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 MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

WINSTON & STRAWN
Thomas G. Weber
T. Justin Trapp
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
tgweber@winston.com
ttrapp@winston.com

Attorneys for Petitioner, TCRG SN4057, LLC

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND...4

A. The Taxpayer, TCRG...4

B. TCRG's Purchase of the Aircraft..4

C. Aircraft's Extended Time in Gulfstream's Storage Required Extensive Repairs and Maintenance 5

D. Aircraft's Break-In Period at Midway Airport..6

1. The Aircraft Was Brought to Midway Airport for the Break-In Period Because Midway Was the <u>Only</u> Location Where TCRG's Aircraft Service Provider Had the Necessary Staff and Resources to Perform the Work.................6

2. During the Break-In Period, the Aircraft's Contact with Illinois Was Merely Coincidental 7

E. Aircraft Moved to Permanent Home in New York in May 2016 8

F. Department's Audit and Events Leading to This Proceeding............10

1. Department's Audit of Parent, the Incorrect Taxpayer 10

2. Auditor's Flawed Reasons for Seeking to Impose Tax Liability...12

3. TCRG's Petition...13

LEGAL STANDARD...14

ARGUMENT 15

A. *Complete Auto* Framework for Analyzing U.S. Constitution's Dormant Commerce Clause 15

B. There Is No Substantial Nexus Between TCRG and the Aircraft, On the One Hand, and the State of Illinois, On the Other Hand 16

1. The Department Applied the Wrong Legal Standard...............17

2. Under Applicable Law, There is No "Substantial Nexus" Here...18

a. The *Irwin* decision contrasts sharply with TCRG/Aircraft's very minimal nexus............................19

b. Additional cases foreclose a finding of "substantial nexus" here 23

3. A Finding of "Substantial Nexus" Would Subvert the very Purpose of the Illinois Aircraft Use Tax....................26

4. The Break-In Period Should Be Excluded for the "Substantial Nexus" Analysis, But Even If Considered, It Still Supports a Finding of No Tax Liability 27

C. Imposing the Use Tax Here Is Not "Fairly Related" to Services Provided By Illinois....................31

D. As a Matter of Law, the Department Applied the Wrong Rate of Taxation....................36

E. The Department is Not Entitled to Any Penalties....................37

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

Cases

American River Transportation v. Bower,
351 Ill. App. 3d 208 (2004) 34, 35, 36

Brown's Furniture, Inc. v. Wagner,
171 Ill. 2d 410 (1996) ....*passim*

Bruce Motor Freight, Inc. v. Lauterbach,
247 Iowa 956, 77 N.W.2d 613 (1956)...29

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981)...33, 34

Complete Auto Transit, Inc. v. Brady
430 U.S. 274 (1977)..*passim*

Dep't of Revenue v. Yacht Futura Corp.,
510 So. 2d 1047 (Fla. Dist. Ct. App. 1987)...29

Director of Revenue v. Superior Aircraft Leasing Co., Inc.,
734 S.W.2d 504 (Missouri 1987) ....*passim*

Grudle v. Iowa Dep't of Revenue & Fin.,
450 N.W.2d 845 (Iowa 1990)...29

Irwin Indus. Tool Co. v. Dep't of Revenue,
394 Ill. App. 3d 1002, 1015 (2009) ....*passim*

Irwin Indus. Tool Co. v. Illinois Dep't of Revenue,
238 Ill. 2d 332 (2010) ....*passim*

National School Bus Service. Inc. v. Dept. of Revenue,
302 Ill. App. 3d 820 (1998) 16

Panhandle Eastern Pipeline Company v. Hamer,
981 N.E.2d 1107 (Ill. App. 2012)..34

Quill Corp. v. North Dakota,
504 U.S. 298 (1992)...18, 25

Union Pac. R. Co. v. Utah State Tax Comm'n,
110 Utah 99, 169 P.2d 804 (1946)..30

Wisconsin v J. C. Penney Co.,
311 U.S. 435 (1940)..34

Wm. O'Donell, Inc. v. Bowfund Corp.,
114 Ill. App. 2d 107 (1969) 26

Statutes

35 ILCS 105/3-55(h-2)..12

35 ILCS 157/10-15..15, 36

35 ILCS 735/3-8..37

735 ILCS 5/2-1005(c) 14

Cook County Code Section 74-272(b)...36

Other Authorities

https://www.chicago/gov/content/dam/city/depts/fin/supp_info/CAFR
/..33

SUBSTANTIAL, Black's Law Dictionary (11th ed. 2019) 16

PRELIMINARY STATEMENT

Petitioner, TCRG SN4057, LLC ("TCRG"), is a Delaware LLC that purchased an aircraft in December 2015 (the "Aircraft") for the purpose of permanently housing it in New York and transporting New York-based executives. At the time of purchase, the Aircraft had remained in Gulfstream's storage facility for nearly 1.5 years, so extensive repairs and maintenance were required to ensure the Aircraft was airworthy. Thus, after TCRG purchased the Aircraft in Connecticut, it was brought into Wisconsin for 75 days for certain repairs and maintenance, then intermittently brought into Illinois during a two-month break-in period because TCRG's third-party service provider only had the personnel and resources to perform these extensive repairs at Midway Airport. During that break-in period, as the Department admits, TCRG had "no business operations in Illinois."

In May 2016, after the break-in period, the Aircraft was brought to its permanent home at Stewart International Airport in New York. Thereafter, it flew periodically in and out of Illinois from May 2016 through December 31, 2017 (the "Relevant Timeframe"), until TCRG moved the Aircraft back to Illinois in early 2018 under the rolling stock exemption, which the Department does not challenge.

TCRG is entitled to summary judgment in its favor because, based upon the undisputed facts, it would be unconstitutional to impose tax liability under the Commerce Clause and relevant authority. Under the *Complete Auto* test, the tax

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." Here, factors (1) and (4) are not satisfied, which mandates judgment in TCRG's favor.

First, there is no "substantial nexus" between TCRG ***and*** the Aircraft, on the one hand, and the State of Illinois, on the other hand. 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 no business operations in Illinois. There is no connection between TCRG and Illinois.

As for the Aircraft's nexus to Illinois, it is significantly less frequent and more attenuated than any case where a "substantial nexus" has been found. Finding "substantial nexus" here would be an outlier. For example:

- In *Irwin*, the Supreme Court of Illinois approvingly cited a standard from another case (*Superior Aircraft*) looking at the "total flight hours logged on flights to" Illinois as a relevant metric. Here, during the Relevant Timeframe, that number is ***only approximately 7%***, compared to 17.7% in *Superior Aircraft*.

- Also in *Irwin*, the aircraft at issue made 272 total take-offs or landings at Illinois airports; here, the Aircraft made only 67 such flights, a quarter of the amount in *Irwin*.

- In *Brown's Furniture*, substantial nexus was found for a Missouri company that made 940 deliveries into Illinois during a 10-month period (94 deliveries a month) and that placed more than 2,800 advertisements in Illinois media outlets; here, TCRG's Aircraft flew less than 3 flights a month and never advertised in Illinois.

TCRG's connection with Illinois is non-existent and the Aircraft's contact with Illinois was appreciably lower than other cases. In fact, as far as TCRG is aware, no case exists comparable to this one—where a company incorporated outside Illinois with no offices or employees in Illinois purchases an Aircraft outside Illinois, then is subjected to use tax for isolated flights to/from Illinois. If the Tribunal upholds the Department's assessment of tax liability against TCRG, such a finding would lower the standard for "substantial nexus" far beyond what any existing precedent supports. That finding, in turn, would expose other companies to tax liability that have never faced such exposure before. There is thus no "substantial nexus" here.

Second, imposing tax liability of well over $1 million would not be "fairly related" to services provided by Illinois. This is not a case where (i) TCRG used the public roads to deliver its products, (ii) intentionally reached out to Illinois consumers, (iii) had offices or operations in Illinois, or (iv) was organized under Illinois law. Importantly, the Department admits that, during the break-in period, TCRG had "no business operations in Illinois," an admission that logically extends into the Relevant Timeframe as well. The Aircraft only flew into Midway Airport periodically, which is owned by the City of Chicago and shares jurisdiction with various federal agencies. The massive amount of tax liability cannot be "fairly

related" to services provided by the State of Illinois, which TCRG could not have meaningfully availed itself of.

For these reasons and others herein, TCRG respectfully requests that the Tribunal grant summary judgment in its favor and enter a finding that no tax liability is due, among other relief requested in TCRG's Petition.

FACTUAL BACKGROUND

A. The Taxpayer, TCRG

TCRG is an indirectly wholly owned subsidiary of Texas Capitalization Resource Group Inc. ("Parent"). (Stip. ¶ 1.)[1] TCRG is a Delaware limited liability company. (Stip. ¶ 5.) TCRG has never had an office in Illinois and has never had any Illinois-based employees. (Stip. ¶¶ 6-8.)

B. TCRG's Purchase of the Aircraft

On December 18, 2015, TCRG purchased a 2006 Gulfstream Aerospace G450 (the "Aircraft") from Gulfstream Aerospace Corp. in Connecticut. (Stip. ¶ 9.) TCRG purchased the Aircraft for $16.5 million. (Stip. ¶ 10.)

After taking delivery of the Aircraft in East Granby, Connecticut on December 18, 2015, the Aircraft was flown to Appleton, Wisconsin for Gulfstream to perform further repairs and modifications. (Stip. ¶¶ 11-12.) The Aircraft remained in Appleton, Wisconsin for 75 days, during which numerous repairs were performed,

[1] The parties' Stipulation is attached hereto as Ex. 1.

including maintenance on landing gear, electronic equipment and other hardware, repairs to address various fluid leaks, and modifications to the Aircraft's interior and paintjob. (Stip. ¶¶ 13-14.) During the 75 days in which the Aircraft was in Wisconsin for repairs and maintenance, the Aircraft was never present in Illinois. (Stip. ¶ 15.) The State of Wisconsin has not attempted to collect a use tax based upon the Aircraft's limited presence in that state for repairs and maintenance during that time. (Stip. ¶ 16.)

Following repairs and maintenance in Wisconsin, on March 2, 2016, the Aircraft was flown to Cincinnati, Ohio for Part 135 certification. (Stip. ¶ 17.)

C. Aircraft's Extended Time in Gulfstream's Storage Required Extensive Repairs and Maintenance

From July 2014 until TCRG's purchase of the Aircraft in December 2015, the Aircraft had been stored in Gulfstream's used aircraft inventory in Savannah, Georgia. (Stip. ¶ 18.) The extended period that the Aircraft spent out of service in Gulfstream's facilities required more detailed and frequent inspections and repairs to ensure the Aircraft was safe to fly. (Stip. ¶ 19; Majchrowski Aff. at ¶ 3 ("I understand that the Aircraft was stored in Gulfstream Aerospace Corporation's used aircraft inventory in Savannah, Georgia from July 2014 until TCRG's purchase of the Aircraft in December 2015. A year-and-a-half is a longer period than normal for an aircraft to remain in storage and not flying, and this longer period resulted in the

need for more extensive maintenance and repairs to ensure the Aircraft was safe to fly.”).)[2]

D. Aircraft’s Break-In Period at Midway Airport

1. The Aircraft Was Brought to Midway Airport for the Break-In Period Because Midway Was the Only Location Where TCRG’s Aircraft Service Provider Had the Necessary Staff and Resources to Perform the Work

Following the Part 135 certification in Cincinnati, Ohio, the Aircraft was intermittently brought to Midway Airport from March 3, 2016 to May 17, 2016 for maintenance and repairs (the “Break-In Period”).[3] (Stip. ¶ 20.) As the Director of Maintenance for Jen-Air, the third-party contractor that provided maintenance and repair services for the Aircraft, stated:

> In early 2016, after the Aircraft had been in storage for a year-and-a-half, Jen-Air 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. In fact, in New York, where the Aircraft was to be based, Jen-Air did not have any resources to perform maintenance or repair work on the Aircraft during that time period.

(Majchrowski Aff. ¶ 4.) Put differently, the Aircraft was brought to Midway for extensive repairs because Jen-Air, the company that serviced and maintained

---

[2] The Sennett affidavit is attached hereto as Ex. 2 and the Majchrowski affidavit is attached hereto as Ex. 3.

[3] Prior to the Break-In Period, the Aircraft did not take-off or land in Illinois. (Stip. ¶ 23.)

TCRG's fleet of aircraft, was ***only capable of performing the extensive repairs at its Midway Airport facility***, which was the only Jen-Air location in the U.S. at the time with the staff and resources to perform this work. (Majchrowski Aff. ¶ 4; Sennett Aff. ¶ 6.) If Jen-Air would have had the repair and maintenance resources at another airport, whether it be at Stewart International Airport in New York (the Aircraft's home airport) or any other airport in the United States, the Aircraft would have intermittently spent the Break-In Period there. (*Id.*)

As explained in more detail below, while periodically at Midway Airport during the Break-In Period, consistent with the Aircraft's unusually long time in storage at Gulfstream's facility, substantial repairs were made to the Aircraft. (Stip. ¶ 28.)

2. During the Break-In Period, the Aircraft's Contact with Illinois Was Merely Coincidental

During 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 fact, 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.) 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.)

The Department also admits that, during the Break-In Period, "TCRG had no business operations in Illinois." (Stip. ¶ 21.) And it is equally true that none of the passengers flown during the Break-In Period were employees, officers, or directors of TCRG or Parent. (Stip. ¶ 26.)

Moreover, for the flights that occurred during the Break-In Period, they took off from Midway Airport because Jen-Air's facilities were there, and they returned to Midway Airport after each flight to receive maintenance from Jen-Air's team: "The flights the Aircraft flew during this time returned to Midway Airport for the purpose of receiving maintenance and repair work." (Majchrowski Aff. ¶ 5.) Consistent with that, after almost every trip, substantial repairs were made to the Aircraft at Jen-Air's facility at Midway Airport. (Majchrowski Aff. ¶ 5; *see* Ex. 1 thereto.) For instance, during the Break-In Period, 200 hours were spent to perform major repairs on the Aircraft, including but not limited to repairs to landing gear, ice detection unit, central maintenance computer, actuators, hydraulic systems, oil indicating system, and display operational system. (Majchrowski Aff. ¶ 5; *see* Ex. 2 thereto.)

E. Aircraft Moved to Permanent Home in New York in May 2016

After May 17, 2016, the Aircraft was flown to New York to take up its permanent place at a hangar with FBO operator, Atlantic Aviation Stewart, at Stewart

International Airport. (Stip. ¶ 29.) The Aircraft was brought to New York for the purpose of transporting New York-based business executives, which is the reason why the Aircraft was purchased in the first place. (Stip. ¶ 30; Sennett Aff. ¶ 4.)

From May 17, 2016 through December 31, 2017 (again, the "Relevant Timeframe"), the Aircraft made 98 total trips.[4] (Stip. ¶ 31; *see* Ex. D to TCRG's Petition.)[5] Of those 98 trips, 62 (66%) originated in New York and 17 (18%) originated in Illinois. (*Id.*) During this 19-month period, the Aircraft took less than one trip a month originating in Illinois. (*Id.*) And measuring the Aircraft's connection with Illinois in a manner consistent with the standard in *Superior Aircraft*, which looked at the "total flight hours … logged on flights to" Illinois "solely" for the taxpayer's business, during this same timeframe, only approximately 7% of the total flight hours for the Aircraft were logged on flights ***to Illinois***. (*See* Stip. ¶ 31; Ex. D to TCRG's Petition (dividing total flight hours by total flight hours into Illinois).)

It is also undisputed that none of the passengers flown during the Relevant Timeframe were employees, officers, or directors of TCRG, and the flights were not performed to transport TCRG employees, officers, or directors to/from Illinois to conduct business. (Stip. ¶ 32.)

---

[4] "Trips" are delineated on Ex. D to TCRG's Petition.

[5] For efficiency purposes, where TCRG is referring to exhibits attached to its Petition, it has included a cross-reference to that exhibit and is not attaching that exhibit to this motion. The exhibits to the Petition are alphabetical and separate exhibits attached to this brief are numerical (*e.g.*, Exs. 1-6.)

F. Department's Audit and Events Leading to This Proceeding

1. Department's Audit of Parent, the Incorrect Taxpayer

At the beginning of 2018, TCRG decided to base the Aircraft in Illinois because a primary customer wanted to base a longer-range aircraft in New York instead. (Sennett Aff. ¶ 9.) TCRG thus applied for the rolling stock exemption, which listed TCRG (not Parent) as the purchaser of the Aircraft. (Ex. 4, 1/30/18 Rolling Stock Exemption Application.) In connection with the application for the rolling stock exemption, TCRG provided the Department with the required documentation; the Department has never challenged application of the rolling stock exemption to the Aircraft from January 1, 2018 going forward. (Sennett ¶ 9.)

On November 19, 2018, the Department issued an audit notice informing Parent (not TCRG) that the Department would be auditing Parent regarding use of the Aircraft. (Ex. 5, 11/19/18 Notice of Audit Initiation.) After conclusion of the audit, which found tax liability was owed, on August 7, 2020, Parent filed a petition before the Illinois Independent Tax Tribunal seeking reversal of the June 9, 2020 notice of tax liability (the "Parent Petition"). The Parent Petition identified, among other things, that (i) the Department issued the notice of tax liability to the wrong entity, (ii) under prevailing law, there was no basis to find any tax liability was due under the Aircraft Use Tax Act and (iii) even if Aircraft Use Tax did apply to the

purchase of the Aircraft, the Department was applying an incorrect rate for Aircraft Use Tax.[6] (*See generally* 20 TT 93 Docket.)

While the Parent Petition was pending, the Department initiated a parallel audit against TCRG, the purchaser of the Aircraft. (*See* Ex. E to TCRG's Petition (11/30/20 Notice of Audit Initiation).) After issuing the Notice of Audit Initiation and Audit Records Request to TCRG on November 30, 2020, the Department issued both the Notice of Proposed Audit Findings and Notice of Proposed Audit Liability to TCRG on December 7, 2020—just over one week later. (*Id.*)

The Notice of Proposed Audit Liability issued to TCRG on December 7, 2020 imposed Aircraft Use Tax in the amount of $1,196,250, plus interest and penalties. (*Id.*) The $1,196,250 amount was calculated as 7.25% of the purchase price of the Aircraft. (*Id.*) The Department issued the Notice of Proposed Audit Findings and Notice of Proposed Audit Liability to TCRG before TCRG had an opportunity to respond to the Audit Records Request within the 30-day deadline.[7] (*Id.* (December 7, 2020 Notices and November 30, 2020 Audit Records Request).)

---

[6] In connection with the Parent Petition, TCRG moved for summary judgment on the incorrect taxpayer issue, which the Tribunal denied.

[7] In an email dated May 10, 2021, the auditor stated: "I was instructed by management to move forward with a new audit under a pseudo- FEIN. Due to the close statute, I was unable to allow the normal timeframes to respond and determined taxability based on the information already submitted under the parent FEIN." (Ex. 6, 5/10/21 Department email to TCRG.)

Following review by the Informal Conference Board, in late April 2021, the ICB referred the matter back to the auditor to complete the audit of TCRG. (Ex. 6, 4/29/21 ICB email.)

2. Auditor's Flawed Reasons for Seeking to Impose Tax Liability

After some preliminary exchanges with the auditor, the Department sent TCRG a letter on May 18, 2021 (the "Department's May 2021 Letter"). (*See* Ex. F to TCRG's Petition.) In the Department's May 2021 Letter, the auditor claimed that tax liability was being levied against TCRG because the Aircraft did not qualify for an exemption under 35 ILCS 105/3-55(h-2) (hereinafter, the "(h- 2) Exemption"). (*Id.* at 1.) In the Department's May 2021 Letter, the Department claimed the relevant test to "determining taxability" of the Aircraft is whether the Aircraft was stored or used in Illinois ***more than 10 days during the 12 months following purchase of the Aircraft***, which is based off of the definition of "Based in this State" for purposes of the (h-2) Exemption. (*Id.*) In concluding that "there is proper nexus to determine taxability of the aircraft in Illinois," the Department's May 2021 Letter applied the test for determining "Based in this State" for purposes of the (h-2) Exemption. (*Id.*)

On May 28, 2021, TCRG responded, in part, by sending an email noting the Department's error in relying upon the (h-2) Exemption, which does not apply here. (Ex. 6, 5/28/21 TCRG email to Department.) In that same email, TCRG requested

yet again that the Department provide its analysis of the Commerce Clause issue. (*Id.*)

On June 1, 2021, the auditor sent an email addressing why imposing tax liability against TCRG complied with the *Complete Auto* test.[8] (Ex. 6, 6/1/21 Department email to TCRG.) This email is addressed below, but suffice it to say, it included factually incorrect statements and applied the incorrect legal standard, which TCRG pointed out in its letter dated July 7, 2021. (*See* Ex. G to TCRG's Petition.)

In late September 2021, following TCRG receiving notice from the ICB that the Department determined there would be no adjustment to the original proposed assessment, TCRG confirmed that it did not wish to continue with the ICB process so that it could timely seek review before the Tribunal. The Department then sent a Notice of Audit Results dated October 14, 2021, and a Notice of Tax Liability dated November 16, 2021 (the "Notice"). (*See* Ex. A & H to TCRG's Petition.)

3. TCRG's Petition

On January 14, 2022, TCRG filed the Petition that is currently before the Tribunal. TCRG's Petition seeks the following relief:

- "Enter judgment in favor of TCRG and against the Department, resulting in

[8] This email was created by the Department in response to TCRG's inquiry; it was not prepared prior to the assessment of tax liability against TCRG.

cancellation of the Notice and a finding that TCRG owes no tax liability, interest[], penalties, or any other payment."

- "In the alternative, if the Tribunal determines that the Aircraft Use Tax applies to TCRG's ownership of the Aircraft, TCRG respectfully requests that the Tribunal determine the proper amount of Aircraft Use Tax to be $1,031,250 (or a lesser, apportioned amount taking into account the minimal time spent by the Aircraft in Illinois compared to other states)."
- "In the alternative, if the Tribunal determines that the Aircraft Use Tax applies to TCRG's ownership of the Aircraft, TCRG respectfully requests that the Tribunal find that TCRG had reasonable cause not to timely pay such Aircraft Use Tax such that no penalties apply to TCRG's failure to timely pay the Aircraft Use Tax."
- "Any other relief that the Tribunal determines is appropriate and just."

(*See* 22 TT 04 Docket.)

LEGAL STANDARD

Summary judgment is appropriate "if 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." 735 ILCS 5/2-1005(c).

ARGUMENT

For the reasons herein, based upon the undisputed facts, TCRG is entitled to judgment as a matter of law that, under the *Complete Auto* factors, tax liability cannot be imposed in connection with the Aircraft.

A. *Complete Auto* Framework for Analyzing U.S. Constitution's Dormant Commerce Clause

Under the Illinois Aircraft Use Tax Act, "[a] tax is hereby imposed on the privilege of using, in this State, any aircraft as defined in Section 3 of the Illinois Aeronautics Act acquired by gift, transfer, or purchase after June 30, 2003."[9] 35 ILCS 157/10-15. "The rate of tax shall be 6.25% of the selling price for each purchase of aircraft that qualifies under this Law." *Id.*

But there are constitutional limits to imposing use tax. "The Supreme Court has consistently interpreted" the Commerce Clause of the U.S. Constitution "as implicitly containing a negative command, known as the dormant commerce clause, which limits the power of the states to tax interstate commerce even when Congress has failed to legislate on the subject." *Irwin Indus. Tool Co. v. Illinois Dep't of Revenue*, 238 Ill. 2d 332, 341 (2010). "Contemporary dormant commerce clause

[9] The Department has been unclear whether it is proceeding under the Illinois Aircraft Use Tax or the Illinois Use Tax, but the analysis under either law for purposes of this motion is similar.

analysis does not prohibit all state taxation of interstate commerce but rather only that which is unduly restrictive or discriminatory." *Id.*

"[T]o withstand a claim that it has unconstitutionally burdened interstate commerce, a state tax must satisfy the four-part test articulated in *Complete Auto Transit, Inc. v. Brady* [430 U.S. 274 (1977)]." *Id.* "Under *Complete Auto,* the tax 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.* If any of the four *Complete Auto* factors are not met, there can be no finding of tax liability against TCRG. *Id.*

B. There Is No Substantial Nexus Between TCRG and the Aircraft, On the One Hand, and the State of Illinois, On the Other Hand

Under the first *Complete Auto* factor, the "tax must … be applied to an activity with a substantial nexus with the taxing state." *Irwin*, 238 Ill. 2d at 341. Critically, simply having a "nexus" with Illinois is not sufficient—it must be "substantial." *See* SUBSTANTIAL, Black's Law Dictionary (11th ed. 2019) ("Considerable in extent, amount, or value; large in volume or number"); *e.g.*, *National School Bus Service. Inc. v. Dept. of Revenue*, 302 Ill. App. 3d 820 (1998) ("The case law interpreting the rolling stock exemption has required some ***substantial use*** of the rolling stock in interstate commerce. The Department has therefore required ***proof of regular and frequent such use*** of the rolling stock.") (emphasis added).

As explained below, (i) the Department admittedly applied the wrong legal standard; and (ii) the undisputed facts establish that TCRG's and the Aircraft's nexus with Illinois is insufficient to constitute a "substantial nexus" under prevailing law. Because TCRG itself indisputably has ***no nexus*** to Illinois and the Aircraft's flights to/from Illinois are orders of magnitude less extensive than existing precedent, this Tribunal should find there is no "substantial nexus."

1. The Department Applied the Wrong Legal Standard

In an email dated June 1, 2021, the auditor explained that the "substantial nexus" standard was met because:

> TCRG had locations and/or operations in several states, including Illinois at the time the aircraft was purchased and subsequently used in Illinois. The aircraft had physical presence in Illinois and was regularly used in Illinois. Furthermore, per Brown's Furniture Inc., only the "slightest" presence is necessary to create nexus, therefore, nexus has been established.

(Ex. 6, 6/1/21 Department email to TCRG.) In essence, the Department's decision to impose tax liability was based upon two findings: (i) that TCRG "had locations and/or operations" in Illinois, and (ii) "per Brown's Furniture Inc., only the 'slightest' presence is necessary to create nexus, therefore, nexus has been established." (*Id.*) Both assertions are demonstrably wrong and undermine the reliability of the Department's audit and conclusions.

First, it is undisputed that TCRG is not an Illinois entity and does not have any Illinois offices, Illinois employees, Illinois "locations," or Illinois "business

operations." (Stip. ¶¶ 5-7, 21.) TCRG pointed this out to the Department in a letter dated July 7, 2021. (*See* Ex. G to TCRG's Petition.) And the Department has stipulated that "TCRG has no business operations in Illinois." (Stip. ¶ 21.) Despite being alerted during the audit that there was no reasonable basis to rely upon this fact to impose tax liability, the auditor/Department never corrected its mistaken reliance on this fact.

Second, the Department's position that "only the 'slightest' presence is necessary to create nexus" is wrong—and the Department relied upon that faulty legal premise despite TCRG notifying the Department that it was incorrect and prejudicial to TCRG to apply that standard.

In *Quill Corp. v. North Dakota*, the Supreme Court of the United States stated that its own precedent has "***expressly rejected*** a 'slightest presence' standard of constitutional nexus." 504 U.S. 298, 314 n. 8 (1992) (emphasis added). Applying *Quill*, the Supreme Court of Illinois in *Irwin* stated that "the 'slightest' physical presence within a state ***is not enough*** to establish substantial nexus." 238 Ill. 2d at 342 (emphasis added). The Department's adherence to the "slightest presence" formulation contradicts applicable law.

2. Under Applicable Law, There is No "Substantial Nexus" Here

While *Quill* indicated that the nexus must be more than slight, essentially setting a minimal floor, it never indicated in detail ***how much more*** than slight was

required, leaving that to the discretion of courts applying the law to the specific facts of each case. But the leading cases applying the "substantial nexus" standard invariably support the following conclusion: that where a "substantial nexus" has been found, it includes far more connections between the taxpayer/its activity and the taxing state than TCRG and the Aircraft. In fact, TCRG respectfully submits that a finding of tax liability here—where the taxpayer itself has absolutely no connection to Illinois and the flights to/from Illinois are a fraction of the flights in other cases—would be the first decision of its kind in any jurisdiction in the United States. In effect, to uphold a finding of tax liability, this Tribunal would have to apply *Irwin* in a way that lowers what constitutes "substantial nexus," which could have far-ranging implications of subjecting new activities to tax liability.

a. The *Irwin* decision contrasts sharply with TCRG/Aircraft's very minimal nexus

Under the Supreme Court of Illinois' *Irwin* decision, the "substantial nexus" analysis includes a review of ***whether the aircraft*** ***<u>and</u>*** ***whether the taxpayer*** have a "sufficient physical presence in Illinois to establish a substantial nexus with the state." *Irwin*, 238 Ill. 2d at 342-343 ("With the foregoing principles and decisions in mind, we now consider ***whether ATC Air [the taxpayer] and the airplane*** at issue had a sufficient physical presence in Illinois to establish a substantial nexus with the state.") (emphasis added); *see also Irwin Indus. Tool Co. v. Dep't of Revenue*, 394 Ill. App. 3d 1002, 1015 (2009) ("… the United States Supreme Court seemed to

indicate that a connection has to be established both between the state and the taxpaying entity being taxed, as well as the state and the activity (*i.e.,* use of the property) that it seeks to tax.”). This two-prong analysis shows there is not a “substantial nexus” in this case.

Focusing first on the taxpayer itself, the *Irwin* court noted the taxpayer’s extensive connections with Illinois:

> [A]lthough ATC Air is 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 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.

Irwin, 238 Ill. 2d at 345 (emphasis added); *see also id.* at 335 (“ATC Air was a wholly owned subsidiary of Irwin, and its sole purpose was to provide air transportation services to Irwin and its affiliated companies. Irwin’s CEO was ATC Air’s only director, as well as its chairman and CEO. ATC Air’s other officers were also Irwin’s officers. ATC Air’s CEO/only director/chairman, CFO, and general counsel all had their offices in Illinois.”).

While it was critical in *Irwin* that the aircraft’s very purpose was to transport executives into Illinois and the taxpayer’s sole director, chairman, CEO, CFO, and general counsel all had offices in Illinois, TCRG has no such connections. It is undisputed that TCRG is a Delaware LLC that has no offices in Illinois, no

employees in Illinois, no officers or directors in Illinois, and no business operations in Illinois. (Stip. ¶¶ 5-7, 21.) Thus, for the prong of the "substantial nexus" test relating to the taxpayer's connection to Illinois, the undisputed evidence establishes there is **no connection** whatsoever between TCRG and Illinois.

As for the Aircraft's connection to Illinois, the court in *Irwin* referenced the test in *Superior Aircraft* that "the time the airplane spent in flight between [the taxing state] and other destinations … demonstrated the significance of the airplane's presence inside the state, as it related to its purpose, function, and use." *Irwin*, 238 Ill. 2d at 344. In *Superior Aircraft*, discussed in more detail below, the Missouri Supreme Court looked at the "total flight hours … logged on flights ***to Missouri*** solely" for the taxpayer's business, noting that 17.7% of total flights hours were on flights ***to Missouri***. *See Director of Revenue v. Superior Aircraft Leasing Co., Inc.*, 734 S.W.2d 504, 507 (Missouri 1987). Applying that same standard, during the Relevant Timeframe, only approximately 7% of the total flight hours for the Aircraft were logged on flights to Illinois. (*See* Stip. ¶ 31; Ex. D to TCRG's Petition.) The percentage of flight hours here is far less than *Superior Aircraft*.

Further, the *Irwin* court relied upon the fact that, during the relevant period, the aircraft "made a total of 272 take-offs or landings at Illinois airports." *Irwin*, 238 Ill.2d at 342-343. Here, the undisputed evidence shows the Aircraft had merely a fraction of flights compared to *Irwin*. During the Relevant Timeframe, the

Aircraft took 67 flights to/from Illinois, which is a quarter of the take-offs/landings in *Irwin*.[10] (*See* Ex. D to TCRG's Petition.)

Based upon the nexus between ***both*** the aircraft and taxpayer, on the one hand, and Illinois, on the other, *Irwin* held that the "substantial nexus" test was "met." *Irwin*, 238 Ill.2d at 345. This case is much different:

	Irwin and *Superior Aircraft*	TCRG/Instant Case
Taxpayer's connection to taxing state	Sole director, CEO, Chairman, CFO, and General Counsel had offices in IL and used aircraft to travel there (*Irwin*) Incorporated with office in taxing state (*Superior Aircraft*)	**None**
Aircraft's connection to IL	272 take-offs and landings in IL (*Irwin*) 17.7% of flights hours were on flights into taxing state (*Superior Aircraft*)	67 take-offs and landings in IL (**less than 1/4 of *Irwin***) 7% of flight hours were on flights into IL (**39% of *Superior Aircraft***)

[10] While the "purpose" of the aircraft in *Irwin* was to "provide transportation services to Irwin's officers and employees" who all had physical offices in Illinois and conducted business in Illinois, the purpose of TCRG's Aircraft has no such connection to Illinois. *Irwin*, 238 Ill. 2d at 343; Sennett Aff. ¶ 4.

The foundation for *Irwin*'s finding that a "substantial nexus" existed is simply not present here. Given that the taxpayer's connection to Illinois bolstered the overall finding of "substantial nexus" in *Irwin*, surely a lack of any such connection between TCRG and Illinois requires a ***stronger*** finding of nexus between the Aircraft and Illinois to support an overall finding of "substantial nexus." But no such finding exists, and the "substantial nexus" test is not met.

b. Additional cases foreclose a finding of "substantial nexus" here

Irwin is not alone. Other cases highlight that "substantial nexus" cannot be found here.

First, in *Director of Revenue v. Superior Aircraft Leasing Co., Inc.*, 734 S.W.2d 504 (Missouri 1987), mentioned above, the taxpayer was a Missouri corporation with an office in Missouri and its principal place of business in Ohio. *Id.* at 505. In finding a "substantial nexus" under the *Complete Auto* framework, the Supreme Court of Missouri relied upon two findings, neither of which apply here.

The court first relied upon the fact that, during the relevant time period, "17.7 percent of the total flights hours were logged on flights to Missouri solely for Super Aircraft's business." *Id.* at 507. Applying that same formula to this case, from May of 2016 through the end of 2017, only approximately 7% of the total flight hours were logged on flights to Illinois. (*See* Ex. D to TCRG's Petition.)

The court next stated:

> ***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 (emphasis added). But here, in contrast, TCRG is not "organized and licensed under the laws of" Illinois, did not "maintain[] a business office in" Illinois, did not conduct board meetings in Illinois, did not conduct board meetings "in accordance with" Illinois law, and did not subject itself to using Illinois law to "enforce resolutions arising from" its board meetings. (Stip. ¶¶ 5-7, 21.)

Second, in *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410 (1996), the Supreme Court of Illinois held that imposing the use tax did not violate the Commerce Clause because the taxpayer (a Missouri company) made over 940 deliveries into Illinois during a 10-month period and placed more than "2,800 individual advertisements in Illinois media outlets." *Id.* at 413-414. The Court in *Brown's Furniture* noted:

> According to a stipulation prepared by the parties, Brown's Furniture made 942 deliveries in Illinois during the 10–month audit period. Testimony at trial indicated that during a typical trip into Illinois, Brown's Furniture might make as many as five or six individual deliveries. Thus, during the audit period, Brown's Furniture was averaging between 15 and 18 trips into Illinois per month, or a minimum of about one every other day. We believe that by physically

> sending its representatives into Illinois on this regular and frequent basis, Brown's Furniture has established more than a slight physical presence within the State.

Id. at 425.

Brown's Furniture is no comparison to this case. The taxpayer in *Brown's Furniture* took more than 94 trips a month into Illinois; in contrast, TCRG averaged less than 3 flights in/out of Illinois per month during the Relevant Timeframe. (Stip. ¶ 31.) And TCRG has not advertised at all in Illinois (unlike the 2,800 advertisements in *Brown's Furniture*). *Brown's Furniture* and this case are worlds apart.

Third, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the taxpayer was a Delaware corporation that sold office equipment and supplies, with offices and warehouses in Illinois, California, and Georgia. *Id.* at 302. While the taxpayer had no employees or tangible property in North Dakota, it nevertheless had about 3,000 customers in North Dakota. *Id.* And the taxpayer also "each year mails over 60 different catalogs and flyers to its North Dakota customers. This amounts to more than 230,000 separate pieces of mail, weighing over 24 tons, sent into the State annually by Quill." *State By & Through Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 205 (N.D. 1991), *rev'd sub nom. Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298 (1992). These extensive contacts constituted a "substantial nexus."

Again, the comparison to TCRG is not even close, which does not have "thousands" of customers in Illinois, has not advertised its services within Illinois through any medium whatsoever, and, by the Department's own admission, has "no business operations" in Illinois. (Stip. ¶ 21.)

3. A Finding of "Substantial Nexus" Would Subvert the very Purpose of the Illinois Aircraft Use Tax

While the authority above, by itself, requires finding there is no "substantial nexus," there is a separate reason why the Tribunal should grant TCRG's motion: a finding of substantial nexus, and tax liability, undermines the very purpose of the use tax—and, in the process, would harm Illinois businesses.

A use tax intends to prevent Illinois residents from evading the Retailers' Occupation Tax, ultimately serving to protect Illinois retailers against the diversion of business to out-of-state retailers. *E.g.*, *Wm. O'Donell, Inc. v. Bowfund Corp.*, 114 Ill. App. 2d 107, 109-110 (1969) ("The purpose of the use tax is to prevent the evasion of the Retailers' Occupation Tax when purchases of tangible personal property used in Illinois are made outside the State and to protect the local retail merchant against diversion of his business to out-of-state sellers."); *see also* *Brown's Furniture*, 171 Ill.2d at 418.

But if the Tribunal upholds tax liability here, despite the taxpayer having no presence in Illinois and minimal flights in and out of Illinois, it will incentivize aircraft owners to avoid Illinois airports out of fear of becoming unfairly liable for

tax liability despite minimal or no connections to, or presence in, Illinois. That would divert business to out-of-state retailers and take business away from skilled technicians and professionals in Illinois by imposing additional, severe costs on coming into Illinois for such repairs and maintenance. It would also motivate out-of-state businesses that operate their own aircraft to avoid organizing or attending meetings or events in Illinois.[11]

For these policy reasons as well, summary judgment in TCRG's favor should be granted.

4. The Break-In Period Should Be Excluded for the "Substantial Nexus" Analysis, But Even If Considered, It Still Supports a Finding of No Tax Liability

In *Irwin*, the Supreme Court of Illinois stated that presence in Illinois supports imposing the use tax ***only if*** such presence is "not coincidental":

> The airplane's frequent physical presence in Illinois, through the many takeoffs and landings from Illinois runways, as well as the nights that it spent in Illinois, ***was not coincidental, but was inherent in its basic purpose and function in this state. The airplane was owned by ATC Air, whose corporate purpose was to provide transportation services to Irwin's officers and employees. Thus, the airplane frequently and regularly flew to Illinois at the behest of Irwin's corporate officers (four of whom had their offices***

[11] Further, it is unclear how imposition of a tax in this instance would prevent avoidance of the retailers' occupation tax by those making out-of-state purchases, as TCRG did not purchase the Aircraft with the intention to bring it into Illinois, but rather with the intention to bring it to New York for New York based executives. If Jen-Air had the requisite staff and expertise at its New York facilities, TCRG would have taken the Aircraft there instead.

> ***in Illinois) to transport them to and from destinations throughout the United States.***

238 Ill. 2d at 343 (emphasis added). The Aircraft's presence in Illinois during the limited Break-In Period was purely "coincidental"—and had nothing to do with TCRG's business operations in Illinois (there are none).

The undisputed facts show 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.[12] (Stip. ¶¶ 21, 26.)

---

[12] Unlike *Irwin*, the Aircraft's presence in Illinois during the Break-In Period had nothing to do with the Aircraft's "basic purpose and function," which was to be a New York-based aircraft servicing New York-based clients. And further unlike

It bears emphasis that the Department has expressly stipulated to the fact that, during the Break-In Period, "TCRG had no business operations in Illinois." (Stip. ¶ 21.) That admission is critical because it establishes that TCRG's flights in and out of Illinois during the Break-In Period were happenstance given Jen-Air was located here, not because of any business objectives. TCRG is not aware of a single case in any jurisdiction where the use tax was imposed upon a taxpayer that admittedly had "no business operations" whatsoever in the taxing state.

Even beyond the "coincidental" nature of the Aircraft's contacts with Illinois during the Break-In Period, as a legal matter, 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." *See generally Dep't of Revenue v. Yacht Futura Corp.*, 510 So. 2d 1047 (Fla. Dist. Ct. App. 1987) (no tax where a boat was having warranty repairs performed over a period of 85 days); *Grudle v. Iowa Dep't of Revenue & Fin.*, 450 N.W.2d 845 (Iowa 1990) (no tax where the trucks "were at rest either awaiting another trip or being repaired to keep them in condition for interstate use"); *Bruce Motor Freight, Inc. v. Lauterbach*, 247 Iowa 956, 77 N.W.2d 613 (1956) (no tax where trucks were idle for purpose of installing

---

Irwin, the Aircraft did ***not*** "frequently and regularly" fly into Illinois "at the behest" of Illinois-based officers to "transport them" throughout the United States to conduct TCRG's business.

safety equipment); *Union Pac. R. Co. v. Utah State Tax Comm'n*, 110 Utah 99, 169 P.2d 804 (1946) (no tax where train engines were temporarily standing idle while being repaired).

Simply put, if TCRG would have known that these limited Break-In Period contacts, which were coincidental and tangential to the purpose for which the Aircraft is used, could incur tax liability, it would have never retained a company with operations in Illinois—it would have taken other efforts to work with a maintenance and repair company in New York, where the Aircraft is based. 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 them avoiding Illinois-based and Illinois-located maintenance and repair companies. That perverse result contradicts the very purpose of a use tax.

Alternatively, even if the Break-In Period is considered, it would not change the final analysis. Indeed, it would have no effect on the undisputed facts that the Aircraft had no connection to Illinois and was intended to be based in New York for the benefit of New York-based executives. (Sennett Aff. ¶ 4.) So that prong of the "substantial nexus" analysis remains strongly in TCRG's favor. And 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 Aircraft's take-offs and landings at Illinois airports would be 79 over a period

extending over two years (compared to 272 flights in *Irwin*). (Stip. ¶ 31; *see also* Ex. E to TCRG's Petition, 2/5/21 Letter at 8-9.) There is no precedent supporting a finding of "substantial nexus" on these undisputed facts.

C. Imposing the Use Tax Here Is Not "Fairly Related" to Services Provided By Illinois

The fourth *Complete Auto* factor requires that imposing the tax be "fairly related to the services provided by the state."[13] *Irwin*, 238 Ill. 2d at 341. TCRG's complete lack of any business presence in Illinois, coupled with the fact that the Aircraft's time in Illinois was practically limited to a single airport, makes it difficult to see how services provided by the State of Illinois with respect to either the Aircraft or TCRG are "reasonably related" to the $1 million+ tax liability that the Department is attempting to collect.

For example, in *Brown's Furniture*, the Supreme Court of Illinois described the reasons for finding the "reasonably related" prong was met as follows: "Illinois provides services which facilitate Brown's Furniture's sale of furniture within the State. Brown's Furniture benefits from public roads, police protection, a judicial system and all the other 'usual and usually forgotten

[13] Despite TCRG's attempt over months and numerous emails to understand the Department's basis to impose tax liability, all the Department ever revealed on the "fairly related" prong was the statement that "[t]he taxpayer was dependent upon the State of Illinois for policy protection and State services while the aircraft was being used in Illinois." No explanation beyond this conclusory statement was ever provided.

advantages conferred by the State's maintenance of a civilized society.'" 171 Ill. 2d at 429. And in *Superior Aircraft*, the Supreme Court of Missouri found the tax was "fairly related" to services provided by Missouri because the taxpayer was "***a corporation organized and licensed under the laws of Missouri and maintains a business office in Missouri, [and] 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." *Superior Aircraft*, 734 S.W.2d at 507 (emphasis added).

TCRG has no business functions in the State of Illinois, as the Department admits, so the services provided by Illinois cannot facilitate TCRG's business. Unlike in *Brown's Furniture*, where the taxpayer was using public roads to deliver merchandise and thus secure a profit, TCRG was not using public roads (instead periodically taking off and landing at Midway Airport on runways not maintained by the State of Illinois) and was not delivering merchandise in Illinois. Further, TCRG, in fact, paid for its use of the runways and facilities at Midway, in the form of various fees as shown in Ex. F to the TCRG Petition (last page of exhibit).

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. It is a well-established fact, of which the Tribunal can take judicial notice, that Midway Airport: (i) is owned by the City of Chicago, (ii) is operated by the Chicago Department of Aviation, and (iii) receives significant police support and security assistance from federal TSA agents.[14] And, of course, the runway at Midway Airport is unlike the public roads of Illinois, which are maintained by Illinois, funded by Illinois, and subject to Illinois-provided police and fire services.

Further, as a matter of common sense, when the Aircraft—which was hangered in New York during the Relevant Timeframe, was purchased by a Delaware LLC, and was intended to transport New York-based executives—periodically flew in and out of Midway Airport, it did not receive the scope of services usually present in other cases that would justify imposing tax liability well over $1 million.

Courts have also explained that, in applying the "fairly related" factor of *Complete Auto*, "the measure of the tax must be ***reasonably related to the extent of the contact***, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), (quoting *Western Live Stock v. Bureau of*

---

[14] *See, e.g.,* https://www.chicago/gov/content/dam/city/depts/fin/supp_info/CAFR/2021CAFR/Midway2021.pdf, at 7 (noting that "Chicago Midway International Airport [is] an enterprise fund of the City of Chicago, Illinois"), 24.

Revenue, 303 US 250, 254) (emphasis added). In other words, "the incidence of the tax as well as its measure [must be] tied to the earnings which the State ... has made possible . . . ." *Id.* (quoting *Wisconsin v J. C. Penney Co.*, 311 U.S. 435, 446 (1940)).

The incidence and measure of the tax, here the Aircraft's brief presence in Illinois and its purchase price, respectively, are ***not*** reasonably related to earnings "made possible" by Illinois. In finding that the "fairly related" test is satisfied, courts have consistently found that benefits provided by the state must contribute to the taxpayer's revenue stream. *E.g.*, *Commonwealth Edison*, 453 U.S. at 628-629 (noting the necessary tie to earnings made possible by the State); *Panhandle Eastern Pipeline Company v. Hamer*, 981 N.E.2d 1107, 1119-1120 (Ill. App. 2012) (taxpayer operated compressor stations across Illinois that were maintained by Illinois employees and on Illinois land, and thus enjoyed "the benefits that Illinois provides for its property and operations in Illinois"). By simply taking off and landing at Midway Airport periodically, TCRG was not reliant upon significant benefits from the State of Illinois for its revenue stream.

In *American River Transportation v. Bower*, the Appellate Court of Illinois sustained a challenge based on the fairly related prong of the *Complete Auto* test against a use tax for fuel as applied to certain tugboats that purchased and loaded the fuel outside of Illinois. 351 Ill. App. 3d 208, 212-213 (2004). The tugboats

at issue spent at least half of their time pushing barges in Illinois waters, but never docked in any Illinois port; separate tugboats that docked at Illinois ports did pay the tax at issue. In finding that the fairly related prong was not satisfied, the Appellate Court distinguished the facts from two separate cases, *Brown's Furniture* and *Town Crier, Inc. v. Department of Revenue*:

> Both cases involved out-of-state retail establishments that made substantial deliveries of their products, via their own trucks, to buyers in Illinois. As such, those retailers received the benefits of Illinois's public roads, police protection, and judicial system, as well as other advantages conferred by the maintenance of a civilized society. Here, ARTCO did not receive any such benefit from Illinois in relation to its line haul tugboats. The Department argues that Illinois statutory law provided ARTCO tugboats with protection from polluted waterways and protection of aquatic life. However, these "benefits," while related to waterways used by ARTCO, fall far short of benefits that might be enjoyed by a firm sending its trucks to use the roads of this state.

American River, 351 Ill. App. 3d at 212.

TCRG's situation is much closer to the ARTCO tugboats than a firm sending its trucks to use the roads of Illinois to make "substantial deliveries." The "benefits" afforded to TCRG, if any at all, are limited to (i) the small amount of time the Aircraft spent in Illinois airspace and there is no authority "flying over" or through a state satisfies this *Complete Auto* factor,[15] and (ii) the time the Aircraft spent at

[15] *American River*, 351 Ill. App. 3d at 212-213 ("In an analogous situation, an aircraft owner does not pay Illinois tax for fuel purchased and loaded out of state yet consumed while flying over this state. This is so even though the aircraft is in Illinois

Midway Airport between flights. This is more analogous to the nominal benefits afforded in *American River* to the line haul tugboats while in Illinois waters.

In the end, TCRG has no employees in Illinois, no offices in Illinois, did not advertise in Illinois, has "no business operations in Illinois," and did not leverage Illinois' state services to extract financial benefits—the Aircraft merely flew in and out of Midway Airport with frequency that pales to other examples where the "fairly related" prong was met. This is particularly true in light of the $1 million+ tax liability that the Department is attempting to impose upon TCRG. The Tribunal should find this factor of the *Complete Auto* analysis in TCRG's favor, which prevents the Department from assessing tax liability in connection with the Aircraft.

D. As a Matter of Law, the Department Applied the Wrong Rate of Taxation

Under the Aircraft Use Tax Act, the taxable rate is 6.25% of the purchase price. 35 ILCS 157/10-15 ("The rate of tax shall be 6.25% of the selling price for each purchase of aircraft that qualifies under this Law."). The Department failed to apply that rate, purportedly claiming in a recent telephone call that an additional 1% Cook County Use Tax applies here. That position was never provided by the auditor. In any event, Section 74-272(b) of the Cook County Code provides that "[e]xcept as provided in Section 74-273, a tax is imposed at the rate of one percent

---

airspace and Illinois provides services to help keep the air clean as well as emergency services and other indicia of 'civilized society.'").

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 Aircraft is not titled or registered with an agency of the State of Illinois, but rather with the FAA. The Cook County Use Tax therefore does not apply to the purchase of the Aircraft by TCRG.

E. The Department is Not Entitled to Any Penalties

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. Given the lack of any authority imposing use tax on aircrafts with presence in the taxing state as transient as the Aircraft (especially imposing such tax on a taxpayer not organized in and having no locations or business operations in Illinois), along with 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.

CONCLUSION

For these reasons, TCRG respectfully requests that the Tribunal grant its 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.

Dated: January 20, 2023

Respectfully submitted,

Thomas G. Weber
T. Justin Trapp
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
tgweber@winston.com
ttrapp@winston.com

Attorneys for Petitioner, TCRG SN4057, LLC

CERTIFICATE OF SERVICE

I, Thomas G. Weber, Petitioner's attorney, hereby certify that on January 20, 2023, a copy of Petitioner TCRG's Memorandum of Law in Support of Its Motion for Summary Judgment, was sent via e-mail and U.S. mail to:

John J. Walz
Robert Lynch
Office of the Illinois Attorney General
100 W. Randolph St.
Chicago, IL 60601
john.walz3@illinois.gov
robert.lynch2@illinois.gov

/s/ Thomas G. Weber
Thomas G. Weber