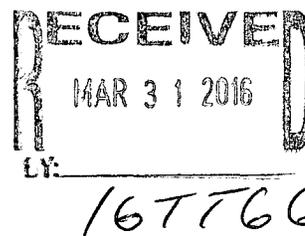


ILLINOIS INDEPENDENT  
TAX TRIBUNAL

TERRY KELLEY, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 ILLINOIS DEPARTMENT OF REVENUE )  
 )  
 Respondent. )



**PETITION**

The Petitioner, TERRY KELLEY, hereby petitions the Illinois Independent Tax Tribunal to review and reverse and/or modify the Notice of Tax Liability (Letter ID: CNXXXXXX588968X1) (“Notice”) issued by the Illinois Department of Revenue (“Department”), for the reasons stated below:

**INTRODUCTION**

1. The Notice was issued by the Department on January 28, 2016, assessing in the amount of \$18,438.00 in aircraft use tax, \$3,938.00 in penalties, and \$1,488.00 in interest for the reporting period April 20, 2012 with respect to aircraft identified as N212CB (“Aircraft”). A copy of the Notice is attached to this Petition.

2. Petitioner is an individual residing at 4003 N Hollyridge Cir, Peoria, Illinois. Petitioner’s phone number is 309-368-0015. Petitioner’s Taxpayer Account number is 19254-07488.

**BACKGROUND AND RELEVANT FACTS**

3. Simply Living Ltd., a corporation owned by Petitioner that has been administratively dissolved, acquired the Aircraft on April 25, 2012, when the Aircraft was

located in Atlanta, Georgia. The closing was conducted by an escrow agent located in Oklahoma City, Oklahoma.

4. On April 25, 2012, the Aircraft was flown from Atlanta, Georgia to Aurora, Illinois, where the Aircraft remained for avionics repairs from April 25, 2012 through June 20, 2012.

5. On June 20, 2012, the Aircraft was flown to Peoria, Illinois for an engine change and its annual inspection. The Aircraft remained in Peoria, Illinois and was not flown again until July 5, 2012.

6. On July 5, 2012, the Aircraft left Peoria to fly to Duluth, Minnesota for a test flight, paint, and interior repairs, and was flown to Lewis Lockport, Illinois to pick up a second aircraft.

7. Later on July 5, 2012, the Aircraft was flown to Rockford, Illinois to drop off the second aircraft.

8. Later on July 5, 2012, the Aircraft completed its flight to Duluth, Minnesota for a test flight, paint, and interior repairs. The Aircraft remained in Duluth, Minnesota and was not flown again until July 8, 2012.

9. On July 8, 2012, the Aircraft was flown to Northbrook, Illinois for a meeting with the Federal Aviation Administration.

10. On July 9, 2012, the Aircraft was flown to Peoria, Illinois to drop off a passenger.

11. On July 9, 2012, the Aircraft was flown back to Duluth, Minnesota for further repairs.

12. From July 9, 2012 through September 28, 2012, the Aircraft was in Duluth, Minnesota for chute replacement, painting, and interior repairs.

13. On September 28, 2012, the Aircraft was flown to Peoria, Illinois to pick up ferry flight/survival gear before being flown to an ultimate destination of Germany, where the Aircraft arrived approximately October 8, 2012. On this flight to Germany, the Aircraft was landed in New York, Bar Harbor, and Quebec before normal ferry stops in Greenland, Iceland, and the United Kingdom, before ultimately landing in Germany.

14. After the Aircraft left Peoria, Illinois on September 28, 2012, it never again returned to Illinois while owned by Simply Living Ltd..

15. The Aircraft remained in Europe from September 28, 2012 through the date that Simply Living Ltd. sold the Aircraft on March 2, 2015.

16. Simply Living Ltd. owned the Aircraft for 1,041 days. The Aircraft was in Illinois overnight on 71 days or 6.8% of the days the Aircraft was owned by Simply Living Ltd.

17. The Aircraft was in Illinois for these 71 days only because it was being repaired at a location in Illinois. While the Aircraft was located in Illinois, the Aircraft was not yet in operating condition and could not be flown except on the six dates that it was flown. The few flights that occurred in Illinois were necessary to make sure that the Aircraft was safe and in airworthy condition.

#### **APPLICABLE LAW**

18. The Illinois Aircraft Use Tax Law imposes a tax “on the privilege of using, in this State, any aircraft as defined in Section 3 of the Illinois Aeronautics Act acquired by gift, transfer, or purchase after June 30, 2003.” 35 ILCS 157/10-15.

19. “The rate of tax shall be 6.25% of the selling price for each purchase of aircraft that qualifies under this Law. For purposes of calculating the tax due under this Law when an aircraft is acquired by gift or transfer, the tax shall be imposed on the fair market value of the

aircraft on the date the aircraft is acquired or the date the aircraft is brought into the State, whichever is later. Tax shall be imposed on the selling price of an aircraft acquired through purchase. However, the selling price shall not be less than the fair market value of the aircraft on the date the aircraft is purchased or the date the aircraft is brought into the State, whichever is later.” 35 ILCS 157/10-15.

20. The United States Constitution grants Congress the power to “regulate Commerce . . . among the several States.” U.S. Const., art. I, § 8, cl. 3.

21. “The Supreme Court has consistently interpreted this express grant of congressional authority as implicitly containing a negative command, known as the dormant commerce clause, which limits the power of the states to tax interstate commerce even when Congress has failed to legislate on the subject.” *Irwin Indus. Tool Co. v. Illinois Dep’t of Revenue*, 238 Ill. 2d 332, 341 (2010).

22. “To withstand a claim that it has unconstitutionally burdened interstate commerce, a state tax must satisfy the four-part test enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).” *Irwin Indus. Tool Co. v. Illinois Dep’t of Revenue*, 238 Ill. 2d 332, 341 (2010).

23. “Under *Complete Auto*, the tax must: (1) be applied to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state.” *Irwin Indus. Tool Co. v. Illinois Dep’t of Revenue*, 238 Ill. 2d 332, 341 (2010).

#### **ERROR I**

(Lack of Substantial Nexus with Illinois)

24. Petitioner realleges and incorporates herein paragraphs 1 through 23 of this Petition.

25. The Department erred by assessing aircraft use tax with respect to the Aircraft when the Aircraft did not have a substantial nexus with Illinois.

26. The Aircraft was located in Illinois on only 6.8% of the nights that the Aircraft was owned by Simply Living Ltd.

27. While the Aircraft was owned by Simply Living Ltd., the only reason the Aircraft was present in Illinois was because it was being repaired in Illinois

28. The Aircraft was not in operating condition nearly the entire time that the Aircraft was present in Illinois. Therefore, while the Aircraft was present in Illinois, it was not capable of being used for the use for which it was designed, namely flying.

29. Instead of being used for flying while located in Illinois, the Aircraft was really only temporarily stored in Illinois while it was being repaired.

30. The small amount of time that the Aircraft was present in Illinois combined with the fact that the Aircraft was not being flown but was only stored in Illinois while being repaired cause the Aircraft to lack substantial nexus with Illinois.

WHEREFORE, Simply Living Ltd. requests that the Tax Tribunal (a) rule that Petitioner is not liable for any aircraft use tax, interest, or penalties with respect to the Aircraft, (b) cancel the Notice in its entirety, and (c) grant any further relief that the Tax Tribunal deems appropriate.

**ERROR II**

(Overstated Assessed Value)

31. Petitioner realleges and incorporates herein paragraphs 1 through 23 of this Petition.

32. Petitioner does not owe any aircraft use tax because the Aircraft lacked substantial nexus with Illinois, as alleged in paragraphs 24-30 above. However, if aircraft use tax is

determined to be due, the Department erred by assessing aircraft use tax with respect to the Aircraft using a value of \$295,000.

33. Vref, the aircraft value reference publication, lists the value of the Aircraft as \$135,300. However, the Aircraft needed the following work, which would reduce the value below the listed value by the amounts indicated: paint (\$5,400), interior repair (\$5,400), parachute repack (\$13,500), airframe repair (\$7,161), engine repair (\$31,060), and other repairs and reconditioning (\$8,168).

34. When considering the condition of the Aircraft and the repairs necessary to make the Aircraft airworthy, the fair market value of the Aircraft when acquired by Simply Living Ltd. was \$64,611.

WHEREFORE, Petitioner requests that the Tax Tribunal (a) rule that the Aircraft had a fair market value of \$64,611, (b) modify the Notice's assessment of aircraft use tax, interest, and penalties to reflect the Aircraft's fair market value of \$64,611, and (c) grant any further relief that the Tax Tribunal deems appropriate.

**ERROR III**  
(Assessment of Penalties)

35. Petitioner realleges and incorporates herein paragraphs 1 through 23 of this Petition.

36. Petitioner does not owe any aircraft use tax because the Aircraft lacked substantial nexus with Illinois, as alleged in paragraphs 24-30 above. However, if aircraft use tax is determined to be due, Petitioner should not owe any penalties with respect to the aircraft use tax due to reasonable cause pursuant to 35 ILCS 735/3-8.

37. "The most important factor to be considered in making a determination to abate a penalty will be the extent to which the taxpayer made a good faith effort to determine his proper

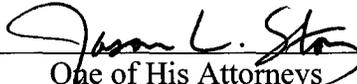
tax liability and to file and pay his proper liability in a timely fashion.” 86 Ill. Admin. Code 700.400(b).

38. Petitioner, in good faith, determined that Petitioner did not owe aircraft use tax with respect to the Aircraft because, in several previous audits of Simply Living Ltd., the Department has determined that no aircraft use tax was due with respect to aircraft owned by Simply Living Ltd. with facts very similar to the facts in this case involving the Aircraft.

WHEREFORE, Petitioner requests that the Tax Tribunal (a) rule that Petitioner had reasonable cause in believing that no aircraft use tax was due with respect to the Aircraft, (b) cancel the Department’s imposition of penalties with respect to the Aircraft, and (c) grant any further relief that the Tax Tribunal deems appropriate.

TERRY KELLEY

WESTERVELT, JOHNSON, NICOLL &  
KELLER, LLC

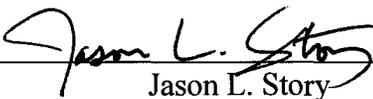
By:  \_\_\_\_\_  
One of His Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 28, 2016, a copy of the foregoing Petition was served on the Illinois Department of Revenue, as required by 86 Ill. Admin. Code § 5000.310(a)(2)(A), by enclosing a copy of the Petition in an envelope addressed to the Illinois Department of Revenue as indicated below and depositing said envelope with first-class postage prepaid in a depository for U.S. mail in Peoria, Illinois, on said date:

Illinois Department of Revenue  
Office of Legal Services  
100 W. Randolph St., 7-900  
Chicago, IL 60601

  
\_\_\_\_\_  
Jason L. Story

# Notice of Tax Liability

for Form EDA-128, Auditor-prepared Aircraft/Watercraft Use Tax Report



#BWNKMGV  
#CNXX XXXX 5889 68X1#  
TERRY KELLEY  
4003 N HOLLYRIDGE CIR  
PEORIA IL 61614-7211

January 28, 2016



Letter ID: CNXXXXXX588968X1

Account ID: 19254-07488  
Reporting Period: Apr 20, 2012

AV/AW: 200300311  
N: 212CB



We have audited your account for the transaction listed above. As a result, we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Audit Tax	18,438.00	0.00	18,438.00
Late Payment Penalty Increase	3,688.00	0.00	3,688.00
Late Filing Penalty Increase	250.00	0.00	250.00
Interest	1,488.00	0.00	1,488.00
<b>Assessment Total</b>	<b>\$23,864.00</b>	<b>\$0.00</b>	<b>\$23,864.00</b>

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of this tax liability, exclusive of penalty and interest is more than \$15,000 or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is March 28, 2016. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). Mail Form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/ 2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at [tax.illinois.gov](http://tax.illinois.gov)), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action.

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

BUREAU OF AUDITS  
TECHNICAL REVIEW SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012  
217 785-6579