ILLINOIS INDEPENDENT

TAX TRIBUNAL

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

ORDER ON SUMMARY JUDGMENT MOTION

Background

The Petitioner, Texas Capitalization Resource Group, Inc. ("the Corporation"), is the indirect owner of a subsidiary known as TCRG SN4057, LLC (the "LLC"). Pet. at ¶¶ 2-3.[1] The Corporation's federal employer tax identification number ("FEIN") is 20-1765214. *Id.* at ¶ 2. The LLC is a disregarded entity for federal tax purposes. *Id.* at ¶ 3.

In 2015, the LLC bought an aircraft. *Id.* at ¶ 4; *see also* Pet'r Ex. A; Dep't Ex. G. The Corporation's president signed the sales agreement for the Corporation on behalf of the LLC, as its sole member. Pet'r Ex. A; Dep't Ex. G.

The purchase occurred outside of Illinois, as did much of the aircraft's initial repair, maintenance and modification work. Pet. at ¶¶ 6-8, 10. The aircraft eventually ended up in Illinois for its "break-in period," which required additional inspection, maintenance, repair, and test flights. *Id.* at ¶¶ 9, 11-20; Dep't Ex. E.

[1] The background facts and parties' arguments are cited as follows: Petitioner's Petition ("Pet. __") and its exhibits ("Pet. Ex. __"); the Petitioner's Motion for Summary Judgment ("Mot. __") and its exhibits ("Pet'r Ex. __"); the Department's Response to the Motion for Summary Judgment ("Resp. __") and its exhibits ("Dep't Ex. __") and the Petitioners Reply ("Pet'r Reply __").

In January 2018, the LLC filed an Illinois use tax return and sought a rolling stock exemption for the aircraft. Pet'r Ex. C; Dep't Ex. F. On the use tax return, the LLC provided the Corporation's FEIN. Pet. at ¶ 2; Pet'r Ex. C; Dep't Ex. F. In November 2018, the Department began a tax audit of the Corporation for its use of the aircraft in Illinois. Pet. at ¶ 27; Resp. at 2. In December 2018, the Department auditor communicated by email with an individual identified as an officer or employee of the LLC regarding the aircraft's use in Illinois. Dep't Ex. C. In a December 4, 2018 email, the auditor requested a copy of the "purchase agreement" for the aircraft from the LLC. Dep't Ex. C at 5.

In January 2019, the Corporation submitted an IL-2848 power of attorney form, signed by the Corporation's president and naming an attorney as its representative ("the POA") in the audit. Dep't Ex. A. In 2019, the auditor communicated in writing with the Corporation's POA regarding the audit and the aircraft's claimed exemption. Dep't Exs. B, D, E. In all of the written communications throughout 2018 and 2019, the owner or user of the aircraft was referred to as "TCRG." *Id.*, B, C, D, E. On June 9, 2020, the Department issued a Notice of Tax Liability against the Corporation assessing it use tax on the aircraft on the ground that it was brought into Illinois on March 3, 2016. Pet. Ex. A.

The Corporation filed a petition challenging the Notice in the Tribunal and raised several defenses to this Notice, but, for the purposes of this motion, the relevant claim is that the Department assessed the wrong entity. According to the Corporation, the LLC, not it, was the aircraft's legal owner and thus it cannot be subject to the Department Notice. *See* Pet. ¶¶ 45-48.

While this matter has been pending, the parties advised the Tribunal that the Department had issued a notice of proposed tax liability for use tax on the aircraft to the LLC, and the LLC has filed a request for review of this notice by the Department's Informal Conference Board ("ICB"). *See* Mot. at 1-2. The parties further advised that an ICB conference occurred in April 2021 and that the ICB had referred the proposed notice back to its auditing division for further action.

The Corporation has now filed a motion for summary judgment arguing that the Department's actions surrounding the proposed notice to the LLC has mooted the case against the Corporation.

For the reasons stated below, the motion is denied.

Analysis

Summary judgment may be sought at any time after the parties have appeared. *See* 735 ILCS 5/2-1005(a). "The judgment sought shall be rendered without delay if 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c). A mootness question may be resolved by summary judgment. *See Sharma v. Zollar*, 265 Ill. App. 3d 1022, 1026-28 (1st Dist. 1994). However, summary judgment is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is "clear and free from doubt." *In re Estate of Hoover*, 155 Ill. 2d 402, 410 (1993) (citing *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)).

"An issue is considered moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief," as to either the parties or the controversy. *GlidePath Development, LLC v. Illinois Commerce Comm'n*, 2019 IL App 1st 180893, ¶ 27 (citing *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984) and *Edwardsville School Service Personnel Ass'n, IEA-NEA v. Illinois Educational Labor Relations Board*, 235 Ill. App. 3d 954, 958 (4th Dist. 1992)); *see also Felzak v. Hruby*, 226 Ill. 2d. 382, 391-92 (2007). Once "it becomes apparent that an opinion cannot affect the results as to the parties or the controversy before it, the court should not resolve the question." *Edwardsville School Service Personnel Ass'n, IEA-NEA*, 235 Ill. App. 3d at 958; *Sharma*, 265 Ill. App. 3d at 1027.

A case can be mooted a number of ways. In *Wheatley*, 99 Ill. 2d at 484-85, a class action seeking a writ of mandamus and declaratory judgment filed by a group of teachers challenging their dismissal without a public hearing was mooted when,

a month after the suit was filed, the class representative accepted new employment within the district. In *Edwardsville School Service Personnel Association, IEA-NEA*, 235 Ill. App. 3d at 958, a bargaining unit's action challenging the Educational Labor Relation's Board order granting a severance election was mooted when the election was held, and the bargaining unit won. In *GlidePath Development, LLC*, 2019 IL App. (1st) 180893, at ¶ 28, a suit challenging the denial of plaintiff's participation in an electric infrastructure project was mooted after the project was substantially completed. In *Felzak*, 226 Ill. 2d at 391-92, an action to enforce an order allowing grandparent visitation with a minor grandchild was mooted when the grandchild turned 18. In all of these cases, the courts mooted the action only after the mooting event occurred.

The Corporation argues that this case is moot because:

> "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."

Mot. at 2 (emphasis in original). Therefore, "[r]egardless of the outcome of the second audit, the proceeding before this Tribunal has been rendered moot." *Id.* [2]

One way to view the Petitioner's argument is that the mooting event is the ICB decision or the Department's issuance of a Notice to the LLC. Neither event has happened yet. No case law was presented or uncovered in which a controversy

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[2] At oral argument, the Corporation clarified that it was not making a waiver argument, which, in any event, would not succeed. It is true that during status conferences this court urged the Department to expedite ICB proceedings and to consider dismissing this case while matters progressed at the ICB. It is also true that Department counsel appeared amenable to this suggestion and then later informed this court that the Department would not agree to dismiss this case in advance of the ICB decision. As a general practice, parties are not held to waiver for statements made in the course of pretrial status conferences, and this is not the case to make an exception.

was mooted in advance of a mooting event, even if certain to occur. *See, e.g., Felzak*, 226 Ill. 2d at 391-92 (mooting controversy over grandparent visitation only after minor child turned 18); *Maday v. Township High School District 211*, 2018 IL App (1st) 180294, ¶ 48 (mooting appeal filed during last semester of high school from the denial of preliminary injunction in a civil rights action brought by transgender student after student graduated). Until the ICB reaches a decision, or the Department issues a Notice to the LLC, any mootness argument based on the occurrence of those events is premature.

Another way to view the argument is that because the Department has recognized the LLC as a proper taxpayer, it cannot assess use tax against the Corporation. That result is not so obvious, at least at this point in the proceedings.

The Department argued that there are facts that show that the Corporation breached its "duty of consistency" in tax matters, thus estopping it from claiming that it was not the taxpayer here. Dep't Resp. at 8-12 (citing *e.g. Hollen v. Comm'r*, T.C. Memo., 2000-99, *aff'd*, 25 F. App'x 484 (8th Cir. 2002) and *Baldwin v. Comm'r*, T.C. Memo., 2002-162)). The duty of consistency generally bars a taxpayer from taking inconsistent positions in different tax periods to its benefit. *See Hollen*, T.C. Memo. 2000-99; *Baldwin*, T.C. Memo, 2002-162. As the Corporation points out, that doctrine does not fit neatly into this case, as this case involves separate entities, not separate tax periods. *See* Pet'r Reply at 4.

This "duty of consistency" doctrine, however, is not as rigid as the Corporation asserts. It is a subset of broader estoppel principles, sometimes referred to as "quasi-estoppel," that apply in tax matters to prevent taxpayers from disavowing previously asserted positions on which the government has reasonably relied. *See R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934); *Illinois Power Company v. Comm'r*, 87 T.C. 1417, 1430-34 (1986); *Baldwin v. Comm'r,* T.C. Memo., 2002-162; *see also generally* Michael E. Baillif, *The Return Consistency Rule: A Proposal for Resolving the Substance-Form Debate*, 48 Tax Law. 289 (1995). As the *R.H. Stearns Co.* Court noted, it is a fundamental legal principle that "[h]e who

prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned." 291 U.S. at 61.

The Corporation complains that the Department has not cited any cases applying equitable estoppel "in a dispute between a party and the Department regarding the identity of the correct taxpayer." Pet'r Reply at 2. But the Corporation has provided no authority or rationale for why this common legal doctrine would not apply to a such a dispute–particularly to one in which a taxpayer seeks a tax exemption. Indeed, the estoppel principles asserted here are similar to the "substance over form" doctrine, which looks to the economic reality of a transaction to permit the government to defeat a taxpayer's attempt to assert conflicting tax attributes to its own advantage*, see, e.g.*, *JI Aviation, Inc. v. Department of Revenue*, 335 Ill. App. 3d 905, 917-22 (1st Dist. 2002) (analyzing substance over form doctrine) (citing with approval *e.g. In re Stoecker*, 179 F.3d 546, 549-50 (7th Cir. 1999), *aff'd sub nom. Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000)); M. Bailiff, *supra*, 295-300 (discussing relationship between estoppel and economic reality doctrine in tax law).

The Department has provided some facts supporting the application of estoppel here. The Department initially issued an audit notice to the Corporation. *See* Pet. ¶ 27; Resp. at 2. Yet, the earliest communications in the record, from December 2018, are between the auditor and an individual identified as a representative of the LLC. Dep't Ex. C. In these December 2018 communications, the issue of the correct owner of the aircraft was not discussed; rather, the entity owning or using the aircraft was always referred to as "TCRG." *See id.*

The use tax return and rolling stock exemption request were filed by the LLC. Pet'r Ex. C; Dep't Ex. F. On the tax return form, however, the LLC used the Corporation's FEIN. Resp. at 4; *see* Pet. ¶ 2; Pet'r Ex. C; Dep't Ex. F. This may be perfectly reasonable given that the LLC was a disregard entity for federal tax

purposes and the tax form asked for a FEIN number.[3] But did the auditor know that? The auditor apparently never was provided with a copy of the sales agreement showing the LLC as the aircraft's purchaser. Dep't Resp. at 11; *see* Dep't Ex. C; Dep't Ex. G. Although, she had requested it by email on December 4, 2018. *See* Dep't Ex. C at 5.

Moreover, the Corporation's president also signed the IL-2848 form (along with the POA), which designated the Corporation as the taxpayer. Dep't Ex. A. Given that the IL-2848 and the use tax return reflected the Corporation as the taxable entity, could the Department reasonably rely on this information in issuing the Notice to the Corporation? *See, e.g., Baldwin*, T.C. Memo., 2002-162 (finding that federal tax auditor reasonably relied on representations made by taxpayer in audit in applying duty of consistency doctrine).

The Corporation argues that:

> "In executing the power of attorney on behalf of "Texas Capitalization," [the POA] simply indicated he was representing **the entity that was named in the Department's audit**. It was not a representation that Texas Capitalization owned the Aircraft or was the correct party. It would have made no sense for [the POA] to submit a power of attorney on behalf of an entity that was not subject to the audit (TCRG)."

Pet'r Reply at 6 (emphasis in original).

The Corporation does not cite to any rule preventing the LLC from submitting a separate or new POA on its own behalf. Its response also suggests at least some level of purposefulness to the Corporation's actions, at a minimum that it was aware that the Department had targeted the wrong party in the audit. So it would seem to make sense that someone might have wanted to alert the Department that it was auditing the wrong party.

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[3] The Department has recognized that an entity disregarded for federal tax purposes is not required to be treated as disregarded entity for state use tax purposes. *See Department of Revenue v. ABC Business Taxpayer*, UT 11-08 (Aug. 26, 2011) (cited in Pet'r Reply at 5 n.3).

Yet, there is no evidence to show that anyone did. All of the written communications after the IL-2848 from was submitted, between the POA and the auditor, referenced the rolling stock exemption being claimed for the aircraft. Dep't Exs. B, D, E. There is no evidence in the record that the POA ever sought to inform the Department that the Corporation was not the aircraft's owner–if in fact that was the case.

In short, the Department has provided facts raising the issue of whether the Corporation is improperly taking inconsistent positions on the question of the aircraft's ownership or whether the Department reasonably relied on incorrect or incomplete representations by the Corporation in issuing it the Notice. Whether characterized as falling under the label of "duty of consistency," "quasi-estoppel" or "substance over form," at this stage of the proceedings, it is not clear and free from doubt that the Corporation can avoid possible use tax liability on the aircraft, simply because the ICB is now reviewing the proposed notice directed to it to the LLC. Summary judgment for the Corporation is thus premature.

Conclusion

The Petitioner's motion of summary judgment is DENIED, and it is further ORDERED that the matter is set for a telephone status conference on July 21, 2021, at 10:30 a.m.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: July 6, 2021