ILLINOIS INDEPENDENT TAX TRIBUNAL

TCRG SN4057, LLC, Petitioner,	)	Case No.: 22-TT-004
v.	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

THE ILLINOIS DEPARTMENT OF REVENUE'S BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The Respondent, Illinois Department of Revenue ("Department"), by its duly authorized representatives, John J. Walz and Robert O. Lynch, files its brief in support of its cross-motion for summary judgment, and in response to Petitioner's motion for summary judgment, and states as follows:

PRELIMINARY STATEMENT

In 2015, Texas Capitalization Resource Group Inc. ("Parent") formed TCRG SN4057, LLC ("TCRG") in the State of Delaware. TCRG purchased a Gulfstream G450 Jet (the "Aircraft") on December 18, 2015. While Petitioner would lead this Court to believe that the Parent, TCRG, and the Aircraft have little to no connection to the State of Illinois, the record in this matter contradicts this assertion. As shown further below, Illinois law unquestionably imposes tax liability upon Petitioner.

In order to impose taxation, Illinois Courts require that the tax must satisfy the four-pronged test established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under *Complete Auto*, a tax is constitutional if: 1) applied to an activity with a substantial nexus with the taxing state; 2) it is fairly apportioned; 3) it does not discriminate against interstate commerce; and 4) it is fairly related to the services provided by the state. *Id*. at 297.

For determining substantial nexus, courts must look to two important factors: the **connection** between the taxpayer/aircraft and the State of Illinois, and the basic **purpose, function, and use** of the aircraft. *Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 238 Ill. 2d 332 (2010) (*emphasis added*). The Department will show that both TCRG and the Aircraft's connections with the State of Illinois were deliberate and continuous. Further, the Department will show that the purpose, function, and use of the Aircraft was to lease it to a Chicago-based company for three consecutive years.

Second, *Complete Auto* requires that a tax must be fairly apportioned. The main question for this factor is whether an entity was taxed multiple times for a single transaction. The Department will show that the Notice of Tax Liability as issued was fairly apportioned as TCRG never paid any retail tax upon purchase of the Aircraft, nor was ever assessed use tax by any other jurisdiction in the United States.

Third, the tax must not discriminate against interstate commerce. For this factor, Petitioner does not contest this portion of the *Complete Auto* Test.

Finally, the tax must be fairly related to the services provided by the State of Illinois. The Department will show that by housing the Aircraft in Illinois for extended periods of time, flying passengers from a Chicago-based company on numerous occasions, and entering into multiple contracts with companies doing business in Illinois, Petitioner intentionally availed itself to the services of the State of Illinois.

BACKGROUND

All facts are drawn from the Department's separately filed Statement Undisputed Material Facts in Support of Its Motion for Summary Judgement and exhibits filed in support thereof.

TCRG SN4057, LLC is a Delaware LLC that is a wholly owned subsidiary of Texas Capitalization Resource Group Inc. (Exhibit A, Stip. ¶ 1.) The Parent is real estate company located in and incorporated in the State of Texas. (Exhibit A, Stip. ¶ 4.)

On December 18, 2015, TCRG purchased a Gulfstream Aerospace G450, serial number 4057, from Gulfstream Corporation in Connecticut for $16.5 million. (Exhibit A, Stip. ¶¶ 9, 10.) To this date, TCRG has not paid any retail or use tax to any jurisdiction in connection with the purchase and use of the Aircraft. (Exhibit B, Petitioner's Answers to Request to Admit.) On December 15, 2015, TCRG entered into a lease with Executive Jet Management ("EJM") stating that the Home Airport Location of the Aircraft would be Midway Airport in Chicago, Illinois. (Exhibit C, EJM Lease.) Also on December 15, 2015, TCRG entered into a contract to lease the

plane to Guggenheim Capital ("Guggenheim"), a Chicago-based company. (Exhibit D, Guggenheim Lease.) Section 16 of that lease states that any and all disputes concerning its terms shall be construed by Illinois Courts using Illinois law. (*Id.*) Shortly after the purchase, the Aircraft was registered by TCRG with the Federal Aviation Administration ("FAA") in the State of Illinois using the address 277 W. Monroe, Suite 4900, Chicago, IL 60606. (Exhibit F, FAA Registration.)

The Aircraft entered Illinois on March 3, 2016, where it remained until May 17, 2016, as a "temporary home." (Exhibit A, Stip. ¶ 20; Exhibit J, Sennett Emails.) During this 10-week period, the Aircraft made twelve (12) flights in and out of Midway Airport carrying passengers of Guggenheim. (Exhibit H, Flight Manifest.) From December 18, 2015, through December 17, 2016, the Aircraft flew into and out of Illinois forty-four (44) times and remained on the ground for a total of 71 days (19.5% of the year). (Exhibit I, Flight Logs.)

LEGAL STANDARD

Summary judgment is proper only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rogers v. Ill. Dept. of Rev.*, 2017 IL App (1st) 151449, ¶ 30. While the filing of cross-motions does not necessarily establish the lack of an issue of material fact, it does indicate that the parties agree that the case involves a matter of law and that they invite the court to decide that issue. *Shared Imaging, LLC v. Hamer*, 2017 IL App (1st) 152817, ¶ 13.

ARGUMENT

The Department's Notice of Tax Liability constitutes *prima facie* proof of the amount due. *See* 35 ILCS 120/5. The burden then shifts to the Taxpayer to "establish by competent evidence that the return corrected by the Department is not correct" *Sprague v. Johnson*, 195 Ill. App. 3d 798, 803 (4th Dist. 1990).

Petitioner challenges the Department's NTL on three grounds. First, Petitioner argues that assessment of use tax on the Aircraft violates the commerce clause of the United States Constitution. Second, Petitioner argues that the Department has imposed the wrong tax rate. Finally, Petitioner argues that it is entitled to an abatement of penalties for "reasonable cause." The Department will address each of these arguments in turn.

I. Imposing Taxation Upon the Petitioner is Constitutional under the *Complete Auto* Test

In order to impose taxation, courts require that the tax must satisfy the four-pronged test established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Complete Auto* held that for the tax to be constitutional it must: 1) Be applied to an activity with a substantial nexus with the taxing state; 2) be fairly apportioned; 3) not discriminate against interstate commerce; and 4) be fairly related to the services provided by the state. *Id*. at 297.

Here, the Department will show: 1) Both TCRG and the Aircraft had deliberate and continuous connections with the State of Illinois to establish a "substantial nexus"; 2) the tax as applied was fairly apportioned and based on statutory language; 3) the tax does not discriminate against interstate commerce; and 4) TCRG and the

Aircraft availed themselves both directly and indirectly to services provided by the State of Illinois.

A. Both TCRG and the Aircraft Have a Substantial Nexus with the State of Illinois

Petitioner relies on *Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 238 Ill. 2d 332 (2010), to support their argument that the Aircraft did not have a substantial nexus with the State of Illinois. However, Petitioner's reliance on *Irwin* is misplaced. Petitioner would like this court to focus on two factors in determining nexus: that TCRG had no "business operations" or employees in Illinois, and the number of flights and days the Aircraft was in Illinois as compared to the plane in *Irwin*. Both these arguments distort the substantial nexus test that *Irwin* used to determine that the petitioner and the aircraft did indeed have a substantial nexus with the State of Illinois. The substantial nexus test established by *Irwin* directs a court to focus on the **connections** between the taxpayer/aircraft and the State of Illinois, and the **purpose, function, and use** of the aircraft.

In *Irwin*, the taxpayer was a multinational corporation that was headquartered in Lincoln, Nebraska, and had an office in Hoffman Estates, Illinois. 238 Ill. 2d at 462. Irwin established ATC Air as a wholly owned subsidiary for the sole purpose of providing transportation services to Irwin and its affiliates. *Id.* ATC Air's only offices were located in Illinois, while maintaining its business records in Nebraska. *Id*. ATC Air then purchased an aircraft from a company in Kansas and did not pay any sales tax on the purchase. *Id*. at 463. ATC Air registered the aircraft with the FAA in Illinois using their Illinois address in Hoffman Estates. *Id.* The aircraft

was used for customer visits, transporting Irwin employees, and legal matters. *Id*. In the two years ATC Air owned the aircraft, the plane was in Illinois for 143 days and made 271 flights in and out of Illinois. *Id*. Subsequently, the Illinois Department of Revenue issued a Notice of Tax Liability to ATC Air for its contacts with the State of Illinois. *Id*.

The Court stated that in order to impose taxation, the tax must satisfy the four-pronged test established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In terms of a substantial nexus, there must a link, or **minimum connection**, between a state and the person, property, or transaction it seeks to tax. *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S.768, 777-78 (1992) (*emphasis added*). The tax must be imposed on the activity itself, rather than a connection only to the individual or corporation. *Id*. This type of nexus is satisfied by **more than a slight physical presence** in the State. *Quill Corp. v. North Dakota,* 504 U.S. 298, 317-18 (1992) (*emphasis added*). The physical presence **need not be substantial** but **more than the slightest presence**. *Brown's Furniture*, 171 Ill. 2d 410, 428 (1996) (*emphasis added*).

The Court found that ATC Air and the aircraft had a substantial nexus with Illinois. *Irwin*, 238 Ill. 2d at 467. The court determined this by evaluating ATC Air and the aircraft's **connections** with the State of Illinois and the **purpose, function and use** of the aircraft. *Id.* (*emphasis added*). They reasoned that even though the aircraft was hangered and maintained outside of Illinois, the number of flights in and out of Illinois were not coincidental. *Id*. They further took into account that the

aircraft was registered with the FAA in Illinois. *Id.* The court also ignored that ATC was not an Illinois corporation because they found that ATC Air had demonstrated more than a slight physical presence in Illinois. *Id*. These deliberate and continuous connections led the court to determine that ATC and the aircraft had a substantial nexus with Illinois.

The Court then looked to what the **purpose, function, and use** of the aircraft and found it to essentially be doing the business of the Irwin corporation in and out of Illinois. *Id*. The court found that the purpose, function, use of the plane was to provide transportation services to Irwin and its affiliates.

i. TCRG Had More Than the Slightest Presence in Illinois

Petitioner argues that to impose taxation, TCRG must have a "substantial" connection with the state of Illinois.[1] However, this is not the legal standard that the court in *Irwin* used to determine the extent of ATC Air and the aircraft's connections to Illinois. As shown above, the court in *Irwin* looked to *Allied Signal*, *Quill*, and *Brown's Furniture* for guidance on the "substantial nexus" test. The court specifically held that nexus can be shown by **more than the slightest presence in the State**. *Brown's Furniture*, 171 Ill. 2d at 424 (*emphasis added*).

Petitioner first argues that there is no substantial nexus between TCRG and the Aircraft. This is nonsensical and without merit. TCRG admits that they purchased and are the legal owner of the Aircraft. (Exhibit A, Stipulations.)

[1] For the support this notion, Petitioner cites the definition of "substantial" from Black's Law Dictionary and not the Court's ruling in *Irwin*.

They next argue that TCRG and the Aircraft have "minimal" connections to the State of Illinois. Again, this notion flies in the face logic. According to the record in this matter, TCRG and the Aircraft have the following connections with the State of Illinois:

a. TCRG registered the Aircraft with the FAA within the State of Illinois;

b. TCRG's registered agent for the Aircraft is based in Chicago;

c. The lease between TCRG and EJM lists Midway Airport as the Aircraft's home airport;

d. TCRG entered into a lease agreement with a Chicago-based company, Guggenheim, for the use of the Aircraft **prior** to the completion of its purchase;

e. This lease lists TCRG's principal place of business as 277 W. Monroe, Suite 4900, Chicago, IL 60606;

f. This lease states that Illinois law/courts would control/handle any disputes as to the construction of the lease;

g. TCRG housed the plane in Illinois at Midway Airport continuously for ten (10) weeks from March 3, 2016 through May 17, 2016;

h. While the Aircraft was stored at Midway from March 3, 2016 through May 17, 2016, TCRG contracted with a company both incorporated and headquartered in Illinois, Jen-Air, to perform service and maintenance on the Aircraft;

i. From March 3, 2016 though May 17, 2016, the Aircraft was used to fly into and out of Illinois twelve (12) times containing Guggenheim passengers;

j. From December 18, 2015 to December 17, 2016, the Aircraft took off from and landed in Illinois forty-four (44) times;

k. In total, 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; and

l. During the audit process, TCRG registered agent/lessor Matthew Sennett informed the Department on three separate occasions (December 3, 4, and 5 of 2018) that Illinois was a "temporary home" for the Aircraft from March 3, 2016 through May 17, 2016.

(*See* Statement of Undisputed Facts; these facts will now be referred to as the "Connections")

Petitioner would like this court to focus on two narrow factors in determining nexus: that TCRG had no "business operations" or employees in Illinois, and the number of flights and days the Aircraft was in Illinois. First and foremost, in the lease that TCRG entered into with EJM, they unequivocally admit that the entity of TCRG exists for the sole purpose of owning the Aircraft and has no other assets or business operations. (Exhibit C, EJM Lease.) TCRG then entered into a lease with Guggenheim, a Chicago-based company, for use of the plane in 2016 and 2017. (Exhibits D and E, Guggenheim Leases.) By contracting with a Chicago-based company to lease the Aircraft, TCRG was conducting a "business operation" in Illinois. The language of the lease gives Guggenheim virtually limitless control over the Aircraft. (Exhibit D, Guggenheim Lease.) TCRG also contracted with Jen-Air, a company headquartered and incorporated in the State of Illinois, to perform service and maintenance on the Aircraft. (Exhibit G, Majchrowski Email.) 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, the Aircraft's home airport.

Using Petitioner's reasoning, 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. This interpretation of *Irwin* would lead to virtually no tax liability on any aircraft that ever entered the State of Illinois.

Petitioner next argues that the number of flights by the Aircraft in and out of Illinois are far less than *Irwin* and *Superior Aircraft* and therefore do not establish substantial nexus. This argument also fails. First, the Court in *Irwin* expressly stated that no one factor is determinative in the test for a substantial nexus, focusing on the connections and purpose of the taxpayer/aircraft. *Irwin*, 238 Ill. 2d at 343. Flight travel, as shown by both *Irwin* and *Superior Aircraft*, are just one of the myriad of factors that a court will look at when determining if a taxpayer and property have more than the slightest presence in the State of Illinois. While the Aircraft's flights are a slightly lower percentage than the aircrafts in *Irwin* and *Superior Aircraft,* the taxpayers in those matters did not have the deliberate and continuous Connections that both TCRG and the Aircraft have with Illinois. Notably, in *Irwin* and *Superior Aircraft,* the aircrafts in those matters were hangered and stored in states **outside** of Illinois. Here, it is undisputed that the Aircraft remained in Illinois on a deliberate and continuous basis from March 3, 2016, through May 17, 2016. (Exhibit I, Flight Log.) Further, TCRG's lease with EJM specifically states that the Aircraft's home airport is to be Midway Airport. (Exhibit C, EJM Lease.) Finally, Matthew Sennett referred to Midway as being the Aircraft's "temporary home" on three separate occasions. (Exhibit J, Sennett Emails.)

Petitioner then contends that despite these numerous Connections, the Aircraft only remained in Illinois from March 3, 2016, through May 17, 2016, as a "Break-In" period. Simply put, this concept is a legal fiction invented by the Petitioner and has no bases in Illinois law. Prior to litigating this matter, the "Break-In" period was first referred to as being a "Temporary Home" for the Aircraft by the Petitioner. (Exhibit J, Sennett Emails.) While Petitioner suggests that a "Break-In" period exempts taxation is some other states, they cite no legal authority that establishes its existence in the State of Illinois. Regardless, the cases cited from outside Illinois fail to support Petitioner as to the alleged "Break-In" period.

Petitioner cites a Florida appellate court decision which reversed the tax on a yacht that was brought into Florida solely to receive warranty work as having no basis in Florida tax statutes. *Dep't of Revenue v. Yacht Futura Corp.*, 510 So. 2d 1047, 1049 (Fla. Dist. Ct. App. 1987). The case stands for the proposition that the "mere presence in Florida for warranty repairs, without more, will [not] subject a boat to the use tax" under Florida statutes. *Id.*

Petitioner next cites a pair of decisions from the Iowa Supreme Court and a decision of the Utah Supreme Court that are just as inapposite, as all three involve the application of the "taxable moment doctrine." *Grudle v. Iowa Dep't of Revenue & Fin.*, 450 N.W.2d 845, 848 (Iowa 1990); *Bruce Motor Freight, Inc. v. Lauterbach*, 77 N.W.2d 613 (Iowa 1956); *Union Pac. R.R. v. Utah State Tax Comm'n*, 169 P.2d 804 (Utah 1946). *Bruce Motor Freight* and *Union Pac. R.R.* were decided decades before *Complete Auto*, and the Iowa Supreme Court did not consider *Grudle* under the

Complete Auto test because it found that Iowa had assessed and defended the assessment solely under a "taxable moment" theory, and therefore Iowa was barred from raising *Complete Auto* on appeal. *Id.* The Department does not ground its assessment of Use Tax in the "taxable moment doctrine," and in fact Illinois courts have recognized that the *Complete Auto* test has supplanted the "taxable moment doctrine." *See Archer Daniels Midland Co. v. Dep't of Revenue*, 170 Ill. App. 3d 1014, 1023 (1st Dist. 1988).

Whether referred to as a "Break-In" period or a "Temporary Home" there is no dispute that the Aircraft was present in the State of Illinois on a deliberate and continuous basis for ten weeks in 2016. During this period, Guggenheim was still using the plane to fly into and out Illinois. (Exhibit H, Manifest.) This explicitly contradicts the notion that the Aircraft was merely present during those ten weeks for service and maintenance by Jen-Air. The housing of the Aircraft, in addition to the countless Connections between the Petitioner/Aircraft and the State of Illinois clearly show they had more than the slightest presence in Illinois.

As shown above, Petitioner's arguments distort the substantial nexus test use in *Irwin*. *Irwin* focused its analysis into the totality of contacts that the taxpayer/aircraft had with the state, not just the number of flights. Here, TCRG and the Aircraft's Connections are deliberate and continuous with the State of Illinois. The multitude of these connection establish that TCRG and the Aircraft not only had more than a slight presence in Illinois, but a substantial presence.[2]

[2] See SUBSTANTIAL, Black's Law Dictionary (11th ed. 2019) ("Considerable in extent, amount, or value, large in volume or number").

ii. The Purpose, Function and Use of the Plane was for TCRG to Lease it to a Chicago-based Company

While the Petitioner has stated repeatedly that the purpose of the Aircraft was for "permanently housing it in New York and transporting New York-based executives," (Pet. Motion at 1) there is not a scintilla of evidence in the record to support this notion. Instead, the record reflects that the purpose of this Aircraft was for TCRG to lease it to Guggenheim, a Chicago-based company.

On December 15, 2015, TCRG entered into a lease with Guggenheim so they could use the Aircraft subject to the terms of the lease. (Exhibit D, Guggenheim Lease.) Particularly, this lease was entered into **three days before** the sale of the Aircraft became final to TCRG on December 18, 2015. (Exhibit A, Stipulations.) TCRG then entered into lessor/lessee agreements with Guggenheim again for the year of 2017. (Exhibit E, Guggenheim Lease.) The purpose, function, and use of the Aircraft, even before its purchase became final, was to lease it to a Chicago-based company. Guggenheim then used the Aircraft to fly throughout the United States, Europe, and South America at its behest per the terms of the lease. TCRG has not identified a single "New York-based executive" from either Guggenheim, Texas Capitalization, or any other entity that ever flew on the Aircraft. To the contrary, flight manifests show that Guggenheim used the Aircraft at their whim throughout 2016. (Exhibit H, Manifest.) This adheres to the terms of the Lease which essentially give Guggenheim complete control over the Aircraft during the duration of the lease.

B. The Tax Applied to the Aircraft was Fairly Apportioned

Petitioner has made no direct arguments that the tax was not fairly apportioned, however, the tax clearly satisfies this prong of the *Complete Auto* test. The Use Tax Act provides an exemption from the imposition of use tax to those who have "already paid a tax in another State in respect to the sale, purchase, or use of that property, to the extent of the amount of the tax properly due and paid in the other State." 35 ILCS 105/3-55(d); *Am. River Transp. Co. v. Bower*, 351 Ill. App. 3d 208, 213 (2004). Because Illinois provides a credit for use taxes paid to other states, and because the record indicates that Petitioner paid no use tax to any other jurisdiction, imposing Illinois Use Tax on the full purchase price of the Aircraft is fairly apportioned under *Complete Auto*. *See D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) (a tax is fairly apportioned where it provides a credit against its use tax for sales taxes that have been paid in other States).

C. Taxing the Aircraft Does Not Discriminate Against Interstate Commerce

Petitioner also makes no direct arguments that the tax discriminates against interstate commerce. Here, the Illinois use tax imposed on the Aircraft is imposed at the same rate that would be imposed on use by in an in-state taxpayer. Therefore, the Use Tax Act does not discriminate against interstate commerce. *Brown's Furniture*, 171 Ill. 2d at 428 (1996) (*citing D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 32 (1988)).

D. The Tax is Fairly Related to the Services Provided by the State of Illinois

Petitioner next claims that the tax is not fairly apportioned because of TCRG's "complete lack" of business operations[3] in Illinois, and only flying the Aircraft into one airport located in the State. This, again, fails in both law and fact.

In *Brown's Furniture*, the Supreme Court of Illinois held that the "fairly related" prong was satisfied by the taxpayer "benefit[ting] from public roads, police protection, a judicial system and all the other "usual and usually forgotten advantages conferred by the State's maintenance of a civilized society." *Brown's Furniture*, 171 Ill. 2d at 429, *quoting Jefferson Lines*, 514 U.S. 175, 200 (1995). *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. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and "'contribute to the cost of providing all governmental services, including those services from which it arguably receives no **direct** benefit." *Goldberg v. Sweet*, 488 U.S. 252, 619-20 (1989), *quoting Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981) (*emphasis in original*).

Petitioner would like this Court to believe that TCRG was merely an outsider glancing into the State of Illinois from afar. As shown by their Connections, TCRG

[3] As shown in Connections, TCRG's sole purpose was to own the Aircraft and lease it to Guggenheim.

and the Aircraft had a deliberate and continuous presence in Illinois. Most importantly, TCRG entered into multiple leases with Guggenheim that explicitly state that Illinois law and courts would control any disputes arising out of the lease. (Exhibits D and E, Guggenheim Leases.) Had there been a dispute, both TCRG and Guggenheim would have had to use the Illinois court system and the laws of Illinois to settle a dispute. Illinois law would also have presumably controlled any disputes between TCRG and Jen-Air had there been any issue with their service and maintenance, as those activities took place within the State of Illinois. Indeed, *Superior Aircraft* addressed this exact situation in finding a substantial nexus stating that because taxpayer averred itself to Missouri law, the Missouri courts system would be the arbiter of any legal disputes. *Dir. of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504, 507 (Mo. 1987).

In terms of public roads and property, Petitioner attempts once again to distinguish their activity in Illinois as non-existent. Petitioner fails to acknowledge that TCRG had a registered agent and an address listed within in the State of Illinois (Exhibit C, EJM Lease.) When 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.

Petitioner then would like to paint Midway Airport as existing exclusively within the location and purview of the City of Chicago. However, it is well established that the City of Chicago exists within the State of Illinois, and the State's law

supersede any ordinance enacted by the City of Chicago. Petitioner also fails to mention that Aircraft landed at DuPage Airport (DPA) and Waukegan Airport (UGN)[4] in 2016. (Exhibit I, Flight Log.) Petitioner further ignores that the Illinois Department of Transportation ("IDOT") is responsible for "all aspects of aviation safety" within the State of Illinois. See *Illinois Aeronautics Act*, 620 ILCS 5/1. IDOT is responsible for inspecting landing facilities in all airports located in the State of Illinois, and on some occasions conducts inspections on behalf of the FAA. IDOT also requires that all pilots that reside in Illinois or fly aircraft into the state register their FAA Pilot Certification with IDOT.

II. The Department Assessed Use Tax at the Correct Rate

The tax at issue in this case is based in the Use Tax Act, 35 ILCS 105/1 *et seq*., and not the Aircraft Use Tax Act, 35 ILCS 157/10-15-1 *et seq*. The Use Tax Act is applicable to this transaction because the aircraft was purchased at retail from Gulfstream Aerospace Corp., a "retailer" as defined section 2 of the Use Tax Act. Additionally, Petitioner has recognized that its purchase of the aircraft occurred through a retail sale by its filing of a RUT-25 return in connection with its 2018 rolling stock exemption claim. In contrast Aircraft Use Tax concerns acquisitions by acquired by gift, transfer, or purchase from a non-retailer, and such tax is reported to the Department of form RUT-75.

Use Tax on this Aircraft was imposed at a rate of 7.25% of the purchase price. The tax rate is comprised of the state Use Tax rate of 6.25% plus a 1% local rate for

[4] DuPage and Waukegan are not located within the City of Chicago

Cook County pursuant to Section 4.03 of the Regional Transportation Authority Act, 70 ILCS 3615/1.01 *et seq*. Petitioner argues that it is not subject to the 1% county tax because the aircraft is not titled or registered with the State. (Pet. Br. at 36-37.) Aircraft are generally required to be registered with the Illinois Department of Transportation. 620 ILCS 5/42(b). There is an exception to registration for aircraft owned by a non-resident person of the state of Illinois lawfully entitled to operate the aircraft in the state of his or its residence. 92 Ill. Admin. Code § 14.230(b).

Petitioner's argument against the 1% county tax must fail. Petitioner has failed to identify or explain why the exception to registration with the Department of Transportation would apply. Otherwise, Petitioner was required to register with the Illinois Department of Transportation but failed to do so. Failure to register cannot excuse the tax imposed in connection with such registration. Therefore, as the use of the Aircraft occurred within Cook County, the 1% county tax was properly imposed.

III. Petitioner is Not Entitled to an Abatement of Penalties Due for Reasonable Cause

Finally, Petitioner seeks an abatement of penalty pursuant to section 3-8 of the Uniform Penalty and Interest Act, 35 ILCS 735/1-1 et seq., and argues that its failure to report and pay Use Tax upon bring the Aircraft into Illinois in March 2016 was due to "reasonable cause." (Pet. Br. at 37.) Department regulations provide several factors to consider, the "most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine the proper tax liability and to file returns and pay the proper liability in a timely fashion." 86 Ill. Adm. Code 700.400(b). Whether a taxpayer

has made a good faith effort to determine and pay the proper tax liability will depend on whether that taxpayer exercised ordinary business care and prudence in doing so. 86 Ill. Adm. Code 700.400(c). Finally, "[a] determination of whether a taxpayer exercised ordinary business care and prudence is dependent upon the clarity of the law or its interpretation and the taxpayer's experience, knowledge, and education. *Id.*

Here, Petitioner briefly argues that it is entitled to penalty relief due to "reasonable cause" due to lack of authority on imposing use tax on transient aircraft. (Br. at 37.) Lacking are any evidence or argument that Petitioner exercised ordinary business care. Regardless, Petitioner's claim for penalty abatement is without merit. First, the Illinois Supreme Court's analysis of the *Complete Auto* test in both *Brown's Furniture* and *Irwin Tools* were established case law for years prior to the Petitioner's purchase and use of the Aircraft in Illinois. As set forth above, those decisions reinforced that substantial nexus will be found when the activity involves more than the slightest presence in Illinois. Second, as Petitioner's motion makes clear, it engaged with sophisticated aircraft management and maintenance professionals in determining the placement and use of the Aircraft. Petitioner must be held to the standard of such industry professionals it employs.

As Petitioner has failed to demonstrate that it made a good faith effort to determine its use tax obligations in connection with the use of the Aircraft in Illinois, Petitioner's request for penalty abatement must be denied.

CONCLUSION

For the reasons stated above, the Department's NTL should be upheld in total.

Dated: March 10, 2023

Respectfully submitted,

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