STATE OF MICHIGAN

COURT OF APPEALS

FMG LEASING, LLC, Petitioner-Appellant,	UNPUBLISHED June 26, 2014
v DEPARTMENT OF TREASURY, Respondent-Appellee.	No. 312448 Tax Tribunal LC No. 00-410944

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Petitioner, FMG Leasing, LLC, a limited liability company formed to hold title to an aircraft, sought to take advantage of the statutory exception in MCL 205.95(4) that permits a lessor of tangible personal property to pay use tax on receipts from the rental or lease of the property in lieu of paying a sales or use tax on the full cost of the property at the time of purchase. Respondent, Department of Treasury, disallowed the leasing election and assessed the use tax due on the purchase price of the aircraft, plus a penalty. Petitioner appealed that decision to the Michigan Tax Tribunal (MTT), which denied petitioner's motion for summary disposition under MCR 2.116(C)(10) and granted summary disposition in favor of respondent, thereby upholding the use tax assessment and penalty. Petitioner appeals as of right, and we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On January 8, 2008, petitioner was formed as an LLC. Shortly thereafter, petitioner purchased a 2008 Beechcraft G36 Bonanza aircraft for $585,000. In lieu of paying use or sales tax on the purchase price, petitioner timely registered with respondent to collect and pay use taxes from leasing the aircraft. Upon purchasing the aircraft, petitioner entered into rental agreements with FMG Concrete Cutting, Inc (FMG Concrete), who was listed as a member of petitioner, and Frank Gobright, who is the president of FMG Concrete. The rental agreements specified rental rates of $80 per flight hour for FMG Concrete and $250 per flight hour for Gobright (less the direct cost of any fuel purchased). FMG Concrete was required under its lease to pay for fuel, maintenance, insurance, and other variable and fixed operating costs for the aircraft. Rental payments were due on an annual basis. According to flight logs, the aircraft

logged a total of 76 trips from February through August of 2008, with a total of 68.55 flight hours, for an average usage of 11.42 hours per month. FMG Concrete was the user of the aircraft for 66 of the trips logged.[1] Gobright was never listed as a user of the aircraft during this time period; however, he appeared as a passenger on several trips. No entries were found for any lessees other than FMG Concrete. Petitioner remitted use tax on the lease receipts. Petitioner maintained that in engaging in this leasing operation, it relied upon the advice of Advocate Consulting, a Florida firm that held itself out as having experience in Michigan's sales and use tax compliance requirements, as well as expertise in the aviation industry.

In August 2010, respondent rejected petitioner's election to pay taxes on the aircraft by collecting and paying use taxes from leasing the aircraft. Respondent assessed a use tax of $36,563.40 and a penalty of $9,140.85, as well as $4,869.51 in interest.

In October 2010, petitioner filed a petition with the MTT for a redetermination of respondent's decision. In April 2012, following discovery, petitioner filed a motion for summary disposition pursuant to MCR 2.116(C)(10), noting that there were no genuine issues of material fact. Attached to the motion, petitioner included an affidavit from Gobright in which he averred that he had personal knowledge that similar aircraft to the one at issue rented for $195 per flight hour, with the cost of maintenance, insurance, storage, and fuel included in that rate. Gobright also averred that the rental rates of $80 and $250 per flight hour "seemed to comport" with the prevailing market rate of $195 per flight hour. Gobright further averred that petitioner's intent in purchasing the aircraft was to lease it to others. In addition, he contended that petitioner would have considered other offers to rent the aircraft for the same rate it leased the aircraft to FMG Concrete—$80 per flight hour—provided the parties agreed to absorb some portion of the fixed costs; however, it received no such offers. Finally, Gobright stated that he expected rental receipts to be higher than what they were, but the economy took a downturn in 2008, which led to dramatically lower rental hours.

In addition to Gobright's affidavit, petitioner provided the affidavit of Thomas Trumbull, who owned an aircraft leasing business. Trumbull averred that the type of lease agreement petitioner entered into with FMG Concrete was common in the industry and that the rate of $80 per flight hour charged to FMG Concrete was consistent with rates charged by other leasing companies for the same make and model aircraft. Trumbull further averred that the aviation industry struggled in 2008, leading to a decrease in leasing revenues.

Respondent filed a cross-motion for summary disposition, arguing that petitioner was not in the business of leasing the aircraft. It argued that petitioner never offered leases to parties other than FMG Concrete or Gobright, or held itself out to the public by advertising its services beyond "word-of-mouth" advertising. Respondent offered the opinion of Dr. C. Edward Fee, an

---

[1] The column indicating the "Individual/Business Using the Aircraft" was left blank on the remaining ten flight log entries. Notably, Gobright's wife was listed as the only passenger for eight of those entries, six of which were for the purpose of a "day at Higgins Lake" and two of which were for a "vacation in U.P., MI/1st long trip." They appear to chronicle four round-trip flights. Gobright was never charged an hourly flight rate.

associate professor of finance at Michigan State University. Dr. Fee opined that, based on the financial data he received for petitioner's leasing activities, petitioner's decision to purchase the aircraft for leasing purposes did not offer a sufficient rate of return for an arm's-length investor.

On July 6, 2012, the hearing referee issued a proposed decision denying petitioner's motion and granting respondent's motion for summary disposition. Concluding that petitioner was not legitimately engaged in the business of leasing the aircraft to others, the referee concluded that petitioner did not qualify for the lessor election in MCL 205.95(4). Further, the referee upheld the penalty assessment under MCL 205.24 because "[t]he facts and circumstances of this case clearly demonstrate that [p]etitioner's intent at the time of purchase of the aircraft was to allow for use by the owner and a limited number of persons at a discounted rate," and because "[i]t has not been established that FMG Leasing was formed for the business of leasing tangible personal property *to others*." On August 29, 2012, the MTT affirmed the referee's decision.

II. LESSOR EXCEPTION

The standard by which this Court reviews a decision of the MTT is summarized in *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010), as follows:

> The standard of review of Tax Tribunal cases is multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by competent, material, and substantial evidence on the whole record. But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo. [Quotation marks and footnotes omitted.]

In this case, the tribunal determined that respondent was entitled to summary disposition. The tribunal's decision to grant summary disposition for respondent is subject to de novo review. *Id*. Petitioner moved for summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. A reviewing court or tribunal must consider the pleadings, together with any affidavits, depositions, admissions, or other documentary evidence filed by the parties. MCR 2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 43; 706 NW2d 460 (2005); *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). However, if it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

At issue is whether petitioner can claim the benefit of the statutory "lessor exception" to the payment of use tax on the purchase of an aircraft. MCL 205.95(4) provides:

> A lessor may elect to pay use tax on receipts from the rental or lease of the tangible personal property in lieu of payment of sales or use tax on the full cost of the property at the time it is acquired. For tax years that begin after December 31, 2001, in order to make a valid election under this subsection, a lessor of tangible

> personal property that is an aircraft shall obtain a use tax registration by the earlier of the date set for the first payment of use tax under the lease or rental agreement or 90 days after the lessor first brings the aircraft into this state.

Mich Admin Code, R 205.132(1) ("Rule 82") also provides:

> A person engaged in the business of renting or leasing tangible personal property to others shall pay the Michigan sales or use tax at the time he purchases [the property], or he may report and pay use tax on the rental receipts from the rental thereof. . . .

This Court recently addressed the statutory "lessor exception" in *Devonair Enterprises, LLC v Dep't of Treasury*, 297 Mich App 90; 823 NW2d 328 (2012), which is factually similar to this case. In *Devonair*, the petitioner purchased a 2007 Pilatus PC-12 aircraft for $3,610,690 and, on the same, day, entered into two lease agreements, one with DJS Enterprise Group, LLC (DJS), which was the petitioner's sole member, and the other with Donald Smith, a member of DJS. *Id.* at 92. The lease with DJS provided that DJS would pay $200 per flight hour, as well as all operational costs including maintenance, repairs, insurance, fuel, and storage costs for the airplane. The lease with Smith provided that he would pay $636 per flight hour, which was later adjusted to $680 per flight hour. DJS did not enter into any other lease agreements for the Pilatus, which was DJS's only asset. This Court held that the petitioner was not a "lessor" under MCL 205.95(4) because it was not engaged in the business of renting or leasing property to others as set forth in Rule 82. *Id.* at 103.

In *Devonair*, this Court relied on MCL 205.92(h) for the definition of "business," which provides that the term means "all activities engaged in by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect." *Id.* at 100, quoting MCL 205.92(h). This Court concluded that to be considered a lessor of property under MCL 205.95(4), the "petitioner must have engaged in the business of selling, i.e., selling activities with the object of gain, benefit, or advantage." *Id.* at 101. In its decision, this Court noted that the MTT

> considered three factors as indicators of whether an entity is engaged in the business of renting or leasing tangible personal property to others: (1) whether the rates and terms of the lease are consistent with leases resulting from an arm's-length transaction, (2) whether the taxpayer holds itself out to the public as a lessor, and (3) whether the amount of time that the property is leased is sufficient to produce revenue consistently with other leasing businesses. [*Id.* at 93.]

In affirming the MTT's decision to disallow the lessor exception, this Court reasoned:

> In this case, the only business or selling activities that petitioner engaged in was a lease agreement with its sole member DJS, and a lease agreement with DJS member [Smith]. The MTT concluded that these leases did not reflect arm's-length transactions and were not indicative of petitioner being engaged in the business of leasing the Pilatus to others. This finding was supported by the

> extremely favorable leasing terms with regard to the lease agreement with [Smith], as well as by the unreasonable lease terms provided in the DJS agreement. Pursuant to the agreement with [Smith], the aircraft was leased at an hourly rate significantly less than the hourly operational costs incurred by petitioner. Pursuant to the DJS agreement, DJS was responsible for all operational costs, including maintenance, storage, insurance, fuel, and repairs, although the lease was nonexclusive and terminable at will by petitioner. Thus, even if other entities leased the aircraft, DJS remained liable for all associated costs. And even if DJS had paid for significant repairs on the aircraft, petitioner could terminate the lease immediately after the repairs were completed.
>
> The MTT's conclusion that petitioner was not in the business of leasing aircraft to others was also supported by the fact that petitioner did not seek out any other leasing opportunities, for example, by advertising its purported aircraft leasing business. As a consequence of petitioner's inactivity, the aircraft was flown a minimal number of hours compared to the typical expectation of between 290 and 479 hours a year, producing little revenue for petitioner. Although petitioner argues on appeal that it did not seek out other leasing opportunities in an effort to preserve the aircraft's resale value, such an objective is not consistent with its claim that it was engaged in the business of leasing the aircraft to others. See former MCL 205.95(1).
>
> We conclude that the MTT did not err in applying the law and that its factual findings were adequately supported by the evidence on the whole record. . . . That is, the MTT's conclusion that petitioner was not a "lessor," as set forth in MCL 205.95(4), because it was not "engaged in the business of renting or leasing [the Pilatus] to others," as set forth in Rule 82, is affirmed. [*Id.* at 102-103.]

Although petitioner argues that the three factors referenced by this Court in *Devonair*, 297 Mich App at 93, were not actually adopted by this Court, and thus should not have been considered by the Tax Tribunal in this case, it is apparent that this Court considered each of those factors in its analysis and found that they supported the Tax Tribunal's decision to disallow the lessor exception under MCL 205.95(4).

We find that *Devonair* controls the outcome in this case and supports the decision of the MTT. Similar to the petitioner in *Devonair*, the undisputed facts failed to show that petitioner was engaged in the business of renting or leasing the aircraft to others as set forth in Rule 82. Indeed, similar to the leases at issue in *Devonair*, 297 Mich App at 102, the leases at issue in this case do not indicate that they were arm's-length transactions. In particular, the lease with FMG Concrete was unreasonable, as it required FMG Concrete to be responsible for all operational costs and repairs of the aircraft, regardless of who used the aircraft, and that all replacement parts would become the property of petitioner upon installation. It also required FMG Concrete to insure the aircraft. Meanwhile, the nominal rate of $80 per flight hour, upon which petitioner calculated its use tax, was hardly sufficient to cover the actual cost of the aircraft, let alone make a profit. By contrast, the lease with Gobright was quite favorable to Gobright. Furthermore, petitioner did not hold itself out to the public as a lessor; indeed, it never advertised its leasing services, outside of purported "word-of-mouth" advertising, which did not result in a single

additional lessor of the aircraft. Although petitioner attempts to fault an economic downturn for its decreased leasing revenues, it ignores the fact that it did not advertise the aircraft or take any formal efforts to hold itself out as a leasing company. Finally, the aircraft was flown a minimal number of hours in this case, and according to Fee, was flown in a manner that would have produced little revenue for petitioner. In light of these factors, the MTT did not err in holding, consistent with this Court's decision in *Devonair*, that petitioner was not a "lessor" within the meaning of MCL 205.95(4). We therefore affirm the MTT's decision denying petitioner's motion for summary disposition and granting summary disposition in favor of respondent.

In reaching this conclusion, we disagree with petitioner's argument that the MTT erred by failing to give due consideration to the affidavits of Gobright and Trumbull. Petitioner argues that the tribunal was required to accept Gobright's statement expressing that it was petitioner's intent to lease the aircraft for more than 300 hours a year, which would have been sufficient to achieve profitability. Although Gobright did aver in his affidavit that the aircraft was purchased with an intent to own it "exclusively for the purpose of leasing [it] to others," he did not specify any anticipated number of hours that the aircraft was to be leased. Further, his statement that it was petitioner's intent to operate a legitimate leasing business and not to defraud the state of taxes are more conclusory than factual. Mere conclusory allegations, which are devoid of detail, are insufficient to establish a question of fact to avoid summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996); *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991). Trumbull's affidavit does not contain the same type of conclusory statements, but it also does not support that petitioner was engaged in the business of renting or leasing the aircraft to others with the object of gain, benefit, or advantage. Although Trumbull averred that there were legitimate business reasons for the leasing arrangement, he did not indicate that petitioner was using the aircraft consistent with a leasing business to turn a profit.

III. PENALTY

Petitioner also argues that the MTT erred by failing to waive the penalty for failure to timely pay the use tax. MCL 205.24 authorizes the imposition of a penalty for failure to timely pay a tax, subject to waiver of the penalty as prescribed in subsection (4), which provides:

> If a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the state treasurer or an authorized representative of the state treasurer shall waive the penalty prescribed by subsection (2).

Under MCL 205.24(4), the taxpayer bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to file or pay was due to reasonable cause and not willful neglect. Mich Admin Code, R 205.1013(3)-(4); *JW Hobbs Corp*, 268 Mich App at 53. In addition, Mich Admin Code, R 205.1013(5) provides that taxpayers are "required to exercise ordinary business care and prudence in complying with filing and payment requirements." An "honest difference of opinion" can satisfy the reasonable cause standard. See *JW Hobbs Corp*, 268 Mich App at 54.

Mich Admin Code, R 205.1013(7) and (8) set forth various factors that may be considered in determining whether reasonable cause for failure to pay a tax existed. As noted above, petitioner purported to rely upon the advice of Advocate Consulting. In pertinent part, Mich Admin Code, R 205.1013(8)(d) states that incorrect advice from a "tax advisor who is competent in Michigan state tax matters" does not alone constitute reasonable cause, but is a factor that may be considered with other facts and circumstances.

Petitioner argues that its reliance upon the advice of Advocate Consulting justified waiver of the penalty. We disagree. Although subsection (8)(d) recognizes that petitioner's reliance on the advice of a tax advisor may, along with other factors, support a finding of reasonable cause for failure to pay the use tax, subsection (8) also provides that this factor alone does not constitute reasonable cause for failure to file or pay a tax. Here, although petitioner relied on Advocate Consulting, a Florida firm, such reliance was offset by the fact that petitioner entered into two leases that were not profitable and that petitioner leased the aircraft in such an infrequent manner that it would have taken petitioner dozens of years to repay its tax obligations. Furthermore, petitioner made little, if any, efforts to advertise its purported leasing business. Given the foregoing, petitioner was unable to meet its burden of establishing, by clear and convincing evidence, reasonable cause and the absence of willful neglect. See *JW Hobbs Corp*, 268 Mich App at 54. Thus, we find that the MTT did not err in upholding the penalty assessment.[2]

Affirmed.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

[2] Although this Court in *Devonair*, 297 Mich App 90, addressed a similar issue, it did not address the penalty provision set forth in MCL 205.24.