

UT 18- 07

Tax Type: Use Tax

Tax Issue: Aircraft Use Tax

Temporary Storage Exemption

Nexus (Taxable Connection With Or Event Within The State)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

JOHN DOE d/b/a

ABC, LTD.

Taxpayer

Docket # XX-XX-XXX
Acct ID: XXXXX-XXXXX
Acct ID: XXXXX-XXXXX
Letter ID: CNXXXXXXXXXXXXXXXXX
Letter ID: CNXXXXXXXXXXXXXXXXX

RECOMMENDATION FOR DISPOSITION

Appearances: Matthew Crain, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Roger E. Holzgrafe and Jason L. Story of Westervelt, Johnson, Nicoll & Keller, LLC for JOHN DOE d/b/a ABC, Ltd.

Synopsis:

After conducting an audit, the Department of Revenue (“Department”) determined that ABC, Ltd. owed tax on the acquisition of an aircraft pursuant to the Aircraft Use Tax Law (35 ILCS 157/10-1 *et seq.*). The aircraft was acquired on April 6, 2011. On August 28, 2014, the Department’s Informal Conference Board issued a decision abating all penalties related to the assessment. On October 21, 2014, the

Department issued a Notice of Tax Liability (“NTL”) to ABC, Ltd. that assessed the aircraft use tax on the acquisition of the aircraft in the amount of \$XXXXXXX, plus interest. After the Department determined that ABC, Ltd. was involuntarily dissolved at the time the NTL was issued, the Department issued an NTL to JOHN DOE (“taxpayer”) on February 9, 2016 for the same liability.¹ The NTL issued to JOHN DOE assessed tax in the amount of \$XXXX.XX, plus penalties and interest. The taxpayer filed a Motion for Summary Judgment to which the Department filed a response, and then the taxpayer filed a reply. Both parties filed a Stipulation of Facts with supporting documents. After the Motion for Summary Judgment was denied, the taxpayer filed a Renewed Motion for Summary Judgment with Supplemental Stipulations of Facts and Documents. In response, the Department filed a Motion for Judgment on the Filings, which will be construed as a Motion for Summary Judgment. The issues presented by the taxpayer are the following: (1) whether the taxpayer’s acquisition of the aircraft qualifies for the temporary storage exemption; (2) whether the aircraft lacks substantial nexus with Illinois to prevent imposition of the tax; (3) if the taxpayer owes the tax, whether the amount of tax was correctly assessed; and (4) if the taxpayer owes the tax, whether the penalties should be abated. For the following reasons, it is recommended that this matter be resolved partially in favor of the taxpayer.

FINDINGS OF FACT:

1. The aircraft for which tax was imposed against the taxpayer in this case is a 20XX
ZZZ aircraft that has been registered with the Federal Aviation Administration

¹ According to the on-line records of the Illinois Secretary of State, ABC, Ltd. was initially incorporated on 9/17/91 and involuntarily dissolved on 2/1/99. It was again incorporated on 6/18/04 and involuntarily dissolved on 11/1/05. The aircraft bill of sale in this case indicates that ABC, Ltd. acquired the aircraft on

- with the N-Number XXXX. (This aircraft is hereinafter referred to as the “Aircraft.”) (Stip. #1)
2. In this case the Department assessed tax against the taxpayer for the privilege of using the Aircraft in Illinois pursuant to 35 ILCS 157/10-15. (Stip. #2)
 3. On March 29, 2011, PAUL SMITH entered into a contract with JAMES JONES pursuant to which PAUL SMITH agreed to purchase the Aircraft from JAMES JONES for a purchase price of \$145,000 at a closing to occur on or before April 15, 2011. (Stip. #3)
 4. Paul Smit and JAMES JONES are not related parties. (Stip. #4)
 5. Title to the Aircraft was transferred from JAMES JONES to PAUL SMITH on April 6, 2011 upon payment by PAUL SMITH to JAMES JONES of the \$XXXXXXX purchase price. (Stip. #5)
 6. The purchase price of the Aircraft paid by PAUL SMITH to JAMES JONES of \$XXXXXXX was equivalent to the fair market value of the Aircraft at the time the Aircraft was transferred to PAUL SMITH. (Stip. #6)
 7. Title to the Aircraft was transferred by PAUL SMITH to the taxpayer on April 6, 2011.² (Stip. #7)
 8. While title to the Aircraft was held by the taxpayer, the Aircraft first entered the State of Illinois on April 7, 2011. (Stip. #8)
 9. The Aircraft was flown into the State of Illinois on April 7, 2011 only so that the Aircraft could be inspected and so that the Aircraft could be prepared for an engine change. (Stip. #9)

April 6, 2011. (Ex. A, p. 17) Because ABC, Ltd. was involuntarily dissolved at the time the aircraft was acquired, the taxpayer will be referred to as John Doe d/b/a ABC, Ltd.

10. The Aircraft was located in Anywhere, Illinois from April 7, 2011 through April 29, 2011. (Stip. #10)
11. While the Aircraft was located in Anywhere, Illinois from April 7, 2011 through April 29, 2011, the Aircraft (a) was inspected and was prepared for an engine change and (b) no further activity involving the Aircraft occurred until it was flown to Anywhere, Indiana on April 29, 2011. (Stip. #11)
12. The Aircraft was flown to Anywhere, Indiana on April 29, 2011 only so that repairs and upgrades could be made to the Aircraft in Anywhere, Indiana. (Stip. #12)
13. The Aircraft was located in Anywhere, Indiana from the night of April 29, 2011 through June 17, 2011. (Stip. #13)
14. While the Aircraft was located in Anywhere, Indiana from April 29, 2011 through June 17, 2011, the Aircraft (a) was repaired and upgraded and (b) no further activity involving the Aircraft occurred until it was flown to Anywhere, Illinois on June 17, 2011. (Stip. #14)
15. The Aircraft was flown to Anywhere, Illinois on June 17, 2011 only so that the Aircraft's engine could be changed, so that the Aircraft could be inspected, and so that the Aircraft could be prepared for a flight to a country in Europe. (Stip. #15)
16. The Aircraft was located in Anywhere, Illinois from June 17, 2011 through June 27, 2011. (Stip. #16)
17. While the Aircraft was located in Anywhere, Illinois from June 17, 2011 through June 27, 2011, the Aircraft (a) had its engine changed, was inspected, was

² According to the auditor's notes, no funds were involved in the transfer of title. (Ex. A, pp. 13-14)

- prepared for a flight to Germany, and (b) no further activity involving the Aircraft occurred until it was flown out of Illinois on June 27, 2011. (Stip. #17)
18. On June 27, 2011, the Aircraft was flown out of Illinois and never returned to Illinois while title to the Aircraft was held by the taxpayer. (Stip. #18)
19. While title to the Aircraft was held by the taxpayer, the following 8 take-offs or landings were in Illinois:
- Landing in Anywhere, Illinois on April 7, 2011;
 - Take-off from Anywhere, Illinois on April 29, 2011;
 - Landing in Anywhere, Illinois on June 17, 2011;
 - Test flight take-off from Anywhere, Illinois on June 26, 2011;
 - Test flight landing in Anywhere, Illinois on June 26, 2011;
 - Test flight take-off from Anywhere, Illinois on June 26, 2011;
 - Test flight landing in Anywhere, Illinois on June 26, 2011;
 - Take-off from Anywhere, Illinois on June 27, 2011. (Stip. #9, 12, 15, 18; Ex. A p. 25)
20. While title to the Aircraft was held by the taxpayer, the Aircraft flew 63 flight segments. (Supplemental Stip. #3)
21. Title to the Aircraft was transferred to PAUL SMITH on March 15, 2012. (Stip. #19)
22. The taxpayer has not had an ownership interest in the Aircraft after title was transferred to PAUL SMITH on March 15, 2012. (Stip. #20)
23. If or to the extent the taxpayer used (as “use” is defined in 35 ILCS 105/2) the Aircraft in Illinois, such use only occurred on or during the following days: (a) April 7, 2011 through April 29, 2011 and (b) June 17, 2011 through June 27, 2011. (Stip. #21)
24. Notwithstanding anything in this Stipulation to the contrary, the taxpayer expressly does not admit that the taxpayer ever used (as “use” is defined in 35

ILCS 105/2) the Aircraft in Illinois, and the taxpayer reserves the right to argue that the taxpayer did not use the Aircraft in Illinois as “use” is defined in 35 ILCS 105/2 and, if such use did occur, that such use did not constitute a sufficient nexus to Illinois to permit taxation. (Stip. #22)

25. The taxpayer is a resident of Illinois. (Ex. A, p. 2; Ex. B p. 6)
26. The taxpayer registered the Aircraft with the Federal Aviation Administration by filing an aircraft registration application that lists the taxpayer’s address in Anywhere, Illinois. (Ex. A, p. 18)
27. On August 28, 2014, the Department’s Informal Conference Board entered an Action Decision in which it abated all penalties relating to the aircraft use tax assessed against ABC, Ltd. (Ex. A, p. 4)
28. On October 21, 2014, the Department issued an NTL to ABC, Ltd. for aircraft use tax in the amount of \$XXXX, plus interest in the amount of \$XXX.XX, for a total assessment of \$XXXXX.XX. (Ex. A, p. 2)
29. On February 9, 2016, the Department issued an NTL to JOHN DOE for the aircraft use tax that was assessed against ABC, Ltd. The NTL assesses aircraft use tax in the amount of \$XXXX, plus a late payment penalty of \$XXXX, a late filing penalty of \$XXX, and interest in the amount of \$XXXX, for a total assessment of \$XXXXX. (Ex. B, p. 7)

CONCLUSIONS OF LAW:

Under section 2-1005(c) of the Code of Civil Procedure, a party is entitled to summary judgment under the following circumstances:

[I]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law.
735 ILCS 5/2-1005(c).

The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511, 517 (1993). The parties have submitted Stipulations of Facts with supporting documents, and there is no genuine issue as to any material fact in this case. Summary judgment is, therefore, appropriate.

The Aircraft Use Tax Law (“AUTL”) imposes a tax upon the privilege of using in Illinois any aircraft acquired by gift, transfer, or purchase after June 30, 2003. 35 ILCS 157/10-15. Section 10-35 of the AUTL incorporates by reference the Use Tax Act (“UTA”) (35 ILCS 105/1 *et seq.*), except for the provisions of section 3-70.³ Section 12 of the UTA incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*), which provides that the Department’s determination of the amount of tax due shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax due as shown therein. 35 ILCS 157/10-35; 105/12; 120/5.

Once the Department has established its *prima facie* case by submitting the certified copy of the Department’s determination into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient

³ Section 3-70 of the UTA allows an exemption for property acquired by a nonresident. 35 ILCS 105/3-70.

documentary evidence to support its claim. *Id.*; Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295 (1st Dist. 1981).

It is well-established under Illinois law that tax exemption provisions are strictly construed in favor of taxation. Heller v. Fergus Ford, Inc., 59 Ill. 2d 576, 579 (1975). The party claiming the exemption has the burden of proving by clear and convincing evidence that it is entitled to the exemption. *Id.*; JB4 Air, LLC v. Department of Revenue, 388 Ill. App. 3d 970, 974 (2nd Dist. 2009). Whenever doubt arises, it must be resolved in favor of requiring the tax to be paid. *Id.*; Quad Cities Open, Inc. v. City of Silvis, 208 Ill. 2d 498, 508 (2004).

Temporary Storage Exemption

The taxpayer first argues that the tax does not apply because the use of the aircraft qualifies for the temporary storage exemption. Under the AUTL, the tax does not apply “if the use of the aircraft is not subject to the Use Tax Act by reason of subsection (a), (b), (c), (d), or (e) of Section 3-55 of that Act dealing with the prevention of actual or likely multistate taxation.” 35 ILCS 157/10-15. Section 3-55(e) of the UTA provides an exemption for the following:

The temporary storage, in this State, of tangible personal property that is acquired outside this State and that, after being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing, or shaping, and, as altered, is used solely outside this State. . . . 35 ILCS 105/3-55(e).

The taxpayer argues that the aircraft was temporarily stored in Illinois from April 7 through April 29, 2011 where it was inspected and prepared for an engine change. The aircraft was then flown to Indiana where it was repaired and upgraded, and on June 17,

2011 it was returned to Illinois. The taxpayer contends that the aircraft was again stored in Illinois from June 17 through June 27, 2011 while its engine was changed and the aircraft was inspected. The taxpayer points out that while the aircraft was in Illinois, it was not being used to transport passengers or cargo. The taxpayer claims that it was being stored in Illinois only so that its engine could be changed. The taxpayer, therefore, believes that the aircraft qualifies for the temporary storage exemption.

In response, the Department has cited the Department's use tax regulation concerning Exemptions to Avoid Multi-State Taxation, which includes 3 exemptions for aircraft beginning July 1, 2007.⁴ 86 Ill. Admin. Code §150.310(a)(8). The first exemption is for aircraft purchased in Illinois (86 Ill. Admin. Code §150.310(a)(8)(A)); the second exemption is for aircraft temporarily located in Illinois for the purpose of a pre-purchase evaluation (86 Ill. Admin. Code §150.310(a)(8)(B)); and the third exemption is for aircraft temporarily located in Illinois for the purpose of a post-sale customization (86 Ill. Admin. Code §150.310(a)(8)(C)). The Department argues that the taxpayer has not met the requirements for these exemptions.

The taxpayer replies by admitting that these three exemptions are not applicable in this case, but contends that the temporary storage exemption under section 3-55(e) is a separate exemption. The taxpayer notes that the Department's regulation concerning the aircraft use tax indicates that the tax does not apply "if the use of the aircraft is not subject to the Use Tax Act by reason of subsection (a), (b), (c), (d), or (e) of Section 3-55 of that Act dealing with the prevention of actual or likely multistate taxation." 86 Ill.

⁴ The three aircraft exemptions that are included in the Department's regulation are also included in section 3-55 of the UTA. See 35 ILCS 105/3-55(h-2).

Admin. Code §152.115(a)(3). The taxpayer, therefore, claims that the temporary storage exemption is still applicable to aircraft use tax cases.

I agree with the taxpayer that the temporary storage exemption is a separate exemption that also applies to aircraft use tax cases, but it does not apply in the present case. The same argument raised by the taxpayer was specifically rejected by the court in Shared Imaging, LLC v. Hamer, 2017 IL App (1st) 152817. As will be explained, the aircraft in the present case became disqualified for the temporary storage exemption when the taxpayer brought the aircraft back into Illinois from June 17 to June 27, 2011.

The temporary storage exemption applies when the property is (1) acquired outside this State; (2) stored temporarily; and (3) used, either in the form in which it came into Illinois or as altered, solely outside this State. Nutrition Headquarters, Inc. v. Department of Revenue, 106 Ill.2d 58, 61 (1985). The aircraft in this case meets the first requirement because it was acquired outside of Illinois. With respect to the second requirement, the aircraft was not actually “stored” when it was initially brought to Illinois. It “was inspected and was prepared for an engine change.” (Stip. #11) The term “inspected” indicates more than just storage, and the record does not explain what “preparing for an engine change” entails. Even if it is assumed that these activities constitute “storage,” the aircraft clearly does not meet the third requirement for the exemption because after the initial post-acquisition “storage” of the aircraft, it was not used solely outside of Illinois.

In Shared Imaging, *supra*, the taxpayer was in the business of leasing trailers and other mobile equipment. Three of the taxpayer’s units were purchased outside of Illinois and initially stored in Illinois for less than 2 months before being leased outside of

Illinois for the remainder of the audit period. After the end of the audit period, the three units were returned to Illinois for storage. The court found that the units were not exempt from tax under the temporary storage exemption because even if the units were again leased outside of Illinois after the second storage period, they did not meet the requirement of the exemption that they be solely used outside of Illinois. Shared Imaging, at ¶37.

The Shared Imaging court noted that the term “use” is defined, in relevant part, in the UTA as “the exercise by any person of any right or power over tangible personal property incident to the ownership of that property.” 35 ILCS 105/2. The court then stated as follows:

Storage of tangible personal property qualifies as a use of that property, because placing property in storage and maintaining the storage of that property represents an exercise of rights and power over the property that belongs only to the owner of the property. It goes without saying that a person who has no ownership interest in a piece of property cannot choose to put the property into storage or dictate how long said property will remain in storage; that power belongs uniquely to the owner of the property. *Id.* at ¶38.

The court added that the fact that the UTA “includes specific exemptions for circumstances involving storage indicates that the term ‘use’ was intended to generally include storage.” *Id.* at ¶39. Accordingly, the court found that whether or not the units were again leased outside of Illinois after their second storage period, the return of the units to Illinois for the second storage period after their initial post-purchase storage indicates that they were not used solely outside of Illinois because storage constitutes use under the UTA. The fact that the return of the units to Illinois took place after the audit period was not relevant because the plain language of the exemption suggests that the property must *always* be used outside of Illinois, without limitation. *Id.* at ¶42.

The Shared Imaging court rejected the taxpayer's argument that although the units were returned to Illinois after their initial post-purchase storage, they were returned only for temporary storage, which the taxpayer believed was again exempt under the temporary storage exemption. The court stated that there is a limit to the number of times a taxpayer may temporarily store property in Illinois because the exemption provides that after the initial post-purchase temporary storage of the property, it must be used "*solely*" outside of Illinois. The return of the property to Illinois, even if only for storage, constitutes use in Illinois. "Therefore, although the temporary storage exemption permits the initial post-purchase storage of property, it prohibits the further storage (*i.e.*, use) of property in Illinois absent the payment of the use tax." *Id.* at ¶43.

The rationale in Shared Imaging applies to the present case. When property leaves the State of Illinois after the initial post-acquisition storage, the property must *always* be used outside of Illinois. As the Shared Imaging court stated, there is a limit to the number of times a taxpayer may temporarily store property in Illinois for the exemption, and the limit is one time. In the present case, the return of the property to Illinois during the time period of June 17 to June 27, 2011 constitutes use in Illinois. During this second time period in Illinois, the aircraft had its engine changed, was inspected, and was prepared for a flight to Germany. Just as storage constitutes use, the maintenance of the aircraft qualifies as use because it is an exercise of rights and power over the aircraft that belongs only to the owner (*i.e.*, the taxpayer). As the owner of the aircraft, the taxpayer had the ability and authority to allow or to not allow a business to perform maintenance work on the aircraft. The taxpayer chose to have the engine

changed in Illinois. The return of the aircraft to Illinois constitutes a subsequent use in Illinois and disqualifies the property for the temporary storage exemption.

Substantial Nexus with Illinois

The taxpayer next argues that the acquisition of the aircraft is not subject to Illinois tax because the aircraft does not meet the constitutional requirement of having substantial nexus with the State of Illinois. Article I, section 8 of the United States Constitution expressly authorizes Congress to “regulate Commerce with foreign Nations, and among the several States;” this clause is referred to as the commerce clause. U.S. Const., art. I, §8. The Illinois Supreme Court in Irwin Industrial Tool Co. v. Department of Revenue, 238 Ill. 2d 332 (2010), stated as follows:

The [United States] 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. *Id.* at 341.

The court continued by indicating that the dormant commerce clause does not prohibit all state taxation of interstate commerce, but only that which is unduly restrictive or discriminatory. *Id.*

In order to avoid unconstitutionally burdening interstate commerce, a state tax must satisfy the four-pronged test articulated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). A state tax will be consistent with the dormant commerce clause if “the tax is (1) applied to an activity with a substantial nexus with the taxing State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.” *Id.* at 279. In the present case, the taxpayer contends that the tax does not meet the first prong of the Complete Auto test.

We respect to the substantial nexus requirement, some type of physical presence within the taxing state is necessary. Irwin Industrial, at 342. The “slightest” physical presence, however, is not enough. *Id.*; see also Quill Corp. v. North Dakota, 504 U.S. 298, 315 n. 8 (1992) (ownership of “a few floppy diskettes” in state is insufficient to establish substantial nexus). The Illinois Supreme Court has concluded that the physical presence does not need to be “substantial,” but must be more than a “slightest presence.” Irwin Industrial, at 342, citing Brown’s Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 424 (1996). “In the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the individual or corporation the state seeks to tax.” Irwin Industrial, at 342. In other words, in the present case there must be two connections: (1) a connection between Illinois and the aircraft (*i.e.*, use of the property) that it seeks to tax, and (2) a connection between Illinois and the taxpaying entity being taxed (*i.e.*, the taxpayer).

With respect to the connection between Illinois and the taxpayer (*i.e.*, the taxpayer’s physical presence within the state), the taxpayer has admitted that he has a substantial nexus with Illinois. (Taxpayer’s Renewed Motion for Summary Judgment p. 8 “Taxpayer is domiciled in Illinois and thus the Taxpayer has substantial nexus with Illinois.”) Because the taxpayer is a resident of Illinois, he has substantial nexus with Illinois.

With respect to the connection between Illinois and the aircraft (*i.e.*, the use of the tangible personal property), the taxpayer contends that the nexus requirement has not been met. The taxpayer has noted that in Irwin Industrial, when the Illinois Supreme Court considered whether the aircraft in that case had a substantial nexus with Illinois, it

considered the following factors: (1) the number of take-offs or landings at Illinois airports; (2) the number of days the aircraft took off from or landed in Illinois as compared to the total number of days the aircraft was flown; (3) the percentage of flight segments involving flights to and/or from Illinois; (4) the number of occasions the aircraft was present overnight in Illinois; and (5) the basic purpose and function of the aircraft in Illinois. Irwin Industrial, at 342-343.

In the present case, there were the following 8 take-offs or landings of the aircraft in Illinois while it was owned by the taxpayer:

- Landing in Anywhere, Illinois on April 7, 2011;
- Take-off from Anywhere, Illinois on April 29, 2011;
- Landing in Anywhere, Illinois on June 17, 2011;
- Test flight take-off from Anywhere, Illinois on June 26, 2011;
- Test flight landing in Anywhere, Illinois on June 26, 2011;
- Test flight take-off from Anywhere, Illinois on June 26, 2011;
- Test flight landing in Anywhere, Illinois on June 26, 2011;
- Take-off from Anywhere, Illinois on June 27, 2011. (Stip. #9, 12, 15, 18; Ex. A p. 25)

All of the Illinois take-offs and landings were made in conjunction with the aircraft being inspected and having its engine replaced. The aircraft made flights in and/or out of Illinois on the following 5 days:

April 7, 2011
April 29, 2011
June 17, 2011
June 26, 2011
June 27, 2011

The aircraft was flown a total of 44 days while owned by the taxpayer, so it was flown approximately 11.4% of the days in Illinois. In addition, 6 of a total of 63 flight segments, which is 9.5%, involved flights to and/or from Illinois.⁵ The aircraft was

⁵ The two flights on June 26, 2011 are each one flight segment.

present overnight in Illinois from April 7 to April 28, 2011, which was 22 nights, and from June 17 to June 27, 2011, which was 10 nights, for a total of 32 nights.

The taxpayer argues that the use of the aircraft in Illinois was not as often as it was in Irwin Industrial. The taxpayer also argues that the court in Irwin Industrial found that the aircraft's frequent physical presence in Illinois was not coincidental but was inherent in its purpose and function in the State of Illinois, which was to provide transportation to the taxpayer's officers and employees (four of whom were located in the state). The taxpayer claims that in the present case, the basic purpose and function of the aircraft was to provide transportation to persons, but the aircraft was never in Illinois for that purpose. According to the taxpayer, the aircraft's presence in Illinois was only coincidental because it is the place where the people who changed the engine were located.

In addition, the taxpayer notes that in Irwin Industrial the court stated that the time that the aircraft spent on the ground in Illinois was not as significant as the time spent in flight between Illinois and other destinations because this demonstrates the significance of the aircraft's presence in Illinois as it relates to its purpose, function, and use. The taxpayer argues that in the present case, the 32 nights that the aircraft was in Illinois were required for it to be inspected and have its engine changed. The taxpayer claims that this does not relate to the aircraft's main purpose and function, which is transporting passengers.

The Department argues that the taxpayer has not met his burden of overcoming the Department's *prima facie* case. The Department states that the taxpayer is an Illinois resident who brought the aircraft to Illinois on April 7, 2011. The aircraft was in Illinois

from April 7 to April 29, 2011 and from June 17 to June 27, 2011. During these periods the aircraft was flown and the taxpayer entered into agreements for various services to be performed upon the aircraft. The Department argues that these contacts with Illinois exceed de minimus contact and support imposition of the aircraft use tax.

I agree with the Department that the aircraft's connection with Illinois is more than a "slightest presence." Of the total days that the aircraft was flown by its Illinois owners, approximately 11.4% of those days were in Illinois. Approximately 9.5% of the flight segments involved flights to and/or from Illinois. In addition, with respect to the amount of time that the aircraft spent on the ground in Illinois, the court in Irwin Industrial looked at the purpose and function of the aircraft in Illinois, which in that case was to provide transportation services to the taxpayer's officers and employees. In the present case, the purpose and function of the aircraft in Illinois was to be inspected and prepared for an engine change and to have the engine changed. In other words, the aircraft was in Illinois for maintenance purposes and not to transport passengers. The purpose of any aircraft is to transport cargo or passengers, but that is not the reason why the aircraft was in Illinois. The taxpayer specifically brought the aircraft to Illinois for maintenance purposes, and its presence in Illinois was not coincidental. The 32 nights that the aircraft was in Illinois for maintenance purposes, as well as the days and flight segments in Illinois, support the finding that the aircraft's presence in Illinois was more than slight.

The taxpayer contends that the contacts with Illinois in this case are analogous to the contacts that a resident of a state bordering Illinois might have if that person chose to have his or her car serviced at an Illinois garage. The taxpayer states that the Department

would not attempt to assess use tax on a nonresident's car for having it repaired in Illinois even if the nonresident regularly used the same garage for the car's service. The facts in this analogy are not similar to the facts in the present case because the taxpayer in this case is a resident of Illinois. The taxpayer has admitted that he has substantial nexus with Illinois. The physical presence/substantial nexus requirement has two components: a connection with the entity being taxed and a connection with the activity or use of the property. In the present case, the first connection is clearly met because the taxpayer resides in Illinois. The second connection is also met because the aircraft's presence in Illinois was more than slight. The Department has met the constitutional requirement to allow it to impose use tax on the aircraft.

Assessed Value and Penalties

The taxpayer argues that if he owes the tax, it was not correctly assessed and penalties should not be imposed. The AUTL provides the following concerning the assessment of the tax:

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.

According to the stipulations, the taxpayer acquired title to the aircraft on April 6, 2011. It was first brought into Illinois while owned by the taxpayer on April 7, 2011. The parties stipulated that the fair market value of the aircraft on April 6, 2011 was \$XXXXXX, and the taxpayer contends that nothing indicates that the fair market value

would have changed one day later. The Department assessed the tax based on a value of \$XXXXXXX, resulting in a tax of \$XXXXX. The taxpayer argues that the tax should be assessed on \$XXXXXXX, resulting in a tax of \$XXXXXXX. The Department did not respond to this argument. I agree with the taxpayer that the tax should be assessed on \$XXXXXXX, resulting in a tax of \$XXXXXXX.

The taxpayer also argues that the penalties should be abated. On August 28, 2014, the Informal Conference Board instructed the Department's audit bureau to abate the penalties assessed with respect to ABC Ltd.'s use of the aircraft. (Ex. A, p. 4) The taxpayer argues that because the penalties have been abated with respect to ABC, they should also be abated with respect to JOHN DOE. The Department has not responded to this argument. I agree with the taxpayer that because the Department has already abated the penalties with respect to ABC Ltd., they should be abated for JOHN DOE.

Recommendation:

For the foregoing reasons, it is recommended that the parties' Motions for Summary Judgment each be granted in part and denied in part. It is recommended that the taxpayer is liable for the tax, but the tax should be assessed on the fair market value of \$XXXXXXX, resulting in a tax of \$XXXXXXX. In addition, the penalties should be abated.

Linda Olivero
Administrative Law Judge

Enter: March 30, 2018