



# Business Update

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MasudaFunai

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### Illinois Use Tax Case Illustrates Complexity and Scope of Tax

Most states impose a sales tax on the purchase of personal property at retail. In Illinois, the tax is imposed on retailers and is properly called the "Retailers Occupation Tax." States also impose a corresponding use tax to capture out-of-state transactions that may not be collected under the state sales tax.

For most transactions, sales and use tax represents a few cents or a few dollars added to the purchase price. Multiplied by the millions of transactions occurring every day, the tax has become a major source of revenue for state and local governments. Correspondingly, it is a major expense to individuals and businesses purchasing products at retail.

Sales and use tax is, in most states, no longer so small as to be unnoticed by the payers. Recently, in Chicago, Illinois, the rate reached 10.25%, when the tax for all jurisdictions was added. After a strong protest, Cook County reduced its portion of the tax, so that the tax in Chicago, from July 1, 2010, will become "only" 9.75%.

For expensive items, the tax can represent hundreds or thousands of dollars. A recent case in Illinois shows both the complexity of the tax and the burden that the tax represents. (Irwin Industrial Tool vs. Illinois Department of Revenue, Illinois Appellate Court, No. 04 L 50666, September 11, 2009)

ATC Air, Inc. (a former subsidiary of Irwin Industrial Tool Co.) purchased an airplane in 1999 for \$7,520,710. At the time, ATC Air listed its address as Hoffman Estates, Illinois and filed a registration with the Federal Aviation Administration for the airplane in April 2000 listing the Illinois address. Apparently regretting this decision, only two months later, ATC amended its registration to show an address in Nebraska. ATC owned the airplane until April 2002.

In April, 2004, as a result of an audit by the Illinois Department of Revenue, Illinois assessed \$813,319.94, representing \$536,950 in tax, \$500 in penalties, and \$275,869.94 in accrued interest. ATC paid the tax but, of course, under protest. In its counter-arguments, ATC asserted: a) there was no jurisdiction over ATC as imposition of the use tax was contrary to the U.S. Constitution and b) even if there was jurisdiction over ATC, the tax should have been apportioned to reflect the aircraft's actual activity in Illinois.



With respect to the first argument, both the lower court and the Illinois Appellate Court had no problem to find that Illinois had jurisdiction over ATC (and the airplane) based on: a) 290 take-offs and landings in Illinois; b) 1/3 of total flight segments logged on flights to and from Illinois; and c) the airplane being present overnight in Illinois airports on 25 occasions.

But how much tax should Illinois be allowed to impose? The lower court felt that 4% would be "equitable," since this was the percentage of actual use in Illinois. But there were alternative ways to "equitably" apportion the tax. How about the fact that 30% of the flights originated or ended in Illinois? Or perhaps using 50% of the total days flown being in Illinois?

The Appellate Court rejected 4%. It also rejected 30% and 50%. The Appellate Court determined that Illinois' portion of the use tax should be 100%.

Although this does not seem "fair," the Court asserted that it is consistent with Illinois law and with similar cases in other states. Once a tax is imposed by a state, the tax must be "fairly apportioned." This means, according to U.S. Supreme Court precedent, that if every state imposed an identical tax, it would not result in an object being burdened by multiple taxation. That is not the situation here, said the Court, because no other state imposed a sales or use tax on the purchase of the airplane. Even if another state had imposed such a tax, Illinois use tax permits a credit to the extent the taxpayer has paid the same tax in another state. Therefore, even imposing the entire Illinois use tax on the aircraft did not result in multiple or unfairly burdensome taxation.

The Irwin Industrial Tool/ATC Air case illustrates the scope of taxation, even in ways that might be perceived as unfair. Certainly, as applied to the Illinois use tax, a taxpayer who is in for a little could also be in for a lot.

### **Hart Scott Rodino Thresholds for Pre-Merger Notification Reduced**

The Federal Trade Commission announced on January 19 that the thresholds for Hart-Scott-Rodino pre-merger notification have been revised, as the statute requires. The thresholds are carefully watched because transactions covered by the HSR filing requirement can be delayed pending clearance and the parties to the transaction bear the burden of hefty fees for filing the notification.

This announcement was extraordinary for a simple reason. The thresholds are adjusted annually based on changes to the gross national product. For the first time, the thresholds were reduced, due to the decrease in GNP from the recession. This year, the threshold for reporting proposed mergers and acquisitions decreased from \$65.2 million to \$63.4 million.

The Hart-Scott-Rodino Act requires notification of certain mergers or acquisitions to the FTC and the Justice Department's Antitrust Division. The parties to the transaction must then wait a designated period of time before consummating the transaction. While the \$63.4 million revised threshold will apply to most transactions, there are several other tests that must be met before it can be determined that a filing is required. While the analysis for most transactions is straightforward, the application of HSR to some transactions can be quite complex. So those contemplating a transaction should consult with legal counsel before determining whether or not a filing is required. For more information on the revised thresholds, visit the FTC website at: <http://www.ftc.gov/>.



For more information about this or any other corporate law topic, please contact Stephen Proctor, Chair of the Business Group, at 847.734.8811 or via email at [sproctor@masudafunai.com](mailto:sproctor@masudafunai.com).

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### About the Business Group

The Business Group at Masuda Funai is at the core of our extensive commercial practice. Our Business lawyers provide comprehensive legal advice and counseling to clients on a wide range of business issues from complex corporate and financing transactions to general day-to-day operational issues. We strive to provide, in a timely and personal manner, services that are tailored to each client's needs. We place special emphasis on clearly explaining U.S. laws and practices to our foreign clients doing business in the United States.

### About Masuda Funai

Masuda Funai is a full-service law firm representing international and domestic companies operating and investing in the United States. Our 45 attorneys located in Chicago, Schaumburg and Los Angeles counsel clients in every aspect of business, including establishing, acquiring, and financing operations; ownership, development and leasing of real estate; transfer of overseas employees to the U.S.; employment, labor, and benefits counseling and dispute resolution; intellectual property, copyright and trademark; business litigation; creditors' rights and business risk management; structuring the distribution and sale of products and services throughout the U.S.; and estate planning and administration.

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