); *see Am. Can Co.*, 47 Ill. 2d at 534; *Mobil Oil Corp*, 93 Ill. 2d at 131-32. Horsehead nevertheless argues that the principle purportedly underlying these cases should "apply equally in the context of the Use Tax Act's exemption provisions" but provides no support for this assertion — and there is none. These cases, addressing what constitutes "use" for purposes of the use tax, have no bearing on the distinct question of which uses are exempt under the specific language of the chemical exemption.

Horsehead also relies on non-precedential letter rulings (Priv. Ltr. Rul. ST 11-0010 (Aug. 18, 2011) and Gen. Information Ltr. ST 09-0149-GIL (Nov. 9, 2009)) and an Office of Administrative Hearings order (*Dep't of Revenue v. XYZ Water Purifiers*, ST 99-11 (Ill. Dep't of Revenue, Aug. 19, 1999). (Br. at 30). But the private letter rulings, which applied the chemical exception to blasting agents employed immediately following initiation of a manufacturing process, turned on materially different facts from the manufacturing process at issue here, which requires multiple steps over more than two hours between

the introduction of the coke and the creation of the carbon monoxide that diffuses into the pellets to ultimately produce Horsehead's iron and zinc products. As for the order entered in *XYZ Water Purifiers*, in addition to being non-precedential, the order predates the chemical exemption and, as such, provides no useful guidance here.

Horsehead's attempt to analogize its manufacturing process to the steam produced by an iron or used to cook carrots, or a bullet hitting a target, is similarly unavailing. (Br. at 24, 27). In these examples, it is the water (in the first and second examples) and bullet (in the third) that effectuate change on the final "product." Here, it is not the coke (or the carbon diffused or even the carbon dioxide) that effects change on the zinc and iron products Horsehead produces. Rather, it is the carbon monoxide that has the direct and immediate effect.

Horsehead also suggests that the aluminum oxide cracking oil example in the Department's rules supports its position. (Br. at 26) (citing 86 Ill. Admin. Code § 130.330(c)(6)). That example describes a manufacturing process pursuant to which an aluminum oxide catalyst is used to refine heavy gas oil into gasoline. *Id.* But unlike Horsehead's metallurgical coke, it is the aluminum oxide itself, and not some compound into which aluminum oxide has been converted, that effects the change.

Finally, while Horsehead argues that rejecting its admittedly qualified interpretation of "direct" and "immediate" gives rise to what in Horsehead's

view is an overly narrow construction of the chemical exemption, this ignores the requirement that exemptions be construed narrowly in favor of taxation. *Provena*, 236 Ill. 2d at 388. Moreover, qualifications — something Horsehead concedes that it is seeking (Br. at 21) — may not be implied when construing statutory language. *Ellis*, 199 Ill. 2d at 39 (courts may not read into statutory language "exceptions, limitations, or conditions the legislature did not express.").

In sum, none of Horsehead's cited authorities support a reading of the exemption that would exempt chemicals that are simply an active or essential part of the manufacturing practice. The Tribunal's determination that the chemicals must instead "directly" and "immediately" effect a change on Horsehead's products should be affirmed.

B. Horsehead's Attempt To Broaden The Chemical Exemption On Purported Policy Grounds Should Be Rejected.

Finally, Horsehead asserts that its construction of the chemical exemption, allowing intermediate steps, is superior because it "harmonizes" with the statutory structure and avoids increasing the tax burden on manufacturing companies. (Br. at 32-33). Regarding its first point, Horsehead argues that interpreting the chemical exemption broadly would parallel Illinois law's broad exemption for manufacturing equipment, which requires only that equipment be "used primarily" in the manufacturing process. 35 ILCS 105/3-5(18). But as Horsehead acknowledges, the chemical exemption is different

from the manufacturing exemption because the former adds a further requirement of "direct and immediate change." (Br. at 32). Indeed, the use of the "used primarily" language for manufacturing equipment demonstrates that the legislature knew it could employ this language for the chemical exemption, but chose not to. *See, e.g., Vill. of S. View v. Cty. of Sangamon*, 228 Ill. App. 3d 468, 473 (4th Dist. 1992) ("Where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent.").

Horsehead's second argument – that this Court should adopt a broad construction of the exemption to discourage relocation of manufacturers – is based on policy arguments better suited for the General Assembly's consideration. *See, e.g., Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶ 32 ("[I]t is not a matter for this court to question the wisdom of the General Assembly in establishing licensing requirements, nor to determine whether it has chosen the best available means to achieve its desired result."). As drafted, the exemption is limited by the "direct" and "immediate" requirements, and, as explained, must be construed narrowly in favor of taxation.

III. The Tribunal's Finding That Horsehead Was Not Entitled To An Abatement Of Penalties Was Not Against The Manifest Weight Of The Evidence.

For its final argument, Horsehead seeks an abatement of the late filing and late payment fines assessed by the Department. (Br. at 37). Section 3-8 of

the UPIA states that penalties "shall not apply if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause. Reasonable cause shall be determined in each instance in accordance with the rules and regulations promulgated by the Department." 35 ILCS 735/3-8 (2018).

And a Department rule states that the "determination of whether a taxpayer acted with reasonable cause shall be made on a case by case basis taking into account all pertinent facts and circumstances." 86 Ill. Admin. Code § 700.400(b). The "most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion." *Id*. Under the rule, a "taxpayer will be considered to have made a good faith effort to determine and file and pay his proper tax liability if he exercised ordinary business care and prudence in doing so. A determination of whether a taxpayer exercised ordinary business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer's experience, knowledge, and education." 86 Ill. Admin. Code § 700.400(c).

Although Horsehead asserts that, for purposes of determining if a taxpayer is liable for penalties, the question of whether the law was clear is reviewed *de novo*, Horsehead concedes, as it did in the appellate court below, that the manifest weight standard of review applies to the Tribunal's finding

that it was not entitled to the abatement. (Br. at 38); *Horsehead Corp.*, 2018 IL App (1st) 172802, ¶ 26. This standard applies because whether reasonable cause exists to abate a tax penalty is a factual determination made on a case-by-case basis. *Hollinger Int'l, Inc. v. Bower*, 363 Ill. App. 3d 313, 315-16 (1st Dist. 2005). Under the manifest weight standard, an administrative agency's determination will not be reversed unless the opposite result is clearly evident. *Id.* at 315.

As the Tribunal found and the appellate court confirmed, notwithstanding the lack of precedent on this issue, the language of the chemical exemption is clear. While Horsehead argues that it was wrong for the appellate court to have held its erroneous interpretation against it because every taxpayer seeking abatement will have made an erroneous interpretation (Br. at 39), this misunderstands the court's reasoning. The appellate court did not affirm the Tribunal's decision to assess fines merely because Horsehead made an error in interpreting the chemical exemption, the court affirmed because Horsehead's *only* basis for not paying the tax was its own erroneous reading. *Horsehead Corp.*, 2018 IL App (1st) 172802, ¶ 29. Indeed, resources readily available to Horsehead, including the common understanding of these words, dictionaries, the examples provided by the Department's rule, and, as noted by the appellate court, its own testifying employees, all dictated that coke would not qualify.

As the Tribunal found, although it had the opportunity to do so, Horsehead presented no evidence that it acted in good faith. (C120). Specifically, it could have, but did not, present testimony of its employees regarding a business decision not to pay tax, or evidence that they sought guidance on the issue. Additionally, as noted by the Tribunal, Horsehead's reliance on the circuit court's non-precedential order in *PPG Industries* does not support a good-faith finding, as Horsehead's decision not to pay use tax predated that order. (C120).

While Horsehead asserts that it should be entitled to the abatement because there was no then-available precedent interpreting the chemical exemption (Br. at 40), this argument, if adopted, would expand the reasonable-cause rule to any case in which a taxpayer purported to rely on a statutory provision that had not yet been judicially interpreted. There is no indication that the General Assembly intended such a broad exception to the penalties provision. Rather, because it is well settled that exemptions to taxation should be narrowly construed, the General Assembly more likely intended that, absence precedent favoring the exemption, taxpayers cannot show reasonable cause for failing to pay liabilities owed. And, in the case of genuine uncertainty, taxpayers may and should seek a private letter ruling from the Department. *See, e.g.*, 2 Ill. Admin. Code § 1200.110 (explaining private letter ruling are "issued in response to specific taxpayer inquiries concerning the

application of a tax statute or rule to a particular fact situation" and noting their binding effect on the Department as to that taxpayer).

In sum, given that Horsehead failed to present any evidence to support a finding of good faith, the Tribunal's decision not to abate penalties was not against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, Respondent-Appellee the Illinois Department of Revenue requests that this Court affirm the decision of the Illinois Independent Tax Tribunal.

Respectfully submitted,

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July 25, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 41 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 25, 2019, I electronically filed the foregoing Brief of Respondent-Appellee Illinois Department of Revenue with the Clerk of the Court for the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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