ILLINOIS INDEPENDENT TAX TRIBUNAL

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

ILLINOIS DEPARTMENT OF REVENUE'S SUPPLEMENTAL BRIEF

By its May 10, 2023, order, this Tribunal invited the parties to submit supplemental argument and evidence on the following matters:

> 1). The effect of the Missouri Supreme Court's decision in *Fall Creek Construction Co. v. Director of Revenue,* 109 S.W.2d 165 (Mo. 2003), on this case;
>
> 2). the role of the 2015 EJM Lease (Dep't Ex. C), the 2015 Guggenheim Lease (Dep't Ex. D), and the 2016 Guggenheim Lease (Dep't Ex. E) on the substantial nexus analysis; and
>
> 3). the source of authority for the imposition Cook County use tax in this case and whether it was properly assessed; and
>
> 4). whether Petitioner is or may be exempt from the Illinois Aircraft registration requirement under 92 Ill. Adm. Code 14.230(b).

The Department will address each issue in turn.

1. ***Fall Creek* provides additional support for the existence of substantial nexus in this case.**

In *Fall Creek*, the Missouri Supreme Court held that substantial nexus was established with the state by two aircrafts that entered/exited Missouri a combined total of forty-two times and remained on the ground for a combined twenty-four nights during a 428-day audit period. *Fall Creek Constr. Co. v. Dir. of Revenue*, 109 S.W.3d 165 (Mo. 2003). The court went on to state, "[t]he use in Missouri, **however brief**, is a taxable incident" and was sufficient to create a substantial nexus. *Fall Creek*, 109 S.W.3d at 171 (*internal citations omitted*) (*emphasis added*).

The court's substantial nexus analysis focused on the number of flights in and out of Missouri, and the length of time it spent on the ground. *Id.* The court further reasoned that it was immaterial that the plane was hangered and maintained outside of Missouri. *Id.* Finally, that the taxpayer's principal place of business was in Missouri did not factor into the court's analysis. *Id.*

Fall Creek is yet another case that demonstrates how even a limited presence of a taxpayer's property in a taxing state can establish substantial nexus.[1] In terms of how this holding applies to the matter before this Court, the following chart is useful:

[1] Economic activities of a vendor within a state can also establish substantial nexus. Both are not required, either one can show nexus. *Brown's Furniture v. Wagner*, 171 Ill. 2d 410, 424 (1996).

	TCRG	Fall Creek Plane 1	Fall Creek Plane 2
Length of Audit Period	365 days	428 days	428 days
Total Number of Flights	145	840	897
Flights into/out of State	44	26	16
Percentage of Flights	30.3%	3%	1.7%
Overnights Spent on Ground	71	13	11
Percentage on Ground	19.5%	1.5%	1.2%
Aircraft Hangared and Maintained in Taxing State	Yes	No	No

Here, TCRG's Aircraft flew in/out of Illinois and remained on ground **more than 10 times** that of both aircrafts in *Fall Creek*. Based on this analysis, it is undisputed that the presence of TCRG's Aircraft within the State of Illinois is a taxable incident. The use of TCRG's Aircraft within in Illinois was neither coincidental or isolated, but deliberate and continuous.

2. <u>The Guggenheim and EJM Leases are evidence of both the economic activities and physical presence of TCRG in Illinois.</u>

a. ROLE OF GUGGENHEIM LEASES

TCRG entered into two leases with Guggenheim Capital during the audit period. As shown, Guggenheim Capital is a corporation that is both headquartered in and has its principal place of business in Chicago, Illinois. These leases are direct evidence of TCRG conducting economic activities within the State of Illinois. *Brown's Furniture* (citing *Orvis*) stated:

> "[substantial nexus] 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."

Brown's Furniture v. Wagner, 171 Ill. 2d 410, 424 (1996), *citing Orvis Co. v. Tax Appeals Tribunal*, 86 N.Y.2d 165, 178 (1995) (*emphasis added*). However, the location of the lessee is not the only connection to the State of Illinois. The language is unequivocal that any disputes arising out of these leases are to be governed by Illinois law, and presumably handled by Illinois courts. This type of economic activity is like those in both *Brown's Furniture* and *Town Crier* in which out-of-state vendors contracted with Illinois residents for the purchase of their items.

b. ROLE OF EJM LEASE

The role of TCRG's lease with EJM is evidence of their substantial nexus with Illinois by showing that they had a physical presence within the State of Illinois. *Brown's Furniture* states that a vendor's physical presence in a State need not be substantial, but **more than the slightest presence**. *Brown's Furniture*, 171 Ill. 2d at 424. (*emphasis added*). The EJM lease clearly establishes that TCRG had a physical presence in by listing their principal place of business is 227 W. Monroe, Suite 4900, Chicago, IL 60666. Further, the lease states that the Lessor Representative of the Aircraft is Matthew M. Sennett, an Illinois resident located at the same address. While the physical presence of a taxpayer is not required to establish nexus in the wake of *Wayfair*,[2] the evidence shows that TCRG still maintained a physical presence within the State of Illinois during the audit period.

[2] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

3. **The 1% Use Tax imposed by the Reginal Transit Authority Act was properly assessed.**

As set forth in the Department's prior briefs, the 1% tax imposed on the Notice of Tax Liability, in addition to the 6.25% state use tax rate, is assessed pursuant to the Regional Transportation Authority Act ("RTA Act"), 70 ILCS 3615/1.01, *et seq*. The RTA Act imposes a 1% RTA Retailers' Occupation Tax on gross receipts from sales of tangible personal property in Cook County. 70 ILCS 3615/4.03(e). The RTA Act further imposes a corresponding 1% tax in Cook County "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." 70 ILCS 3615/4.03(g).

Here, the parties have stipulated that the Aircraft was not titled or registered with the State of Illinois. This would seem to exclude the Aircraft from the 1% RTA Use Tax, as it was not "titled or registered with an agency of this State's government." However, the correct inquiry is not whether the Aircraft was actually titled or registered with the state, but whether the Aircraft was required to be titled or registered with the state. This is supported by the language of the statute, which reads:

> The 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. The tax or proof of exemption may be transmitted to the Department by way of the State agency with which, or the State officer with whom, the tangible personal property must be titled or registered if the Department and the State agency or State officer

> determine that this procedure will expedite the processing of applications for title or registration.

70 ILCS 3615/4.03(g) (*emphasis added*). Therefore, if the tax was due only as to property registered or titled with the state, it would never be owed, since such property cannot be titled or registered until such tax has been paid. The fact that the Aircraft was not titled or registered with the state cannot be a basis for avoidance of the 1% RTA Use Tax included in the assessment. The RTA Use Tax is properly imposed on property both registered and required to be registered in the state. *Square D Co. v. Johnson*, 233 Ill. App. 3d 1070, 1084 (1992).

4. <u>Petitioner is not exempt from the Illinois Aircraft registration because it is a "resident" for the purposes of the Illinois Aeronautics Act.</u>

This naturally leads to the question of whether the Aircraft was required to be titled or registered with the State. The Illinois Aeronautics Act requires that all aircraft operating in Illinois be registered with the Illinois Department of Transportation. 620 ILCS 5/43; 92 Ill. Adm. Code § 14.200. Here, the Aircraft was unquestionably operating in Illinois. However, the Illinois Aeronautics Act excepts from this registration requirement, *inter alia*, an "aircraft which is owned by a nonresident of the State who is lawfully entitled to operate such aircraft in the state of his residence." 620 ILCS 5/44(2); 92 Ill. Adm. Code § 14.230(b). Neither the Illinois Aeronautics Act nor the accompanying administrative rules define the words "resident" or "nonresident."

Petitioner is a Delaware limited liability company. Whether a foreign company should be deemed an Illinois resident "must be based upon the statute

involved and its purpose. *Le Blanc v. G.D. Searle & Co.*, 178 Ill. App. 3d 236, 240 (1988). The Illinois Aeronautics Act requires a broad reading of the term "resident" as the purpose of the act is to permit the state to "uniformly regulate and supervise aircraft used and operated in Illinois." *Square D Co.*, 233 Ill. App. 3d at 1085. *Square D* involved a taxpayer that was incorporated in Michigan, and who operated an aircraft in Illinois that was registered in Michigan. *Id.* The court found that the taxpayer was nevertheless considered a "resident" for purposes of the Illinois Aeronautics Act because the taxpayer had its world headquarters in Illinois and because it operated the aircraft out of an Illinois hangar. *Id.* Here, Petitioner maintained an agent for the aircraft in Illinois, contracted with Illinois businesses, and both stored and operated the aircraft from Midway airport. Therefore, for purposes of Illinois Aeronautics Act, Petitioner should be considered a "resident" who was required to register the Aircraft with the State.

Finally, the burden on the question of whether Petitioner is a "nonresident" for the purposes of the Illinois Aeronautics Act lies with Petitioner. *See Branson v. Dep't of Revenue*, 168 Ill. 2d 247, 257 (1995) (Department's determination *prima facie* correct and *prima facie* evidence for all elements of the assessment). While Petitioner has sought to obfuscate its connections with Illinois, it's has failed to identify its connection with any other state. If there are no employees in Illinois, where are its employees? If the Petitioner conducts no business in Illinois, where does it conduct business? Despite its best efforts, the record as presented on the parties' motions only shows a contemporaneous connection to one state—Illinois.

Therefore, as Petitioner has produced no evidence to rebut the presumption that it is a resident of Illinois for purposes of the Illinois Aeronautics Act, the 1% tax imposed under the RTA Act must be upheld.

Dated: May 26, 2023

Respectfully submitted,

/s/ John J. Walz
John J. Walz
Robert O. Lynch
Special Assistants Attorney General
Illinois Department of Revenue
555 West Monroe St., Suite 1100
Chicago, Illinois 60661
Phone: 312-814-4558
John.walz3@illinois.gov
Robert.lynch2@illinois.gov

CERTIFICATE OF SERVICE

I, Robert O. Lynch, an attorney, hereby certify that on May 26, 2023, I caused a copy of the ILLINOIS DEPARTMENT OF REVENUE'S SUPPLEMENTAL BRIEF to be served by email on the below listed counsel for the Petitioner.

/s/ Robert O. Lynch

SERVICE BY ELECTRONIC MAIL

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