

STATE OF MICHIGAN
COURT OF APPEALS

EMERY WORLDWIDE,

Petitioner-Appellant,

v

TOWNSHIP OF CASCADE,

Respondent-Appellee.

UNPUBLISHED

March 10, 2005

No. 251416

Michigan Tax Tribunal

LC No. 00-269404; 00-278041

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Petitioner Emery Worldwide appeals as of right from the Michigan Tax Tribunal’s order denying petitioner’s motion for summary disposition and granting summary disposition to respondent Cascade Township. We affirm.

The property that is the subject of this dispute is a freight hangar and associated improvements located at the Kent County International Airport in Cascade Township (“the township”).¹ In June 1998, petitioner entered into a written lease agreement with the owner of the airport, the Kent County Board of Aeronautics (KCBA), for approximately 250,000 square feet of ground area and 57,000 square feet of apron improvements. Under the terms of this lease agreement petitioner was granted the right to construct, at its sole expense, certain improvements including office, parking, and hangar space for use in its air cargo and general freight transportation business. Consistent with this right petitioner began construction of such improvements in September 1998. Shortly thereafter there arose a dispute regarding the manner in which these improvements, as well as the ground on which they were situated, would be assessed by the township for the 1999 tax year. Before 1999 the township had treated the subject land as exempt from taxation under the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, as property owned by a governmental entity and used for a public purpose, i.e., a public airport.²

¹ Since the dispute that is the subject of this appeal, the Kent County International Airport has changed its name to the Gerald R. Ford International Airport.

² Section 7m of the GPTA provides, in relevant part, that:

[p]roperty owned by . . . a county, township, city, village, or school district used for public purposes and property owned or being acquired by an agency,
(continued...)

However, in a series of letters to the KCBA authored in early 1999, the township indicated its belief that the 1998 lease agreement between petitioner and the KCBA significantly altered the tax-exempt status of that parcel. The township thereafter assessed and later levied taxes against the state equalized value of both the improvements as well as the leased ground for tax years 1999 and 2000.

Petitioner, as the party responsible for these taxes under the terms of its lease agreement with the KCBA, sought review of the assessments by the Cascade Township Board of Review, which summarily affirmed the assessments, prompting appeals of the assessments to the Michigan Tax Tribunal (“the tribunal”). On appeal to the tribunal, petitioner asserted that the tax year 1999 and 2000 assessments against the leased land and improvements were improper because the entirety of that property, whether real or personal in nature, was exempt from taxation under both the GPTA and the lessee-user tax act (LUTA), MCL 211.181 *et seq.*

In deciding the parties’ cross-motions for summary disposition the tribunal first concluded that because, under the terms of its lease agreement with petitioner, the KCBA retained the majority of the “bundle of sticks” generally associated with property ownership, the KCBA was the “owner” of both the land and its improvements for purposes of taxation. Therefore, the tribunal concluded, petitioner could properly be assessed neither real nor personal property taxes because the entirety of the property was exempt from taxation under § 7m of the GPTA.

However, concluding that such was not the “type or character of the tax levied,” the tribunal further determined that petitioner’s “use” of the property was nonetheless assessable to petitioner under the LUTA because such use failed to meet the requirements for exemption from taxation as a “concession.” See MCL 211.181(2)(b). Specifically, the tribunal concluded that although the lease agreement contained a number of general restrictions with respect to operation of petitioner’s business, the agreement afforded petitioner a great deal of discretion with respect to the daily operation of its business. The tribunal further concluded that petitioner had, in any event, failed to provide sufficient evidence that its operations at the leased premises were available for use by the general public, as also required for exemption under the LUTA. *Id.*

In reaching these conclusions the tribunal rejected petitioner’s claim that the taxes levied against it had been expressly assessed by the township, not as a privilege tax under the LUTA, but rather as ad valorem real and personal property taxes under the GPTA. In doing so the tribunal reasoned that the “classification of [a] tax is disparate to its nature,” and that the listing of the improvements as “personal property” on the official tax statements did not necessarily render the assessment a personal property assessment under the GPTA. The tribunal further reasoned that the township had no other way to characterize the property being leased to

(...continued)

authority, instrumentality, nonprofit corporation, commission, or other separate legal entity comprised solely of, or which is wholly owned by, or whose members consist solely of a political subdivision, a combination of political subdivisions, or a combination of political subdivisions and the state and is used to carry out a public purpose itself or on behalf of a political subdivision or a combination is exempt from taxation under this act. [MCL 211.7m.]

petitioner, stating that “the nature of the property involved is by definition personal property, and as such is not the indicator or reason why the tax is being levied.”

Relying on these conclusions, the tribunal denied petitioner’s motion for summary disposition and granted summary disposition to the township. This appeal followed.

I

Petitioner first argues that the tribunal erred in concluding that the taxes levied against it had been assessed by the township not as ad valorem real and personal property taxes under the GPTA, but rather as a privilege tax under the LUTA. Upon review of the record as a whole, we agree.

Although this Court generally reviews de novo the grant or denial of summary disposition, *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), “review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record.” *Michigan Bell Telephone Co v Dep’t of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994), citing Const 1963, art 6, § 28.

As previously noted, before 1999 the township treated the subject land as exempt from taxation under § 7m of the GPTA, as property owned by a governmental entity and used for a public purpose. However, in a series of letters to the KCBA authored in early 1999 the township indicated its belief that the 1998 lease agreement between petitioner and the KCBA significantly altered the tax-exempt status of that parcel. Specifically, the township opined in a letter dated January 19, 1999, that because the lease agreement provided that petitioner would retain title to the improvements then being constructed on the leased ground, the land and associated improvements no longer qualified for exemption under the GPTA:

The lease indicates that Emery Airfreight Corporation owns the building. Kent County does not own the building and therefore it is not exempt from taxation.

Likewise, the land leased to Emery is not exempt. In order to be eligible for exemption, the land must not only be owned by an organization eligible for the exemption, it must be used for the purpose for which the organization is exempt. Leasing land for commercial buildings is not an activity for which the airport is exempt.

The Emery building lease and ownership is similar in form to the corporate hangers that have been taxed from the beginning without dispute.

The past practice has been to put the land and buildings *on the roll as real property* under their own parcel number. The new buildings are now on the main airport parcel number. We will be placing the 1999 Emery *land and building assessment* on the airport parcel number. After we have received legal descriptions for the new buildings and Kent County has created new parcels, we will be able to move the Emery assessment to its own parcel. [(Emphasis added).]

The township thereafter, on February 15, 1999, issued to the KCBA a “Real Property Change Notice” indicating that the entire taxable value of both the improvements and leased ground would be assessed against the subject property. The KCBA responded to this notice by indicating its belief that the property was exempt from taxation under the LUTA, as a concession available for use by the general public. In response to this objection, the township acknowledged the exemption provided for under the LUTA. In doing so, however, the township implied that, as a “for profit company,” Emery did not qualify for such an exemption and that “the Emery *building*” was, therefore, taxable because it was owned by Emery.

Despite having been provided with this evidence, the tribunal concluded that the taxes levied by the township were assessed not as ad valorem real or personal property taxes under the GPTA, but rather as a privilege tax under the LUTA. However, although the township did acknowledge the LUTA in its correspondence with the KCBA, it impliedly rejected its application to the subject property. Moreover, the township’s earlier indication that the “Emery land and building assessment” would be placed “on the roll as real property,” when viewed in connection with its subsequent statement that the Emery “building” was itself taxable, belie any conclusion that the 1999 assessment was anything other than an assessment against real property. As correctly noted by petitioner, our Supreme Court has held that the tax provided for under the LUTA is not an ad valorem tax on real property, but rather a tax on the privilege of using tax-exempt property levied against the lessee or user of the property. *United States v Detroit*, 345 Mich 601, 604-608; 77 NW2d 79 (1956). Consequently, we find that the record does not support that tribunal’s conclusion that the taxes levied by the township for tax year 1999 were assessed under the LUTA, rather than the GPTA. *Michigan Bell, supra*; see also *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992) (a court must review the entire record and not just those portions that support an agency’s findings).

When viewed as a whole, the record similarly does not support the tribunal’s conclusion that the taxes levied for tax year 2000 were assessed by the township as a privilege tax under the LUTA, rather than ad valorem personal property taxes under the GPTA. As previously noted, following petitioner’s appeal of the tax year 1999 assessment to the tribunal, the township sought the advice of legal counsel regarding the proper manner in which to assess the land and associated improvements. In a letter dated January 11, 2000, the township was advised by counsel that the ground and apron improvements leased to petitioner by the KCBA were exempt from taxation under § 7m of the GPTA because that property was owned by the KCBA and used for a public purpose, but that because petitioner had not bound itself to pay any real property taxes associated with the leased premises, the improvements constructed upon that land by petitioner were assessable to petitioner as personal property under § 14(6) of the GPTA. MCL 211.14(6). In a letter to petitioner’s counsel date January 12, 2000, the township indicated its intent to follow the advice of its counsel:

[The township] has received the legal opinion we requested on the taxable status of the Emery Freight Building at the Kent County Airport. . . . The crux of [t]his opinion is that the building is taxable but the land and apron are exempt.

In response to this opinion and our prior conversation, we have established a ***personal property account number*** for the Building. The new account number which we will use for the 2000 assessment is 41 50 18 022 151. We will not have

an assessment on the real property account number 41 19 20 300 016 in year 2000. [(Emphasis added).]

The township thereafter issued an Official Tax Statement for tax year 2000 in which it characterized petitioner's air freight hangar as "personal property," against the assessed value of which the township levied taxes. In discounting this characterization of the hangar as mere necessity, and concluding that the tax year 2000 taxes were levied not as personal property taxes under the GPTA, but rather as a privilege tax under the LUTA, the tribunal failed to account for the township's clear reliance on the advice of counsel, as reflected by the correspondence quoted above, that the improvements were taxable as personal property under § 14(6) of the GPTA. Consequently, because when viewed as a whole the record does not support the tribunal's conclusion, we find that the tribunal erred in reaching a contrary conclusion. Nonetheless, as explained below, such error is irrelevant to the tribunal's ultimate decision granting summary disposition in favor of the township. *Michigan Bell, supra; Great Lakes Sales, supra.*

II

Petitioner next argues that the tribunal lacked jurisdiction to effectively impose a privilege tax under the LUTA because the taxes imposed by the township and challenged by petitioner on appeal were ad valorem real and personal property taxes assessed under the GPTA. We disagree. This Court reviews de novo questions of subject matter jurisdiction. See *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

The jurisdiction and powers of the Michigan Tax Tribunal are defined by the tax tribunal act, MCL 205.701 *et seq.*, which confers on the tribunal, upon the filing of a timely petition, "exclusive and original jurisdiction" over assessment disputes. MCL 205.731; see also MCL 205.732, 735. In challenging the tribunal's jurisdiction here, petitioner does not dispute the tribunal's general authority to hear the instant dispute. Indeed, it was petitioner that invoked such jurisdiction by filing a timely petition for review. See MCL 211.735(2). Rather, petitioner challenges the scope of the tribunal's authority in deciding the matter, arguing that the tribunal was limited to addressing only the validity of the tax actually assessed against petitioner. However, in resolving a similar claim in *American Golf of Detroit v Huntington Woods*, 225 Mich App 226, 229; 570 NW2d 469 (1997), this Court held that even though the tax imposed by the respondent city and challenged by the petitioner was an ad valorem real property tax, the tribunal had jurisdiction to determine whether the value of the subject property was nonetheless taxable to the petitioner under the LUTA. In reaching this conclusion, the panel reasoned:

Throughout the Tax Tribunal proceedings, petitioner continually asserted that it was exempt from the lessee-user tax under MCL 211.181(2)(b). In light of respondent's attempt to tax the value of the land to petitioner and petitioner's reliance on the concession exemption to the lessee-user tax in challenging the imposition of a tax – and because the lessee-user tax is imposed "in the same amount and to the same extent" as real property taxes – we conclude that the Tax Tribunal had jurisdiction to determine whether the value of the [subject property] was taxable to petitioner or whether petitioner was exempt from taxation as the operator of a concession. [*Id.*, citing MCL 205.731.]

Petitioner's attempt to distinguish *American Golf* on the ground that, unlike the petitioner in that case, it did not rely on the public concession exemption in challenging the township's assessment is wholly unpersuasive. Although petitioner ultimately attempted to dissuade the tribunal from reaching the issue, it expressly alleged in each of its petitions before the tribunal that it was exempt from taxation under the LUTA, "for the reason that" its use of the subject property was "that of a concessionaire, operating as a concession exempt from taxation under [the LUTA]." Consistent with these allegations, petitioner further requested that the tribunal enter an order finding the subject property exempt from taxation under the act, and later even framed the legal issues to be decided by the tribunal as including a determination "whether [its] occupancy of the building is as a concessionaire exempt from taxation under the [LUTA]."

Moreover, while petitioner is correct that, unlike the ad valorem real property assessment at issue in *American Golf*, the tax year 2000 assessment at issue here was premised only on the value of the building improvements as personal property, as opposed to both the improvements and leased ground as real property, that distinction is irrelevant to the question whether the tribunal possessed the authority to address the applicability of LUTA. Although an assessment only against the value of the improvements as personal property may have resulted in an assessed value (and thus an assessed tax) less than that imposed had the value of the land also been assessed, petitioner does not dispute that the assessment and equalization process applicable to the freight hangar, whether characterized as real or personal property, is ultimately the same. See *American Golf, supra*. Moreover, neither the assessment procedure nor the accuracy of the assessed value against which the tax ultimately imposed was calculated is currently before this Court. Accordingly, we reject petitioner's contention that the tribunal exceeded the scope of its authority in addressing and ultimately affirming the subject assessments as proper under the LUTA. *Id.* As in *American Golf, supra*, although the tax at issue had been imposed by the taxing authority under the GPTA, the applicability of an assessment under the LUTA, the assessment of which would not alter the ultimate tax imposed, was placed squarely before the tribunal and was within its authority to decide.

III

Petitioner also argues that the tribunal erred in concluding that its operations did not fall within the public concession exemption of the LUTA. Again, we disagree.

Neither party disputes the tribunal's conclusion that the land and building improvements at issue here, being real property owned by the KCBA, are exempt from ad valorem property taxation under § 7m of the GPTA. See MCL 211.7m. At issue here is the tribunal's conclusion that, despite that exemption, petitioner's use of the property under the lease agreement with the KCBA is taxable under the LUTA, which provides, in pertinent part, that:

if real property exempt for any reason from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, *the lessee or user of the real property is subject to taxation in the same amount and to the same extent as though the lessee or user owned the real property.* [MCL 211.181(1) (emphasis added).]

As this Court recognized in *Skybolt Partnership v City of Flint*, 205 Mich App 597, 601; 517 NW2d 838 (1994), “[t]he lessee-user tax is intended to ensure that lessees of tax-exempt property will not receive an unfair advantage over lessees of privately owned property.” However, the tax is not applicable to every use of such property. “Property that is used as a concession at a public airport, park, market, or similar property and that is available for use by the general public” is expressly exempt from taxation under the act. MCL 211.181(2)(b). Thus, petitioner’s use of the property at issue here, being located at a public airport, is subject to taxation under the LUTA unless that the property is both “used as a concession” and is “available for use by the general public.” *Skybolt*, *supra* at 602.

In *Detroit v Tygard*, 381 Mich 271, 275; 161 NW2d 1 (1968), our Supreme Court first considered the meaning of the term “concession” and in doing so observed that central to the concept of a concession, which the Court defined as a “[a] privilege or space granted or leased for a particular use within specified premises,” is the concession holder’s responsibility to uphold specific obligations, and to maintain particular services under specified terms and standards. Here, in concluding that petitioner’s use of the subject property did not constitute a concession under the LUTA, the tribunal found that although the lease agreement contained general restrictions and obligations, petitioner possessed an “unacceptable” level of discretion and thus failed to meet the requirement of a concession. In arguing that the tribunal erred in reaching this conclusion, petitioner asserts that the terms of its lease agreement with the KCBA were quite similar to those at issue in *Kent Co v Grand Rapids*, 381 Mich 640; 167 NW2d 287 (1969), wherein the Court upheld the lower court’s finding that sufficient restrictions and obligations had been imposed to warrant an exemption from the lessee-user tax to a fixed base operator. See *id.* at 648-649, 675. However, as explained below, resolution of this matter does not turn on whether such obligations or restrictions exist under the terms of the parties’ lease agreement.

In *Tygard*, *supra* at 276, the Court made clear that equally important to the determination whether private use of exempt property constitutes a concession is the requirement that the services offered by the would-be concessionaire “bear a reasonable relationship to the purposes” of the facility being operated. In *Tygard*, *supra*, as here, the facility at issue was located at a public airport. Although concluding that the servicing and storage of transient aircraft offered by the fixed base operator involved there bore the necessary relationship to the purpose of the airport, the Court went on to address the nature of concessionary services at public airports and in doing so noted that the grant to political subdivisions of “the right to ‘confer concessions . . . upon its airports’ bespeaks [the Legislature’s] intention to assure that the services *customarily and needfully required at airports* will be assured.” *Id.* at 276 (citation omitted; emphasis added). In *Kent Co*, *supra* at 645, the Court similarly took note of the fact that “there should be a ‘fixed base operator’ at the airport to furnish certain services in connection with planes using the airport.” Here, however, unlike the fixed base operators in the *Tygard* and *Kent Co* cases, petitioner offers no service directly associated with use of the airport by the general public. Rather, petitioner’s use of airport property merely facilitates its more general, private business purpose, i.e., the transportation of cargo. Although locating a portion of its operations on airport property certainly enhances its financial and logistical ability to conduct its operations, such use is no more customary or needful to the airport and its public users than use by any other private corporation seeking to enhance its business operations through the expediency of air travel. This is not to say that petitioner’s use of the property does not, as argued by petitioner, benefit the

public in general. However, general public benefit is not the test. Rather, the test is whether the use to which the property is put reasonably relates to the purposes of a public airport, which is to provide a public hub for activities ordinarily associated with airplanes.

In addition, we conclude that summary disposition pursuant to MCR 2.116(C)(10) was nonetheless proper because petitioner failed to put forth documentary evidence sufficient to establish a genuine issue of fact regarding whether its facilities were “available for use by the general public.”

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition under MCR 2.116(C)(10) should be granted where the affidavits or other documentary evidence show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). To avoid summary disposition under MCR 2.116(C)(10) the party opposing the motion must show, via affidavit or documentary evidence, that a genuine issue of fact exists for trial. *Smith, supra* at 455-456 n 2; see also MCR 2.116(G)(4). Here, with respect to the issue whether its facilities were “available for use by the general public,” petitioner submitted the affidavit of its facility’s general manager, James Peterson, wherein Peterson averred that petitioner’s “air cargo and general freight transportation business is open to receive shipments from the general public frequenting the airport, and has been so used.” It is not disputed that no other evidence concerning the availability of petitioner’s facility for use by the general public was submitted by the parties to the tribunal. Petitioner argues that because the township offered no evidence to rebut Peterson’s averment, his affidavit was sufficient to create a genuine issue of material fact precluding summary disposition under MCR 2.116(C)(10). We disagree.

As correctly argued by the township, it was petitioner’s burden to show a genuine issue of material fact in this case. It is well settled that tax exemptions are disfavored and are strictly construed against the taxpayer. *Guardian Industries Corp v Dep’t of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000). Accordingly, “the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption.” *Id.* Moreover, as this Court observed in *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001), when the burden of proof at trial would rest on the party opposing a motion for summary disposition, the nonmovant may not rest upon mere allegation or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. The affidavit submitted by petitioner was insufficient for this purpose. Pursuant to MCR 2.119(B)(1)(b), an affidavit offered in support of or in opposition to a motion must “state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion.” Here, however, Peterson failed to allege any fact in support of his conclusory averment that petitioner’s “business is open to receive shipments from the general public frequenting the airport, and has been so used.” Accordingly, petitioner failed in meeting its burden of establishing that there was a factual issue regarding whether its operations were “available for use by the general public,” and the tribunal did not err in granting the township’s motion for summary disposition, at least in part, on this basis. See also, e.g., *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 174-175; 551 NW2d 132 (1996) (an affidavit that simply states an expert’s opinion, without providing any scientific or factual support, is insufficient to create a genuine issue of material fact).

We affirm.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Bill Schuette