NO. 124155

IN THE
SUPREME COURT OF ILLINOIS

HORSEHEAD CORPORATION, Appellant-Petitioner	Petition for Leave to Appeal from the Illinois Appellate Court, First District, First Division No. 1-17-2802
v.	There on Appeal from the Illinois Independent Tax Tribunal, No. 14-TT-227
ILLINOIS DEPARTMENT OF REVENUE *and* ILLINOIS INDEPENDENT TAX TRIBUNAL, Appellees-Respondents	Chief Administrative Law Judge James M. Conway, Presiding

REPLY BRIEF OF APPELLANT-PETITIONER HORSEHEAD CORPORATION

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INTRODUCTION

Horsehead purchases metallurgical coke—a solid material consisting almost entirely of carbon—for use in its process of recycling electric arc furnace dust ("EAF Dust") into zinc oxide and iron oxide material. In litigation before the Illinois Independent Tax Tribunal (the "Tribunal"), Horsehead took the position that the coke qualified for exemption from the use tax as a chemical that "effect[s] a direct and immediate change" upon a product being manufactured. 35 ILCS 105/3-50(4). The Tribunal determined that coke does not satisfy the plain meaning of the quoted phrase because it is carbon monoxide gas (*i.e.* oxidized carbon) and not coke (*i.e.* solid carbon) alone that directly and immediately reacts with the products being manufactured.

Reviewing for clear error, the Appellate Court effectively rubber-stamped the Tribunal's hyper-narrow, matter-of-first-impression statutory interpretation. As discussed in Horsehead's opening brief, the Appellate Court erred in its standard of review determination, its holding that coke does not qualify for the exemption, and in its ruling that Horsehead did not satisfy the "reasonable cause" standard for penalty abatement. IDOR's arguments in response miss the mark for at least four principal reasons.

***First*,** where the facts are agreed to but the parties dispute the meaning of the governing legal rule, *de novo* review is required. The cases cited by Respondent ("IDOR") are not to the contrary. IDOR's suggestion that the Court must review the application of the statute for clear error misconstrues the issues before this Court and ignores this Court's precedent.

Second, nothing in this Court's jurisprudence suggests—let alone mandates—that determinations on issues of law made by an independent, administrative tribunal with neither rule-making nor enforcement powers should be afforded deference. The agencies

that IDOR identifies in its response are nothing like the Tribunal. One of them has rule-making powers and the other is charged solely with making evidentiary findings. And IDOR's argument that the Tribunal's legal determinations are entitled to deference because its enabling statute calls it a tax expert is a mere tautology.

Third, the Appellate Court's error in adopting deferential review resulted in it affirming the Tribunal's interpretation of the chemical exemption in a way that creates an arbitrary and unworkable standard that ignores every touch-point for fulsome statutory interpretation. IDOR does not address these critical errors but instead relies on mischaracterizations of the undisputed facts as well as trivial and arbitrary differences to distinguish Horsehead's coke from persuasive, illustrative examples, including one in the Department's own regulations. Despite IDOR's efforts, the undisputed facts show that coke is the carbon component of the carbon monoxide which IDOR *agrees* "directly and immediately" reduces the zinc and iron oxides.

Finally, the explicit purpose of the "reasonable cause" exception for penalty abatement is to provide relief to a taxpayer who erred, albeit reasonably. Even if this Court determines that Horsehead's coke did not qualify for the chemical exemption, Horsehead's position was, at the very least, based on a reasonable interpretation of the statute's plain language. IDOR's argument that penalties should apply because Horsehead has not memorialized the guidance it relied upon is unsupported by the statute and contrary to the purpose of the abatement process.

For these reasons and those discussed in Horsehead's opening brief, this Court should reverse the Appellate Court's Order and enter a judgment that Horsehead's coke qualifies for the chemical exemption.

ARGUMENT

I. The Tribunal's interpretation of the chemical exemption and its application to the undisputed facts is reviewed *de novo*.

A. The Tribunal's interpretation of the chemical exemption is a pure question of law and no authority IDOR cites suggests otherwise.

The facts in this case are not in dispute, but the meaning of the statutory phrase "effect a direct and immediate change" in the chemical exemption is very much in dispute. Indeed, IDOR, the Appellate Court, and the Tribunal all agree that the chemical exemption's interpretation is a matter of first impression at the appellate level. Resp. Br. at 38; A15-A16; A33. As discussed in Horsehead's opening brief, this Court has offered clear direction on the appropriate standard of review in a situation like this:

> [W]here the historical facts are admitted or established, but there is a dispute as to whether the governing legal provisions were interpreted correctly by the administrative body, the case presents a purely legal question for which our review is *de novo.*

Goodman v. Ward, 241 Ill. 2d 398, 406 (2011). This proposition is not novel, and is repeated throughout this Court's jurisprudence. *E.g.*, *Ill. Landowners All., NFP v. Ill. Commerce Comm'n*, 2017 IL 121302, ¶ 45 (quoting *Goodman*); *Hossfeld v. Ill. State Bd. of Elections*, 238 Ill. 2d 418, 423 (2010). As these cases make clear, such a situation is wholly distinct from one where "***the controlling rule of law is undisputed*** and the issue is whether the facts satisfy the statutory standard . . . for which the standard of review is 'clearly erroneous.'" *Goodman*, 241 Ill. 2d at 406 (emphasis added).

Here, the facts are admitted but there is a dispute as to whether the Tribunal correctly interpreted the statutory chemical exemption. *Goodman* is thus clear that this case "presents a purely legal question for which . . . review is *de novo*." *Id.* None of IDOR's arguments in response support a different conclusion.

First, IDOR asserts that "[i]t is well established that whether a taxpayer is entitled to a tax exemption presents a mixed question of law and fact." Resp. Br. at 13 (citing *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368 (2010)). But *Provena* says no such thing. Instead, *Provena* applies a legal framework which is consistent with Horsehead's position that the appropriate standard of review in this case is *de novo*. *Provena* recognized that when the parties dispute "an agency's conclusion on a point of law," the appropriate standard of review is *de novo*. *Id.* at 387. *Provena* further explained that, in contrast, "when the dispute concerns the legal effect of a given set of facts"—that is, where "the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard"—this is a mixed question of law and fact reviewed for clear error. *Id.* at 387. Because *Provena* was a property tax exemption case (a heavily litigated area of tax law), "the governing legal principles [were] well established," and, as a result, this Court reviewed for clear error. *Id.* There is no support for IDOR's assertion that the clearly erroneous standard is specially implicated by a tax exemption case, let alone a tax exemption case of first impression.

Similarly, in *AFM Messenger Service, Inc. v. Department of Employment Security*, also cited by IDOR, the Court recognized that "the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated." 198 Ill. 2d 380, 391, 398–99 (2001) (citation omitted) (reviewing for clear error the application of a statute that was the subject of decades of precedential case law).

Unlike in *Provena* and *AFM Messenger*, in this case the meaning of the governing statute is very much in dispute. The entire case hinges on Horsehead's argument that the

Tribunal's matter-of-first-impression interpretation of the statutory language was incorrect. Thus, this is a "dispute as to whether the governing legal provisions were interpreted correctly by the administrative body, [and] the case presents a purely legal question for which [a court's] review is *de novo*." *Goodman*, 241 Ill. 2d at 406.

Second, IDOR suggests that, notwithstanding the fact that legal interpretations require *de novo* review, "the ultimate question before the court" is "whether the facts of the case satisfy the statutory standard," Resp. Br. at 14-15, and thus the case presents a mixed question for which review is for clear error. But this simply misconstrues the "ultimate question" before this Court, which is, first and foremost, the very meaning of the statutory standard itself. Indeed, IDOR's argument strongly implies that all questions of law are in fact mixed questions, since all questions before a court regarding the interpretation of a law ultimately implicate application of the facts to the law as interpreted. IDOR's approach would frustrate a key purpose of appellate review by blocking a court from correcting an agency's decision that is premised on a mistake of law. If this Court affirms the Appellate Court's choice of standard of review, the paradoxical result will be a precedential interpretation of the chemical exemption as a matter of first impression that no Illinois court has reviewed *de novo*.

IDOR's reliance on *Elementary School District 159 v. Schiller*, 221 Ill. 2d 130 (2006)—which predates *Goodman*—does not rescue its argument. In *Schiller*, the Court once again recognized that a "mixed question of law and fact" is one that "asks the legal effect of a given set of facts" where "a reviewing court must determine whether established facts satisfy applicable legal rules." *Id*. at 143. Again, that is not the case here, where the meaning of the applicable legal rules is heavily disputed. Indeed, in *Schiller*,

this Court reviewed *de novo* a question of law regarding the meaning of statutory language—*exactly* what Horsehead advocates for here. *Id.* at 144. After fulsome *de novo* review of the legal question, the *Schiller* Court agreed with the relevant agency's interpretation of the applicable law and as a result concluded that the agency's application of that law was not clearly erroneous. *Id.* at 143-148. *Schiller* says nothing about how the Court would have reviewed the agency's application of the law had it *disagreed* with its interpretation of that law. As a practical matter, if a reviewing court were to disagree with an agency's interpretation of the applicable statute, the subsequent inquiry of the application of the corrected interpretation to the facts would also require *de novo* review.

B. No statute, precedent, or policy supports special deference to the Tribunal's legal conclusions.

Neither statute nor this Court's jurisprudence suggests—let alone mandates—special deference to the Tribunal's legal conclusions. The Illinois Independent Tax Tribunal Act of 2012 (the "Tax Tribunal Act") and the Administrative Review Law together require deference to the Tribunal's decisions of fact, but are completely silent as to the standard of review for the Tribunal's legal determinations. Opening Br. at 13–14. Against that backdrop of statutory silence, it is this Court's precedent that controls, and as has been made clear time and again by this Court, an administrative agency receives deference in interpreting *the agency's* own regulations and making decisions based on the statutes *the agency* enforces. Opening Br. at 14.

Unlike the Illinois Department of Revenue (the "Department"), whose expertise from administering and enforcing the tax laws has been found to warrant deferential review, the Tribunal has neither rule-making nor enforcement powers with respect to any

law. As a result, under this Court's longstanding precedents, the Tribunal does not qualify for deference to its decisions of law. That is how it should be, since—just like a circuit court whose decisions of law receive no deference—the Tribunal is designed to be a fair and independent interpreter of the statutes enacted by the legislature and regulations promulgated by the Department. *See* 35 ILCS 1010/1-5(a).

Horsehead has not found any case in which an Illinois higher court has deferred to an independent administrative agency's legal decision with respect to a statute it neither administers nor enforces. Neither has IDOR.

IDOR notes that this Court affords deference to the Illinois Human Rights Commission (the "IHRC"), which IDOR then claims is an agency whose "sole function is to adjudicate." Resp. Br. at 19, citing *Sangamon Cty. Sheriff's Dep't v. Ill. Human Rights Comm'n*, 233 Ill. 2d 125, 136 (2009). IDOR is wrong. Unlike the Tribunal, the IHRC is not a solely adjudicative body—far from it. In creating the IHRC, the Illinois Human Rights Act expressly authorized the IHRC to "***adopt, promulgate, amend, and rescind rules and regulations"*** consistent with the Illinois Human Rights Act. 775 ILCS 5/8-102(E) (emphasis added). And the IHRC has made extensive use of these administrative and rule-making powers, issuing "Joint Rules" with the Department of Human Rights regarding substantive provisions of the Illinois Human Rights Act, while at the same time

interpreting that Act in administrative actions.[1] Since the IHRC both administers and enforces the Illinois Human Rights Act, it is hardly surprising that courts defer to the IHRC's interpretations of that Act. On the other hand, the Use Tax Act neither created the Tribunal nor authorized the Tribunal to promulgate rules thereunder.

IDOR also suggests that Illinois appellate courts defer to decisions of the Illinois Concealed Carry Licensing Review Board (the "Board"), Resp. Br. at 19-20. But the Board does not receive deference on matters of law—just as the Tribunal shouldn't. The Board's sole task is to "consider any objection to an applicant's eligibility to obtain a license under [the Firearm Concealed Carry Act] submitted by a law enforcement agency." 430 ILCS 66/20(a). It carries out that task by answering a single statutorily mandated evidentiary question: whether "a preponderance of the evidence [shows] that the applicant poses a danger to himself or herself or others, or is a threat to public safety." *Id.* at 66/20(g). Thus, when the issue on appeal is the Board's evidentiary determination under 66/20(g), it makes sense that review is deferential. But given the Board's statutory role as a fact-finder, it also makes sense that the Board does not receive deference on matters of law. *See Jankovich v. Ill. State Police*, 2017 IL App (1st) 160706, ¶¶ 38–39 (reviewing *de novo* the "questions of law" whether the Firearm Concealed Carry Act authorized the Board to consider certain evidence).

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1 For example, the "Purpose and Coverage" section of the "Joint Rules of the Human Rights Commission and Department of Human Rights Rules on Sex Discrimination in Employment" begins by stating that "[i]n this part, the Department of Human Rights and the Human Rights Commission set forth **their** interpretations of the provisions of Section 2-102 of the Illinois Human Rights Act . . . prohibiting discrimination in employment because of a person's sex." 56 Ill. Adm. Code 5210.10 (emphasis added). The IHRC then interpreted these same rules in an administrative proceeding. *In re: Thompson*, No. 21B950219, 1999 WL 33256257, at *4 (Ill. Hum. Rts. Com. Nov. 2, 1999).

Despite IDOR's recognition that the Tribunal neither administers nor enforces ***any*** law (tax or otherwise), IDOR argues that this Court should defer to the Tribunal's decisions of law simply because the Tax Tribunal Act defines the Tribunal as a body "with tax expertise." Resp. Br. at 18-19. But this so-called "statutory mandate" is nothing more than a tautology. It certainly is not an instruction for how to conduct appellate review. Indeed, when the General Assembly intends to specify a level of deference, it does so explicitly. *See* 735 ILCS 5/3-110 (identifying level of deference to be given to an administrative agency's factual findings). Nowhere does the General Assembly specify a level of deference to be afforded to the Tribunal's determinations of law.

In focusing on the Tribunal's purported "statutory mandate" of tax expertise, IDOR ignores the Tax Tribunal Act's express purpose to create an "independent administrative tribunal" that "increase[s] public confidence in the fairness of the State tax system" by providing "both the appearance and the reality of due process and fundamental fairness."[2] 35 ILCS 1010/1-5. The best way to achieve the Tribunal's purpose is to review its legal decisions in the same way that an appellate court reviews a circuit court's legal decisions (*i.e.*, *de novo*, including for mixed questions). This

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2 IDOR's argument that deference should be afforded to the Tribunal because the General Assembly was concerned about potential disparities between the Tribunal and the Department is illogical and a non-starter. The legislative history quoted by IDOR illustrates precisely the opposite: That the General Assembly explicitly considered disparities between the two forums and proceeded with the Tribunal anyway, recognizing the practical value of setting a monetary threshold for Tribunal cases. There was no such consideration and acceptance of a two-track system for wealthy taxpayers that can pay their liability and litigate in the circuit courts with a fulsome appellate process versus cash-strapped taxpayers that cannot pay their liability and must litigate in the Tribunal with no shot at meaningful appellate review. And most importantly, the excerpted dialogue says nothing about what standard of review should apply.

approach would leave the Tribunal as a close-to-the-ground impartial fact-finder specializing in tax disputes, just as its authorizing statute envisions. And both the taxpayer and the Department could look to the appellate process with confidence to correct any perceived mistakes of law.

II. The Tribunal's statutory interpretation created an unworkable standard incompatible with common sense, the statute's own purpose, and every persuasive authority identified by either party in this case.

In determining whether Horsehead's coke is exempt from the use tax as a chemical that effects a "direct and immediate change," the Tribunal endeavored to come up with a definition for the phrase as a matter of first impression. But the Tribunal's circumscribed attempt at statutory interpretation resulted in an unworkable definition that is incompatible with both the common sense understanding and legal dictionary definitions of direct and immediate causes, and is contrary to the exemption's statutory purpose. The Tribunal's interpretation also is inconsistent with every persuasive authority identified by *either* party in this case, including the Department's ***own*** regulatory example of an aluminum oxide catalyst that qualifies for the chemical exemption. As a result of its lacking statutory interpretation, the Tribunal incorrectly concluded that Horsehead's coke does not qualify for the exemption.

A. IDOR's attempts to defend the Tribunal's decision further illustrates the ruling's arbitrary and unworkable standard.

IDOR does not address the critical errors in the Tribunal's interpretation. Instead, IDOR relies on repeated mischaracterizations of Horsehead's position and unavailing attempts to minimize coke's active and continuous involvement in the reactions that directly and immediately reduce the zinc and iron oxides in the EAF Dust. IDOR also draws trivial and irrelevant distinctions between Horsehead's coke and the regulatory and

other examples of "direct and immediate" changes identified in Horsehead's opening brief. These efforts only serve to further demonstrate that the Tribunal's ruling in this case creates an arbitrary and unworkable standard that has no basis in law or policy.

First, IDOR attempts to minimize coke's role in the Waelzing process by making several misleading assertions that cannot be squared with the Tribunal's undisputed findings of fact. For example, IDOR asserts that "[c]oke is separated from the iron and zinc products that Horsehead produces" both by the heating process and the oxidation reaction that causes coke's solid carbon to convert to gaseous carbon monoxide. Resp. Br. at 32; *see also* Resp. Br. at 26 (suggesting that coke's solid carbon merely "help[s] form" carbon monoxide and referring to carbon monoxide as a "distinct gas product").[3] But despite IDOR's tortured language, the undisputed facts are clear that once coke is heated to its reactive temperature within the oxygen-poor kiln environment, coke naturally oxidizes, turning from solid carbon to gaseous carbon monoxide that ***retains the original carbon component***.[4] A4; A22-A23. Coke thus does not merely "help form" a "distinct gas product"; to the contrary, coke is the *carbon* component of the *carbon*

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3 IDOR also asserts that "carbon must first be formed" through "an hours-long process" of heating and burning the coke. Resp. Br. at 8. This is not true. First, the Tribunal found that the entire Waelzing process, and not just the initial heating and oxidation of coke, takes "approximately two to two and a half hours *from start to finish*." A22-A23 (emphasis added). Second, coke is not heated to form carbon. Coke *is* solid carbon. A4.

4 In a theme repeated throughout its brief, IDOR makes much of the fact that all three of Horsehead's witnesses testified that carbon monoxide, and not carbon alone, is the agent that reduces the zinc and iron oxides. *See, e.g.*, Resp. Br. at 6, 25-26. This is a red herring. The referenced testimony is entirely consistent with Horsehead's position in this appeal. To the extent IDOR is attempting to further imply that these witnesses were expressing a judgment that coke did not "effect a direct and immediate change" within the meaning of the chemical exemption, Resp. Br. at 38, IDOR is flatly wrong.

monoxide that IDOR acknowledges directly and immediately reduces the zinc and iron oxides in the EAF Dust. *See* Resp. Br. at 26-27.

Second, IDOR's assertion that the act of heating coke to its reactive state separates it from the reduction reactions also flies in the face of the Department's *own* regulatory example. In its regulations under the exemption statute, the Department provides the example of an aluminum oxide catalyst that qualifies for the chemical exemption even though it must first be heated to at least 500 degrees centigrade before reacting with the product being manufactured. *See* Ill. Admin Code § 130.330(c)(6)(B). That example confirms that the Department does not view the act of super-heating a chemical in order to bring it to its reactive state as an intervening event that renders the chemical's remaining involvement not "direct and immediate."

Third, in trying to distinguish the coke from the Department's own example and the other illustrative examples in Horsehead's opening brief, IDOR resorts to overly trivial and irrelevant distinctions that have no principle or practical justification. In addition to the Department's regulatory example, Horsehead likened coke's role to heated water converting to steam that is used to cook carrots or iron clothes, and a bullet fired from a gun and striking a target. Coke (solid carbon) first undergoes the exact same process (super-heating) as the aluminum oxide catalyst in the Department's example. It also undergoes a change (oxidizes) as a result of that process, just like the water (which converts to gaseous form as a result of being heated) and the bullet (which undergoes a variety of physical changes as a result of being fired from a gun) in Horsehead's examples. And, just like the agents in all of these examples, carbon remains an active and

essential component of the reaction that directly and immediately changes the final "product."

IDOR nevertheless insists that among these analogous situations, it is Horsehead's coke alone that fails to effect a direct and immediate change. IDOR offers no justification for drawing this distinction between intervening factors and intermediate steps that produce changes in temperature (as with the aluminum oxide) or physical state (as with the water and bullet), and those that produce changes in chemical formulation (as with the coke). That is because this is a completely arbitrary distinction that would be impossible to apply in practice.[5]

For example, assume a manufacturer purchases two chemicals, mixes them together, and then uses that mixture to cause a change to a product that neither chemical could produce on its own. Would either chemical qualify for the exemption? Neither? Does the answer depend on whether the chemicals each retain their separate chemical identity, versus chemically bonding together the moment they are mixed? What about acids that are diluted with water before being applied to the products being manufactured? Is the act of diluting the acid, and thereby increasing its pH and reducing its acidity, a disqualifying intervening factor or intermediate step? The sort of arbitrary

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5 The arbitrary and results-oriented nature of IDOR's proposed application of the statutory language is also on full display when it attempts to argue that coke does not meet the first-listed definition of "direct" in the Oxford Living Dictionary, *i.e.*, "extending or moving from one place to another without changing direction or stopping," Resp. Br. at 32. Excising everything after the word "changing," IDOR states that this definition by its terms prohibits changes and thus does not encompass Horsehead's coke. *Id*. Of course, this is not what the definition says. It merely prohibits those changes that alter the natural course of events or terminate the chemical's involvement, neither of which is true here.

line drawing necessitated by the Tribunal's interpretation of the chemical exemption is antithetical to a fair and effective administration of the use tax and should be rejected.

Fourth, IDOR repeatedly mischaracterizes Horsehead's position as allowing for all "intervening factors and intermediate steps," and therefore exempting any chemical so long as it plays *some* part in the manufacturing process. *E.g.*, Resp. Br. at 9, 26, 28; *see also* Resp. Br. at 35-36 (relying on a similar mischaracterization to assert that Horsehead's interpretation of the chemical exemption does not harmonize with the overall statutory structure because it simply incorporates the same "used primarily" standard set forth in the broader MM&E exemption). To the contrary, Horsehead asks this Court to define a "direct and immediate" change as "one that occurs at once without any intervening factors or intermediate steps that disrupt the natural sequence of events or terminate the chemical's involvement," Opening Br. at 20. Horsehead's proposed definition thus permits changes to occur through a natural and unbroken sequence of events, so as to allow for practical application of the statute, but still requires the chemical's active and essential involvement in the reaction that directly and immediately changes the product being manufactured.

Horsehead's interpretation thus sets a significantly higher bar for exemption than merely being used in (or even being essential to) the manufacturing process. For example, assume that nitrogen gas is purchased and applied to the vapor space inside a kiln in order to help maintain the oxygen-poor atmosphere necessary for carbon to oxidize and convert to the carbon monoxide gas that directly and immediately changes the products being manufactured. Although the nitrogen in that example creates the conditions necessary for, and thus is essential to, the reaction that changes the products, it

would not qualify for the chemical exemption under Horsehead's sensibly narrow interpretation because it is not *actively involved* in that reaction.

Finally, IDOR asserts without support that Horsehead's reference to legal dictionaries' definitions of direct and immediate causes is inappropriate because those concepts are "terms of art." Resp. Br. at 31-32. This assertion strains credulity. First, the chemical exemption uses the phrase "direct and immediate change" in the causal sense, *i.e.*, in reference to chemicals that "*effect* a direct and immediate change." Second, the Tribunal's interpretation is drawn entirely from the second-listed definition of "direct" and the first-listed definition of "immediate" in a single, general usage dictionary—an arbitrary mash-up that neither the Tribunal nor IDOR made any attempt to justify. Beyond these strained attacks, IDOR does not seriously dispute that Horsehead's interpretation of the chemical exemption is in full accord with the ordinary understanding and legal dictionary definitions of direct and immediate causes.[6]

B. Horsehead's interpretation is consistent with every other persuasive authority identified by either party in this case.

Horsehead identified in its opening brief a number of persuasive authorities that support a broader interpretation of the chemical exemption than the one created by the Tribunal in this case. Opening Br. at 28-30. These authorities each interpreted the same or similar statutory language without resort to an absolute prohibition on all intervening

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6 IDOR suggests that Horsehead's interpretation fails to account for one of the alternative legal meanings of "immediate," *i.e.*, "not separated by other persons or things," because Horsehead's coke is "separated from the iron and zinc products" by the heating process and oxidation reaction, Resp. Br. at 32. As discussed above, this is a factually misleading assertion that flies in the face of the Department's own regulatory example of an aluminum oxide catalyst that qualifies for the chemical exemption, and thus is not "separated from" the direct and immediate change, even though it must first be heated to 500 degrees centigrade. *See* discussion *supra* at 12.

factors and intermediate steps. *Id*. Instead, each adopted a functional interpretation that allows for changes that occur through a natural and continuous flow of operations. *Id*.

IDOR's argument that these authorities are either non-precedential or inapposite misses the point. *See* Resp. Br. at 33-34. Horsehead cited these authorities not for precedential weight or identical facts, but because they demonstrate that the Tribunal's statutory interpretation was severely limited. *See, e.g.*, *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 418-19 (1996) (interpreting the term "operating" in the Use Tax Act and analyzing whether the interpretation was in accord with an ordinary understanding and the interpretation adopted by "sister states").

Horsehead's interpretation also is consistent with the persuasive authority identified by IDOR. IDOR cites to several cases from other states to assert "that 'direct effect' exemptions do not include items that are merely necessary or essential to the manufacturing process." Resp. Br. at 28-30. But Horsehead's interpretation of the chemical exemption would not encompass chemicals that are only necessary or essential to a manufacturing process. *See* discussion *supra* at 14-15.

Only one of the cases IDOR cites actually analyzes what constitutes a "direct effect," as opposed to merely holding that a "direct effect" requires more than being necessary and essential to the manufacturing process. And that case, *Sabine Mining Co. v. Strayhorn*, No. 13-06-330, 2007 WL 2390686 (Tex. App.-Corpus Christi Aug. 23, 2007), interpreted the relevant statutory phrase—"directly makes or causes a chemical or physical change"—in a manner that would encompass Horsehead's coke.

The court in *Sabine* considered whether dragline equipment that lifted lignite coal up to the surface where air could then come in contact with the coal, causing it to dry out

and fracture, satisfied the language at issue. *Id*. at *4. The court found that the draglines did not qualify because they merely created the conditions necessary for air to effect a change upon the coal. *Id*. In reaching this conclusion, the court considered the taxpayer's argument that its interpretation "absurdly implies, for instance, that a can of spray paint does not change the physical appearance of a product because it is the paint—not the can—which has the 'direct' impact." *Id*. Finding that the analogy was inapposite, the court stated that "Sabine fails to appreciate that in the spray paint example, the spray can *generates* the stream of paint which alters the physical appearance of the product. In the case of marketable coal, however, draglines do not generate the air which causes drying and micro-fracturing." *Id*. (emphasis in original).

Here, the undisputed facts establish that coke (solid carbon) not only generates, but also remains a component of, the carbon monoxide that IDOR, the Appellate Court, and the Tribunal all acknowledge directly and immediately reduces the zinc and iron oxides in the EAF Dust. *See* Resp. Br. at 26-27; A4; A22-A23. Thus, coke would qualify under even the narrowest interpretation of a "direct effect" adopted by any authority identified in this case.

C. IDOR does not dispute that the Tribunal's interpretation would frustrate the chemical exemption's statutory purpose.

IDOR does not dispute that the statutory purpose of the chemical exemption is to attract new manufacturing facilities to the State and discourage existing ones from leaving. *See Chi. Tribune Co. v. Johnson*, 106 Ill. 2d 63, 72 (1985). Nor does IDOR dispute that the Tribunal's interpretation of the exemption will frustrate these legislative goals. Instead, IDOR simply asserts that such concerns are irrelevant. *See* Resp. Br. at 36. This baseless assertion flies in the face of this Court's clear guidance for statutory

interpretation: "The primary object in construing a statute, is to ascertain the legislative intent expressed therein . . . . In seeking the legislative intent, courts should consider the language used, the object to be attained, or the evil to be remedied, and this may involve more than the literal meaning of the words used." *Scott v. Freeport Motor Cas. Co.*, 379 Ill. 155, 162 (1942); *see also In re Objections to Tax Levies of Freeport School Dist. No. 145*, 372 Ill. App. 3d 562, 580 (Ill. App. 2 Dist. 2007) ("Traditional rules of statutory construction are merely aids in determining legislative intent, and these rules must yield to such intent. In this regard, we may properly consider the statute's purpose, the problems it targets, and the goals it seeks to achieve." (quotations and citations omitted)).

The Tribunal erred by failing to consider this crucial component of statutory construction and IDOR's suggestion otherwise ignores this Court's clear direction.

III. Penalties must be abated because Horsehead's position was *at the very least* reasonable, and IDOR's contrary arguments are unavailing.

IDOR asserts that Horsehead does not satisfy the "reasonable cause" exception for penalty abatement because Horsehead's interpretation of the governing tax provision was found to be wrong and Horsehead does not point to anything other than the reasonableness of its position to support that erroneous interpretation. Resp. Br. at 38. But the explicit purpose of the "reasonable cause" regulations is to provide relief to a taxpayer who erred, albeit reasonably. *See* 86 Ill. Admin. Code 700.400. IDOR's argument precludes this result, creating a nearly impossible standard for penalty abatement for a taxpayer whose position relates to a statute that has never been interpreted by any precedential authority. Because Horsehead's position was, at the very least, reasonable, Horsehead qualifies for the "reasonable cause" exception. Accordingly,

even if this Court ultimately determines that position was wrong, penalties must be abated. IDOR's contrary arguments are unavailing.

First, IDOR baldly asserts that "resources readily available to Horsehead" all dictated that coke did not qualify for the chemical exemption. Resp. Br. at 38. But the opposite is true. Horsehead's interpretation is consistent with a normal understanding of what it means to "effect a direct and immediate change." Opening Br. at 24-25; *supra* at 10-15. That in and of itself is enough to satisfy the reasonable cause exception. *See Shared Imaging, LLC v. Hamer*, 2017 Ill. App. (1st) 152817, ¶¶ 38, 40, 76 (abating penalties where there was no guiding case law and taxpayer's interpretation was "not unreasonable" based on "typical[] understand[ing]" of the relevant language). Here, Horsehead's interpretation also is consistent with both the legal dictionary definitions of direct and immediate causes and every persuasive authority identified by either party in this case. *Supra* at 15-17. Under these circumstances, it borders on absurd to treat Horsehead's interpretation as unreasonable.

Second, IDOR's assertion that a taxpayer seeking abatement under the "reasonable cause" exception is required to produce some evidence of its decision-making process or show that it sought guidance on the issue, *see* Resp. Br. at 39, is inconsistent with the "reasonable cause" statute and regulations, which do not contain any such requirement. IDOR attempts to justify this additional hurdle by asserting that tax exemptions are to be narrowly construed. *Id*. But the reasonable cause exception is not a tax exemption, it is a set of conditions under which penalties "shall not apply" because the taxpayer acted reasonably. IDOR does not—and cannot—point to anything

in the statute to suggest that the General Assembly intended the statute be construed narrowly in favor of penalties.

CONCLUSION

For these reasons and those discussed in Horsehead's opening brief, this Court should reverse the Appellate Court's Order, vacate the Department's Notices of Tax Liability in their entirety, and enter a judgment that Horsehead's coke purchases qualify for exemption from the use tax under 35 ILCS 105/3-5(18).

Dated: August 8, 2019

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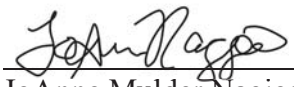
CERTIFICATE OF COMPLIANCE

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)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.



JoAnne Mulder Nagjee (No. 6298588)

CERTIFICATE OF SERVICE

I, JoAnne Mulder Nagjee, an attorney, certify under penalty of law as provided in 735 ILCS 5/1-109 (2014), that on August 8, 2019, I caused the **REPLY BRIEF OF APPELLANT-PETITIONER HORSEHEAD CORPORATION** to be filed with the Supreme Court of Illinois through its e-filing system and served upon the following via electronic mail:

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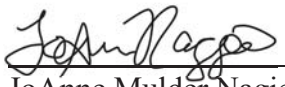
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.



JoAnne Mulder Nagjee (No. 6298588)

No. 124155

In the Supreme Court of Illinois

HORSEHEAD CORPORATION,	)	Appeal from the Illinois Appellate
	)	Court, First District, First Division
Appellant-Petitioner,	)	No. 1-17-2802
	)	
v.	)	There on Appeal
	)	from the Illinois Independent Tax Tribunal,
	)	No. 14-TT-227
ILLINOIS DEPARTMENT OF REVENUE	)	
and ILLINOIS INDEPENDENT TAX	)	Chief Administrative Law Judge
TRIBUNAL,	)	James M. Conway, Presiding
	)	
Appellees-Respondents.	)	

NOTICE OF FILING OF
REPLY BRIEF OF APPELLANT-PETITIONER HORSEHEAD CORPORATION

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on August 8, 2019, Appellant-Petitioner, HORSEHEAD CORPORATION (now known as American Zinc Recycling Corp.), filed electronically through Odyssey File & Serve the Reply Brief of Appellant-Petitioner Horsehead Corporation, a copy of which is attached.

Dated: August 8, 2019

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I, JoAnne Mulder Nagjee, an attorney, certify under penalty of law as provided in 735 ILCS 5/1-109 (2014), that on August 8, 2019, I caused the NOTICE OF FILING OF REPLY BRIEF OF APPELLANT-PETITIONER HORSEHEAD CORPORATION and the REPLY BRIEF OF APPELLANT-PETITIONER HORSEHEAD CORPORATION to be filed with the Supreme Court of Illinois through its e-filing system and served upon the following via electronic mail:

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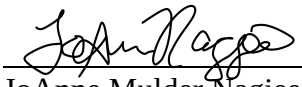

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