IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION

MICHAEL L. SHAKMAN, individually and as Trustee of the Michael L. Shakman Revocable Trust	)	
PLAINTIFF,	)	
v.	)	**No. 2017 L 050873**
ILLINOIS DEPARTMENT OF REVENUE, and MICHAEL FRERICHS as TREASURER OF THE STATE OF ILILINOIS,	)	
DEFENDANTS.	)	

OPINION AND ORDER

I. OPINION

Plaintiff Michael L. Shakman's ("Plaintiff") seeks relief from taxation pursuant to the State Officers and Employees Money Disposition Act. The parties have filed cross motions for summary judgment. This opinion and order follow.

BACKGROUND

The facts of this case are not in dispute. In 2003, the legislature imposed a tax of 6.25% "on the privilege of using, in this State, any aircraft...acquired by gift, transfer, or purchase." 35 ILCS 157/10-15. In 2008, Plaintiff personally purchased a single-seat glider plane for recreational purposes. In full compliance with this aircraft use tax statute, Plaintiff paid a tax of $7,370.00.

Then, in 2014, Plaintiff took steps related to estate planning. As part of this planning he created a living trust and transferred the title of many of his assets from his personal possession into the possession of his trust. Plaintiff remains the trustee and the beneficiary of his living trust.

This technique of moving personal assets into a trust is a common estate planning technique for individuals with significant assets in the United States. The primary benefit of this technique is that it allows the owner of the assets to retain use and control of the assets while they are alive and well, while also after death enabling their surviving beneficiaries to take possession without going through the time and expense of probate court proceedings.

As part of this estate planning process, Plaintiff moved his plane from his personal possession into the possession of his living trust. Because aircraft ownership is regulated by the Federal Aviation Administration, the process Plaintiff used to transfer title of the aircraft from his personal possession to the possession of his living trust was to complete an FAA bill of sale form and file it on the agency's electronic registry. The language of the FAA bill of sale form states that the transferor "hereby sell, grant, transfer and deliver all rights, title and interests in and to such aircraft."

Personnel at the Illinois Department of Revenue (the "Department") routinely check the FAA database in order to determine whether any aircraft have been acquired within the state, and to assess taxes if so. In 2014 the Department saw that Plaintiff had transferred his aircraft from his personal possession to the possession of his trust and assessed a *second* use tax of $7,511.01, reasoning that because Plaintiff's trust is a separate and distinct entity, Plaintiff as trustee of his living trust was subject to another tax. Plaintiff paid this second tax under protest, and now appeals the Department's assessment before this court. Plaintiff argues that under the statute, the transfer of the plane from his personal possession to the possession of his living trust is not a taxable transaction.

SUMMARY JUDGMENT

"Summary judgment is appropriate '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.'" Irwin Tool Co. v. Illinois Dep't of Revenue, 238 Ill.2d 332, 340-41 (2010) (quoting 735 ILCS 5/2-1005(c)). As a general rule, summary judgment is encouraged as an aid to the expeditious disposition of a lawsuit. Bryant v. Glen Oaks Medical Center, 272 Ill.App.3d 640, 649 (1st Dist. 1995) (citation omitted). "Interpretation of a statute is a question of law." Northwest Airlines, Inc. v. Dep't of Revenue, 295 Ill.App.3d 889, 892 (1st Dist. 1998) (citing Branson v. Dep't of Revenue, 168 Ill.2d 247, 254 (1995)); see also Travenol Laboratories, Inc. v. Johnson, 195 Ill.App.3d 532, 535 (1st Dist. 1990) ("It is well settled that construction of a statute is a question of law.") (citing Oberman v. Byrne, 112 Ill.App.3d 155 (1st Dist. 1983)). Thus, the interpretation and applicability of a statute presents a question of law suitable for resolution by summary judgment. Wilkins v. Williams, 2012 IL App (1st) 101805, ¶ 14 (citing Allegis Realty Investors v. Novak, 223 Ill.2d 318, 330 (2006)). In this case, there are no genuine issues as to any material fact. The only issue is the statutory interpretation of "transfer" under the Aircraft Use Tax Law. The parties dispute the correct statutory interpretation of the state's aircraft use tax. The court will therefore review the issue *de novo.*

DISCUSSION

This case hinges on the court's interpretation of the word "transfer" as that term is used in 35 ILCS 157/10-15. The court is called on to determine whether, in order to qualify as a taxable transaction, an aircraft must be acquired in a bona-fide transaction between parties operating at arm's length, or whether simple re-registration (to use Plaintiff's language) suffices to incur an

additional tax liability. As far as this court is aware, the interpretation of Illinois' current aircraft use tax statute is a matter of first impression.

Plaintiff urges the court to look to the economic substance of the transfer. Plaintiff points out that because he is, individually, the trustee of his living trust, this transfer changed nothing. He controlled the plane and paid all related expenses prior to the transfer, and he continues to do so now. This estate-planning device, Plaintiff reasons, is not a bona fide transaction because the underlying economic reality—control of the plane—did not change as a result of the transaction. Therefore, Plaintiff argues that the court should not consider this transaction to be a transfer under applicable Illinois statute. Because he paid the tax in 2008, he argues that he is not subject to a second tax now.

The Department disputes this characterization. Plaintiff's living trust is a separate and distinct legal entity, the Department points out. According to the Department, the trust is a separate legal entity and the trust must also pay the tax for the privilege of using the aircraft, just as Plaintiff did individually. Under the interpretation the Department argues this court should adopt, transferring title to a distinct legal entity is sufficient to trigger a tax; the underlying characteristics of the transaction do not matter.

Both sides argue that the plain meaning of 35 ILCS 157/10-15 supports their interpretation. For its part this court is not convinced that the plain meaning of the term "transfer" is sufficiently clear in this situation. Plaintiff correctly points out that he continues to use and control the aircraft just as he did before he moved title to his trust. The Department points out, equally correctly, that the trust is a separate and distinct legal entity that now controls the plane. In short, both sides have strong arguments that the plain meaning of the statute supports their position and the court is not convinced by either. The court has also researched the legislative history regarding the passage of

the aircraft use tax, and finds no information relating to the legislature's intent or understanding of the word "transfer" as it applies to the aircraft use tax.

Economic Substance

Plaintiff argues that because the transfer from his personal possession to his living trust did not change the economic reality of who controlled or used the plane, the transaction is not taxable under Illinois law. In making this argument, Plaintiff is essentially borrowing the concept of economic substance from federal tax law. 26 USC 7701 (o).

This doctrine, originally developed at common law and now enacted as statute within the Internal Revenue Code, essentially bars taxpayers from certain tax avoidance strategies when they carry out the transaction solely to reduce their tax liability. In order to enjoy the reduced liability, the transaction must have "economic substance," or change the taxpayer's economic position in a meaningful way unrelated to their federal income tax.

Plaintiff cites several cases for the assertion that because the transfer of his plane lacked economic substance, the transaction is not taxable. Plaintiff cites *Ji Aviation v. Department of Revenue*, 335 Ill. App. 3d 905, 920 (1st Dist. 2002). That case involved a more complex transaction, and the more complex predecessor statute than the current aircraft use tax. The transaction in that case was more complex because the seller sought to classify its sale as a tax-free like-kind exchange pursuant to section 1031 of the Internal Revenue Code.

In order to comply with the strictures of 1031, the seller transferred title to an intermediary that was in the business of selling planes, and buyer likewise wired its purchase price to the intermediary. The intermediary then credited seller with the purchase money in order to enable the seller to purchase a new jet. The court in that case was also interpreting a more complex statute—the aircraft use tax statute in effect at the time of that transaction exempted "occasional sellers" of aircraft but did not exempt routine sellers of aircraft. The court in that case looked at the substance

of the transaction and ultimately held that the Department could not levy a use tax since the true seller (as opposed to the intermediary) was, in fact, an occasional seller.

The court is not convinced that *Ji Aviation* requires the court to substantively analyze the transaction in this case. That case, interpreting the state's prior aircraft use tax, exempted "occasional sellers" from paying that tax. The "occasional seller" statutory language in that case, by its very nature, required the Department and the courts to look at the substance of a transaction to determine whether a seller was "occasional," and could therefore qualify as exempt from the statute. In the instant case, the statute that the court is called upon to interpret contains no such requirement, and the court is not convinced that *Ji* requires a close look at the economic substance of the transaction in this case.

Cases from other Jurisdictions

In further support of his argument that the court should consider the economic substance of the transaction in question, Plaintiff also cites case law from several foreign jurisdictions, and refers the court to *Irwin Industrial Tool Co. v. Department of Revenue*, 394 Ill. App. 3d 1002 (1st Dist. 2009) for the authority to do so. The court is skeptical that *Irwin* should impact the court's handling of this case—that case involved the interpretation of the commerce clause of the federal constitution. Because other state judiciaries are in a similar position to this one when interpreting the federal constitution, it made sense to consider their approach to applying the commerce clause to analogous situations. By contrast, the dispute in this case hinges solely on an interpretation of an Illinois statute and this court considers itself in a better position to interpret Illinois statutes than the courts of any foreign jurisdiction. Nevertheless, on a matter of first impression the court will treat the foreign opinions Plaintiff cites with respect, though they are obviously not binding on this court.

Plaintiff first cites *Mississippi State Tax Comm'n v. Oscar E. Austin Trust*, 719 So. 2d 1172, 1173 (Miss. 1998). That case involved a sales tax that the Mississippi State Tax Commission levied when plaintiff taxpayer transferred his car from his personal possession into his living trust. In that case, the plaintiff's trust was a marital deduction trust created pursuant to section 2056 of the Internal Revenue Code, a provision designed to allow taxpayers to pass property to surviving family while limiting their estate tax liability. Plaintiff states that the Mississippi statute is "virtually identical" to the Illinois statute at issue in the instant case, but this court does not agree.

The Mississippi statute contained specific exemptions much more broad than the Illinois statute. While the Illinois statute exempts gifts from an estate given to a surviving spouse, the Mississippi statute exempts transfers of legal ownership between family members and transfers pursuant to a will or the state's intestate succession law. *Id.* at 1174. The court in that case reasoned that the plaintiff's trust was a will substitute and that the specific purpose of the type of trust the plaintiff had created was to pass property on to his surviving family. Without taking a position on the Mississippi court's interpretation of its unique statutory exemption, it is clear that the Mississippi court was applying a much broader exemption than that which exists in this case. Plaintiff in this case is indeed, similarly situated—he created his living trust as either a substantial or complete will substitute, and he did so with the ultimate intent of passing his assets on to his surviving family. But Mississippi's broadly interpreted exemptions for transfer by will and transfer to family members are simply not part of Illinois' statute.

Plaintiff next cites *Imaging Services v. Oklahoma Tax Comm'n*, 1993 OK 164, for the assertion that the state's use tax should not apply to this transaction. In that case three doctors owned a plane as a limited partnership where a corporation was made to be the general partner. They were unable to register their plane with the FAA because pursuant to 14 CFR 47.7(c), Plaintiffs were not allowed to register a plane since the owner is a partnership and the general

partner is a corporation. In order to be allowed to register with the FAA, they were advised to create a trust and transfer their ownership into the trust and designate a trustee. They did, and this involved another transfer, on which the Oklahoma Tax Commission levied a tax.

The plaintiffs in the Oklahoma case carried out the transfer at issue solely to set up an ownership structure that complied with FAA regulations such that the FAA would permit them to register their plane. The statute at issue contained another very specific exemption in cases where an aircraft is "transferred to a partnership when the organization of the partnership is by the former owners of the aircraft. However, the former owners of the aircraft must have control of the partnership in proportion to their interest in the aircraft prior to the transfer." *Imaging Services v. Oklahoma Tax Comm'n*, 1993 OK 164, ¶ 6. The court reasoned that that exemption applied precisely to the situation of those Plaintiffs. Again, the Illinois statute at issue in this case does not contain any analogous exemption that could provide a basis for this court to set aside the tax.

Importance of Predictability

Plaintiff's interpretation of the state's aircraft use tax statute could lead to absurd results. It would require the Department to inquire into the substance of the transaction every single time an aircraft owner registers a new FAA bill of sale. This would risk a slew of litigation, constantly requiring the Department to prove that a transfer of title in an aircraft involved a change in beneficial use, a term that is not without vagueness. Parties seeking to avoid the use tax could seek more complex ways to transfer their planes while retaining beneficial use, and the limited resources of the Department (not to mention the judiciary) could be strained trying to figure out the true nature of every single transaction. The court cannot believe that this is what the legislature intended when it enacted the use tax and its very limited exemptions.

There is one obvious advantage of establishing a clear, general principle of decision: predictability. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179.

Happily, in this case establishing a clear, general principle seems relatively straightforward. Any time an aircraft owner in Illinois files an FAA bill of sale with the FAA, they will incur a tax liability under 35 ILCS 157/10-15 (as long as they don't meet one of Illinois' narrower statutory exceptions). When applied *en masse*, this rule will provide both aircraft owners and the Department with a level of predictability that a substantive analysis of transactions would not, and it will do so with far more efficiency than the approach Plaintiff advocates. The court believes this holding is fully consistent with the text of 35 ILCS 157/10-15 and the intent of the legislature when it enacted the aircraft use tax.

CONCLUSION

Plaintiff's motion for summary judgment is denied. The court finds that the statute creating Illinois' aircraft use tax does not require a substantive analysis of the underlying transaction, but merely creates a tax liability any time an aircraft owner files an FAA bill of sale registering as an aircraft owner with the FAA. In this case, Plaintiff filed an additional FAA bill of sale form, in a transaction that does not fall into any of the narrow statutory exceptions to the tax. In doing so, he incurred an additional tax liability. The court is not unsympathetic to Plaintiff's situation. He essentially incurred a double-tax simply by engaging in routine estate planning. For the reasons discussed above, however, the court is not convinced that the statute requires the substantive analysis of the transaction that Plaintiff urges this court to undertake. For these reasons, this court agrees with the Department's original assessment finding of a tax owed by Plaintiff and grants Defendant's motion for summary judgment.

II. ORDER

This matter having been fully briefed, and the Court being fully appraised of the facts, law, and premises contained herein, it is ordered as follows:

A. Defendants' Motion for Summary Judgment is **GRANTED.**

B. Plaintiff's Motion for Summary Judgment is **DENIED.**

C. This is a **FINAL AND APPEALABLE** order.

Judge James M. McGing
OCT - 5 2018
Circuit Court - 1926

Date: Friday, October 5, 2018

ENTERED: ______________________________
Judge James M. McGing

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