

Court of Appeals, State of Michigan

ORDER

NACG Leasing v Department of Treasury

Docket No. 306773

LC No. 00-338928

E. Thomas Fitzgerald
Presiding Judge

Patrick M. Meter

Mark T. Boonstra
Judges

The Court orders that the unpublished per curiam opinion in this case, which was issued on October 16, 2012, be amended to correct clerical errors.

The second paragraph on page 4 is amended to read:

The Tribunal determined that our decision in *Fisher*, 282 Mich App at 207, compels the conclusion that plaintiff “used” the aircraft. *Fisher* involved a vastly different fact pattern than the instant case. In *Fisher*, the plaintiff purchased a 25% undivided interest in a personal jet. *Id.* at 209. Through a series of agreements with the seller, the plaintiff was entitled to use other airplanes in the seller’s fleet for personal transportation. *Id.* The airplane specifically identified as part-owned by the plaintiff never entered Michigan; however the plaintiff did make use of other airplanes in Michigan. *Id.* This Court determined that the plaintiff’s use of other airplanes in the fleet was “pursuant to its contracts to share ownership rights to its own airplane” and therefore the plaintiff was subject to the use tax. *Id.* (emphasis in original).

In all other respects, the October 16, 2012 opinion remains unchanged.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

NOV 05 2012

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

NACG LEASING f/k/a CELTIC LEASING, LLC,
Plaintiff-Appellant,

UNPUBLISHED
October 16, 2012

v

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 306773
Michigan Tax Tribunal
LC No. 00-338928

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right from the judgment of the Michigan Tax Tribunal ordering plaintiff to pay \$414,000 in use tax, \$103,500 in penalty, and statutory interest pursuant to the Use Tax Act (UTA), MCL 205.91 *et seq.* We reverse.

I. BASIC FACTS AND PROCEDURE

The parties have stipulated to the following facts. Plaintiff¹ was formed as a Michigan limited liability company in 2003, with its registered address in Ypsilanti, Michigan. Its initial members were Murray Aviation, Inc., a Michigan corporation, and HBJ Leasing, LLC, a Michigan LLC, which each owned 50% of plaintiff. Plaintiff was formed for the purpose of engaging in the activity of aircraft leasing and operations, and prior to 2005 (the year of the subject use tax assessment) had purchased at least two aircraft and leased them Murray Air, Inc. (“Murray,” formerly known as Murray Aviation, Inc).

In April 2005, plaintiff purchased a DC-8 aircraft and simultaneously entered into a lease agreement with Murray. Murray previously had arranged to lease the aircraft from another company, had taken possession of the aircraft in January of 2005, and had maintained uninterrupted possession since that date; the deal subsequently fell through, leading Murray to approach plaintiff about purchasing the DC-8 and leasing it to Murray.

¹ Plaintiff was formerly known as Celtic Leasing, LLC.

In 2006, defendant issued a use tax assessment in the amount of \$414,000, plus a penalty of \$103,500 and statutory interest, for use tax on the purchase of the aircraft. Plaintiff filed a petition with the Tribunal in 2007, asserting that it was not subject to the use tax, and later moved the Tribunal for Summary Disposition pursuant to MCR 2.116(C)(10).

No further action was taken on the case until June of 2011. On June 10, 2011, the Tribunal granted plaintiff's motion for summary disposition, holding that plaintiff "did not incur a use tax liability when it purchased and simultaneously leased an aircraft to a related entity that had possession and control over such aircraft at the time." The Tribunal further found that the fact that plaintiff "did not have possession of the aircraft and did not, at any time, take responsibility for such things as repairs and maintenance, insurance, potential benefit of warranties, or any options for use thereof" compelled the conclusion that plaintiff did not "use" the aircraft within the meaning of the UTA.

Defendant moved the Tribunal for Reconsideration in July of 2011. The Tribunal granted that motion in August of 2011 and reversed its previous decision, entering judgment in favor of defendant for the full amount of the assessment. The Tribunal considered this Court's decision in *Fisher & Co v Dept of Treasury*, 282 Mich App 207; 769 NW2d 740 (2009), a decision entered after the parties had filed briefs but prior to the Tribunal's rendering of its initial opinion and judgment, and concluded that, pursuant to *Fisher*, plaintiff "did use the aircraft as the term is defined in the Michigan Use Tax Act and was, therefore, properly assessed use tax. Thus, [defendant] has demonstrated a palpable error that misled the Tribunal and the parties and that would have resulted in a different disposition if the error was corrected." The Tribunal denied plaintiff's motion for reconsideration in October of 2011. This appeal followed.

II. STANDARD OF REVIEW

Absent fraud, this Court's review of a decision of the Michigan Tax Tribunal is limited to determining whether it erred in applying the law or adopted an incorrect legal principle. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). Factual findings of the Tribunal are conclusive and will not be disturbed if they are supported by competent, material, and substantial evidence on the whole record. *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). However, we review the Tribunal's ultimate decision on a motion for summary disposition de novo. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

III. DISCUSSION

The UTA, MCL 205.91 *et seq.*, is a complement to the General Sales Tax Act (GSTA), MCL 205.51 *et seq.* The UTA is designed to cover transactions not covered under the GSTA. *Ameritech Publishing, Inc. v Dep't of Treasury*, 281 Mich 132, 136; 761 NW2d 470 (2008). MCL 205.93 (1) provides in relevant part:

There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services.

“A sales-use tax scheme is designed to make all tangible personal property, whether acquired in, or out of, the state subject to a uniform tax burden. Sales and use taxes are mutually exclusive but complementary, and are designed to exact an equal tax based on a percentage of the purchase price of the property in question.” *Catalina Marketing Sales Corp v Dep’t of Treasury*, 470 Mich 13, 19 n 3; 678 NW2d 619 (2004), quoting 85 CJS2d, Taxation, § 1990, p 950.

Plaintiff argues that the Tribunal erred in concluding (on reconsideration) that the use tax was properly assessed against it on the grounds that it “used” the aircraft in Michigan. We agree. In *WPGPI, Inc v Dep’t of Treasury*, 240 Mich App 414; 612 NW2d 432 (2000), the plaintiff purchased an aircraft subject to preexisting leases with Southwest Airlines; the purchase “did not interrupt Southwest’s continuous use of the airplanes in interstate commerce.” This Court determined that the plaintiff did not avail itself of the “privilege of using, storing, or consuming personal property in this state” as defined by the UTA. *Id.* at 417; MCL 205.93(1). “Use” as defined by the UTA, means “the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given.” MCL 205.92(b). This Court reasoned that “[b]ecause of the leases, plaintiff at no time used, stored, or consumed the property in Michigan. . . . In other words, by virtue of the leases, plaintiff ceded control of the airplanes to Southwest, and therefore could not have ‘used’ the airplanes for purposes of use tax liability under the UTA.” *WPGPI*, 240 Mich App at 418.

Defendant attempts to distinguish *WPGPI* from the instant case by pointing out that plaintiff did not purchase the aircraft subject to a preexisting lease, but rather executed a lease contemporaneously with the purchase. We do not find this fact dispositive. What was primarily important in *WPGPI* was that “the leases gave Southwest *total* control of [the aircraft], because pursuant to the leases Southwest was responsible for the flight schedules and general maintenance of the planes. Plaintiff did not direct Southwest’s routes or otherwise exercise dominion over Southwest’s use of the planes.” 240 Mich App at 419; compare *Czars, Inc v Dep’t of Treasury*, 233 Mich App 632, 639; 593 NW2d 209 (1999) (holding that a corporation that allowed its sister corporation to use an aircraft in the absence of a formal lease did not relinquish control of the aircraft sufficiently to avoid the use tax).²

² This Court has found that a plaintiff remains liable for the use tax when it cedes partial, rather than total, control to another entity. See *Glieberman Aviation, LLC v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided February 19, 2004 (Docket No. 242352) (holding that the plaintiff did not relinquish total control of the aircraft when it reserved the right to use the aircraft during the lease term and in fact did use the aircraft); see also *Aerogenesis, Inc v Dep’t of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided November 10, 2011 (Docket No. 300266) (holding that plaintiff could not claim exemption from the use tax when it reserved the right to use the aircraft and the lease designated plaintiff as having exclusive responsibility for repairs and modifications). Although these cases are not binding on this Court, MCR 7.215 (C)(1), they illustrate the type of situation where we would, in applying the rationale of *WPGPI*, 240 Mich App at 419, find that the plaintiff was

It is undisputed that the lease executed contemporaneously with plaintiff's purchase of the aircraft ceded total of the aircraft to Murray. Murray was responsible for repairs and maintenance of the aircraft and was responsible for all insurance and taxes, including specifically the Michigan use tax. Murray was assigned all warranties in the aircraft and bore all the risk of loss of the aircraft. The aircraft was in Murray's possession prior to plaintiff's purchase and that possession was not interrupted. We therefore conclude that plaintiff did not "use" the aircraft under the UTA. MCL 205.92(b).³

The Tribunal determined that our decision in *Fisher*, 282 Mich App at 207, compels the conclusion that plaintiff "used" the aircraft. *Fisher* involved a vastly different fact pattern than the instant case. In *Fisher*, the plaintiff purchased a 25% undivided interest in a personal jet. *Id.* at 209. Through a series of agreements with the defendant, the plaintiff was entitled to use other airplanes in defendant's fleet for personal transportation. *Id.* The airplane specifically identified as part-owned by the plaintiff never entered Michigan; however the plaintiff did make use of other airplanes in Michigan. *Id.* This Court determined that the plaintiff's use of other airplanes in the fleet was "pursuant to its contracts to share ownership rights to its own airplane" and therefore the plaintiff was subject to the use tax. *Id.* (emphasis in original).

Fisher did not present the issue of whether there was a "use" of the particular airplane. Rather, the issue before the Court in *Fisher* was whether the plaintiff had purchased an actual airplane (as co-owner), or services (which are not subject to use tax). While a majority of the Court determined that plaintiff had purchased a fractional interest in tangible personal property, it did so premised upon the fact that the plaintiff's use of *other* airplanes in the fleet was "pursuant to its contracts to share ownership rights to its own airplane" and therefore the plaintiff was subject to use tax. *Id.* (emphasis in original).

liable for the use tax. Here, by contrast, we have a *total* ceding of control by plaintiff to Murray, as stated above.

³ This Court reached a similar conclusion in *M & M Aerotech, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, decided November 23, 1999 (Docket No. 33429980), a case relied upon by the Tribunal in issuing its original summary disposition order. In *M & M Aerotech*, the plaintiff purchased an aircraft and simultaneously, i.e., "on or about the same date," leased it to a North Carolina company, Merit. Unpub op at 1. When the aircraft was flown into Michigan within 90 days of purchase for the purpose of having avionics equipment installed, the Department of Treasury attempted to assess the plaintiff for use tax due on the aircraft. *Id.* This Court noted that "[p]ursuant to the lease, plaintiff relinquished all 'operational control' of the aircraft to Merit during the period of possession" and that the lease provided (as the lease does in the instant case) that Merit was responsible for all taxes related to the use and operation of the aircraft. *Id.* at 3. This Court applied *Czars* in determining that the "plaintiff intended to and did relinquish total control of the aircraft for the lease term" and held that plaintiff had rebutted the presumption that the use tax applied. *Id.* at 4; *Czars*, 233 Mich App at 639; MCL 205.93(1). Although unpublished opinions are not binding on this Court, MCR 7.215 (C)(1), *M & M Aerotech* buttresses our conclusion that the presence of a preexisting lease is not a requirement for our finding that the use tax does not apply to plaintiff.

The Tribunal reversed its prior decision in this case based upon the following sentence from *Fisher*: “Entering into a contract to give up some of one’s rights to possession or control is, itself, an exercise of those rights.” 282 Mich App at 213. The lead opinion in *Fisher* made this statement in the context of analyzing what was, in effect, a time-share arrangement in a fleet of airplanes. Therefore the plaintiff’s use of any of the fleet aircraft in Michigan was an exercise of its ownership right in the particular aircraft in which it had purchased a fractional ownership interest. *Id.* The statement on which the Tribunal relied did not arise in the context of an aircraft lease, as here, and in any event it is not apparent that more than a single judge endorsed the quoted language, particularly as now sought to be applied in a factual context other than that which was uniquely presented in *Fisher*.

Here, by contrast, it is undisputed that plaintiff never did anything with the aircraft other than lease it to Murray, which it did simultaneously with its purchase of the aircraft. Critically, plaintiff did not retain any right of use of the aircraft, but ceded total control to Murray pursuant to the lease. In simple terms, therefore, defendant’s argument is that when the plaintiff purchased the aircraft and simultaneously leased it to Murray, there existed a momentary point in time where plaintiff “exercised a right or power” over the airplane by virtue of ceding that control to Murray. A problem with defendant’s argument is that the UTA’s definition of “use” provides that it includes “transfer of the property *in a transaction where possession is given.*” MCL 205.92(b) (emphasis added). Thus, for the purposes of the UTA, a transfer of property unaccompanied by a transfer of possession is simply not “use” that is subject to the tax. Unlike *Fisher*, this Court is not faced with a situation where a plaintiff’s use of property in Michigan was pursuant to an ownership interest in out-of-state property; here the only action by plaintiff that could have resulted in tax liability was the purchase and simultaneous lease of an aircraft that was already in possession of the lessee. Such a transaction (provided that total control over the aircraft is ceded to the lessee) simply does not incur use tax liability. See *WPGPI*, 240 Mich App at 419. *Fisher* does not alter this result, and the Tribunal therefore erred in relying on *Fisher* in reversing its previous decision.

We note that, as stated above, “[s]ales and use taxes are mutually exclusive but complementary.” *Catalina Marketing Sales Corp*, 470 Mich at 19 n 3. There appears to be no reason discernible from the record as to why defendant in this case could not simply seek (or have sought) sales tax from the seller of the aircraft. In any event, the facts before this Court compel the conclusion that the Tribunal erred in ordering plaintiff to pay the use tax assessment.

Having determined that the Tribunal erred in ordering plaintiff to pay the assessment, we decline to address plaintiff’s contention that the amount of the assessment was erroneous. This Court declines to address moot issues. *Driver v Naini*, 287 Mich App 339, 355; 788 NW2d 848 (2010), *aff’d in part and rev’d in part on other grounds* 490 Mich 239; 802 NW2d 311 (2011).

Reversed. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra