ILLINOIS INDEPENDENT TAX TRIBUNAL

TEXAS CAPITALIZATION RESOURCE GROUP, INC., Petitioner, v. ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	20 TT 93 Hon. Brian F. Barov

PETITIONER TEXAS CAPITALIZATION RESOURCE GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT

Petitioner, Texas Capitalization Resource Group, Inc. ("Texas Capitalization"), by its undersigned attorneys, Winston & Strawn LLP, files this Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005 and the Tax Tribunal's Rules. For the reasons below, Petitioner respectfully requests that the Tribunal grant summary judgment in its favor and against Respondent, the Illinois Department of Revenue (the "Department"), and enter an order cancelling and declaring null and void the Notice of Tax Liability issued by the Department on June 9, 2020.

INTRODUCTION

This proceeding arose with respect to the purchase of a 2006 Gulfstream Aerospace G450, Serial No. 4057 (the "Aircraft") by TCRG SN4057, LLC ("TCRG"). It is factually undisputed that Texas Capitalization did not purchase the Aircraft. And it is legally uncontested that, because Texas Capitalization did not purchase the Aircraft, the Department cannot attempt to assess and collect a tax against Texas Capitalization.

Admitting this to be true, in December 2020 the Department initiated a second parallel audit against the purchaser of the Aircraft, TCRG. Along with that, the Department expressly agreed—in calls with Texas Capitalization's counsel and during status conferences before the

Tribunal—to withdraw the Notice of Tax Liability against Texas Capitalization ***if either*** (i) a Notice of Tax Liability is issued against TCRG in the second audit, ***or*** (ii) the Informal Conference Board ("ICB") finds in TCRG's favor in the second audit.[1] Regardless of the outcome of the second audit, the proceeding before this Tribunal has been rendered moot.

Texas Capitalization expects that the Department will attempt to invoke a purported estoppel defense in response to this motion. But under the two scenarios above, the merits of the estoppel defense (which the Department cannot establish legally or factually in any event) are not even before the Court on this motion. That is, to even consider the merits of the estoppel defense, the Tribunal must make a threshold finding that this entire proceeding is ***not facially moot***—a finding that is inconceivable given the undisputed facts and the Department's own concessions.

For these reasons, Texas Capitalization respectfully requests that the Tribunal grant summary judgment in its favor.

FACTUAL BACKGROUND

A. This motion should be granted based upon two undisputed facts.

To resolve this motion, the Tribunal need only consider two uncontested facts. First, through a Sales Agreement executed on November 25, 2015, TCRG (and not Petitioner) purchased the Aircraft giving rise to the present proceeding.[2] (*See* Ex. A, Excerpts of Pre-Owned Aircraft Sales Agreement; *but see* Ex. B, Notice of Tax Liability, Notice of Proposed Audit Liability, and Notice of Proposed Audit Findings issued to Texas Capitalization.) And second, on January 30, 2018, TCRG SN4057, LLC submitted a Form RUT-7-A (Rolling Stock Certification for Aircraft, Watercraft, Limousines, and Rail Carrier Items) and Form RUT-25 (Vehicle Use Tax Transaction

[1] TCRG's conference before the ICB is scheduled to take place on April 19, 2021.
[2] Texas Capitalization is the indirect parent of TCRG and both are separate legal entities.

Return) with respect to the Aircraft, and each form identified TCRG as the purchaser of the Aircraft. (*See* Ex. C, submitted Form RUT-7-A and Form RUT-25.) The Department was thus aware of the Aircraft's purchaser from the very beginning.

B. The Department admitted that these facts are accurate but refused to submit a stipulation.

Consistent with the Tribunal's Rule 5000.340, on the morning of March 17, 2021, Texas Capitalization submitted to the Department only ***two proposed uncontested facts*** to include in a stipulation to accompany this motion. Those two facts are practically identical to the facts in the paragraph above and were tailored to address the facts essential to disposing of this motion. In an email on March 17, 2021, and explicitly on a telephonic meet-and-confer that same afternoon, the Department ***conceded that those facts are true and correct.*** Nevertheless, the Department refused to enter into the stipulation because it claimed the stipulation was "incomplete" (but not inaccurate) and the Department did not have sufficient time to incorporate certain extensive additional facts into the stipulation.[3]

Texas Capitalization respectfully requests that the Tribunal make a finding that the facts above are undisputed for purposes of this motion given the supporting documentation that Texas Capitalization has provided and the Department's concession that these facts are true and correct.

In any event, while a stipulation is not necessary, the inability to submit a stipulation cannot be held against Texas Capitalization. The Department has claimed that they lacked the time to review Texas Capitalization's uncontested facts or to propose their own facts. But Texas Capitalization's proposed stipulation only included ***two facts*** that Texas Capitalization, as the

[3] These alleged additional facts, the Department informed Texas Capitalization yesterday, relate to the Department's purported estoppel defense, which, as explained herein, is not pertinent to this motion. Texas Capitalization reserves all of its rights on this issue, including the right to present additional facts in its reply, if necessary, or object to the Department's presentation of facts in its response.

moving party, deemed to be essential to this motion. Each of these facts were supported by documents previously delivered to the Department and the Department has never challenged these facts (either in the months leading up to this motion or after receiving Texas Capitalization's draft stipulation). And there is no obligation, nor does it make any sense, for Texas Capitalization to anticipate the Department's extraneous, immaterial facts in preparing the stipulation. Of course, the Department was free to contact Texas Capitalization in the weeks leading up to the filing to convey their intent to include extensive additional facts or draft those facts in advance themselves. The Department did neither and took no action to prepare their own alleged uncontested facts.

ARGUMENT

A. Texas Capitalization did not purchase and has never owned the Aircraft and thus no viable legal basis exists to assess and collect a tax in this proceeding.

As a matter of law, because Texas Capitalization did not purchase or own the Aircraft, no tax can be assessed or collected against Texas Capitalization. It is self-evident, and fundamental to notions of due process, that a use tax can ***only*** be applied against the legal owner of the Aircraft. And Texas Capitalization, as the indirect parent of TCRG (a single-member LLC that purchased the Aircraft), cannot be subject to the use tax on the purchase of the Aircraft. In *Department of Revenue of the State of Illinois v. ABC Business Taxpayer*, UT 11-08 (Aug. 26, 2011), the administrative law judge held that "[a]s the Department has stated, nothing in the Use Tax Act or case law requires that an LLC that is treated as a disregarded entity for income tax purposes must be treated as a disregarded entity for use tax purposes." *Id.* (citing *Kmart Michigan Property Services, LLC v. Department of Treasury*, 283 Mich. App. 647 (2009), which held that filing as a disregarded entity for federal income tax purposes does not require a single member LLC to be a disregarded entity for purposes of Michigan's Single Business Tax Act).

Consistent with *ABC Business Taxpayer*, there is no provision in the Aircraft Use Tax Act (or the Illinois Use Tax Act) requiring that an entity disregarded for federal income tax purposes is also disregarded in applying the Aircraft Use Tax Act (or the Illinois Use Tax Act). The absence of such a provision is dispositive because, where Illinois law has decided to treat an entity as disregarded for purposes of its tax laws, it has expressly said so. For example, in contrast to the Aircraft Use Tax Act, the Illinois Income Tax Act holds that if an entity is disregarded for federal income tax purposes, it is ***also*** treated as disregarded for Illinois income tax purposes. *See* 35 ILCS 5/1501 (a)(4); 86 Ill. Admin. Code § 100.9750(b)(1).[4]

This foundational principle of use taxation conclusively establishes that Texas Capitalization is the incorrect legal entity. In fact, consistent with the authority above, in this very proceeding, the Department has ***never even attempted to assert*** that Texas Capitalization is the correct legal entity, forfeiting the issue.

B. The Department's request to allow this proceeding to remain pending during the second audit against the purchaser of the Aircraft is illogical, prejudicial, and serves no legitimate purpose.

After months of forcing Texas Capitalization to incur unnecessary attorneys' fees and expenses in this proceeding, the Department finally admitted there was no cognizable legal basis

[4] The applicable statutory provision states: "(4) Corporation. The term 'corporation' includes associations, joint-stock companies, insurance companies and cooperatives. Any entity, including a limited liability company formed under the Illinois Limited Liability Company Act, shall be treated as a corporation if it is so classified for federal income tax purposes." *See* 35 ILCS 5/1501. And the corresponding Illinois Administrative Code provides: "Accordingly, any entity treated as a corporation for federal income tax purposes must be treated as a corporation for all purposes of the IITA, and no entity (other than a cooperative) that is not treated as a corporation for federal income tax purposes may be treated as a corporation for purposes of the IITA. Thus, any entity electing to be taxed as a corporation under 26 CFR 301.7701(a) is a corporation for all purposes of the IITA, and any entity that elects not to be treated as a corporation separate and distinct from its owners is not a corporation separate and distinct from its owners. For example: A) ***An entity that has elected to be disregarded as an entity separate from its corporate owner for any federal income tax purpose pursuant to 26 CFR 301.7701-3(a) and its corporate owner are a single corporation for the equivalent purpose of the IITA***." 86 Ill. Admin. Code § 100.9750(b)(1) (emphasis added).

to proceed against Texas Capitalization. That is, five days after the status conference before the Tribunal on November 25, 2020, setting a summary judgment briefing schedule on the incorrect taxpayer issue, the Department initiated a ***second*** audit and issued a Notice of Audit Initiation and Audit Records Request to TCRG regarding the 2015 purchase of the Aircraft.[5]

In light of this, Texas Capitalization requested that the Department agree that the Notice of Tax Liability against Texas Capitalization was null and void and the proceeding before this Tribunal should be voluntarily dismissed in Texas Capitalization's favor. In response, while never defending the validity of the Notice of Tax Liability against the incorrect entity, the Department insisted upon keeping this proceeding pending and represented and agreed that:

- If a Notice of Tax Liability is issued against TCRG in the second audit, then the Department would immediately withdraw the Notice of Tax Liability against Texas Capitalization.
- Alternatively, if TCRG prevails before the Informal Conference Board and no Notice of Tax Liability is issued against TCRG, then the Department would immediately withdraw the Notice of Tax Liability against Texas Capitalization.

Regardless of the outcome of the ICB's review, the proceeding before this Tribunal is effectively moot. Counsel for Texas Capitalization reiterated these two scenarios during status conferences before the Tribunal on January 15, 2021, and February 16, 2021; the Department never disputed or advanced a contrary position.[6]

Rather than contesting the mootness of this proceeding, which is a necessary threshold issue, it appears that, based upon prior status conferences, the Department may assert two arguments in response to this motion. Neither have merit.

---

[5] In violation of due process and notice requirements, the Department also proceeded to issue a Notice of Proposed Audit Findings and Notice of Proposed Audit Liability on December 7, 2020, without providing TCRG any opportunity to respond to the second audit.

[6] The mootness of this proceeding can be illustrated by a simple hypothetical: If the Department had never initiated an audit against Texas Capitalization with respect to the purchase of the Aircraft, but had instead followed the law and initiated an audit against the disclosed purchaser, TCRG, would the Department have any standing to proceed against Texas Capitalization for the Aircraft Use Tax at issue? Of course not.

First, the Department may claim that a purported "estoppel" defense may justify continuing to attempt to collect a tax from the incorrect taxpayer. But that defense, which is inconsistent with disclosures to the Department identifying the purchaser and the Department's own precedent, is irrelevant. Not only that, but the Department disclosed yesterday that it intends to stuff the record for this motion with alleged facts pertaining to the merits of this defense. Texas Capitalization reserves its rights to address that issue, if necessary, in its reply brief. But suffice it to say, as explained, the merits of that defense have nothing to do with this motion because, as a threshold matter, this proceeding is moot. Perhaps by the Department's design, this frolic-and-detour unnecessarily clouds the simple and clear issues raised by Texas Capitalization's motion. Such an attempt should be rejected.

Second, the Department may assert that dismissal of this proceeding against Texas Capitalization should be denied due to certain "administrative concerns," namely that this proceeding should remain open as a "safety net" just in case the Department, for example, fails to issue a timely Notice of Tax Liability to TCRG in the second audit. But the Department is not entitled to a judicially-authorized insurance policy to cover its own potential mistakes. There is no legal authority or precedent for such a drastic request. As in any other audit, the Department must comply with its own rules and regulations in timely issuing the various notices; this case is no exception to that basic obligation. Texas Capitalization is entitled to be treated the same as other taxpayers. Any unique allowance to protect the Department if it fails to follow its own requirements, which serve to ensure fairness and notice to the taxpayer, is unfounded. The solution to the Department's concern is for the Department to simply follow its own procedures—not seek relief from the Tribunal. At any rate, this is no reason to keep the current proceeding pending.

Finally, the prejudice to Texas Capitalization for extending the Department this unsupportable accommodation is real and significant. In the context of this proceeding, the Department's lawyers knew about the incorrect taxpayer issue (a dispositive flaw) since August of 2020, yet failed to remedy it, waiting until months later when a summary judgment motion was upcoming to initiate a second audit against the purchaser of the Aircraft—forcing Texas Capitalization to incur unnecessary fees for months. And, of course, granting the Department an unprecedented "safety net" against administrative errors, which would apply only to the detriment of Texas Capitalization and no other taxpayers in their audits, is inappropriate and highly prejudicial. Texas Capitalization, like any taxpayer, has a right to timely termination of a proceeding that is facially defective instead of having it languish for no discernable reason, which is important for potential M&A, financial auditing, and other reasons. In contrast, there is ***no*** prejudice to the Department, which has now attempted to correct its fatal error by pursuing a second audit against TCRG.

CONCLUSION

For these reasons, Texas Capitalization respectfully requests that the Tribunal grant its motion for summary judgment, cancel and declare the Notice of Tax Liability against Texas Capitalization null and void, and enter judgment in Texas Capitalization's favor in this proceeding.

Dated: March 18, 2021

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, Texas Capitalization Resource Group Inc.

CERTIFICATE OF SERVICE

I, Thomas G. Weber, Petitioner's attorney, hereby certify that on March 18, 2021, a copy of Petitioner Texas Capitalization Resource Group, Inc.'s Motion for Summary Judgment, was sent via e-mail and U.S. mail to:

Michael Coveny
Tina Tsatsoulis
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900 (7th floor of Thompson Center)
Chicago, IL 60601
michael.coveny@illinois.gov
tina.tsatsoulis@illinois.gov

/s/ Thomas G. Weber
Thomas G. Weber