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 SUPPLEMENTAL RESPONSE TO THE TRIBUNAL'S MAY 10, 2023 ORDER

WINSTON & STRAWN LLP
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

The Tribunal's May 10, 2023 order (the "Order") requested that the parties provide "supplemental argument and evidence" on four issues. Petitioner TCRG SN4057, LLC ("TCRG") responds to those four issues below.

(1) "The effect of the Missouri Supreme Court's decision in *Fall Creek Construction Co. v. Director of Revenue*, 109 S.W.3d 165 (Mo. 2003), on this case"

TCRG respectfully submits that *Fall Creek* highlights why there is no substantial nexus in this case.

Fall Creek involved a situation where the taxpayer, which was a real estate company with its principal place of business in the taxing state of Missouri and real estate developments also in Missouri, held fractional interests in two aircraft. 109 S.W.3d at 167. Under this arrangement, the taxpayer shared the aircraft with other participants in the program who held fractional interests and coordinated with Raytheon Travel Air Company, a third-party that managed scheduling and maintenance for the aircraft. *Id.* at 167-168. It was important to the Court that, during the flight itself, the taxpayer "is in 'operational control' of the aircraft while in the air and may direct the pilot to an alternate destination." *Id.* at 168. During the relevant tax period, the taxpayer flew in and out of Missouri on 67 flights (almost 50% more flights than in TCRG's case), both on its own aircraft and others from the exchange program. *Id.*

The Court indicated that "the use in Missouri, however brief, is a 'taxable incident' and was sufficient to create a substantial nexus." *Id.* at 171. It appears that this reference to a "taxable incident" is applying the "taxable moment" test, which the Court in *Superior Aircraft* noted had been replaced by the four-prong test set out in *Complete Auto*. The Department agrees. *See* Dep't Response at 13 ("Illinois courts have recognized that the *Complete Auto* test has supplanted the 'taxable moment doctrine.'"). This legal error renders questionable the conclusion reached in *Fall Creek*, in particular the conclusion that the number of flights at issue exceeded the requisite minimum threshold.

But setting that aside, the facts of *Fall Creek* are drastically different from this case and support TCRG's argument that there is no substantial nexus. Most critically, the taxpayer in *Fall Creek* had its principal place of business in the taxing state of Missouri and ongoing real estate development projects in Missouri, which ***together with*** the flights in and out of Missouri supported a finding of substantial nexus. *Id.* at 167. Thus, even though the Court references 42 flights in and out of Missouri on the aircraft at issue, there are four key points of differentiation:

- Unlike *Fall Creek*, TCRG does not have a principal place of business or any business operations physically in Illinois, which the Department has conceded.

- The taxpayer in *Fall Creek* had "operational control" of the aircraft and chose to fly into Illinois; as the lessor (under dry leases) of the Aircraft at issue, TCRG had no involvement whatsoever in where the Aircraft was flown by lessees.

- Similarly, the taxpayer in *Fall Creek* "used" the aircraft "when it boarded the aircraft and assumed operational control." The same cannot be said for TCRG. As explained below, the "dry leases" establish that the lessees of the Aircraft, not TCRG, have operational control of the Aircraft.

- In *Fall Creek*, the taxpayer assumed operational control of the aircraft and Raytheon generally handled the aircraft when not in use by the fractional owners. Here, the lessees take operational control of the Aircraft while they operate it, and TCRG generally handles the aircraft when not in use by the lessees. If anything, TCRG's role is closer to Raytheon's role, which was not deemed to be the relevant taxpayer.

In sum, *Fall Creek* stands for the proposition that the taxpayer's decision to exercise its operational control to fly into or out of Missouri 42 times on the aircraft at issue, coupled with the taxpayer's ongoing projects in Missouri and its principal place of business in Missouri, supported a finding of substantial nexus. None of these things apply to TCRG, and therefore *Fall Creek* supports a finding of no substantial nexus here.

(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"

TCRG's leases with third parties are irrelevant to the substantial nexus analysis, and TCRG respectfully submits that reliance on these leases is inconsistent with applicable law.

First, as far as TCRG is aware (and the Department has provided no authority to the contrary), no court has ***ever*** found that a substantial nexus exists based upon the substantive provisions of the taxpayer's lease with third parties. If the Tribunal

were to rely upon the third party leases here, TCRG believes it would be the first to do so.

Second, there is on-point authority for the opposite proposition: that the leases are, in fact, legally irrelevant. In *Director of Revenue v. Superior Aircraft Leasing Co., Inc.*, the Supreme Court of Missouri noted that the aircraft there was purchased to "lease" to a third party, and when not leased, "respondent was allowed to use the aircraft for its own business." 734 S.W.2d 504, 505 (Mo. 1987). Ultimately, the Court found there was substantial nexus, but in so doing, it only relied upon the flights in which the ***taxpayer itself used the aircraft*** and ignored flights where the aircraft was leased to third parties. *Id.* at 507 ("[a]ll of these flights, with the exception of one for inspecting a construction site, were recorded as being for board meetings of Superior Aircraft.").

As mentioned above, *Fall Creek* affirms the rule that leases of the aircraft to third parties, which in turn assume operational control of the Aircraft, are immaterial to the substantial nexus inquiry. *Fall Creek* held that dry leases provide the lessee operational control and thus do not represent "use" by the lessor itself (here, TCRG). 109 S.W.3d at 167. The Court in *Fall Creek* found that the taxpayer, by assuming operational control, effectively "used" the aircraft in a way to justify imposing use tax; but the Missouri Department of Revenue did not contend that Raytheon (functionally, a third party lessor) owed any use tax and the Court did not make that

finding. Here, the three leases at issue make clear that the lessees, which decided unilaterally where to fly the Aircraft (including in and out of Illinois), assumed operational control of the Aircraft, not TCRG:

- Ex. C, § 2.2(b): "EJM acknowledges and agrees that it will exercise operational control authority and responsibility over all flight operations using the Aircraft…."

- Ex. D, § 19: "DURING THE DURATION OF THIS LEASE, GUGGENHEIM CAPITAL, LLC . . . IS CONSIDERED RESPONSIBLE FOR OPERATIONAL CONTROL OF THE AIRCRAFT UNDER THIS LEASE."

- Ex. E, § 19: "DURING THE DURATION OF THIS LEASE, GUGGENHEIM CAPITAL, LLC . . . IS CONSIDERED RESPONSIBLE FOR OPERATIONAL CONTROL OF THE AIRCRAFT UNDER THIS LEASE."

Third, as pointed out in its prior submissions and at oral argument, the "physical presence" test remains good law for the tax period in question and is not overruled by *Wayfair*. The Department agrees. The presence of an Illinois choice-of-law provision in the lease itself, or a "notice" provision referring to an independent third party's address (*e.g.*, Franklin Monroe), is irrelevant to TCRG's "physical presence" in Illinois. Relying upon this alleged evidence, especially in the absence of authority supporting such reliance, exposes TCRG to tax liability for the alleged connections and "presence" of its contractual counter-parties, which is legally incorrect. TCRG can only be taxed based upon TCRG's "physical presence." And it is undisputed that TCRG: (i) has no offices in Illinois, (ii) has no employees

in Illinois, (iii) is not an Illinois entity, and (iv) does not have its principal place of business in Illinois. Further, the Department has stipulated that TCRG has "no business operations" in Illinois. No case has ever found substantial nexus where the taxing authority admitted that the taxpayer had "no business operations" in the taxing state. Indeed, there is no legal support for imposing taxation in light of these undisputed facts, which is precisely why the Department has ventured far beyond existing precedent to manufacture third party "contacts" that no Court has ever credited.

(3) "The source of authority for the imposition [of] Cook County use tax in this case and whether it was properly assessed"

The Department has yet to clearly identify the law it is applying for the purported 1% Cook County Use Tax. To date, the Department has cited the following:

- As support for the proposition that Cook County Use Tax applies: Section 4.03 of the Regional Transportation Authority Act, 70 ILCS 3615/1.01 *et seq*. Section 4.03 does not impose any taxes, however. It merely grants the right to impose taxes.

- As support for the proposition that the Aircraft must be registered with the IDOT: 620 ILCS 5/42(b). This provision does not require registration; it merely grants the authority to require such registration.

- The exception to registration under 92 Ill. Admin. Code 14.230(b), which applies and is discussed more fully below.

To date, the Department and TCRG have only referred to Section 74-272(b) of the Cook County Code as the purported source of authority for the Department's

imposition of additional use tax. As the Department has declined to cite any other source of authority, the Department is now barred from claiming a separate source of authority for imposing the additional 1% tax.

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 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 the FAA. As such, the Cook County Use Tax, on its face, does not apply.

The Department claims, without citation, that the phrase "which is titled or registered" should be read to mean "which is titled or registered ***(or required to be titled or registered)***." But that is not the language in the statute. Further, the Department fails to make any claim whatsoever as to whether the Aircraft would be required to be registered "at location inside Cook County," only that it should be registered with the IDOT.

(4) "Whether Petitioner is or may be exempt from the Illinois Aircraft registration requirement under 92 Ill. Adm. Code 14.230(b)"

In any event, an exception to registration applies here. As noted above, the authority the Department cites for the registration requirement does not actually impose such a requirement. And even if such a requirement were imposed, 92 Ill.

Admin. Code 14.230(b) provides an exception to registration requirements for "aircraft owned by a non-resident person of the state of Illinois lawfully entitled to operate the aircraft in the state of his or its residence." TCRG is, as stipulated, a Delaware LLC and thus a non-resident of Illinois. The Department has never suggested that TCRG is not lawfully entitled to operate the aircraft in Delaware and, in fact, the Aircraft was fully entitled to do so. Delaware has no requirement that the aircraft be registered in the state of Delaware to legally operate, only with the FAA.[1] As stipulated, the Aircraft is registered with the FAA and legally entitled to fly into Delaware. Accordingly, the Aircraft is not required to be registered with "an agency of the State of Illinois at location inside Cook County," and as such the Cook County Use Tax cannot apply.

CONCLUSION

For these reasons, along with the reasons in TCRG's prior submissions and as articulated during oral argument on May 10, 2023, TCRG respectfully requests that the Tribunal grant its motion for summary judgment, deny the Department's cross-motion for summary judgment, cancel and declare the Notice of Tax Liability

[1] https://deldot.gov/Programs/aviation_svcs/index.shtml?dc=faqs under the heading "Aircraft Registration: What laws cover aircraft registration in Delaware?" ("Currently, Delaware has no law requiring aircraft be registered with the State. All aircraft must be registered with the FAA to legally operate.")

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: May 26, 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 May 26, 2023, a copy of Petitioner TCRG's Supplemental Response to the Tribunal's May 10, 2023 Order, was sent via e-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