ILLINOIS INDEPENDENT
TAX TRIBUNAL

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

ORDER ON SUMMARY JUDGMENT

The Illinois Department of Revenue ("Department") issued a Notice of Tax Liability to TCRG SN057 LLC ("TCRG") assessing it use tax, penalties and interest on its Aircraft, under the Aircraft Use Tax Act ("use tax"), 35 ILCS 157/10-1, *et. seq*. TCRG timely filed a petition in the Tax Tribunal protesting this notice alleging that the Department was barred by the Commerce Clause from assessing the tax. TCRG also alleged that the Department wrongly assessed it use tax above the 6.25% state rate without justification. Finally, it alleged that it had reasonable cause to claim that it was not required to pay use tax on the aircraft and, therefore, penalties should be abated.

TCRG and the Department have filed cross-motions for summary judgment on all of the issues raised by the pleadings. For the reasons stated below, summary judgment is granted in favor of the Department and against TCRG in part and in favor of TCRG and against the Department in part.

Background

TCRG is a subsidiary, and a disregarded entity of Texas Capitalization Resource Group, Inc., whose principal place of business is in Texas. Stip. ¶¶ 2-3.[1] TCRG has never had Illinois offices or Illinois-based employees. Stip. at ¶¶ 5-8.

On December 18, 2015, TCRG purchased a 2006 Gulfstream Aerospace G405 (the "Aircraft") in Connecticut. Stip. ¶ 9. TCRG was listed as the purchaser on the Aircraft's Bill of Sale, with an address of 227 West Monroe Street, Suite 4900, Chicago, Illinois 60606. Dep't Ex. F. The registration documents filed with the Federal Aviation Administration ("FAA") seeking a registration change for the Aircraft also listed TCRG's address as 227 West Monroe, Suite 4900, Chicago Illinois 60606. *Id.*

Matthew Sennet ("Sennett"), the managing Director of Franklin Monroe Administrative Services ("Franklin Monroe") averred that Franklin Monroe had been retained by TCRG "to oversee and manage the operation and administration of its aircraft fleet." Affidavit of Matthew Sennett ("Sennett Aff.") at ¶ 2; Second Affidavit of Matthew Sennet ("Second Sennet Aff.") at ¶ 2). According to Sennett, the use of a "Chicago address on the FAA registration document [was] for Franklin Monroe, not TCRG," and that address was provided "on the FAA registration simply for administrative purposes as the location to send documents and notices to." Second Sennett Aff. at ¶ 4.

Prior to the Aircraft's purchase by TCRG, from June 2014 to the purchase date, the Aircraft had been stored in Georgia. Stip. ¶ 18. On December 18, 2015, TCRG took delivery of the Aircraft in Connecticut, and flew it to Wisconsin, where it remained for 75 days undergoing repairs and modifications. *Id.* During that period, it made no take-offs or landings in Illinois. *Id.* ¶ 12-13.

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[1] The facts are taken from the Exhibits to Petitioner to Illinois Independent Tax Tribunal by TCRG SN5047, LLC ("Pet. Ex. __"); the Stipulated Facts of the Parties ("Stip. __"), which were included as exhibits by both parties in this case; TCRG MSJ Exhibits ("TCRG Ex. ___"), of which Exhibit 2 is the Affidavit of Matthew Sennet ("Sennett Aff.__"); the Second Affidavit of Matthew Sennett ("Second Sennett Aff. ___"), which was filed as a separate document, and the Index of Department Exhibits ("Dep't Ex." ___).

On December 15, 2015, TCRG entered into an Aircraft Lease Agreement with Executive Jet Management ("EJM"), which was not an Illinois company, for the Aircraft in order to generate lease payments "for its financial benefit." Dep't Ex. C, Section 1. In the EJM lease, TCRG was listed as the Aircraft's registered owner, with a principal place of business of 227 West Monroe, Suite 4900, Chicago, IL 60606. *Id.* Sennet, of Franklin Monroe, 227 West Monroe, Suite 4900, Chicago, Illinois, 60606 was listed as TCRG's representative under the lease, and the person to whom all invoices and notices regarding such matters as scheduling, security, medical emergency and accidents were to be directed. *Id.* Ryan Majchrowski of Jen-Air, LLC, also of Chicago, was listed as TCRG's representative for maintenance. *Id*. Chicago Midway was listed as the Aircraft's home airport. *Id.* Guggenheim Capital, LLC ("Guggenheim Capital"), 227 W. Monroe, Suite 4900, Chicago, Illinois, 60606, was listed as an allowed user of the Aircraft under the lease. *Id.*

On December 15, 2015, and February 29, 2016, TCRG entered into two "Aircraft Dry Leases" with Guggenheim Capital ("Guggenheim Leases").[2] Dep't Exs. D, E. Both leases were for a term of one year. Dep't Exs. D, E. Under section Eight of the Guggenheim Leases, TCRG, as the lessor, was obligated to repair and maintain the Aircraft "so as to keep it in as good and safe operating condition" during the lease term. Dep't Ex. D, E. Section Nineteen of Guggenheim Leases stated that "Guggenheim Capital LLC with an address of 227 West Monroe Street, Suite 4900 Chicago, Illinois" was considered "responsible for operational control of the aircraft." Dep't Ex. D, E. In both leases, notices to the lessor were to be sent to Sennett, as TCRG's representative, as well as Guggenheim Capitol, by its Chief Legal Officer, David Korman, both of which listed their address as 227 West Monroe Street, Suite 4900, Chicago, Illinois 60606. Dep't Ex. D, E.

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[2] An aircraft dry lease is the lease of an aircraft without a crew. *See* https://www.faa.gov/ about/initiatives/safe_charter_operations/media /GADryLeasingGuide.pdf.

On March 2, 2016, the Aircraft was flown to Ohio for certification. Stip. ¶ 17. Between March 3, 2016 and May 17, 2016, the Aircraft was brought to Midway Airport for pre-flight maintenance and repairs, pursuant to a contract with Jen-Air, LLC ("Jen-Air"). Stip. ¶ 28; Sennett Aff. at ¶ 5. Other than the maintenance agreement, neither TCRG nor its parent corporation signed any agreement for rent, lease or use of hanger space at Midway. Stip. ¶¶ 24-25. Further, from March 3, 2016 to May 17, 2016, TCRG had no business operations in Illinois. *Id.* ¶ 21.

According to Sennett, Midway Airport was chosen for maintenance and repairs during the period from March 3, 2016 to May 17, 2016, because it "was the only facility in which Jen-Air had the capabilities and resources to perform the repairs." Sennett Aff. at ¶ 6; *see also* Second Sennett Aff. at ¶ 8. There was no similar facility in New York, where TCRG intended to eventually base the Aircraft and where it was intended to be used as transportation for New York based executives. Stip. ¶ 30, *see* Sennett Aff. at ¶¶ 4, 6; TCRG Ex. 3, Majchrowski Aff. at ¶ 4.

Sennett further averred the Aircraft was considered transient by its FBO operator Atlantic Aviation MDW[3] and in referring to Midway as the Aircraft's temporary home, he was referring to Atlantic Aviation MDW, the FBO operator, a third-party contracted with to provide services while at Midway. Sennett Aff. at ¶ 7; Second Sennett Aff. at¶ 9. In listing Midway as the Aircraft's home airport location on the EJM lease he was referencing the fact that the Aircraft "did not have a permanent hangar anywhere yet and was periodically flying in and out of Midway Airport for Jen-Air to perform its maintenance work." Second Sennett Aff. at ¶ 8.

In an email dated April 16, 2020, Ryan Majchrowski, Jen-Air's Director of Maintenance, reported to Sennett on the maintenance needs "discovered and

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[3] FBO is an abbreviation for Fixed Base Operator, a term "given to a commercial enterprise that has been granted the right by an airport authority to operate on that airport and provide aviation services, such as fuel, parking and hangar space, to the General Aviation community." See https://www.skybrary.aero/articles/ fixed-base-operatorbo#:~:text=The%20term%20Fixed%20Base%20Operator, General%20Aviation%20(GA)%20community.

addressed" by Jen-Air between March 8, 2016 and May 17, 2016 at Midway Airport. TCRG Ex. 3, Aff. of Ryan Majchrowski, Attachment 2. Majchrowski stated that the following work had been completed along with the hours required to complete it:

> • Heads up display operational issues required troubleshooting and ultimately replacement of the Digital Driver Unit and Overhead Projection Unit. 16 man hours
>
> • Landing Gear Blowdown bottle needed to be replaced. Required jacking of aircraft, operation of emergency blow down operation of gear, and re-serving of bottle. 40 man hours
>
> • Inspection to determine compliance status of Gulfstream mandatory Customer Bulletins and subsequent revs. 8 man hours
>
> • Cockpit pilot and copilot clock battery replacements. 4 man hours
>
> • Part 135 monthly required inspection items for March, April, and May. 8 man hours
>
> • Replacement of failed ice detection unit. 20 man hours
>
> • Central Maintenance Computer failed and required replacement and software loads. 8 man hours
>
> • #4 main tire needed to be replaced. Non-destructive testing is required of wheel during tired replacement. 8 man hours
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> • Left hydraulic flight spoiler actuator was found to be leaking necessitating replacement of the spoiler
>
> actuator. Rigging, hydraulic bleeding, hydraulic servicing, and operational testing was then also
>
> required. 48 man hours
>
> • APU oil indicating system was found to be inoperative. APU capacitance oil system components required replacement and calibration. 40 man hours.
>
> *Id.*

According to TCRG, from May 17, 2016 to December 31, 2017, the Aircraft made 98 trips. *See* Pet'r TCRG SN4057, LLC's Mem. of Law in Supp. Of Its Mot. for Summ. J. at 9 ("TCRG Mem.") (citing Stip. ¶31; Pet. Ex. D). Of those trips, 62 originated in New York (66%) and 17 (18%) in Illinois. *Id.* Only 7% of total flight hours were logged on flights to Illinois. *Id.* None of the trips involved TCRG employees. *Id.* TCRG also stated that the Aircraft made 67 take-offs and landings in Illinois during this time period. TCRG Mem. at 22.

According to the Department, from March 3, 2016 through May 17, 2016, the Aircraft made 12 flights in and out of Midway carrying Guggenheim employees. *See*

Dep't of Revenue's Br. in Supp. Of Its Cross-Mot. for Summ. J. & In Resp. to the Pet'r's Mot. for Summ. J. ("Dep't Resp.") at 4 (citing Dep't Ex. H). Between December 18, 2015 and December 17, 2016, the Aircraft flew into or out of Illinois forty-four (44) times and spent 71 days (or 19.5% of its ground time) in Illinois. *Id*. (citing Dep't Ex. I).

After May 17, 2016, the Aircraft was flown to New York to "a permanent place at a hanger" at Stewart International Airport. Stip. at ¶ 29. It was brought to New York for the purpose of transporting New York-based executives. Stip. at ¶ 30. "None of the passengers flown from May 17, 2016 through December 31, 2017 were employees, officer or directors of TCRG" or its parent. Stip. at ¶ 32.

In early 2018, Franklin Monroe through Sennett applied for a rolling stock exemption for the Aircraft. Sennet Aff. at ¶ 9; TCRG Ex. 4. The Department then initiated an audit of the Aircraft, *see* TCRG Ex. 5, and on November 16, 2021, the Department issued a Notice of Tax Liability for use tax for $1,196,250 tax, $239,500, in penalties; and interest of $278,622 for a total assessment of $1,714,372, based on a date that the aircraft was brought into Illinois of March 3, 2016.[4] Pet. Ex. A.

This litigation followed.

[4] The Department issued an earlier notice of tax liability for use tax on the Aircraft on TCRG's parent corporation, which spurred a prior round of litigation. For a more complete picture of the case's procedural history *see*, Order on Summary Judgment Motion, *Texas Capitalization Resource Group, Inc. v. Illinois Department of Revenue*, No. 20TT93 (July 6, 2021).

Analysis

The parties have filed cross motions for summary judgment contesting whether under the United States Commerce Clause use tax could be assessed on TCRG for the Aircraft's Illinois use. Additionally, the parties contested whether an additional 1% county or local use tax was properly imposed on it under Illinois law. Finally, the parties seek summary judgement on whether penalties were properly imposed on TCRG for failing to pay use tax.

Summary judgment may be granted "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) (2008). Where the parties have filed cross-motions for summary judgment and agreed that there are no genuine issues of material fact, the case may be resolved as a matter of law. *Irwin Industrial Tool Co. v. Illinois Department of Revenue*, 238 Ill. 2d 332, 339-340 (2010) ("*Irwin*").

Commerce Clause

TCRG claimed that the Illinois use tax assessment on the Aircraft exceeded the limits on state taxation permitted under the United States Constitution's Commerce Clause. Under the so-called "dormant commerce clause" a state's taxing power is limited even in the absence of federal legislation. *See Irwin*, 238 Ill. 2d at 341. This limitation is governed by the well-known *Complete Auto* test. *See Irwin*, 238 Ill. 2d at 341 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Under the *Complete Auto* test, in order to pass constitutional muster, a state 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." *See Irwin*, 238 Ill. 2d at 341 (citing *Complete Auto Transit, Inc.*, 430 U.S. at 279). In its summary judgment motion, TCRG took issue only with prongs 1 and 4 of the *Complete Auto* test. It argued that Illinois's use tax was unconstitutionally applied because it was not imposed on an activity that had a substantial nexus with Illinois,

and it was not fairly related to services provided by the state. *See* TCRG Mem. at 3-4. The questions of fair apportionment and nondiscrimination are not at issue in this case.

Substantial Nexus

Under the substantial nexus test, a state sales or use tax cannot be imposed absent the taxpayer's "physical presence in the taxing state." *Irwin*, 236 Ill. 2d at 342 (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 317-18 (1992). In *Quill*, the Supreme Court found that for constitutional purposes physical presence required something more than a "slightest" physical presence in the taxing state, and that this standard was not met where a mail-order sales company's only contact with the state into which it sold merchandise was by US mail and common carrier. *See Irwin*, 238 Ill. 2d at 342 (citing *Quill*, 504 U.S. at 315, n.8).[5]

In *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410 (1996), the Illinois Supreme Court applied *Quill*'s more than a slightest physical presence standard to a Missouri furniture retailer that sold and delivered furniture into Illinois using its own trucks and employees. *Id.* at 424-25. In reaching its decision, *see id.*, the Illinois Supreme Court adopted the substantial nexus analysis developed by the New York Court of Appeals in *Orvis Co. v. Tax Appeals Tribunal*, 86 N.Y.2d 165 (1995).

The *Orvis* case upheld New York's imposition of sales tax on two out-of-state vendors with no permanent physical presence in New York. *See Brown's Furniture, Inc.*, 171 Ill. 2d at 423 (citing *Orvis*, 86 N.Y.2d at 180). One of the vendors sent its personnel into New York approximately 80 times over the course of a year and the

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[5] The physical presence standard was abrogated for remote sellers of personal property via the internet in *South Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S. Ct. 2080, 2099 (2018). The physical presence test for nexus was replaced by a test that looks to whether the taxpayer availed "itself of the substantial privilege of carrying on business' in that jurisdiction." *Id.* [quotation]. Both parties agreed that *Wayfair*'s substantial privilege of carrying on business test did not apply outside the remote seller context and thus the physical presence test of *Quill* is applied here.

other 41 times over the course of three years to provide service or assistance on products they sold to New Yorkers. *See Brown's Furniture*, 171 Ill. 2d at 423 (citing *Orvis*, 86 N.Y.2d at 180). The *Orvis* court rejected the argument that the substantial nexus test required a substantial physical presence in the taxing state of the vendor. *See Orvis*, 86 N.Y.2d at 176-78. Rather, the court held that the physical presence of the vendor "may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." *Id*. at 178. In fact, the *Orvis* court further noted that the substantial nexus test did not require the presence of any of the taxpayer's personnel in the taxing state but could be met where the in-state activity was solely the "origination or consummation of the transaction the State sought to tax." *Id.* (citing *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, 184 (1995) (finding that state where bus ticket for interstate bus travel was purchased had substantial nexus to impose its sales tax); *accord Village of Rosemont v. Priceline.Com, Inc.*, 2011 U.S. Dist. Lexis 119231, *20-22 (finding substantial nexus for Rosemont, Illinois's tax on online rental of hotel rooms because "the consumer stays in a hotel in Rosemont, the majority of the money for the hotel stay is remitted to Rosemont and the purpose of defendants' online transaction is to have the right to use property in Rosemont."). Applying the nexus standard articulated in cases from *Scripto* to *Jefferson Lines*, the *Orvis* court held that that even a limited number of visits to provide service or support to the vendors' customers established substantial nexus to support the New York use tax assessment. *Orvis*, 86 N.Y.2d at 177-79.

Adopting *Orvis*, the *Brown's Furniture* court, found that 942 deliveries into Illinois over a ten-month period by the furniture company consisting of 15 to 18 trips a month by its own employees went "well beyond the 'safe harbor'" established by *Quill* for vendors whose only contact with customers was by common carrier. 171 Ill. 2d at 425 (quoting *Quill*, 504 U.S. at 315). In describing when substantial nexus was lacking, the *Brown's Furniture* court described cases where contacts were so "occasional," "sporadic" or "incidental," such as "rare, nonrecurring visits made by

out of state vendor's agent into the tax jurisdiction." *See* 171 Ill. 2d at 425-27 (citing *In re Laptops Etc. Corp.*, 164 Bankr. 506, 511, 521 (D. Md. 1993) (holding that isolated instances in which vendor's agent made delivery of missing computers or parts to customer in taxing jurisdiction as "aberrations from normal practice" of delivery by common carrier that did not satisfy the substantial nexus test).

Following *Brown's Furniture*, the Illinois Appellate Court in *Town Crier, Inc. v. Department of Revenue*, 315 Ill. App. 3d 286, 293-94 (1st Dist. 2000), likewise, found substantial nexus sufficient to impose Illinois use tax on a Wisconsin furniture store that made only 30 deliveries of merchandise to Illinois purchasers on its own trucks over a 26-month period, along with 5 occasions in which its employees were in Illinois to install blinds or shades. *Id.* The *Town Crier* court made clear that *Brown's Furniture* did not create a constitutional floor for nexus but stated that substantial nexus could be met where a business had "a regular presence in Illinois that enhanced its ability to establish and maintain a market." *Id.* at 294.

Brown's Furniture and *Town Crier* both involved an out-of-state vendor's obligation to collect use tax from sales made to their Illinois customers and not the imposition of use tax on the taxpayer's in-state use of personal property. In *Irwin*, the Illinois Supreme Court applied the substantial nexus analysis in just such a case which, like the present one, involved use tax assessed on an airplane used in Illinois. The airplane was purchased by a corporate subsidiary of the plaintiff known as ATC, Inc. ("ATC"). *See* 238 Ill. 2d at 335. ATC was located in Lincoln, Nebraska, and that is where the airplane was hangered. *See id.* at 335-36.

The *Irwin* plaintiff had offices and employees in Illinois. *Id.* Much of the documents surrounding the aircraft's purchase, including the bill of sale, although naming ATC as the owner, used the plaintiff's Illinois address. *Id.* Similarly, the plaintiff's Illinois address was used by ATC on registration documents filed with the FAA. *Id.*

During the two-year audit period, the plane was flown into or out of Illinois 143 times (or 49.3 percent of its flight days), and 271 of its flight segments (36.9%)

originated or ended in Illinois. *Id.* at 336. The principal passengers on the plane were the plaintiff's corporate officials. *Id.* However, the aircraft was hangered in Nebraska and spent only 25 overnights in Illinois. *Id.* at 343. In all, it spent 3.65% of its ground time in Illinois and only 3.42% of its nights. *Id.* at 336, 338. ATC's pilots flew the plane between Omaha and Chicago. *Id.* at 338

In applying the substantial nexus test, the *Irwin* court looked to both the connection between the state and the activity that it sought to tax, as well as the state and the entity that it sought to tax. *Id.* at 342 (citing *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777-78 (1992)). The *Irwin* court found more than a slightest physical presence in Illinois sufficient to create substantial nexus based upon the use of the plaintiff's Illinois address on the bill of sale and FAA documents, the fact that the company had an Illinois address, the fact it had offices and employees in Illinois that flew on the plane, the number of flights into an out of Illinois on behalf of the plaintiffs, as well as the fact that ATC's "pilot employees frequently and regularly" flew the airplane into and out of Illinois. *Id.* at 343-45. In examining the number of flights, the *Irwin* court did not rely on a bright-line test but evaluated the take off and landings in Illinois, as they related to airplanes "purpose function and use" which in that case was to provide air transportation to company personnel. *See* 238 Ill. 2d at 344.

Turning to the facts of this case, it is clear that substantial nexus is present. First, TCRG leased the Aircraft to an Illinois company for use in Illinois. A lease is a taxable use and, under Illinois law, use tax is imposed on the lessor of property purchased out-of-state and leased for use in Illinois. *See Time, Inc. v. Department of Revenue*, 11 Ill. App. 3d 282, 288-289 (1st Dist. 1973) (citing *William O'Donell, Inc. v. Bowfund Corp.*, 114 Ill. App. 2d 107, 110-11 (1st Dist. 1969) and *Philco Corp. v. Department of Revenue*, 40 Ill. 2d 312, 316-318 (1960)).[6] Thus, since the leases were

[6] The *Philco* case involved the taxability of a computer leased by an out-of-state company to an Illinois company. *See* 312 Ill. 2d at 314. In addition to holding that the use tax could be imposed on the lessor as an Illinois user, *id.* at 318, the supreme court also upheld the constitutionality of the tax under pre-*Complete Auto* law, which allowed use tax to be constitutionally imposed on property that had come to rest in the taxing state and was

a taxable use, the Aircraft's use under the leases must be evaluated under the substantial nexus test. *See Brown's Furniture*, 171 Ill. 2d at 424 (citing *Orvis*, 86 N.Y2d at 178) (stating that a taxpayer's presence "may be manifested by the presence in the taxing State of the vendor's property"); *see, e.g.*, *Truck Renting & Leasing Ass'n v. Commissioner of Revenue*, 746 N.E.2d 143, 149-50 (Mass. 2001) (applying substantial nexus test to hold North Carolina lessor of trucks liable for Massachusetts's excise tax on trucks driven by its lessees in Massachusetts).

Two of the leases involved here were to Guggenheim Capital which is and was located in Illinois–its principal office is listed as 227 West Monroe Street, Suite 4900, Chicago, Illinois 60606. *See* https://apps.ilsos.gov/corporatellc/CorporateLlcController (search term Guggenheim Capital.).[7] The 227 West Monroe Street address was the address that Guggenheim Capital supplied on both the leases signed by its Chief Legal Counsel. *See* Dep't Ex. D, E. All the notices under both leases were to be sent to Sennett, as TCRG's representative, at the same address. Dep't Ex. D, E. Moreover, from March 3, 2016 to May 17, 2016, the Aircraft made 12 flights in or out of Midway carry Guggenheim Capital employees. *See* Dep't Reply at 5 (citing Ex. H).

Although the EJM Lease was with a non-Illinois company, in it TCRG was listed as the registered owner of the Aircraft, with an address of 227 West Monroe St. Suite 4900, Chicago, Illinois 60606. Dep't Ex. C, Section 1. Sennett was listed as TCRG's representative under the lease. *Id.* Sennett of Franklin Monroe, 227 W. Monroe Street, Suite 4900, Chicago, Illinois was listed as the party to whom invoices, and notices were sent under the lease. *Id.*

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no longer moving in interstate commerce, *id.* at 322-23. This "taxable moment" doctrine is no longer governing law, *see Archer Daniels Midland Co. v. Department of Revenue*, 170 Ill. App. 3d 1014, 1021-23 (1st Dist. 1988), and *Philco* is not being cited for its constitutional holding.

[7] The Tribunal can take judicial notice of the Secretary of State's website. *See* Ill. R. Evid. 201; *Ashley v. Pierson*, 339 Ill. App. 3d 733, 739-40 (4th Dist. 2003).

TCRG's contention that the leases were irrelevant to the constitutional analysis, *see* Petitioner TCRG SN 4057, LLC's Supplemental Response to the Tribunal's May 10, 2023 Order ("TCRG Supp. Resp.") at 3-5, is contrary to law, *see Brown's Furniture*, 171 Ill. 2d at 424; *Truck Renting & Leasing Ass'n*, 746 N.E.2d at 149-50, and unsupported by the cases TCRG cites. In one case, *Director of Revenue, v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504, 505 (1987), the taxpayer was a Missouri corporation, with offices in Missouri, being taxed by Missouri. Although the company leased the plane to an Ohio company for an air charter service in Ohio, the court did not need to consider the operations under the lease in considering whether substantial nexus was met. *Id.* at 506-7. This is a far-cry from holding that leases are generally irrelevant to the substantial nexus analysis. The other cited case, *Fall Creek Construction Company v. Director of Revenue*, 109 S.W.3d 165, 169 (Mo. 2003), contrary to TCRG's assertion, *see* TCRG Supp. Resp. at 4, did not involve leases; it involved whether the fractional ownership of the airplanes was a taxable use, *see Fall Creek Construction*, 165 S.W.3d at 169.

Not only were the leases evidence of the Aircraft and TCRG's physical presence in Illinois, but they also highlighted Sennett's role as TCRG's representative with "a regular presence in Illinois that enhanced its ability to establish and maintain a market." *Town Crier*, 315 Ill. App. 3d at 294. In Sennett's own words, he and Franklin Monroe had been retained by TCRG "to oversee and manage the administration of [TCRG's] aircraft fleet." Sennett Aff. at ¶ 2; Second Sennet Aff. at ¶ 2. Almost every aspect of the Aircraft's use centered around Sennett's activities directed from Franklin Monroe's offices at the 227 West Monroe Street address. That address was the home address of Guggenheim Capital; it was the address used for the bill of sale and the FAA registration; it was the address invoices and notices to TCRG were to be sent. The *Irwin* court expressly found that the use of an Illinois address on both the airplane's bill of sale, and registration filing with the FAA were factors in conveying substantial nexus, *see* 238 Ill. 2d at 343, and Sennett's additional activities on behalf of TCRG in Illinois were hardly sporadic; they went well beyond the sort of incidental or nonrecurring contacts that

might provide a safe harbor for TCRG's Illinois activities. *See Brown's* Furniture, 171 Ill. 2d at 424-27. TCRG's attempt to dismiss Sennett's activities in managing the Aircraft as merely "administrative" *see* TCRG Reply at 5, 13, does not shield it from a finding of a substantial nexus with Illinois.

The fact that Sennett was not TCRG's employee or that Midway was not intended as the Aircraft's permanent home is of no constitutional significance. It is well-settled that taxable nexus can be conveyed by the activities of non-employee representatives using the taxpayer's property in the taxing jurisdiction. *See Brown's Furniture*, 171 Ill. 2d at 424 (citing *Orvis*, 85 N.Y. 2d at 178); *see also* Orvis, 85 N.Y.2d at 177 (*citing Scripto, Inc.*, 362 U.S. at 211). As the Supreme Court stated in *Scripto* over 60 years ago "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." *Scripto, Inc.*, 362 U.S. at 211.

Moreover, Ryan Majchrowski, Jen-Air's maintenance Director, also located in Chicago, reported to Sennett on the status of the Aircraft's maintenance and repairs. TCRG Ex. 3, Aff. of Ryan Majchrowski, Attachment 2. The repairs and maintenance were extensive: during the 6 weeks it spent under repair at Midway Airport the Aircraft required over 200-man hours of work on ten systems, including such fundamental operations for flight as brakes, hydraulics and computer systems. *Id.*

TCRG's argument that the use of Jen-Air contact was "coincidental," and not "inherent in its basic purpose and function" because Jen-Air's Midway facility was the only one that could provide the needed repairs, *see* TCRG Mem. at 27-29; TCRG Reply at 24-25 (citing *Irwin*, 238 Ill. 2d at 343), also misses the mark. There was nothing happenstance or accidental about TCRG's use of Jen-Air. That Jen-Air may have been TCRG's best or only option for getting the Aircraft flightworthy made it no less "inherent" in TCRG's basic "purpose and function," *see Irwin*, 238 Ill. 2d at 343, in Illinois, which was to provide an operating the Aircraft for use by its lessees EJM and Guggenheim Capital.

TCRG also argued that critical to the *Irwin* decision was the presence of in-state offices and employees of the taxpayer. TCRG Mem. at 20. This overstates the case, as the supreme court also relied on the fact that ATC pilots were flying the plane and ATC used the plaintiff's address for the bill of sale and registration, *see Irwin*, 238 Ill. 2d at 343-45, but more important, nothing in the *Irwin* court's decision can be read to abrogate *Brown's Furniture*, limit *Town Crier*, repudiate *Orvis* or undermine the Supreme Court decisions holding that substantial nexus can supplied by non-employee representatives acting on the taxpayer's behalf or through the taxpayer's in-state conduct of economic activities. *See, e.g., Jefferson Lines,* 514 U.S. at 184; *Scripto*, 362 U.S. at 211.

TCRG repeatedly sought to the invoke the stipulation that "TCRG had no business operations in Illinois," during the period between March 3, 2016 and May 17, 2016. *See* Stip. ¶ 21; TCRG Mem. *passism*; TCRG Reply *passim*. This stipulation cannot save its case. Whatever is meant by the term "business operations," this court is not required to ignore the effect of regular and frequent contacts by Sennett and the lessees with Illinois before, during and after the six weeks that the Aircraft spent being repaired at Midway. *See* 86 Ill. Adm. Code § 5000.340(c); *see also Kew v. Kew*, 198 Ill. App. 3d 61, 64 (3d Dist. 1990) (noting the court's "discretion to determine the validity and reasonableness of a stipulation").

The number of the Aircraft's take offs and landing at Illinois airports also supports a finding of substantial nexus. According to TCRG, between May 17, 2016 to the end of December 2017, the Aircraft made 98 trips, of which 18 originated in Illinois. TCRG Mem. at 9 (citing Stip. ¶ 31; Pet. Ex. D). About 7% of total flight hours were logged on flights to Illinois. *Id.* at 9, 22. None of the trips involved TCRG employees. *Id.* TCRG acknowledged that during this period, the Aircraft took off or landed at Illinois airports 67 times and spent 19.5% of its ground time in Illinois. *See* TCRG Mem. at 2, 22; TCRG Reply 20-21. TCRG also calculated that for calendar year 2016 less than 18% of the flights were leased to Guggenheim Capital, and for calendar year 2017, this was less under 15%. *See* TCRG Reply at 23 (citing Dep't Ex. H).

Moreover, TCRG did not dispute the Department's calculation that between March 3, 2016 and December 16, 2016, the Aircraft made 145 total flights with 44 going in and out of Illinois and spent 71 days on the ground in Illinois. *See* TCRG Reply at 20-21; Dep't Reply in Supp. of Its Mot. for Summ J. ("Dep't Reply") at 7-8; Nor did it dispute the Department's figures that from March 3, 2016 through May 17, 2016, the Aircraft made 12 flights in an out of Midway carrying Guggenheim employees. [8]

The parties' calculations differ, because they calculate fights using slightly different time periods. But both agree that between March 3, 2016 and December 17, 2016, approximately 30% of the Aircraft's flights took off or landed in Illinois (i.e., 44 out of 145) and it spent 71 days on the ground in Illinois or 19.5% of its ground time. *See* Dep't TCRG Mem. at 21-22; TCRG Reply at 21-22; Dep't Reply at 6-7; *see, e.g.,* Dep't of Revenue's Supp. Br. ("Dep't Supp. Br.") at 3. Another way to view the flight data, is that the parties agreed that that on average, the Aircraft took-off, landed, or spent the night in Illinois approximately once every 6-10 days for a 9 to 18 month period (i.e., 44 times during a 280 period or every 10 days or 67 and 71 days respectively over a 669 day period).

The gist of TCRG's argument, however, is that these flights do not establish more than a slightest physical presence in Illinois because they were significantly less than the number of in-state flights than seen in either *Irwin*–272 flights or *Superior Leasing*–17.7% of total flight hours. *See* TCRG Mem. at 21-22; TCRG Reply at 21-22. The major flaw in TCRG's argument is that neither *Irwin* or *Superior Leasing* established a constitutional floor for when flights or flight times convey more than the slightest physical presence in a state. Rather, *Irwin*'s standard was "frequently and regularly" and in light the Aircraft's "purpose function and use." *Irwin*, 238 Ill. 2d at 344-45. Certainly, that about 30% of the

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[8] TCRG's argument, instead, inferred that the Tribunal ruled in discovery that the passenger identities were irrelevant. *See* TCRG Reply at 18-19. In fact, this court found that personal identifiers were irrelevant, but ordered passengers identified by employer and job title, *see* Tribunal, Discovery Conference Order, (July 5, 2022), which is precisely what the Department did here.

Aircraft's flights involved Illinois airports, about 19% of its ground time was in Illinois and 15 to 18% of its flights operated under Guggenheim Leases, meets that standard.

This conclusion is bolstered by *Fall Creek Construction Co.*, in which the Missouri Supreme Court following *Superior Leasing* rejected an argument similar to the one TCRG makes here. There, the taxpayer purchased a fractional ownership interest in two airplanes. *Fall Creek Construction*, 109 S.W.2d at 167. During the tax period in question, one airplane flew into or out of Missouri 26 times out of 840 flights with 13 overnights in Missouri, and the other airplane made 16 flights in or out of Missouri out of a total of 897 flights, with 11 overnights in Missouri. *Id.* at 168. For the *Fall Creek Construction* court even this brief presence in the state established more than the slightest physical presence necessary to establish substantial nexus. *Id.* at 171.

TCRG's attempt to distinguish *Fall Creek Construction* from the present case on the ground that there the taxpayer operated the airplanes and Missouri was its principal place of business, whereas here the Aircraft was operated by the lessees, TCRG Supp. Resp. at 2-3, is unpersuasive. Both here and in *Fall Creek Construction*, the owners used an airplane in state in pursuit of profit; that the transactional details differ does not diminish the persuasiveness of the *Fall Creek Construction* court's finding that even far fewer flights than present here were sufficient to meet the substantial nexus standard.

Finally, TCRG cited to a number of cases to support its proposition that an asset brought into "another state primarily for maintenance, repairs, overhauls, modifications, or refurbishments, has not been considered to be a taxable 'use.'" *See* TCRG Mem. at 29-30 (citing *Yacht Futura Corp. v. Department of Revenue*, 510 So. 2d 1047 (Fla. Dist. Ct. App. 1987); *Grudle v. Iowa Department of Revenue & Finance*, 450 N.W.2d 845 (Iowa 1990); *Bruce Motor Freight, Inc. v. Lauterbach*, 247 Iowa 956 (1956), and *Union Pacific Railroad Co. v. Utah Tax Commission*, 110 Utah 99 (1946). None of these cases bear on the substantial nexus question. In *Yacht Futura Corp.*, 510 So. 2d at 1049, the court found that "standing alone" bringing a

boat into a state for extensive repairs was not a taxable use under state law. The present case involved much more than repairs "standing alone" and it involves the application of a constitutional standard. *Grudle, Bruce Motor Freight* and *Union Pacific R.R.* all involved the question of whether idling or repairing trucks or train engines otherwise used in interstate commerce was a sufficient break in the interstate travel to permit the state to impose a use tax under the older "taxable moment" doctrine. None of the courts applied the *Complete Auto* analysis: *Grudle* found it waived by the government, *see* 450 N.W.2d at 846-48, and *Bruce Motor Freight* and *Union Pacific Railroad* were decided before *Complete Auto*. As noted, *Complete Auto* supplanted the taxable moment doctrine*, see Archer Daniels Midland Co.,* 170 Ill. App. 3d at 1021-23, and that earlier standard is not applicable here.

In sum, the facts show that TCRG purchased an Aircraft using an Illinois address and through its Illinois-based representative, registered it with FAA in Illinois, and TCRG leased the Aircraft to, among others, Guggenheim Capital, an Illinois-based company with Illinois offices. In so doing, TCRG's Illinois-based representative managed the leases for TCRG from Illinois, held TCRG and the Aircraft out as based in Illinois and oversaw approximately 200 hours of repairs and modifications conducted over a 6-week period by a company located in Illinois. During the year to 18-months after the Aircraft was brought into Illinois, the Aircraft took off, landed or overnighted at an Illinois airport every 6 to 10 days, which constituted approximately 30% of its flights, 19% of its ground time and 7% of its flight time. For about two years between 15-18% of its flights were operated under the Guggenheim Leases. At least a dozen of those trips involved transporting Guggenheim Capital employees.

Under any benchmark, the facts here show that TCRG used its Aircraft more than occasionally, sporadically or incidentally in Illinois. *See Brown's Furniture*, 171 Ill. 2d at 426-27. It is unnecessary to decide whether any of the factors discussed above, standing alone would conveyed substantial nexus. Considered together, they easily established more that than a slightest physical presence

necessary to create substantial nexus with Illinois. *See Irwin*, 238 Ill. 2d at 345; *Town Crier*, 315 Ill. App. 3d at 294.

Fair Relation

TCRG next argued that the use tax did not meet the fourth prong of the *Complete Auto* test, which requires that a state tax be "fairly related to the services provided by the state." *See* TCRG Mem. at 31-35 (citing *Irwin*, 238 Ill. 2d at 341; TCRG Reply at 26-29). The fair relation prong requires a reasonable relationship between the tax imposed and the "'taxpayer's presence and activities'" in the taxing state. *Brown's Furniture Co.*, 171 Ill. 2d at 428 (quoting *Jefferson Lines*, 514 U.S at 200). The requirement is not transactional; a detailed accounting of or direct relationship between the taxpayer or activity being taxed and governmental services provided is not required. *See Jefferson Lines*, 514 U.S. at 199-200; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627-29 (1981).

Thus:

> The tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. On the contrary, 'interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct" benefit. The fourth prong of the *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. [citations][quotations]

Goldberg v. Sweet, 488 U.S. 252, 267(1989) [citation] *as quoted in Panhandle Eastern Pipeline Co. v. Hamer*, 2012 IL App (1st) 113559, ¶ 50. The state benefits considered under the fair relation test encompass the social and physical infrastructure supporting the economic activity in which taxpayer is engaged, such as "the State's provision of "'police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Commonwealth Edison Co.*, 453 U.S. at 627 [quotation]; *see Goldberg*, 488 U.S. at 267.

As the Supreme Court pointed out in *Commonwealth Edison*, in focusing on the level of contacts between taxpayer, the activity taxed and the state, the fair relation prong of *Complete Auto* is closely related to the substantial nexus analysis. *See Commonwealth Edison,* 453 U.S. at 625-26. TCRG recycled much of its flawed substantial nexus argument in support of its flawed argument that the fair relation test was not met. Notably, however, it argued that the Aircraft's flights were mostly into and out of Midway Airport, a facility owned and operated by a municipality–City of Chicago–and thus few state benefits were involved. TCRG Mem. at 32-33; TCRG Reply at 28-29.

Putting aside that the Aircraft also flew into other Illinois airports, as well as Midway, *see* Dep't Ex. I, TCRG's argument ignored that a municipality, even a home rule one like the City of Chicago, is a political subdivision of the State, *see Evanston v. Regional Transportation Authority*, 202 Ill. App. 3d 265, 275-76 (1st Dist. 1990), and thus there can be no constitutional distinction in this case between city and state benefits. Additionally, air transportation, both the operation of aircrafts and the operation of airports, are regulated by the State, *see* 620 ILCS 5/26, 28, 42, and state tax funds contribute to both the air transport system, *see* 620 ILCS 5/31-41, and to the City of Chicago's budget, *see* Illinois Department of Revenue, *How Sales and Use Taxes are Distributed*, https://tax.illinois.gov/content/dam/soi/en/web/tax/local government/localtaxallocation/ documents/pio-114.pdf.

Here, of course, the Aircraft made extensive use of Illinois airports, taking off or landing at least once every 6-10 days and spent 6 weeks receiving maintenance and repair services in Illinois from an Illinois company. More important, TCRG's argument ignored all of the advantages of "civilized society" that supported the lease transaction. *See Jefferson Lines*, 514 U.S. at 200. The Guggenheim Leases were governed by Illinois law; Guggenheim Capital had Illinois offices and employees; the use of the Aircraft and the three leases were managed by TCRG's Illinois representative from Franklin Monroe's Chicago office. In short, TCRG benefited from Illinois' entire physical and social infrastructure, without which it

would not been able to operate the Aircraft or engage in a profitable lease transaction. *See Jefferson Lines*, 514 U.S. at 199; *Goldberg*, 488 U.S. at 267.

For this reason, TCRG's reliance on *American River Transportation v. Bower*, 351 Ill. App. 208, 212-13 (2d Dist. 2004), is misplaced. The court there found that imposing use tax on personal property situated on tug boats that operated in Illinois waters but that never docked in Illinois, was to too attenuated to be taxed. The court stated:

> As is the case with the harbor service tugs, aircraft that do use ground facilities and fuel purchased in Illinois do pay the appropriate taxes. However, neither boats merely floating in the middle of the Mississippi nor planes passing over Illinois are provided benefits and services by Illinois such that the use tax would pass constitutional muster in those instances.

American River Transportation Company, 351 Ill. App. 3d at 213. Here, of course, the Aircraft used airport ground services in Illinois as well as availing itself of additional state governmental benefits, as explained above.

Panhandle Eastern Pipeline is similarly inapt. There, the Illinois appellate court held the that the fair relation test was met for a company that transported natural gas through Illinois, with compressor stations, real estate and employees in Illinois. *See Panhandle Eastern Pipeline Co.*, 2012 IL App (1st) 113559, ¶ 55. But again, nothing in that decision created a constitutional baseline for the fair relation test, and again, all of TCRG's activities in leasing the Aircraft to an Illinois company, managing the lease through an Illinois representative, repairing the Aircraft with an Illinois company, or regularly availing itself of Illinois airports, provided the requisite "presence in Illinois justifying the assessment of use tax" *see id.,* just as they did when considering the substantial nexus test. The fourth *Complete Auto* prong is easily met.

The 1% Tax

In Count 2 of the Petition, TCRG alleged that it was wrongfully assessed an additional 1% of use tax, over and above the state use tax rate of 6.25%. Pet. at ¶¶ 96-101. As TCRG alleged, under the state tax rate of 6.25% of the Aircraft's selling

price, the assessed amount should have been, at most, $1,031,250. *Id.* at ¶ 98. But the Department assessed it $1,196,250, and TCRG alleged that this additional 1% was added without justification. *Id.* at ¶¶ 99-100. In its memorandum in support of the motion for summary judgment, TCRG asserted that it was informed "in a recent telephone call"–with no record support–that the additional 1% assessed was Cook County use tax. *See* TCRG Mem. at 36 (citing Cook County Ordinance 74-272(b) (approved May 11, 2016)). In response, the Department asserted–also without record support–that the additional 1% assessment was made pursuant to section 4.03(g) of the Regional Transportation Authority Act ("RTA Act"), 70 ILCS 3615/4.03(g). *See* Dep't Resp. at 18-19.

As the record did not indicate the source of the 1% additional assessment after oral argument, the parties were provided the opportunity to submit additional argument or evidence on "the source of authority for the imposition of Cook County use tax in this case and whether it was properly assessed." *See* Tribunal Order May 10, 2023. In response, the parties did not point to any evidence to support the assessment's basis, they just reiterated their prior positions. The Petitioner claimed that the tax was imposed by Cook County under ordinance 74-272(b), *see* TCRG Supp. Resp. at 6-7; and the Department countered that it was imposed under section 4.03(g) of RTA Act use tax, *see* Dep't Supp. Br. at 5.

The Department is likely correct because, while it administered the RTA Act tax, *see* Illinois Department of Revenue, How Sales and Use Taxes are Distributed.pdf, it appeared that Cook County administered its own use tax, *see id.*; *see also* 55 ILCS 5/5-1008. However, it is immaterial which statute was applied because both contained substantially similar language. Section 4.03(g) of the RTA Act, 70 ILCS 3615/4.03(g) imposed a 1% use tax "upon the privilege of using in the metropolitan region, any item of tangible personal property that is purchased outside the metropolitan region at retail from a retailer, and that is titled or registered with an agency of this State's government." County ordinance 74-272(b) stated, "a tax is imposed at the rate of one percent on the selling price of tangible

personal property, purchased through a sale at retail, which is titled or registered with an agency of the State of Illinois at location inside Cook County."

Section 42(b)(1)(i) of the Illinois Aeronautics Act, 620 ILCS 5/42(b) ("Aeronautics Act") required civil aircraft "engaged in air navigation within this State" to register with the Department of Transportation ("IDOT") and required the owner to prove it had either paid local use tax or did not owe the tax (including "Home Rule County Use Tax,") before the aircraft could be registered in Illinois. 620 ILCS 5/42(b)(1)(i). Similarly, section 4.03(g) of the RTA Act required that "[t]he tax must be paid to the State, or an exemption determination must be obtained from the Department of Revenue**,** before the title or certificate of registration for the property may be issued." 70 ILCS 3615/4.03(g). Thus, in either case TCRG could be required to pay the local use tax before it registered the Aircraft.

TCRG contended that the local use tax was only required to be paid on an aircraft registered with the IDOT, and since it never registered the Aircraft with IDOT, it was not liable for the local use tax. TCRG Supp. Resp. at 6-7. This argument was rejected by the Illinois Appellate Court in *Square D Co. v. Johnson*, 233 Ill. App. 3d 1070, 1084 (1st Dist. 1992). The *Square D* court held that an aircraft owner could not avoid RTA and the local tax use tax by failing to register an aircraft. *Id.* Thus, if TCRG was required to register the Aircraft, it was required to pay local use tax whether it registered the Aircraft or not. *See id.*

But the Aeronautics Act, 620 ILCS 5/44, and an IDOT regulation, 92 Ill. Adm. Code 14.230(b), exempts from registration, "[a]n 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." The parties were also provided the opportunity to address whether TCRG was a qualifying non-resident under the statute and rule. *See* Tribunal Order, May 10, 2023.

Both parties agree that TCRG is a Delaware resident. *See* TCRG Supp. Resp. at 8; Dep't Supp. Br. at 6. TCRG pointed out that there is no separate state registration requirement in Delaware and that the Aircraft can lawfully operate there, as long as it was registered with the FAA. *See* TCRG Supp. Br. at 8 (citing

https://deldot.gov/Programs/aviation_svcs/index.shtml?dc=faqs; *see also* 2 Del. C. §§ 161, 501. The Department contended that even though TCRG was a Delaware resident, due the extent of its Illinois contacts, TCRG also qualified as an Illinois resident under the Aeronautics Act. *See* Dep't Supp. Br. at 7-8 (citing *Square D Co.,* 233 Ill. App. 3d at 1085. The *Square D* court held that taxpayer qualified as a resident of Illinois for Aeronautics Act purposes because even if it was incorporated and registered its airplane in Michigan, "it had its world headquarters in Illinois and operate[d] its jet out of an Illinois hangar." *Id.*

The Aircraft was operated out of an Illinois Airport (if not a hangar), and it held out the 227 West Monroe Street address as its principal place of business in the EJM lease and other documents. But TCRG was a disregarded entity of a Texas corporation and there is no evidence showing that it had anything like its "world headquarters" in Illinois. The evidence submitted did not approach the level of contact with Illinois that would make it an Illinois resident under the Aeronautics Act. Since TCRG can lawfully operate the Aircraft in Delaware, and it was not an Illinois resident for Aeronautics Act purposes, it was not required to register the Aircraft in Illinois and was exempt from the additional 1% use tax whether imposed under the RTA Act or the Cook County ordinance. *See Archer Daniels Midland, Co.*, 170 Ill. App. 3d at 1024 (holding that municipal use tax was improperly assessed against plane which was not required to be registered in Illinois and was titled and registered in Delaware). TCRG is entitled to summary judgment on Count 2 of its petition.

Penalties

TCRG also argued that penalties should be abated because it had reasonable cause for its tax position. It makes the sparest of arguments, but an analysis of existing law shows their frailty.

Section 3-8 of the Uniform Penalty and Interest Act, 35 ILCS 735/3-8, provides that tax penalties may be abated "if the taxpayer shows that his failure to file a return or pay tax at the required time was due to reasonable cause." Further, "[r]easonable cause shall be determined in each situation in accordance with the

rules and regulations promulgated by the Department." *Id.* Under the Department's regulations, reasonable cause is measured by the taxpayer's good faith in determining its tax liability, and good faith is based on whether the taxpayer "exercised ordinary business care and prudence in doing so." 86 Ill. Adm. Code § 700.400(c).

Ordinary business care and prudence is "a factual determination that can be decided only on a case-by-case basis," *Kroger Co. v. Dep't of Revenue*, 284 Ill. App. 3d 473, 484 (1st Dist. 1996), but is largely a function of "the clarity of the law or its interpretation and the taxpayer's experience, knowledge and education." 86 Ill. Adm. Code § 700.400(c). Penalties are properly imposed when a taxpayer willfully neglects clear statutory or judicial authority. *See PPG Industries, Inc. v. Department of Revenue*, 328 Ill. App. 3d 16, 25-26 (1st Dist. 2002); *Kroger Co.*, 284 Ill. App. 3d at 484. Penalties should not be imposed if a taxpayer is unable to ascertain a clear legal standard through no fault of its own. *See, e.g.*, *Horsehead Corp. v. Department of Revenue*, 2019 IL 124155, ¶ 51; *Du Mont Ventilation Co. v. Department of Revenue*, 99 Ill. App. 3d 263, 266 (3d Dist. 1981).

This is not a case where there was no controlling legal authority, or in which the legal standard governing taxation was unclear. The substantial nexus standard, its definition as requiring only more than a slightest physical presence, and that a physical presence did not depend upon the activities of a taxpayer's in-state employees working from in-state offices has been clear for decades. *See Brown's Furniture, Inc.*, 171 Ill. 2d. at 421-425 (tracing the history and development of the substantial nexus standard).

The crux of TCRG's argument regarding substantial nexus was that a unique standard applied to use tax on airplanes, and that the supreme court in *Irwin* created a constitutional floor for imposing use tax on airplanes based on the activities of in-state employees working out of in-state offices along with significant number of flights taking off or landing in Illinois. *See* TCRG Mem. at 19-23; TCRG Reply 20-23. This overly narrow and restrictive view of the substantial nexus test

is unsupported by *Irwin*'s holding or any language in *Irwin* or any other known authority.

Likewise, in arguing that the fair relation test was not met, TCRG relied on a transactional approach to the standard that was rejected by the Supreme Court. *See Brown's Furniture*, 171 Ill. 2d at 428-29 (discussing *Jefferson* Lines, 514 U.S 199-200 and *Goldberg*, 488 U.S. at 267). TCRG's contention that only the City of Chicago, and not the State, provided governmental benefits to the Aircraft, disregarded the city-state relationship and the State's considerable involvement in regulating air transportation; but most importantly, it turned a blind eye to the indirect benefits provided by the State's maintenance of the physical and social infrastructure – i.e., the "advantages of civilized society"– on which the success of TCRG's economic transaction rested. *See Goldberg*, 488 U.S. at 267; *see also Jefferson Lines*, 514 U.S. at 199-200. TCRG's constitutional arguments were not based on a "good faith" determination of its tax liability or good faith exercise of "ordinary business care and prudence" within the meaning of 35 ILCS 735/3-8 and 86 Ill. Adm. Code § 700.400(c), and the Department is entitled to summary judgment in its favor on its penalty assessment on Illinois use tax.

Conclusion

The Petitioner's motion for summary judgment is DENIED in part and GRANTED in part. The Department's cross-motion for summary judgment is GRANTED in part and DENIED in part. The portion of the Department's Notice of Tax Liability assessing Airplane Use Tax along with interest and penalties associated with that assessment is affirmed. The portion of the Notice of Tax Liability assessing 1% RTA Act or county use tax and all penalties and interest associated with that assessment is reversed and vacated.

This is a final order subject to appeal under section 3-113 of the Administrative Review Law, and service by email is service under section 3-113(a). *See* 35 ILCS 1010/1-90; 86 Ill. Admn. Code § 5000.330. The Tribunal is a necessary party to this appeal.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: July 5, 2023