IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

IAN C. MCINTYRE,	)	
	)	
Petitioner,	)	
	)	
VS.	)	**NO. 09-2145-III**
	)	
REAGAN FARR, COMMISSIONER, STATE OF TENNESSEE DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

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MEMORANDUM AND ORDER

This lawsuit was filed by a service member, US Navy Captain Ian C. McIntyre. He seeks a refund of $8,393.50 in use tax assessed by the Tennessee Department of Revenue on a single-engine Maule MT-7-235 bush plane, and recovery of his attorney's fees and costs. It is undisputed that the plane was purchased in 2007 in Texas where the Petitioner was stationed at the time, and then transferred in April of 2008 to the Petitioner's permanent residence in Pace, Florida. In May of 2008 the Petitioner reported for duty in Millington, Tennessee. At that time the Petitioner leased a hangar for the plane in Millington where the plane continued to be stored and used by the Petitioner through 2011. On July 8, 2009, the Department of Revenue issued the use tax assessment in issue. The case is before the Court on cross motions for summary judgment.

After considering the pleadings and statements of undisputed material facts, the argument of counsel and the law, the Court denies the Petitioner's motion for summary judgment and grants the motion for summary judgment of the Respondent. The facts and conclusions of law on which the Court's decision are based are as follows.

Facts

The Court bases its decision on the following undisputed material facts established by the record.[1]

1. In June 2007, Petitioner, Captain Ian C. McIntyre, United States Navy, purchased a Maule MT-7-235 aircraft with FAA registration number N5500K from an individual names Weldon Elliott in Texas. The Aircraft is a single-engine, high-wing, tricycle-gear bush plane, designed for short takeoff and landing on unimproved airstrips.

2. The purchase price of the aircraft was $156,000.

3. Petitioner did not pay sales tax at the time of purchase because the transaction was an occasional sale that was not subject to tax in Texas.

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[1]The facts are derived from the Commissioner's September 16, 2011 filing of its statement of undisputed material facts; the Petitioner's November 14, 2011 filing of the same; and the Commissioner's December 12, 2011 Response to Petitioner's Statement of Additional Undisputed Facts. The Court overrules the Commissioner's objection to Petitioner's statement of material facts. The Commissioner objects to the procedure the Petitioner used in designating additional facts. The Court overrules the objection on the grounds that the procedure used by the Petitioner is harmless. Most of the facts posed by the Petitioner were not disputed by the Commissioner.

4. Petitioner did not pay use tax in Florida, his state of residence, because he did not bring the aircraft into Florida during the first six months he owned the aircraft.

5. At the time he purchased the aircraft, Petitioner was stationed at the Naval Air Station and Joint Reserve Base in Fort Worth, Texas.

6. In May 2008, Petitioner was transferred to Navy Personnel Command in Millington, Tennessee, by the United States Navy.

7. Upon arriving in Millington, Tennessee, Petitioner leased a hangar at Millington Regional Jetport.

8. Petitioner renewed the hanger lease in March 2009.

9. Petitioner identified the aircraft on the lease and stored the aircraft in the leased hangar when the aircraft was in Millington, Tennessee.

10. Petitioner transported jewelry, important documents, and other valuables to Millington, Tennessee, in the aircraft.

11. While stationed in Millington, Tennessee, Petitioner flew the aircraft some to and from Millington Regional Jetport.

12. Petitioner's pilot's log identifies flights in the aircraft to and from Millington Regional Jetport, which is identified by airport code NQA.

13. When on leave, Petitioner often flew the aircraft from Millington Regional Jetport to his residence in Pace, Florida. Then, sometimes, he flew the aircraft back to

Millington Regional Jetport when he was required to return from leave or sometimes left it as his permanent residence in Florida.

14. Petitioner voluntarily chose to fly himself and other Navy personnel in the aircraft from Millington Regional Jetport to conferences and meetings that they attended in Norfolk, Virginia, and other locations, and flew the aircraft back to Millington Regional Jetport when the conferences and meetings concluded.

15. On July 8, 2009, the Department of Review issued a use tax assessment against Petitioner in the amount of $8,393.50, consisting of tax of $7,780 and interest of $613.50.

16. The assessment against Petitioner was recorded on the Department's books and record.

17. Petitioner was notified of the assessment against him by notice of assessment dated July 8, 2009.

18. The Department received a payment from Petitioner in the amount of $8,502.84 on November 9, 2009, which was applied to the use tax assessment against Petitioner.

19. Capt. McIntyre's presence in Tennessee was a direct result of his temporary assignment to the Navy Personnel Command facility in Millington, Tennessee, and as a result of his active duty military service as a senior officer in the United States Navy. He was housed in government quarters while at the base.

Petitioner's Challenges

On four grounds, listed in the Petitioner's November 14, 2011 Response and Motion For Summary Judgment and quoted as follows, the Petitioner asserts he is entitled to a refund:

1. Tennessee's taxing authority is limited by the provisions of the United States Constitution, as interpreted by the U.S. Supreme Court. Tennessee's attempt to tax Petitioner, a permanent Florida resident, for the importation of personal property which he had purchased in Texas before being ordered to Tennessee, exceeds the jurisdictional limits placed upon Tennessee's taxing powers by the U.S. Constitution, generally, and the Due Process Clause and Commerce Clause in particular.

2. Tennessee's attempt to tax Petitioner on the use of his Aircraft, which he purchased prior to being stationed in Tennessee, violates the Servicemembers' Civil Relief Act, 50 U.S.C.A. App. §§ 501 *et seq.*, as does Tennessee's attempt to charge interest in excess of the Act's 6% cap.

3. Petitioner is not a "Dealer" as defined under Tennessee Retailers' Sales Tax Act, Tennessee Code Annotated sections 67-6-101 *et seq.* ("RSTA").

4. Should the court determine Petitioner is a dealer under the RSTA, Petitioner's use was exempt from taxation under the "import for export" provision set forth in Tennessee Code Annotated section 67-6-313(a).

Conclusions of Law

The Court dismisses Petitioner's challenges listed above based upon the following conclusions of law. In stating these conclusions, the Court replicates portions of the Respondent's briefs.

1. The Retailers' Sales Tax Act, Tennessee Code Annotated sections 67-6-202(a) and 203(a) (2008), levies a tax at the rate of seven percent of the purchase price "of each item or article of tangible personal property when the tangible personal property is not sold, but is used, consumed, distributed, or stored for use or consumption in this state; provided, that there shall be no duplication of the tax."

2. Tennessee Code Annotated section 67-6-210(a) provides that "[o]n all tangible personal property imported, or caused to be imported from other states or foreign countries, and used by a dealer, the dealer, as defined in section 67-6-102, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the articles had been sold at retail for use or consumption in this state."

3. "Dealer" is defined as every person who "[i]mports, or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, consumption, distribution, or for storage to be sued or consumed in this state." TENN. CODE ANN. § 67-6-102(21)(B) (2008).

4. "Use" is defined as "the exercise of any right or power over tangible personal property incident to the ownership thereof." TENN. CODE ANN. § 67-6-102(89)(A) (2008).

5. "Storage" is defined as "any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business." TENN. CODE ANN. § 67-6-102(83) (2008).

6. "Tangible personal property" is defined as "personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses." TENN. CODE ANN. § 67-6-102(84)(A) (2008).

7. An aircraft is an article of tangible personal property. An aircraft does not qualify as a "personal effect" exclusion from the Act; nor does intent of the purchaser, at the time of purchase, control imposition of the tax. The tax is imposed upon the privilege of using the tangible personal property in Tennessee. The only escape from such taxation is when a similar use has been paid in another jurisdiction. *See Weaver v. Woods*, 594 S.W.2d 693, 695 (Tenn. 1980).

Applying the foregoing law to the facts of this case, here is the Court's ruling.

Constitutional Challenges

8. First, the Court dismisses the Petitioner's constitutional arguments, reproduced above in paragraph 1, because the tax the Respondent has assessed is not on the Petitioner's purchase of his aircraft in Texas; rather, Tennessee taxed Petitioner's use of his aircraft in Tennessee. "The Use Tax is a tax on the enjoyment of that which is purchased after a sale has spent its interstate character." *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d

574, 576 (Tenn. 1970) (quoting *Broadacre Dairies v. Evans*, 193 Tenn. 441, 246 S.W.2d 78, 80 (Tenn. 1952)). Accordingly, the tax imposed against Petitioner is based on his use of his aircraft in Tennessee. The Commerce Clause does not apply because the taxable event—Petitioner's use of his aircraft in Tennessee—does not involve interstate commerce. Unlike *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992),[2] Tennessee made no attempt to require the Texas retailer who sold the aircraft to Petitioner to collect Tennessee use tax from Petitioner. Instead, Tennessee imposed the tax against Petitioner who was physically present in Tennessee when he used his aircraft in Tennessee. Petitioner's physical presence in Tennessee also established far more than the minimum contacts with Tennessee required by the Due Process Clause.

9. Further, in dismissing the Petitioner's constitutional challenges and concluding that the use tax applies in this law, the Court concludes that under Tennessee law, there is no exception for *de minimus* use of tangible personal property in Tennessee; the use tax is not based on the state of residency of the owner of the tangible personal property; and the use in

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[2]The issue before the Court in *Quill* was whether the Commerce Clause permitted North Dakota to require out-of-state retailers to collect sales and use taxes on sales to customers in North Dakota. The Court explained that a tax does not offend the Commerce Clause so long as the "tax [1] is 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." *Quill*, 504 U.S. at 311 (1992), *quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The Court further explained that "the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Id.* at 313. The Court reaffirmed the bright-line rule that physical presence in the taxing state is required to establish "substantial nexus" for purposes of requiring an out-of-state seller to collect sales and use taxes.

other states does not negate Tennessee's authority to tax use in Tennessee. The use tax is a tax on the privilege of "[u]s[ing] or consum[ing] in this state any item or article of tangible personal property as defined in this chapter . . . [or] [s]tor[ing] for use or consumption in this state any item or article of tangible personal property as defined in this chapter." TENN. CODE ANN. § 67-6-201. Residents of other states who exercise the taxable privilege of using tangible personal property in Tennessee or storing tangible personal property for use in Tennessee are subject to the tax. *Cole Bros. Circus, Inc. v. Huddleston*, 1993 WL 190914 (Tenn. Ct. App., June 4, 1993); *Bean Dredging Corp. v. Olsen*, 742 S.W.2d 259 (Tenn. 1987); *Service Merchandise Co., Inc. v. Jackson*, 735 SD.W.2d 443 (Tenn. 1987).

10. Applying the authorities stated in paragraph 9 to the undisputed facts of this case, the Court concludes that the Petitioner's use and storage of the plane in Tennessee subjects him to the use tax. In so concluding, the Court relies upon the facts that although many of Petitioner's flights were interstate and he hangared the aircraft at his residence in Pace, Florida, he also hangared the plane at the leased hangar at Millington Regional Jetport. Moreover, the above authorities demonstrate that the use tax is imposed if tangible personal property is used in Tennessee; the use tax does not require exclusive or even primary use in Tennessee. Petitioner imported his aircraft into Tennessee when he brought it to Millington. He stored his aircraft in the hangar that he leased at Millington Regional Jetport. He flew the aircraft to and from Millington Regional Jetport, thereby exercising rights and powers over the aircraft incident to the ownership thereof. These activities subject the plane to

Tennessee use tax. Petitioner exercised a taxable privilege when he used his aircraft in Tennessee. Petitioner also exercised a taxable privilege when he stored his aircraft for use in Tennessee. Petitioner's status as a Florida resident does not exempt him from the tax. The taxable event was Petitioner's use and storage of his aircraft in Tennessee. Petitioner's residency is not the basis for the tax, nor was residency relevant to the privilege that was being taxed.

Servicemembers' Civil Relief Act

11. As to the Petitioner's second challenge to the tax, the Court concludes that the Servicemembers' Civil Relief Act, 50 U.S.C.A. App. §§ 501 *et seq.*, does not exempt Petitioner from paying Tennessee's use tax. 50 U.S.C.A. App. § 571(a)(1) provides that "[a] servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders." In considering a similar provision in the Soldiers' and Sailors' Civil Relief Act, the Supreme Court determined that "Congress did not intend to free servicemen stationed away from home from the sales or use taxes of the host State." *Sullivan v. United States*, 395 U.S. 169, 176 (1969). The Court held that the protection from personal property taxes applied only to annually-recurring ad valorem taxes on personal property, rather than

one-time sales and use taxes. *Id.* at 181. As in *Sullivan*, the tax assessed in the instant case is a one-time use tax based upon Petitioner's use of his aircraft in Tennessee.

12. The JAG article quoted by Petitioner at page 7 of his November 14, 2011 Memorandum does not demonstrate that the Servicemembers' Civil Relief Act exempts servicemembers from Tennessee's use tax on articles that were purchased prior to their assignment to Tennessee. The article correctly states that imposition of sales and use tax required nexus with the taxing state. Curtis, Jermone, J. Jr., "State Taxation of Servicemen," *Law Notes*, January, 1971, Volume 7, at 63. But nexus is established by the physical presence of Petitioner's airplane in the taxing state. The article also relies on the *Sullivan* decision, which expressly held that the exemption provided by 50 U.S.C.A. App. § 571(a)(1) applies only to annually-recurring income and property taxes that are based on residency in the taxing state. The use tax is not such a tax. The article does not cite any other authority for the proposition that servicemembers are exempt from tax on the privilege of using tangible personal property in a state to which they are not assigned at the time the tangible personal property was purchased. The Servicemembers Civil Relief Act does not restrict a state's power to levy its ordinary sales and use taxes on servicemembers in the state.

"Dealer" Challenge

13. As to the Petitioner's challenge that he does not come within the statutory term "dealer," required for imposition of the tax, the Court concludes that the term is used by the

Legislature broadly and does not require that the taxpayer act in a commercial capacity with respect to the tangible personal property. In so concluding, the Court is persuaded by the Respondent's argument that the purpose of the Tennessee use tax is to prevent the commercial transaction that took place in Texas, when Captain McIntyre purchased the aircraft, from going tax-free. "The primary function of the use tax is to prevent the evasion of sales tax under the Act by a person purchasing tangible personal property outside of Tennessee for use within this state. . . . The legislature intended the use tax to operate as a complement, not supplement, to the sales tax." *Wylie Steel Fabricators, Inc. v. Johnson*, 179 S.W.3d 509, 517 (Tenn. Ct. App. 2005) (internal citations omitted). "[T]he use tax levies a tax on property purchased out of Tennessee but used in this state where such property would have been subject to sales tax had it been purchased in Tennessee. . . . As a result, taxpayers who import property for use in Tennessee pay the same amount in taxes as they would have paid had they purchased the property in Tennessee." *Security Fire Protection Co., Inc. v. Huddleston*, 138 S.W.3d 829, 841 (Tenn. Ct. App. 2003) (internal citations omitted).

Also influencing the Court's reasoning is the decision in *Weaver* that an aircraft does not qualify as a "personal effect."

For these reasons, the Court dismisses the Petitioner's challenge that he is not a "dealer" pursuant to Tennessee Code Annotated section 67-6-102(21)(B) (2008).

Import for Export Exemption

14. As to the Petitioner's last challenge, he does not meet the requirements for the "import for export" exemption because he imported his aircraft into Tennessee for his own personal use in Tennessee, rather than for export. Tennessee Code Annotated section 67-6-103(a) provides that "[i]t is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export." Tennessee Code Annotated section 67-6-313(a) "prohibits the imposition of tax on articles in interstate commerce or which are produced or manufactured in Tennessee for export." *Security Fire Protection Co., Inc. v. Huddleston*, 138 S.W.3d 829, 840 (Tenn. Ct. App. 2003). "The sole purposes of this section is to confine the application of the sales and use tax to those subjects which a statue is permitted to tax under the Commerce Clause of the Constitution of the United States. By this section the legislature did not intend to carve out a class of property and exempt it by its own definition thereof." *Vector Co., Inc. v. Benson*, 491 S.W.2d 612, 613 (Tenn. 1973). As the Tennessee Supreme Court has explained, "no one incurs tax liability with respect to goods by virtue of their transportation through this State in the channels of interstate commerce; but any stoppage or bringing to rest these goods within the State for sale at retail, use, consumption, distribution or storage for subsequent use, does subject such goods to the taxing power of the State." *Texas Gas Transmission Corp. v. Benson*, 444 S.W.2d 137, 139 (Tenn. 1960). "Where property has come to rest within a state, being held there at the pleasure of the owner, for

disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictate, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power." *Vector Co.*, 491 S.W.2d at 614 (quoting *Minnesota v. Blasius*, 290 U.S. 1, 10 (1933)). Petitioner did not transport his aircraft through Tennessee in interstate commerce; rather, he used his aircraft in Tennessee and stored his aircraft for use in Tennessee. His aircraft thus came to rest in Tennessee and became a part of the mass of property in Tennessee.

In *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 177 (1939), the United States Supreme Court determined that "there was a taxable moment when [articles of tangible personal property] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun." Relying on *Southern Pacific*, the Tennessee Supreme Court, in *Service Merchandise Co., Inc. v. Jackson*, 735 S.W.2d 443, 445 (Tenn. 1987), determined that "[t]he flight of plaintiff's aircraft from New Hampshire to Delaware for outfitting, the pilot training flights in Delaware, and the flight thereafter to Tennessee with the son of plaintiff's president as a passenger constitute[d] mere 'interstate movement.' . . . Such movement is distinguished in *Southern Pacific* from 'interstate consumption' and does not preclude the imposition of a use tax by the State of Tennessee." As in those cases, Petitioner's flights to and from other states constituted

interstate movement rather than interstate consumption. There was a taxable moment when Petitioner's interstate movement came to an end and he used and stored his aircraft in Tennessee.

Having dismissed all of the Petitioner's challenges to the imposition of the tax, it is ORDERED that the Petitioner's motion for summary judgment is denied, and the Respondent's motion for summary judgment is granted.

It is further ORDERED that Respondent is entitled to recover its attorney's fees. To effect that recovery, the Court ORDERS the Respondent's counsel to set and file a notice of a hearing on assessment of attorney's fees along with supporting briefing and affidavits, and sufficient time for Petitioner's opposition. It is ORDERED that the fee hearing shall be set so as to be conducted on or before March 30, 2012.

In the event the amount of fees is not contested or that counsel agree to hold the fee determination in abeyance until resolution of an appeal, the Court ORDERS Respondent's counsel to forthwith file a Final Order of Judgment so stating that agreement; stating the disposition of the summary judgment motions; and taxing court costs to the Petitioner.

In light of the remaining issue of assessing attorney's fees, this is not a final order.

ELLEN HOBBS LYLE
CHANCELLOR

cc: David King
R. Mitchell Porcello

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