ILLINOIS INDEPENDENT TAX TRIBUNAL

TCRG SN4057, LLC, Petitioner, v. ILLINOIS DEPARTMENT OF REVENUE, Respondent.	))))))))))	22 TT 04 Hon. Brian F. Barov

PETITIONER TCRG SN4057, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Under prevailing law and the undisputed facts, the Tribunal has two independent reasons to grant TCRG's Motion for Summary Judgment: there is no "substantial nexus," and imposing tax liability does not "fairly relate" to services provided by Illinois.

As an initial matter, there is no substantial nexus between TCRG and the Aircraft, on the one hand, and the State of Illinois, on the other hand. In *Irwin*, the Supreme Court of Illinois was crystal clear "that to satisfy the substantial nexus requirement in the sales and use tax context, ***physical presence*** within the taxing state is necessary." *Irwin Indus. Tool Co. v. Dep't of Revenue*, 238 Ill. 2d 332, 342 (2010) (emphasis added). In applying this "physical presence" framework, the Court in *Irwin* proceeded to evaluate (i) whether the taxpayer was an Illinois entity and had offices or employees in Illinois, and (ii) whether the Aircraft's "physical presence" in Illinois, as measured by flights in and out of Illinois, was sufficient to meet the substantial nexus test.

The Department's Response downplays the specific and focused "physical presence" framework in *Irwin*. Instead, the Department states at least nine times that the Tribunal should conclude that TCRG and the Aircraft's alleged contacts with Illinois were "deliberate and continuous" based upon a wide-ranging assortment of random "connections"—many of which are attributable to third parties, not TCRG.

But the issue of substantial nexus is distinct from the personal jurisdiction "contacts" analysis and, more fundamentally, as far as TCRG is aware, neither the Court in *Irwin* nor any other court has applied the "deliberate and continuous" test in evaluating substantial nexus.

The Department's reliance on the incorrect legal standard has two results: (i) the Department largely disregards the "physical presence" (or lack thereof) of TCRG and the Aircraft in Illinois, and (ii) the Department's alleged "connections" have nothing to do with "physical presence" and thus are legally immaterial. Beyond immateriality, the "connections" themselves lack any specific supporting citations (they refer instead to just the exhibits generically), and even a cursory review reveals that many of these "connections" are incorrect. As just two examples:

- The Department represents to the Tribunal that "TCRG's ***sole purpose*** was to own the Aircraft and lease it to Guggenheim." (Resp. at 16 n.3 (emphasis added).) No cite is provided for that statement, which is demonstrably untrue: TCRG entered into leases with at least ***two other parties*** and the undisputed facts show that during 2016 and 2017, ***well under 20% of flights*** were leased to Guggenheim Capital, LLC, with the balance to Texas Capitalization Resource Group Inc. ("Texas Capitalization"). (*See* Dep't Ex. H, column K.)

- The Department also states, multiple times, that the lease between TCRG and Guggenheim "states that Illinois law/courts would control/handle any disputes as to the construction of the lease." (Resp. at 9.) That statement is also untrue—the lease contains no dispute resolution, jurisdiction, or venue provision stating that "Illinois courts would handle any disputes."

But there is yet another problem with the Department's cobbling together of alleged "connections": the Department improperly attempts to "attribute" the links

of third parties to TCRG. For example, the Department relies heavily upon leases and contracts that TCRG entered with third parties, the location of TCRG's third party administrator, and TCRG's decision to hire an Illinois company to repair the Aircraft. (Resp. at 9.) But substantial nexus concerns ***TCRG's nexus*** with Illinois, not the nexus that independent counter-parties may have with Illinois. The Department has cited no precedent for this notion of "attributional nexus" and, as far as TCRG is aware, no court has validated the use of these types of attenuated "connections" in the substantial nexus inquiry.

These distractions aside, on the inquiry mandated by *Irwin* regarding the flights in/out of Illinois, the Department claims that, from December 18, 2015 to December 17, 2016, "the Aircraft took off from and landed in Illinois forty-four (44) times." (Resp. at 9.) Even accepting for the sake of argument the Department's statement that the Aircraft "took off from and landed in Illinois forty-four (44) times," the *Irwin* Court relied upon the fact that, during the relevant period in that case, the aircraft "made a total of 272 take-offs or landings at Illinois airports." *Irwin*, 238 Ill.2d at 342-343. The Department's basis to find substantial nexus here, which is 44 flights to/from Illinois, is over ***6x lower*** than the 272 flights in *Irwin*. Put differently, *Irwin* involved nearly ***230 more flights to/from Illinois*** than the Department's own position in this case. The Aircraft's physical presence in Illinois here is not even remotely comparable to *Irwin*.

As to whether TCRG has a substantial nexus with Illinois, it is undisputed that the taxpayer, TCRG, is a Delaware entity that has no offices in Illinois, no employees in Illinois, and no officers or directors in Illinois. (Stip. ¶¶ 5-8.) And perhaps most persuasively, the Department itself has stipulated that, "[f]rom March 3, 2016 to May 17, 2016, TCRG had no business operations in Illinois." (Stip. ¶ 21.) That stipulation is dispositive.

Alternatively, imposing use tax here is not "fairly related" to services provided by Illinois. The Department says its "most important[]" argument is that "TCRG entered into multiple leases with Guggenheim that explicitly state that Illinois law and courts would control any disputes arising out of the lease." (Resp. at 17.) But that statement is incorrect: the TCRG and Guggenheim Capital, LLC lease contains no statement, explicit or implicit, that disputes must be brought in an Illinois court. Further, the Department bizarrely claims that ***TCRG*** uses "public roads and property" because it had a "registered agent and an address listed within the State of Illinois." (Resp. at 17.) The Department goes even further, claiming that "[w]hen Guggenheim passengers traveled to Midway Airport, assuredly they traveled upon roads maintained by the State of Illinois to reach their destination. If Guggenheim passengers could not use the roads in this State to travel to Midway Airport, the lease (and the entity of TCRG) would likely not exist." (*Id.*) There is no legal support for these contentions, which would turn the *Complete Auto*

precedent on its head. Nor is there any logic to them: the proposition that the use of Illinois roads by TCRG's contractual counter-parties or customers could be superimposed onto TCRG is an extreme, unsupportable position.

TCRG's Motion for Summary Judgment should be granted.

RESPONSE TO DEPARTMENT'S STATEMENT OF ALLEGED UNDISPUTED FACTS

A. The Department Fails to Offer Undisputed Material Facts Supporting Denial of TCRG's Motion for Summary Judgment

TCRG's Motion for Summary Judgment is supported by the parties' Stipulation, affidavits from Matthew Sennett and Ryan Majchrowski, and documents that directly support TCRG's factual assertions. The Department's Response fails to even mention the two affidavits and otherwise does not contest TCRG's offered facts. Thus, the factual basis for TCRG's Motion is uncontested.

In contrast, the Department's Response offers a purported "Statement of Undisputed Facts" that fails to specifically cite the underlying evidence and, when the underlying documents are consulted, sometimes reveals that the asserted facts are not supported by the documents. The Department's alleged "undisputed facts" are also legally irrelevant, including but not limited to, references to TCRG's leases and other contracts with third parties, the registration of the Aircraft for administrative reasons, and statements by TCRG's third party administrator (not TCRG) taken out of context.

B. The Factual Basis for the Department's Response Is, In Large Part, an Improper Attempt to "Change" Its Stipulation that TCRG Has "No Business Operations in Illinois"

The Department stipulated that "[f]rom March 3, 2016 to May 17, 2016, TCRG had no business operations in Illinois." (Stip. ¶ 21.) That stipulation is binding and conclusive. Realizing this admission is dispositive, the Department has attempted to construct its entire Response to draw upon any facts, no matter how remote, to try to undo that stipulation. The Department's attempt to change and contradict its own stipulation should be rejected.

Indeed, the Tribunal's own Rules provide that "[a] stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation…." *See* Section 5000.340(c). Moreover, the Rules states that the "Tribunal shall no permit a party to a stipulation to qualify, change or contradict a stipulation, in whole or in part, except when justice requires." *Id.* The Stipulations agreed upon by the parties are constitute "conclusive admissions," thus the Department must concede, and the Tribunal must find, that "TCRG has no business operations in Illinois."

ARGUMENT

TCRG has established with undisputed facts that the "substantial nexus" and "fairly related" prongs of the *Complete Auto* test are not met here, and therefore the Department's attempt to impose tax liability upon TCRG's purchase of the Aircraft

cannot be sustained. The Department's Response fails to offer law or facts supporting a different conclusion.

Legally, the Department's entire Response is built upon, and repeats nine times, that the Aircraft is subject to taxation because of its "deliberate and continuous" contacts with Illinois. But that is not the legal standard for determining "substantial nexus"; that language is not mentioned in *Irwin* and the Department fails to cite a single legal authority from any jurisdiction adopting that standard. The "deliberate and continuous" standard, quite simply, is not the law.

Factually, the Department goes to great lengths to offer certain "connections" that allegedly support imposing tax liability, even though (i) the Department has failed to cite a single instance in which any court has ever considered similar "connections" to be relevant to the substantial nexus analysis; (ii) the "connections" are contrary to the *Irwin* decision, which held that substantial nexus depends on the taxpayer and Aircraft's "***physical presence***" in Illinois; (iii) the "connections" are unsupported by the underlying documents; and (iv) the "connections" are often improperly attributable to third parties, not the taxpayer, TCRG.

The Department's Response asks that the Tribunal apply an incorrect and unprecedented legal test to a set of facts having nothing to do with TCRG's physical presence in Illinois. The Department's approach is doubly flawed.

A. Under *Complete Auto*, There is No "Substantial Nexus" That Supports Imposing Tax Liability

In its Opening Brief, TCRG established that the nexus between TCRG ***and*** the Aircraft, on the one hand, and the State of Illinois, on the other hand, is markedly weaker than any prior case where the substantial nexus requirement was met. The Department has not challenged that assertion. The only way the Tribunal can find a substantial nexus here would be to lower that standard far beyond what the existing precedent supports. The Court should decline to do so.

In sum, it is undisputed that the taxpayer, TCRG, is a Delaware entity that has no offices in Illinois, no employees in Illinois, no officers or directors in Illinois, and—as the Department has stipulated to—no business operations in Illinois. (Stip. ¶¶ 5-8, 21.) TCRG has literally no "physical presence" in Illinois. And the Aircraft's physical presence in Illinois is far less frequent and far more attenuated than *Irwin* and other cases. The Department's Response, for example, claims that a substantial nexus exists because the Aircraft made 44 take-offs and landings in Illinois[1]—but that is over ***6x lower*** than the 272 Illinois take-offs and landings in *Irwin*. Put

[1] The Department claims that, from December 18, 2015 through December 17, 2016, the Aircraft flew in and out of Illinois only 44 times. (Resp. at 4.) This is a shorter, one-year period of time than the Relevant Timeframe in TCRG's Opening Brief. Regardless, it is undisputed that the Department is claiming a substantial nexus exists based upon merely 44 flights.

differently, substantial nexus in *Irwin* was based upon the aircraft at issue taking off and landing in Illinois ***over 230 times more*** than the Aircraft in this case.

1. The Department's Response is built entirely upon a legal standard that does not exist

As mentioned above, the Department's Response cites at least nine times the claim that the Aircraft's connections with Illinois were "deliberate and continuous," and thus a substantial nexus exists. (*E.g.*, Resp. at 2, 5, 8, 10, 11 (twice), 13 (twice), and 17.) That is the legal foundation for the Department's entire Response. But the "deliberate and continuous" standard is pure fiction and is not a cognizable legal framework for measuring substantial nexus—it does not appear in *Irwin* and the Department fails to cite a single case from any jurisdiction adopting that test. The Department's entire Response thus misstates applicable law.

2. The Tribunal must review the "physical presence" of the Aircraft and TCRG in Illinois to determine substantial nexus

Beyond inventing the "deliberate and continuous" standard, the purported factual basis for the Department's Response is equally flawed. That is, the Department purports to offer a laundry list of "connections" between TCRG/Aircraft and Illinois that no court has ever relied upon in analyzing "substantial nexus." The Department claims, for example, that a substantial nexus exists because TCRG's "registered agent" is based in Chicago, TCRG entered into a lease with a "Chicago-based company" (which is wrong) that includes a reference to Illinois

jurisdiction/venue for any disputes (also wrong), and TCRG contracted with an Illinois company to perform maintenance on the Aircraft. While many of these assertions (and others) are factually incorrect, as explained below, they are also legally immaterial because none of them have anything to do with TCRG or the Aircraft's "physical presence" in Illinois. This explains why the Department fails to cite a single case relying on any of these alleged "connections" in evaluating substantial nexus.

Instead of an all-encompassing, free-for-all analysis of all possible "connections" that is more akin to a personal jurisdiction analysis, Illinois law mandates that the substantial nexus inquiry is more circumscribed, focusing on whether the taxpayer and the Aircraft "had a sufficient ***physical presence*** in Illinois to establish a substantial nexus with the state."[2] *Irwin*, 238 Ill. 2d at 342 (emphasis added). In fact, the Supreme Court of Illinois in *Irwin* noted that "[i]n order to satisfy the substantial nexus requirement in the sales and use tax context, ***physical presence*** within the taxing state is necessary." *Id.* at 342 (emphasis added). To reiterate, the *Irwin* Court made clear that the relevant analysis is whether the taxpayer and aircraft

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[2] The Department itself admits substantial nexus depends on "physical presence" in Illinois, (Resp. at 7), then proceeds to offer a laundry list of alleged "connections" having nothing to do with physical presence.

"at issue had a ***sufficient physical presence in Illinois to establish a substantial nexus with the state***." *Id.* at 342-43 (emphasis added).

In applying "physical presence," instead of pulling in scattered "connections" in leases and contracts with third parties, the *Irwin* Court focused on the following:

> In addition, although ATC Air was not an Illinois corporation, the record establishes that ATC Air had a demonstrated ***physical presence in Illinois***. ATC Air's sole director, and its chairman and CEO, had his office in Illinois, as did its CFO and its general counsel. Moreover, ATC Air did a substantial portion of its business in Illinois, in that ***its pilot-employees frequently and regularly flew its airplane into and out of Illinois to transport Irwin's corporate officers and directors to and from their offices in Illinois.***

Id. at 345 (emphasis added). Simply put, the taxpayer's physical operations in Illinois (*i.e.*, offices), use of the aircraft to travel to/from the Illinois office, and the quantity of the Aircraft's flights in and out of Illinois—which all relate to "physical presence" in Illinois—drove the Court's analysis. So too here.

Irwin's focus on "physical presence" in analyzing substantial nexus is consistent with the nature of a use tax. Instead of an unbounded review of the "connections" that the taxpayer's customers, contractors, and service providers may have with the taxing state, the relevant determination is whether, and to what extent, the ***taxpayer itself used the article allegedly subject to taxation*** within the physical confines of the state. That is why "physical presence" is a limiting principle that renders legally irrelevant many of the haphazard "connections" that the Department identifies in its Response. (*See* Resp. at 9-10.) Consequently, the Tribunal should

find that many of the "connections" that the Department offers are untethered to the "physical presence" standard—and thus immaterial.

In defense of its fictional legal standard, the Department maintains that "any company could establish an aircraft ownership LLC in Delaware, have deliberate and continuous contacts with a State, and avoid liability simply because the LLC is registered in another State." (Resp. at 10-11.) This scenario makes no sense. Again, "deliberate and continuous contacts" is not the operative legal standard, so this argument falls apart. That aside, TCRG is not attempting to "avoid liability" because it is "registered in another State." TCRG is simply requesting that this Tribunal apply *Irwin* to the undisputed facts, which compels that there is not the required substantial nexus to impose tax liability.

3. As a factual matter, the list of "connections" the Department provides are legally irrelevant and/or incorrect

The Department presents certain "connections" that allegedly support denying TCRG's Motion for Summary Judgment. (Resp. at 9-10.) Only two of these "connections" relate to the Aircraft's flights to/from Illinois. As for the remainder, even a cursory examination reveals that the Department's factual representations are often wrong or, even if true, are immaterial to the substantial nexus inquiry. Some "connections" are more general in nature and others are limited to the Break-In Period; TCRG addresses them below according to those two categories.

a. The Department's general "connections" fail to create a genuine issue of material fact

Registered Address. The Department claims that TCRG "registered the Aircraft with the FAA within the State of Illinois" and "TCRG's registered agent for the Aircraft is based in Chicago." (Resp. at 9.) Neither fact is material to the substantial nexus analysis.

TCRG itself did not "register[] the Aircraft with the FAA within the State of Illinois." Rather, TCRG contracts with an independent third party, Franklin Monroe, to assist with administration of the Aircraft, including filing of the FAA registration document. In preparing that document, which is purely for administrative purposes and is not a reflection of the "use" of the Aircraft, Franklin Monroe (not TCRG) put down its own address. (2nd Sennett Aff. ¶ 4.) The Department is attempting to attribute and impute Franklin Monroe's Chicago office location upon TCRG, an out-of-state taxpayer. In so doing, the Department fails to cite a single case from any jurisdiction that has sanctioned this doctrine of "attributional nexus," where the nexus of a non-taxpayer can be imputed to the taxpayer. This "connection" is thus immaterial and should be disregarded.[3]

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[3] The Court in *Irwin* refers to the fact that the Aircraft was registered in Illinois, but the registration was done by the taxpayer at the taxpayer's address, not by a third party unaffiliated with the taxpayer at the third party's address, and was corroborated the fact that the taxpayer had offices in Illinois.

Third-Party Leases. Without citing any supporting authority establishing materiality (there is none), the Department also selectively cites a lease between TCRG and a third party, Guggenheim Capital, LLC, as evidence of "substantial nexus." (Resp. at 9.) But far from presenting undisputed facts, the Department misrepresents the provisions in the lease in at least three respects.

First, the Department claims the lease "states that Illinois law/courts would control/handle any disputes as to the construction of the lease." (Resp. at 9.) That statement is wrong—and egregiously so. The lease provides that it "is to be construed in accordance with" the laws of Illinois—but it contains no dispute resolution, jurisdiction, or venue provision stating that "Illinois courts would handle any disputes."

Second, the Department claims the lease lists "TCRG's principal place of business as 277 W. Monroe, Suite 4900, Chicago, IL 60606[.]" (Resp. at 9.) Not so. Again, the lease provides Franklin Monroe's address as the "notice" address under the lease. But the lease between TCRG and Guggenheim Capital, LLC does not state that TCRG's "principal place of business" is in Illinois. (2nd Sennett Aff. ¶ 6.) In any event, this assertion is contrary to the Department's binding admission that TCRG has "no business operations in Illinois." (Stip. ¶ 21.)

Third, the Department claims that Guggenheim Capital, LLC is a "Chicago-based company," citing only the lease itself as support for that fact. (Resp. at 9.)

But the lease merely includes a "notice" address in Chicago for Franklin Monroe and Guggenheim Capital, LLC, it ***says nothing*** about Guggenheim Capital, LLC being a "Chicago-based company." The fact of the matter is that Guggenheim Capital, LLC is a Delaware-based LLC that is listed as a "foreign" entity on the Illinois Secretary of State website.[4] The Department's claim that Guggenheim Capital, LLC is a "Chicago-based company" should be disregarded.

In relying heavily upon TCRG's lease with Guggenheim Capital, LLC, the Department claims that "TCRG's ***sole purpose*** was to own the Aircraft and lease it to Guggenheim." (Resp. at 16 n.3 (emphasis added).) No cite is provided for that statement, which is also demonstrably untrue. In fact, TCRG also entered into a lease with Texas Capitalization. That lease is barely cited in the Response at all, likely because Texas Capitalization is a Delaware LLC based in Fort Worth, Texas. But critically, while the Department claims TCRG's "sole purpose" was to lease the Aircraft to Guggenheim Capital, LLC, the undisputed facts show that during 2016 and 2017, ***well under 20% of flights*** were from the lease with Guggenheim Capital, LLC, with ***over 80% of the flights*** from the lease with Texas Capitalization. (*See* Dep't Ex. H, column K.)[5] That eviscerates the Department's contention about TCRG's alleged "sole purpose."

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[4] The Tribunal can and should take judicial notice of this fact.

[5] The other lease the Department downplays is between TCRG and Executive Jet Management, which is an Ohio corporation. That lease provides for confidential

For these reasons, the Department's heavy reliance on third party leases should be given no weight because there is no legal precedent for relying upon them, and the Department's alleged "facts" in connection with the leases are incorrect and immaterial.

b. The Department's Break-In Period "connections" also fail to create a genuine issue of material fact

The Department also highlights purported "connections" specific to the Break-In Period. None of them are legally relevant and/or factually undisputed.

"Housing" of Aircraft at Midway. The Department states that TCRG "***housed the plane in Illinois*** at Midway Airport ***continuously*** for ten (10) weeks from March 3, 2016 through May 17, 2016." (Resp. at 9 (emphasis added).) That is incorrect and contradicts the Department's stipulation that "[d]uring the Break-In Period (and thereafter leading up to early 2018), TCRG never signed an agreement with any party to rent, lease, or use hangar space at Midway Airport (nor did Parent)." (Stip. ¶¶ 24, 25.) In addition, it remains undisputed that:

- The Aircraft was never permanently hangered at Midway Airport during the Break-In Period and was considered "transient" by the FBO operator (Atlantic Aviation MDW), meaning that it was left on the tarmac unless hangar space happened to be available. (Sennett Aff. ¶ 7.)

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arbitration in New York and would be bound by New York law. While this lease does list "MDW – Chicago, IL" as the "Home Airport Location," that is because, at the time the lease was signed, the Aircraft did not have a permanent hangar in New York yet, and it had signed with Jen-Air to provide maintenance services at Midway Airport. (2nd Sennett Aff. ¶ 8.)

- As the Director of Maintenance for Jen-Air stated, "[t]he Aircraft was never permanently hangered at Midway Airport during the [Break-In Period]." (Majchrowski Aff. ¶ 5.)

TCRG "contracted" with an Illinois company for repair work. The Department also claims that, during the Break-In Period, "TCRG contracted with a company both incorporated and headquartered in Illinois, Jen-Air, to perform service and maintenance on the Aircraft." (Resp. at 9.) Once more, entering into a service agreement with an Illinois company does not constitute the "physical presence" contemplated in *Irwin*, and the Department cites no case that has relied upon, or cited approvingly, the notion that service contracts with third parties are relevant to the substantial nexus inquiry. The Department's position that an out-of-state entity that purchases out-of-state an aircraft (or boat or car) is subjected to use tax because it contracted to have an Illinois company provide services to fix the aircraft (or boat or car) would uproot use tax law. It would also directly contradict the primary purpose of the use tax by diverting business from Illinois repair retailers to out-of-state businesses. *Brown's Furniture v. Wagner*, 171 Ill. 2d 410, 418 (1996).

Relatedly, the Department maintains, without citing any evidence, that "***TCRG could have chosen*** to have the Aircraft serviced by any company in any state, however they deliberately and intentionally chose a company with facilities at Midway Airport…." (Resp. at 10 (emphasis added).) The undisputed facts show

otherwise, namely that TCRG ***had no choice*** but to have the Aircraft serviced in Illinois:

> In early 2016, after the Aircraft had been in storage for a year-and-a-half at Gulfstream's Georgia facility, Jen-Air (the third-party maintenance and repair contractor for the Aircraft) only had the employees, equipment, and resources to perform the required maintenance and repair work at its facility at Midway Airport in Chicago, Illinois. There were no other Jen-Air facilities in the United States capable of performing this work in early 2016. (Majchrowski Aff. ¶ 4.)

In addition, it is troubling that the Department, while putting blinders on to the relevant legal and factual issues, so stridently seeks to penalize out-of-state companies for hiring Illinois companies to perform repair work. To emphasize, *Irwin* addresses the "physical presence" of the taxpayer and aircraft, not the incorporation or principal place of business of the taxpayer's third party service providers. The Department's incorrect position, if accepted, could have a far-ranging impact upon the decision of out-of-state companies to do business with Illinois companies in the future.

Identity of passengers. The Department also states that, during the Break-In Period, the Aircraft "was used to fly into and out of Illinois twelve (12) times containing Guggenheim passengers." (Resp. at 9.) As the Tribunal will recall, during discovery, the Department attempted to obtain the identity of the passengers on the Aircraft; the Tribunal, in response, rejected that request and indicated that the identity of the passengers is irrelevant. The Tribunal was correct, and that reasoning

applies here. More to the point, Guggenheim Capital, LLC is a Delaware entity with employees around the United States; there is no discernable basis to conclude that flights "containing Guggenheim passengers" has any relevance to ***TCRG's "physical presence"*** in Illinois. As far as TCRG is aware, no other case has ever found that third party customers using the aircraft (as opposed to the executives of the taxpayer in *Irwin*) were relevant to the substantial nexus analysis.

Reference to "Temporary Home." Finally, the Department claims that TCRG's third party administrator stated that, during the Break-In Period, Illinois was a "temporary home" for the Aircraft. (Resp. at 10.) That is misleading. The third party administrator stated that "TCRG used ***Atlantic MDW*** as a temporary home until we could begin our lease at SWF (Stewart in New York) on May 1, 2016." (*See* Dep't Ex. J at 4.) This simply reflects that the Aircraft was never permanently hangered at Midway Airport during the Break-In Period and was considered "transient" by the FBO operator (Atlantic Aviation MDW), meaning that it was left on the tarmac unless hangar space happened to be available. (Sennett Aff. ¶ 7.) The third party administrator does not refer to the ***State of Illinois*** as the home, but merely the ***FBO operator***, which is third party operating at Midway and providing services such as fuel, parking, and hangar space. (2nd Sennett Aff. ¶ 8.)

4. The Department only half-heartedly engages on the critical issue of TCRG/Aircraft's "physical presence" in Illinois

Setting aside the Department's immaterial "connections," there is little substance offered to support a finding that, similar to *Irwin*, the "physical presence" of TCRG and the Aircraft constitute a substantial nexus.

In its Opening Brief, TCRG explained that its nexus with Illinois is virtually non-existent because TCRG is a Delaware entity that has no offices in Illinois, no employees in Illinois, no officers or directors in Illinois, and no business operations in Illinois (as the Department stipulated to). (*E.g.*, Open. Br. at 20-21.) As for the Aircraft, TCRG established in detail that the number and frequency of flights in and out of Illinois were a fraction of the flights in *Irwin* and *Superior Aircraft*, and of the advertisements and deliveries into Illinois in *Brown's Furniture*. (*See* Open. Br. at 18-26.) The Department's Response fails to meaningfully address the fact that the flights to/from Illinois here are a small proportion of the flights/trips into Illinois (or the taxing state) in *Irwin*, *Brown's Furniture*, *Superior Leasing*, and *Quill*.

Rather, all that the Department can muster are two contentions relating to the Aircraft's flights to and from Illinois. First, the Department states that, from December 18, 2015 to December 17, 2016, "the Aircraft took off from and landed in Illinois forty-four (44) times."[6] (Resp. at 9.) Second, the Department asserts that

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[6] As an initial matter, the Department's selected one-year period is too short to reliably ascertain whether there was a substantial nexus. *E.g.*, *Irwin*, 238 Ill. 2d at

from December 18, 2015 to December 17, 2016, the Aircraft spent 71 days (19.5% of the year) on the ground in the State of Illinois." (Resp. at 9.) Neither claim comes close to satisfying the substantial nexus test.

Even accepting for the sake of argument the Department's statement that the Aircraft "took off from and landed in Illinois forty-four (44) times," the *Irwin* Court relied upon the fact that, during the relevant period there, the aircraft "made a total of 272 take-offs or landings at Illinois airports." *Irwin*, 238 Ill.2d at 342-343. The Department's basis to find substantial nexus here, which is 44 flights to/from Illinois, is over ***6x lower*** than the 272 flights in *Irwin*. In other words, *Irwin* involved nearly ***230 more flights to/from Illinois*** than the Department's own position in this case. The Aircraft's physical presence in Illinois here is magnitudes less than in *Irwin*.

As for the Department's position regarding "days on the ground," that too accentuates why there is no substantial nexus. The Court in *Irwin* discounted the "days on the ground" metric, stating:

> Irwin attempts to distinguish *Superior Aircraft Leasing* by pointing out that the airplane in that case occasionally spent several days or a week on the ground in Missouri. ***However, the time the airplane spent on the ground in Missouri was much less significant to the Superior Aircraft court's decision than the time the airplane spent in flight between Missouri and other destinations, which demonstrated the significance of the airplane's presence inside the state, as it related to its purpose, function, and use. Similarly, in the present case, the time the airplane spent on the ground in Illinois is much less significant***

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332 (reviewing use of aircraft over two-year period of ownership); *Superior Aircraft*, 734 S.W.2d at 507 (reviewing first year and a half of ownership).

> ***to our decision than the time the airplane spent in flight between Illinois and other destinations***, which demonstrates the significance of the airplane's presence inside Illinois, as it relates to its purpose, function, and use.

See Irwin, 238 Ill. 2d at 344 (emphasis added). The Court in *Irwin* gave very little, if any, import to "time on the ground." The Tribunal should follow suit.

Similarly, the Department claims the Aircraft's flights are a "***slightly lower*** percentage" than the flights in *Irwin* and *Superior Aircraft*, but that the taxpayers in both of those cases "did not have the deliberate and continuous [c]onnections that both TCRG and the Aircraft have with Illinois." (Resp. at 11 (emphasis added).) The Department is wrong. The flight activity in this case is not "slightly lower" than in *Irwin* and *Superior Leasing*. By the Department's own metric, the Aircraft here flew in and out of Illinois ***6 times less than*** in *Irwin* and the percentage of flight hours for flights into Illinois are 7% here, compared to nearly 18% (over double) in *Superior Leasing*. No amount of spin can support the Department's "slightly lower" characterization. And the Department's claim that TCRG and the Aircraft have more "connections" with Illinois than *Irwin*—where the sole director, CEO, Chairman, CFO, and General Counsel all had offices in Illinois and used the aircraft to travel there for business—and *Superior Leasing*—where the taxpayer was incorporated with an office in the taxing state—is nonsensical.

To sum it up, as TCRG emphasized in its Opening Brief, the Tribunal's evaluation of the Aircraft's nexus with Illinois focuses on (i) the number of flights

in/out of Illinois, and (ii) the time that the Aircraft "spent in flight between [Illinois] and other designations." (Open. Br. at 21-23.) Both metrics here are nowhere close to similar figures in *Irwin* and *Superior Aircraft*.

5. The Department misstates the Aircraft's "purpose, function, and use"

As stated in the Matthew Sennett affidavit, the "Aircraft was purchased to be based in New York at Stewart International Airport for the purpose of transporting New York-based executives." (Open. Br., Ex. 2 at ¶ 4.) The Department's claim that there is "not a scintilla of evidence to support this notion" (Resp. at 14) fails to account for the Sennett affidavit, the sufficiency of which the Department does not challenge.

The Department's main contention is that, contrary to the Sennett affidavit, the "purpose of this Aircraft was for TCRG to lease it to Guggenheim, a Chicago-based company." (Resp. at 14.) But that assertion fails:

- During calendar year 2016, well under ***18%*** of flights were leased to Guggenheim Capital, LLC, with the balance to Texas Capitalization. (*See* Dep't Ex. H, column K.)

- During calendar year 2017, under ***15%*** of flights were leased to Guggenheim Capital, LLC, with the balance to Texas Capitalization. (*See* Dep't Ex. H, column K.)

- Besides the lease with Guggenheim Capital, LLC, there are ***two other leases*** with other third parties.

For this reason, the Department's representation to the Tribunal that "TCRG's ***sole purpose*** was to own the Aircraft and lease it to Guggenheim," Resp. at 16 n.3, is wrong and should be disregarded.

6. The Department also fails to rebut that the Aircraft's presence in Illinois during the Break-In Period was coincidental

For the Break-In Period in particular, the Tribunal should exclude that period of time for the substantial nexus analysis, but even taking it into account, there still cannot be a finding of tax liability. (*See* Open. Br. at 27-31.)

The Department's leading response is to offer a patchwork of alleged "connections" based upon the Break-In Period, which are addressed above. In addition, unlike the Court's finding in *Irwin*, the Aircraft's presence in Illinois during the Break-In Period was purely coincidental. 238 Ill. 2d at 343. The Department has failed to contest the following undisputed facts, which establish that the Aircraft's presence in Illinois during the Break-In Period was "coincidental":

- In early 2016, after the Aircraft had been in storage for a year-and-a-half at Gulfstream's Georgia facility, Jen-Air (the third-party maintenance and repair contractor for the Aircraft) only had the employees, equipment, and resources to perform the required maintenance and repair work at its facility at Midway Airport in Chicago, Illinois. There were no other Jen-Air facilities in the United States capable of performing this work in early 2016. (Majchrowski Aff. ¶ 4.)

- For the sole reason that Midway Airport is where Jen-Air's facilities were located, the Aircraft was intermittently brought to Midway during the Break-In Period for extensive repairs and maintenance. (Sennett Aff. ¶ 6.)

- During the Break-In Period, TCRG never rented, leased, reserved, or permanently used any hangar space at Midway Airport. (Stip. ¶¶ 24, 25.)

- The Aircraft was never permanently hangered at Midway Airport during the Break-In Period and was considered "transient" by the FBO operator (*i.e.*, it was left on the tarmac unless hangar space happened to be available). (Majchrowski Aff. ¶ 5; Sennett Aff. ¶ 7.)

- During the Break-In Period, "TCRG had no business operations in Illinois" and none of the passengers flown during that period of time were employees, officers, or directors of TCRG. (Stip. ¶¶ 21, 26.)

Again, no matter how hard the Department tries, it cannot run from the fact that its expressly stipulated that, during the Break-In Period, "TCRG had no business operations in Illinois." (Stip. ¶ 21.) TCRG is not aware of a single case in any jurisdiction where use tax was imposed upon a taxpayer that admittedly had "no business operations" whatsoever in the taxing state. This admission is devastating to the Department's case.

In its Opening Brief, TCRG also pointed out that, legally speaking, when an asset is transported into another state primarily for maintenance, repairs, overhauls, modifications, or refurbishments, it is not considered to be a taxable "use." (Open. Br. at 29-30.) The Department's Response claims some of these cases arose prior to the *Complete Auto* test, but fails to clearly explain why that timing is significant. These cases remain helpful authority for the common-sense proposition that bringing an aircraft into Illinois solely for maintenance and repair purposes, not "use," does not trigger tax liability.

At its core, the Department intends to punish TCRG for contracting with an Illinois company to maintain and repair the Aircraft. But that is not the correct legal basis to impose use tax liability on the Aircraft. There is no legal support for the proposition that contracting with a third party to repair an aircraft, car, or boat subjects the out-of-state taxpayer to tax liability concerning the item's "use." As such, if the Tribunal credits the Break-In Period as part of the operative timeframe for determining "substantial nexus," it will create a chilling effect on all aircraft owners, resulting in the avoidance of Illinois-based and Illinois-located maintenance and repair companies. That irrational result contradicts the very purpose of a use tax. (Open. Br. at 26-27, 30.)

Moreover, even if the Break-In Period is considered, it would not change the conclusion that there is no substantial nexus. The flights in and out of Illinois, even if the Break-In Period is included, would still be a fraction of the contacts in *Irwin* and the other cases discussed above. For example, the Department asserts that the Aircraft flew in and out of Illinois only 44 times during a period of time that includes the Break-In Period. But the Department's own flight data shows there is not a substantial nexus, as explained above.

B. The Use Tax is Not "Fairly Related" to Services Provided by Illinois

The Department's Response perpetuates its reliance on immaterial and demonstrably incorrect facts in claiming *Complete Auto*'s "fairly related" prong is

met. Along with that, the Department advances arguments that are disconnected from applicable law and common sense.

First, the Department asserts that "Petitioner would like this Court to believe that TCRG was merely an outsider glancing into the State of Illinois from afar." (Resp. at 16.) That is precisely what TCRG is. As the undisputed facts show, TCRG is not an Illinois entity, it has no Illinois offices, it has no executives, employees, or stockholders from Illinois, and the Department has stipulated that "TCRG had no business operations in Illinois."[7] (Stip. ¶¶ 5-8, 21.)

Second, framed as the Department's "most important[]" argument, the Department states that "TCRG entered into multiple leases with Guggenheim that ***explicitly state*** that Illinois law and courts would control any disputes arising out of the lease." (Resp. at 17 (emphasis added).) That statement is incorrect, as explained above. The lease the Department refers to has no statement whatsoever—explicit or implicit—that any disputes must be brought in an Illinois court.

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[7] The Department recycles its "deliberate and continuous presence" formulation on this prong too. (Resp. at 17.) The Department's argument is legally flawed in other ways too. The Department states: "*Complete Auto* clarified this stating the 'fairly related' prong requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor is a State limited to offsetting the public costs created by the taxed activity." (Resp. at 16.) But the Department provides no quote or citation to *Complete Auto*, and that proposition is not evident from the decision.

The Department continues its speculation, stating that "had there been a dispute" between TCRG, on the one hand, and Guggenheim Capital, LLC or Jen-Air, on the other hand, the Illinois "court system" would have been used. (Resp. at 17.) In the absence of a jurisdiction/venue provision, that is pure speculation. Compare the Department's guesswork to the analysis in *Superior Leasing*, in which the Court noted:

> Because Superior Aircraft is a corporation organized and licensed under the laws of Missouri and maintains a business office in Missouri, it is reasonable to infer that the board meetings were conducted in accordance with Missouri law. Additionally, if necessary, Superior Aircraft could have used Missouri state courts to enforce resolutions arising from such board meetings. Such evidence shows both that a "substantial nexus" exists with Missouri and that the tax is "fairly related" to the services provided by the state.

Superior Aircraft, 734 S.W.2d at 507. Unlike *Superior Aircraft*, TCRG is not "organized and licensed under the laws of" Illinois, does not "maintain[] a business office in" Illinois, and will not use Illinois courts to "enforce resolution arising from [] board meetings."

The Department's other arguments on the "fairly related" prong are far afield. The Department claims that TCRG uses "public roads and property" because it had a "registered agent and an address listed within the State of Illinois." (Resp. at 17.) There is zero authority for the proposition that the "fairly related" prong is met for TCRG because an independent third party (Franklin Monroe) has employees who may use Illinois public roads and property. That argument is unreasonable. More

to the point, the Department says: "[w]hen Guggenheim passengers traveled to Midway Airport, assuredly they traveled upon roads maintained by the State of Illinois to reach their destination. If Guggenheim passengers could not use the roads in this State to travel to Midway Airport, the lease (and the entity of TCRG) would likely not exist." Under this logic, unknown passengers (conceivably from around the world) flying under the Guggenheim Capital, LLC lease can subject ***TCRG*** to taxation for millions of dollars because those passengers (not TCRG) used Illinois roads to travel to/from Midway Airport.[8] This is a absurd argument that, as far as TCRG is aware (and the Department provides no support), no Court has ever entertained, much less decided favorably.[9]

TCRG is entitled to summary judgment because the "fairly related" prong of the *Complete Auto* test is not satisfied.

[8] Likewise, under the Department's logic, the taxpayer in *Brown's Furniture* would have apparently been liable for use tax in Illinois even if it never delivered any furniture into Illinois, so long as its customers used Illinois roads to travel to Wisconsin to pick up their own furniture.

[9] While the Department tries to point out Illinois' responsibilities relating to airports in the state, that still does not explain TCRG's basic point: that the issue of whether police protection is provided by the State of Illinois is also much different in the context of an airport, where such protection is self-contained and provided by the federal government through the TSA and by local city governments. (*See* Open. Br. at 32-33.)

C. The Department Imposed the Wrong Tax Rate of 7.25%

The use tax rate is 6.25%. The Department attempts to impose a tax rate of 7.25%, claiming that an additional 1% should be added as a cook county local tax (the "Cook Count Use Tax"). TCRG respectfully submits that the Department is wrong.

Cook County Code 74-272(b)[10] provides that "[e]xcept as provided in Section 74-273, a tax is imposed at the rate of one percent on the selling price of tangible personal property, purchased through a sale at retail, which **is** titled or registered with an agency of the State of Illinois at location inside Cook County." The Department admits that the Aircraft is not registered with an agency of the State of Illinois at a location inside Cook County. As such, based on the plain language of the Cook County Code, the 1% additional Use Tax cannot apply with respect to the Aircraft.

The Department claims that, because it believes the Aircraft ***should*** have been registered with an agency of the State of Illinois, the Cook County Use Tax should apply. That is not what the statute says—it uses the word "is." And while the Department claims that "Aircraft are generally required to be registered with the

[10] While the Department cites Section 4.03 of the Regional Transportation Authority Act in support of its imposition of Cook County Use Tax, we note that there is no requirement of an imposition of use tax with respect to use of aircraft in that provision, and instead only a grant of authority to impose such taxes.

Illinois Department of Transportation," Resp. at 19, the applicable statute simply says the Department "***is authorized*** … [t]o require the registration." 620 ILCS 5/42(b) (emphasis added). Finally, the 1% additional tax only applies when the aircraft "is titled or registered with an agency of the State of Illinois **at location inside Cook County**," but the Department does not explain or show that the Aircraft should have been registered at location inside Cook County (as opposed to registered with an agency of the State of Illinois at location outside Cook County).

D. Alternatively, It is Undisputed That No Penalties Are Due

The failure to pay taxes on or before their due date will not give rise to penalties if the failure was due to "reasonable cause." 35 ILCS 735/3-8. The factors relevant to determining "reasonable cause" support that conclusion: TCRG made a "good faith effort to determine the proper tax liability" and "exercised ordinary business care and prudence," especially in light of the prevailing *Irwin* decision and other decisions supporting a finding that no tax liability is due. Given TCRG's well-reasoned arguments as to why an imposition of use tax is inappropriate in this case, TCRG had reasonable cause not to pay use tax in this instance. TCRG incorporates its other arguments here in support of its request that the Tribunal find that penalties are not appropriate here.

It is also noteworthy that, as pointed out in TCRG's Opening Brief, the Department's audit process was riddled with errors, including knowingly ignoring

applicable law and bypassing basic due process rights. (*See* Open. Br. at 10-14.) The Department's Response fails to take issue with any of these criticisms.

CONCLUSION

For these reasons, TCRG respectfully requests that the Tribunal grant its motion for summary judgment, deny the Department's cross-motion for summary judgment, cancel and declare the Notice of Tax Liability against TCRG null and void, enter judgment in TCRG's favor in this proceeding, and/or grant the additional relief set forth in TCRG's Petition.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Weber, Petitioner's attorney, hereby certify that on March 29, 2023, a copy of Petitioner TCRG's Reply Brief in Support of Its Motion for Summary Judgment, was sent via e-mail and U.S. mail to:

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