ILLINOIS INDEPENDENT
TAX TRIBUNAL

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

ILLINOIS DEPARTMENT OF REVENUE'S REPLY IN SUPPORT OF IT'S MOTION FOR SUMMARY JUDGMENT

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

PRELIMINARY STATEMENT

In Petitioner argues in its Response[1] to the Department's Motion for Summary Judgment that use tax does not apply in this matter because: TCRG and its Aircraft did not have a substantial nexus with Illinois; and the tax applied was not related to the activities of TCRG and its Aircraft. As explained below, these arguments fail as a matter of law. This brief will address how use tax is undoubtedly applicable in this matter based on *Irwin*, *Brown's Furniture*, and *Town Crier*.

[1] While the Petitioner has titled this document as its "Reply," this brief will refer to the portions of Petitioner's brief in response to the Department's cross-motion for summary judgment as its "Response" to avoid confusion with this reply.

ARGUMENT

I. Both TCRG and the Aircraft Have a Substantial Nexus with Illinois

A. TCRG Has a Physical Presence in Illinois

First, Petitioner inexplicably claims that "TCRG has literally no 'physical presence' in Illinois." (Pet. Resp. at 8.) Petitioner's position from the onset of this litigation has been that to establish a substantial nexus between TCRG/Aircraft with Illinois, there must be a "substantial" connection. This is in direct opposition to decades of substantial nexus jurisprudence in Illinois, and throughout the entire country.

Irwin, *Brown's Furniture,* and *Town Crier* are unequivocal in their holdings that a physical presence within the State of Illinois only be **more than the slightest presence**. *Irwin Indus. Tool Co. v. Dep't of Revenue*, 238 Ill. 2d 332, 342 (2010) (*emphasis added*), *citing Brown's Furniture v. Wagner*, 171 Ill. 2d 410, 424 (1996); *Town Crier v. Department of Revenue,* 315 Ill.App.3d 286, 294 (2000). Throughout this matter, Petitioner has completely ignored this "more than the slightest" standard. Instead, they attempt (without any citations to facts or law) to create their own definition for substantial nexus. The Petitioner's argument, since the beginning of the audit, boils down to: substantial nexus can only be established by a **literal** physical presence of a taxpayer in the taxing State, and a near similar number of flights that occurred in *Irwin*. Petitioner's Reply also attempts to differentiate any contracts and leases entered into by TCRG within Illinois as merely "third party

conduct" that does not establish a physical presence for TCRG in Illinois. However, for the past 27 years, the Illinois Supreme has roundly rejected this argument.

In *Brown's Furniture* (cited by Petitioner), the Illinois Supreme Court looked to define what a "physical presence" in a State exactly entailed. The Court cited *Orvis Co. v. Tax Appeals Tribunal* in holding that an entity's "physical presence" in a state:

> [May] be manifested by the presence in the taxing state of the **entity's property** or the **conduct of economic activities** in the taxing state performed by the **entity's personnel or on it's behalf**.

Orvis Co. v. Tax Appeals Tribunal, 86 N.Y.2d 165, 178 (1995) (*emphasis added*). The Court in *Brown* looked to statutes from Virginia and Maine with explicit minimum requirements necessary to establish substantial nexus. *See* Va. Code Ann. § 58.1-612(C)(4) (Michie Supp. 1995) (out-of-state entity subject to use tax collection when it delivers tangible personal property other than by mail or common carrier into the state more than 12 times during a calendar year); Code Me. R. § 08-125 (sales tax section Rule 311) (1994) (out-of-state entity subject to use tax collection when it delivers into the state at least 12 times in a calendar year). *Town Crier*, 315 Ill.App.3d at 293.

Here, it is undisputed that TCRG entered into numerous leases for the Aircraft with Guggenheim Capital, a company doing business in and headquartered in Chicago, Illinois.[2] Notably, these leases state any disputes arising from these leases shall be governed by Illinois law. Further, TCRG contracted with Jen-Air (a company

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[2] Department requests that the Tribunal take judicial notice pursuant to Ill. R. Evid. 201 of Guggenheim's website, https://www.guggenheimpartners.com/contact, which states they are headquartered in Chicago and New York City.

both incorporated in and doing business in the State of Illinois) for maintenance for the Aircraft while it was it was hangered at Midway Airport in Chicago, Illinois. One could not logically argue that entering into numerous contracts with various entities within a State is not an economic activity.

As stated above, this notion that an entity's "physical presence" requires an entity to own property and have employees in the taxing state appears nowhere in Illinois law. To the contrary, the Court in *Brown's Furniture* found the petitioner to have a physical presence in Illinois even though:

> Brown's Furniture owns **no property** in Illinois, has **no offices or plants** in Illinois, and **employs no permanent or part-time sales force** in Illinois. Brown's Furniture has made use of Illinois court on at least once occasion by filing a small claims suit.

Brown's Furniture, 171 Ill. 2d at 414 (*emphasis added*). This reasoning was also used more recently in *Town Crier*. In *Town Crier*, a Department audit revealed that a furniture store in Lake Geneva, Wisconsin made 50% of their total deliveries to the State of Illinois over a 26-month period. *Town Crier*, 315 Ill.App.3d at 288. The store owned no property in Illinois, had no employees within the State, did not have independent contractors that solicited business in the State, and did not advertise in Illinois. *Id.* Despite having no physical property or employees located within Illinois, the Appellate Court found Town Crier to have a "physical presence" and substantial nexus with the State of Illinois based on their **economic activity** within the State. *Id.* at 294. The Court reasoned that by making deliveries into the State using its own property, they established a regular presence in Illinois. *Id.*

Brown's Furniture and *Town Crier* show that an entity need not own property and have employees physically present within the State to establish a substantial nexus. Instead, both cases focused on the economic activities of the entities during the audit period. Using Petitioner's logic, if states can only tax entities with property and employees within their borders, it would be near impossible for **any** state to tax interstate commerce. That is why Illinois Courts will consider the **economic activities** of an entity within the State. *See Brown's Furniture*, 171 Ill. 2d at 424, citing *Orvis*, 86 N.Y.2d at 178; *Town Crier*, 315 Ill.App.3d at 294. The record in this matter shows that TCRG had multiple economic activities within the State of Illinois, and as such plainly had a physical presence within the State.

In addition to TCRG's economic activity within Illinois, ironically, they also had a literal physical presence within the State. Petitioner argues that because TCRG is a Delaware LLC that has: (1) no offices in Illinois; (2) no employees, officers, or directors in Illinois; and (3) and no business operations in Illinois. All three of these assertions are purely semantical and factually inconsistent with the record in this matter. First, TCRG's principal place of business is listed as 277 W. Monroe, Suite 4900, Chicago, IL 60606 (the "Monroe Address"). Second, TCRG's registered agent, Matthew Sennett, is located at the Monroe Address. Sennett is also listed as the lessor of the Aircraft at the Monroe Address. TCRG also used the Monroe Address for the Aircraft's registration with the FAA. Finally, while not having any traditional "business operations", TCRG was regularly entering into contracts with businesses located within the State. While Petitioner attempts to categorize this physical

presence as merely "third-party activity", *Brown's Furniture* was clear that personnel **acting on behalf** of an entity is evidence of physical presence. *Brown's Furniture*, 171 Ill. 2d at 424, *citing Orvis*, 86 N.Y.2d at 178.

Brown's Furniture and *Town Crier* also held that the presence of the **entity's property** within a state can confer a "physical presence". *Id.* (*emphasis added*). Below, the Department will discuss the extent of TCRG's property (the Aircraft) presence in Illinois.

B. The Aircraft Had a Physical Presence in the State

Petitioner's next argument states that because the number of flights the Aircraft made in and out of Illinois were less than the amount that the aircraft in *Irwin* took, the Aircraft did not have a "physical presence" within the State of Illinois. This, once again, distorts the holdings of *Irwin*, *Brown's Furniture*, and *Town Crier*. Petitioner states nearly a half-dozen times that the Aircraft flew in and out of Illinois "6 times" less than the plane in *Irwin* for their justification that the Aircraft did not have a "physical presence" in Illinois. This argument might hold merit if *Irwin* was the only case in Illinois that addressed "physical presence", but alas, it is not.

In terms of numbers alone, the Petitioner's argument is unbelievably misleading. First and foremost, Petitioner would like this Court to look at the raw number of flights without any context whatsoever. While the plane in *Irwin* did indeed make 272 flights in and out of Illinois, that was over a two-year audit period. Here, the audit period is one year from December 17, 2015 through December 16, 2016. Next, Petitioner fails to mention that the aircraft in Irwin made a much larger

number flights than their Aircraft. The Court in *Irwin* noted that of those 272 flights, exactly 36.9% of them were in and out of Illinois. During the audit period here, the Aircraft made 145 total flights with 44 going in and out of Illinois, totaling 30.3%. In this much needed context, it is obvious that the Aircraft did not travel in and out of Illinois at "6x lower" rate than in *Irwin*.

Petitioner's approach to compare raw numbers also in inconsistent with the reasoning of *Town Crier*. In *Town Crier*, the Illinois Supreme Court found a "physical presence" and ultimately a substantial nexus when the entity's property entered Illinois on just 30 occasions over a 26-month period. *Town Crier*, 315 Ill.App.3d at 294. The Court specifically chose to not just compare raw numbers of incursions into Illinois saying:

> Although the deliveries were **markedly less** numerous than the Missouri retailer's in *Brown's Furniture*, they would be sufficient in number to satisfy the Maine and Virginia statutes referred to by the supreme court in support of its finding in that case.

Id. (emphasis added). Here, even using the Petitioner's own (erroneous) method of determining "physical presence", their Aircraft had more contact with Illinois than the entity's property in *Town Crier*. Moreso, these flights were not the only physical presence their Aircraft had with the State of Illinois. TCRG also hangered and housed the plane in Illinois[3] at Midway Airport continuously for ten (10) weeks from March 3, 2016 through May 17, 2016. While Petitioner claims that this was merely a "Break-

[3] *Irwin* found nexus even though the aircraft there was never hangered or housed in Illinois.

In Period"[4] for maintenance on the Aircraft, passengers from Chicago-headquartered Guggenheim used the Aircraft 12 times during this period. This type of activity is consistent as to why TCRG listed Midway Airport as its home airport[5] in its lease with EJM. Finally, the Aircraft spent 71 days[6] or 19.5% of the audit period on the ground in Illinois.

In *Brown's Furniture*, the Court cautioned that substantial nexus should not be found when an entity or their property have rare, nonrecurring contacts with a taxing state. *Brown's Furniture*, 171 Ill. 2d at 424, *citing In re Laptops Etc. Corp.*, 164 Bankr. 506 (D. Md. 1993). Here, there is no logical way to describe both the economic activities of TCRG **and** the presence of TCRG's property within the State of Illinois as rare and nonrecurring. The record in this matter and the law unquestionably establishes that TCRG and the Aircraft had a constant and deliberate presence within Illinois, thus evidencing a substantial nexus with the State.

III. The Tax is Fairly Related to the Services Provided by the State

In its Motion, the Department argued that the fourth prong of the Complete Auto test is easily met because the tax is fairly related to the services provided by the State. (Dept. Br. at 16-18.) The Department focused on several benefits and advantages TCRG received from the state, including access to Illinois law and courts, access via public roads, and state aviation safety regulations. (*Id.*)

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[4] There is no such legal concept of a "Break-In Period" exempting an entity from use tax in any jurisdiction in the United States.
[5] During the audit period, the Aircraft also made trips to DuPage Airport (DPA) and Waukegan Airport (UGN).
[6] Nearly triple the number of contacts that Town Crier had in half the time period.

The fairly related test does not require the Department to provide an accounting of services provided to the taxpayer, nor does it even require that the proceeds of the tax be directly related to the taxable event. *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 199 (1995). In almost all cases cited by both the Department or TCRG, whether a tax was fairly related to the services provided was either easily answered in the affirmative, or not even subject to dispute. One exception is the Illinois Appellate Court's decision in *Am. River Transp. Co. v. Bower*, 351 Ill. App. 3d 208 (2004).

In *American River*, the court found that tugboats that only pushed barges in Illinois waters, and never docked at any Illinois ports did not receive services from the state that bore a fair relation to the use tax sought to be imposed. *Id.* at 212. The court found that the tugboats utilized navigable waterways of the United States, and that any benefit provided by Illinois, like statutory protections from pollution, was insufficient. *Id.* The court directly contrasted the use of the tugboats in navigable waters with "the benefits that might be enjoyed by a firm sending its trucks to use the roads of this state." *Id.*

The court also analogized the tugboats floating in the Mississippi River to aircraft "passing over Illinois." *Id.* But, the court directly contrasted this with boats that access Illinois harbors, and aircraft that use Illinois ground facilities, which "do pay appropriate taxes." *Id.* Therefore, the Appellate Court's divided[7] opinion must be

[7] The dissent would have held that the tugboats presences in Illinois, coupled with the benefits of the state's laws, emergency services, and access to the judicial system, would justify the imposition of use tax. *Am. River Transp. Co.*, 351 Ill. App. 3d at 214.

read to be limited to situations where a boat or aircraft is only physically located in either the air or waters of Illinois, and not where such vessel or aircraft is located on the ground, including airports and harbors.

Here, the Department argued that TCRG benefits from public roads, police protection, a judicial system, along with the other "usual and usually forgotten advantages conferred by the State's maintenance of a civilized society." *Brown's Furniture v. Wagner*, 171 Ill. 2d 410, 429 (internal citations omitted). TCRG finds these arguments "disconnected from…common sense." (Pet. Resp. at 27-29.) TCRG apparently finds it nonsensical that potential disputes with Illinois agents and businesses involving an aircraft physically located in Illinois, and involving contracts specifically choosing Illinois law, could be resolved in Illinois courts. (Pet. Resp. at 28.)

TCRG completely discounts the role the State plays in air travel, including, *inter alia*, the regulation of Illinois aeronautics through the Illinois Department of Transportation ("IDOT"). IDOT is specifically charged with nearly all aspects of aviation safety in Illinois pursuant to the Illinois Aeronautics Act, 620 ILCS 5/1 *et seq.*, and Part 14 of Title 92 of the Illinois Administrative Code. IDOT is directly involved with improvement planning at Illinois airports, inspections of runways, providing educational outreach on aviation and maintenance topics, and pilot and aircraft registration, among others.[8] The State's direct role in Illinois aviation is clearly sufficient to satisfy the fairly related test. Add in local services and the evidence is overwhelming.

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[8] Illinois Department of Transportation, *Aviation Safety*, https://idot.illinois.gov/transportation-system/safety/aviation-safety/index.

TCRG appears to argue that services received by TCRG must be directly provided by the state, as opposed to those provided by local governments. (Pet. Resp. at 29.) Their argument must be understood that since emergency services at Midway Airport are generally provided by the city of Chicago, TCRG receives no benefit from the state of Illinois. This argument is absurd. First, TCRG cites no authority for the position that taxes levied by a state are not fairly related to services provided by a local government of that state. Second, it overlooks any and all direct and indirect benefits conferred by the state on local governments. Finally, TCRG completely ignores the fact that the state shares funding with local Illinois governments. Sales and use taxes collected by the Department are regularly allocated to local governments. *See*, *e.g.*, State Finance Act, 30 ILCS 105/1 *et seq*. In fact, any use tax paid by TCRG on this assessment will be allocated in part to the City of Chicago, as 20% is allocated to the local municipality and county.[9] Chicago's share of sales and use tax is significant and has "historically been the largest single revenue source in the City's Corporate Fund."[10]

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[9] Illinois Department of Revenue, *How Sales and Use Taxes are Distributed*, https://tax.illinois.gov/content/dam/soi/en/web/tax/localgovernments/localtaxallocation/documents/pio-114.pdf.

[10] City of Chicago, *2023 Budget Overview*, at 23, https://www.chicago.gov/content/dam/city/depts/obm/supp_info/2023Budget/2023-OVERVIEW.pdf.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J. Walz, an attorney, hereby certify that on April 14, 2023, I caused a copy of the ILLINOIS DEPARTMENT OF REVENUE'S REPLY IN SUPPORT OF IT'S MOTION FOR SUMMARY JUDGMENT to be served by email on the below listed counsel for the Petitioner.

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