STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

AeroGenesis, Inc.,
Petitioner,

v

MTT Docket No. 272692
Assessment No. J662244

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case, finds:

1. On May 12, 2010, the Tribunal issued an Order of Partial Judgment, an Order Requiring Additional Information, and an Order Scheduling Hearing. In its Orders, the Tribunal determined that:

> the [subject] aircraft was subject to use tax. However, a material issue of fact does exist. Petitioner alleges that the use tax of $114,750 over-estimates the purchase price of the subject property by almost one million dollars. Petitioner claims to have purchased the subject aircraft for $999,000 and claims that the proper amount of use tax is $59,940. Respondent assessed Petitioner $114,750 of use tax, which is 6% of $1,912,500 (i.e., Respondent's assertion of the purchase price).

2. Accordingly, the Order required the parties to either stipulate to the purchase price of the subject aircraft or attend a hearing that would be limited to determining the purchase price of the subject aircraft. The Orders specified that the parties had 45 days from the entry of the orders to file a stipulation as to the purchase price of the subject aircraft. The Orders further stated that if the parties did not file a stipulation, the above-captioned case is scheduled for a date certain limited hearing commencing at 11:00 a.m. on July 15, 2010.

3. On June 22, 2010, the Tribunal entered an order granting Petitioner's Motion to Adjourn and rescheduled the July 15, 2010 hearing. Specifically, Petitioner requested a 30-day extension of time to file a stipulation in order to research the 1996 purchase price. The Order stated that the parties had until August 13, 2010 to file a stipulation as to the purchase price of the subject aircraft or a limited hearing would commence on August 30, 2010.

4. On August 19, 2010, the parties filed an untimely stipulation as to the purchase price of the subject aircraft. The stipulation states that ". . . the purchase price of the aircraft at issue in this case (FAA Reg. No. N211CP) was $999,000."

5. Although the stipulation was untimely, the Tribunal adopts the $999,000 stipulated purchase price as the purchase price of the subject aircraft. As such, the Tribunal reiterates its determination that Petitioner is subject to use tax on the purchase of the subject aircraft. However, Respondent's Final Assessment No. J662244 is inaccurate as it determined use tax liability from the erroneous purchase price of $1,912,500. As indicated herein, the correct purchase price is $999,000; therefore, Petitioner's use tax liability is $59,940.

6. Given the above, Respondent's records shall be corrected to reflect $999,000 as the purchase price for the subject aircraft. Further, Final Assessment No. J662244 shall be revised and Respondent shall reissue a corrected Final Assessment indicating use tax liability in the amount of $59,940 including the appropriate interest liability.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the appropriate taxes and interest as indicated in the revised Final Assessment within 20 days of its issuance.

IT IS FURTHER ORDERED that Petitioner shall pay the taxes and interest, as reflected in Respondent's revised Final Assessment, within 28 days of entry of the revised Final Assessment.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

By: Cynthia J Knoll

Entered: August 25, 2010
sms

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

AeroGenesis, Inc,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MTT Docket No. 272692
Assessment No. J662244

Tribunal Judge Presiding
Cynthia J Knoll

ORDER PLACING PETITIONER'S MOTION FOR SUMMARY DISPOSITION IN ABEYANCE

ORDER REQUIRING ADDITIONAL INFORMATION

ORDER SCHEDULING HEARING

I. INTRODUCTION

Petitioner, AeroGenesis, Inc., is appealing Final Assessment No. J662244 issued by Respondent, Michigan Department of Treasury, on August 30, 1999. The Final Assessment established that Petitioner owes use tax in the amount of $114,750.00, plus interest on the purchase of an aircraft acquired in November 1996. The assessment is the result of Respondent's denial of Petitioner's claim of exemption from use tax. Petitioner asserts it was exempt from use tax under MCL 205.94(x) because the aircraft was used by a domestic air carrier and it was used for the transport of passengers. Respondent determined that Petitioner did not submit documentation to support its exemption claim and therefore issued the Final Assessment at issue. Specifically, Respondent's denial of the exemption was premised on the fact that Petitioner did not use the aircraft in an exempt manner and cannot claim a "flow-through" exemption based on Petitioner's lease to its subsidiary for exempt use. Further, Respondent established that Petitioner did not satisfy the statutory requirements (i.e., Petitioner was not registered with the Department of Treasury to pay use tax and was not the holder of a sales tax license to remit tax on rental receipts) that are prerequisites to finding the subject purchase exempt from use tax. The Tribunal agrees. Because Petitioner failed to register to pay use tax and did not hold a sales tax license prior to the purchase of the subject aircraft, and because Petitioner was not a domestic air carrier and did not use the subject aircraft in an exempt manner pursuant to statute, Respondent was authorized to issue the Final Determination. Petitioner has failed in its burden to prove it is exempt from the levy of use tax and the

assessment of use tax and interest is appropriate. However, the parties have not provided evidence as to the purchase price of the subject aircraft and therefore, a genuine issue of material fact remains outstanding.

II. BACKGROUND

Petitioner is a Michigan corporation originally formed to operate as an air carrier/charter business commonly referred to as a Part 135 carrier (Part 135 is a reference to the section of Federal Aviation Administration regulation at 49 USC addressing on-demand/charter carriers). Rather than begin operations as an air carrier/charter business, Petitioner purchased West Wind Aviation because it was an existing carrier and possessed a Federal Aviation Administration (FAA) certificate. The acquisition of West Wind Aviation was made through Petitioner's subsidiary, AeroGenesis Aviation, Inc. ("Aviation"). Petitioner then purchased the aircraft at issue, a Beech King Air 200, registration/tail number N211CP, solely for lease to, and use by, Aviation. Petitioner alleges it purchased the aircraft for $999,000.00 and took title, delivery, and possession outside the state of Michigan in November 1996. A lease was entered into on November 4, 1996, between Petitioner and Aviation, which provided that the aircraft was to be hangared in Mason, Michigan.

On December 30, 1996, Respondent's Sales, Use and Withholding Taxes Division sent Petitioner Form C-3128, *Remittance Advice or Claim of Exemption from Use Tax on Aircraft Transfer*, indicating that Respondent was aware that Petitioner had acquired the aircraft and that it must either "submit documentation to support any claim for exemption" or if none applies, complete the payment notice and submit payment. Respondent's communication also stated, "[i]f you are a registered lessor, submit a copy of your Michigan use tax registration, with your account number, and a copy of your lease agreement." Petitioner responded on February 18,

1997, stating "… the aircraft referred to above is exempt from tax. The aircraft is being used by a domestic air carrier in the scheduled transport of passengers and it has a maximum certificated take-off weight of at least 12,500 pounds."

Respondent replied to Petitioner in a letter dated March 3, 1997, stating "…documentation to support this exemption claim was not submitted." It further stated "[i]t is the burden of the person claiming exemption to substantiate by documentary evidence that the exemption claimed is valid. Verbal or written statements are not documentary evidence of exemption." Petitioner responded on March 26, 1997, with evidence showing the certified weight, as well as a copy of Aviation's air carrier certificate and flight logs showing the aircraft being used in the transport of passengers. Respondent then replied on April 7, 1997, stating that it has "…reviewed the documentation you provided and have concluded that it sufficiently supports your declaration. Our review is now complete and we will not be billing you."

On August 30, 1999, Respondent issued the Final Assessment at issue for use tax and interest due arising from the purchase of the subject aircraft in November 1996. Subsequently, Petitioner timely filed the above-captioned appeal on October 5, 1999, requesting cancellation of the Final Assessment and a determination that Petitioner is exempt from use tax liability.

Petitioner also acquired three additional aircraft between March 1997 and March 1998, which although not at issue in this case, were subject to a similar appeal with the Tribunal and ultimately appealed to the Court of Appeals. The Tribunal issued an order on April 14, 2000, placing this case in abeyance in light of Petitioner's similar use tax assessment appeal pending before the Michigan Court of Appeals. The Tribunal determined that the petitioner, in the companion case, was not exempt from use tax and the petitioner subsequently appealed our decision to the Court of Appeals. That case was resolved through a settlement between the

parties based on the enactment of a controlling use tax exemption, MCL 205.94(x), in which the legislature provided for retroactive application of the law. The current case was taken out of abeyance and a Prehearing Conference was scheduled after Petitioner and Respondent were unable to agree on a settlement.

On April 5, 2007, the Tribunal amended the scheduling order and allowed the parties until August 10, 2007, to file briefs in lieu of motions for summary disposition if the parties reached an agreement as to all material facts. Petitioner filed its Brief in Lieu of Motion for Summary Disposition on August 10, 2007. Respondent filed its Brief in Opposition to Brief in Lieu of Motion for Summary Disposition on August 24, 2007. A joint stipulation of facts was never submitted to this Tribunal.

III. PETITIONER'S CONTENTIONS

Petitioner contends that at the time the petition was filed it had claimed exemption from use tax, on the purchase of the subject aircraft, under MCL 205.94(y). MCL 205.94(y) mandated an exemption for the storage, use or consumption by a domestic air carrier of an aircraft purchased after June 30, 1994, that is used solely in the **regularly scheduled** transport of passengers. [Emphasis added] Petitioner further contends that the legislature amended the use tax exemptions and enacted MCL 205.94(x) in 2000, retroactive to September 30, 1996. MCL 205.94(x) states that use tax will not be charged in the following situation:

> The storage, use, or consumption of an aircraft by a domestic air carrier after September 30, 1996 for use solely in the transport of air cargo, passengers, or a combination of air cargo and passengers, that has a maximum certificated takeoff weight of at least 6,000 pounds. For purposes of this subdivision, the term 'domestic air carrier' is limited to a person **engaged primarily in the commercial transport for hire** of air cargo, passengers, or a combination of air cargo and passengers as a business activity. [Emphasis added]

Petitioner states that the application of this exemption to the facts of this case shows that Petitioner's transaction (i.e., the purchase for lease to Aviation) is exempt from use tax. Petitioner argues that MCL 205.94(x) applies retroactively to the November 1996, purchase of the subject aircraft because the statute is retrospective to aircrafts used after September 30, 1996. It is not disputed that the subject aircraft's maximum certificated takeoff weight was over 6,000 pounds, nor that the subject aircraft was used for the transport of passengers. Petitioner argues that the lease to and use by Aviation, a certified Part 135 commercial carrier, entitles Petitioner to the exemption based on the retroactive change in the statute. Petitioner states that MCL 205.94(x) is a more precise exemption (than old MCL 205.94(y)) that applies in this case and the legislature gave its clear intent to exempt the transaction at issue with the adoption of this subsection.

Further, Petitioner contends that Respondent is precluded from arguing that because Petitioner did not make a Rule 82[1] election prior to the purchase of the subject aircraft, it is not eligible for the exemption. Petitioner contends that because Respondent did not impose this restriction at the time of the November 1996, acquisition, it cannot do so now. Petitioner argues "[a]t the time of this transaction, . . . the Department had yet to develop the Catch 22 position it later espoused based on an expansive (arguably wrong) reading of a non-precedential Tribunal decision in *Masse v Department of Treasury* , MTT Docket No. 10087 (1989) to argue that failure to register for use tax before acquiring the aircraft cut off the ability to remit tax on the lease payment based on the tax status of the lessee." [Emphasis in original][2] Petitioner argues that Respondent, in its April 7, 1997, letter, indicated that Petitioner was exempt from use tax and as such, Petitioner had no need to elect to remit use tax on the lease proceeds, relying on its

[1] Petitioner is referring to 1979 AC, R 205.132, *Infra*
[2] Petitioner's Brief in Lieu of Summary Disposition, p. 4.

purported exemption declaration. Petitioner alleges that Respondent is now taking a "Catch-22" position by converting a clearly exempt use by a lessee into a taxable use by artificially focusing on the lessor. Petitioner contends that it ". . . had no warning of this technicality [sic] position which was devised AFTER the Department admitted the exempt status of the aircraft at issue in the April 7, 1997 letter." [Emphasis in original] *Id.* p. 6

Petitioner also argues that the doctrine of equitable estoppel applies and therefore precludes Respondent from assessing and collecting use tax and interest attributable to Petitioner's purchase of the aircraft. Petitioner explains that it relied on Respondent's April 7, 1997, letter stating Petitioner would not be billed for use tax. Petitioner then, in ". . . reasonable reliance upon the Department's affirmative declaration of exempt status, . . . negotiated the purchase price[] of the subject aircraft and acquired [it] equipped with a belief that the total price it would be required to pay for the aircraft would not include Michigan use tax at the rate of 6%." *Id.* p. 8 Petitioner contends it "suffered injury" in that it may well have declined to purchase the subject aircraft or attempted to negotiate a lower purchase price if Petitioner had been aware it was not exempt from use tax.

Petitioner's final argument involves the price of the aircraft subject to tax. Specifically, Petitioner states that ". . . in the event this Tribunal does not fully exempt the aircraft, a less material, but necessary adjustment must be made to impose tax on only the arm's length price of $999,000 actually paid for the aircraft N211CP at issue." *Id.* Petitioner alleges that Respondent's imposed use tax of $114,750 is inflated and should be $59,940 based on a purchase price of $999,000.

IV. RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner is precluded from claiming a "flow-through" exemption based on its subsidiary's right to an exemption from use tax. Respondent submitted Exhibit 4, FAA Air Carrier Certificate issued to AeroGenesis Aviation, Inc., to show that Aviation – not Petitioner – was authorized to use the subject aircraft as an air carrier. Respondent argues that Petitioner did not use the aircraft in an exempt manner and is therefore not entitled to an exemption from use tax based on the use by its subsidiary/leasee. Respondent cites *Czars Inc v Department of Treasury*, 233 Mich App 632; 593 NW2d 209 (1999). In *Czars*, the Court of Appeals held that the petitioner was not entitled to an exemption based on the use of an aircraft by its subsidiary.[3] Respondent also cites *AeroGenesis Inc v Department of Treasury*, MTT Docket No. 258603 (1999), which involved the same parties as the current case. In *AeroGenesis*, the Tribunal applied the *Czars* case and declined to grant the petitioner an exemption. Respondent contends that these cases support its position that Petitioner is not entitled to claim the exemption based on Aviation's use of the subject aircraft.

Respondent also contends that at the time of purchase, Petitioner was not registered with the Department of Treasury to pay use tax and did not hold a sales tax license. Respondent asserts that Petitioner did not acquire use tax registration until April 1, 1998, and therefore was not entitled to make an election pursuant to MCL 205.95(4) to remit use tax on receipts from the rental or lease of the subject aircraft. Respondent cites Rule 82, 1979 AC, R 205.132, in support of its stance that Petitioner was required to be properly registered or licensed with the Department of Treasury before the purchase of the subject aircraft in order to elect to remit tax on rental receipts. Respondent contends that because Petitioner was not registered or licensed, it should have paid use tax on the November 1996, purchase. Respondent cites *Glieberman*

[3] *Id* at 640

Aviation LLC v Department of Treasury, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 261599). The *Glieberman* Court determined that a purchaser/lessor may not elect to pay use tax on rental receipts when the purchaser/lessor is not registered for use tax at the time of purchase of the property. Respondent asserts that use tax was due on the subject aircraft at the time of purchase, and prior to the transfer/transfer to Petitioner's subsidiary.

Respondent further contends that the doctrine of estoppel cannot apply where there was no detrimental reliance. Respondent concedes that it advised (albeit erroneously) Petitioner in its April 7, 1997 letter that the purchase of the subject aircraft was exempt from use tax. However, Respondent states that Petitioner cannot show it detrimentally relied on the letter because Petitioner purchased the subject aircraft in November 1996, approximately six months BEFORE the letter was issued.

Lastly, Respondent argues that Petitioner violated the Settlement Agreement entered into by the parties in the earlier case of *AeroGenesis Inc. v Dept of Treasury* (Michigan Court of Appeals Docket No. 224637). Respondent asks that the Tribunal not consider it in deciding the present case, that it be held inadmissible and struck from the record.

V. FINDINGS OF FACT

Petitioner is a Michigan corporation with its principal office located at 659 Eden Road, Mason, Michigan. Petitioner purchased the subject aircraft solely for lease to its subsidiary, Aviation. Petitioner took title, delivery, and possession of the subject aircraft outside the state of Michigan in November 1996, and brought it into Michigan for lease to and use by Aviation. At the time of the purchase, Petitioner was not registered to pay use tax and did not hold a Michigan

sales tax license.[4] Use tax was not remitted prior to the transfer of the subject aircraft from the seller to Petitioner.

Petitioner entered into an agreement to lease the subject aircraft to Aviation on November 4, 1996. The subject aircraft has a maximum certified take-off weight of over 6,000 pounds. The aircraft was used by Aviation in the transport of cargo and passengers. Although the lease agreement indicates that Petitioner may use the subject aircraft for its ". . . own purposes at any time not conflicting with other flights or uses already scheduled by or through [Aviation],"[5] there is no evidence showing Petitioner itself used the aircraft in any such matter. Aviation, and not Petitioner, is certified to operate as an FAA Part 135 air carrier.

Petitioner claimed exemption from use tax on the transfer of the subject aircraft on the grounds that the aircraft was exempt under MCL 205.94(y)[6]. Respondent replied by requiring Petitioner to submit documentation evidencing its entitlement to the exemption. Respondent's Sales, Use and Withholding Taxes Division erroneously issued a letter indicating that the subject aircraft was exempt from taxation and Petitioner would not be billed. Respondent later issued a Final Assessment for use tax and interest due arising from the purchase of the subject aircraft after it determined Petitioner did not meet the requirements for exemption under MCL 205.94(x).

The Michigan legislature enacted a change to the tax statute in 2000, expanding the exemption allowed for Part 135 carriers, with retroactive effect back to September 30, 1996. Petitioner had a similar appeal pending at the Court of Appeals regarding three different aircraft. The parties entered into a settlement agreement with regard to that appeal on December 12,

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[4] See Affidavit of Glenn R. White, Administrator of the Tax Policy Division, Bureau of Tax & Economic Policy, Michigan Department of Treasury.
[5] Respondent's Exhibit 2, Aircraft Lease Agreement
[6] The legislature amended the exemptions to aircraft use tax and the applicable section is now MCL 205.94(x).

2002, cancelling the assessments on two aircraft. That settlement agreement is not binding as to the outcome of this case.

VI. APPLICABLE LAW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the

motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

VII. CONCLUSIONS OF LAW

The current appeal was filed after Respondent issued a Final Assessment for use tax and interest due in regard to the purchase of the subject aircraft. Under the Use Tax Act, tax is generally imposed on the privilege of using, storing, or consuming tangible personal property. MCL 205.93(1). Further, for the purpose of the proper administration of this act and to prevent the evasion of the tax, all tangible personal property purchased is subject to the tax if brought into this state within 90 days of the purchase date and is considered as acquired for storage, use, or other consumption in this state. MCL 205.93(1)(a). The use tax imposed for the privilege of using, storing, or consuming a[n] . . . aircraft . . . shall be collected *before* the transfer of the . . . aircraft . . . by the department of treasury." MCL 205.93(2) (Emphasis added)

Purchasers of aircraft ". . . 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." MCL 205.95(4). Administrative Rule 205.132 was enacted to provide guidance with regard to this election. Rule 82 states:

> 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 tangible personal property, or he may report and pay use tax on the rental receipts from the rental thereof. . . . A person remitting tax on rental receipts shall be the holder of a sales tax license, or a registration as is provided in the use tax act. Each month such lessor shall compute and pay use taxes on the total rentals charged.

The Use Tax Act further enumerates specific transactions that are exempt from the levy of use tax. Petitioner believes it is exempt from use tax pursuant to MCL 205.94(y), as of 1996. The 1996 exemption read:

> The storage, use, or consumption by a domestic air carrier of an aircraft purchased after June 30, 1994 that is used solely in the regularly scheduled transport of passengers. For purposes of this subdivision, the term 'domestic air carrier' is limited to entities engaged in the commercial transport for hire of cargo or entities engaged in the commercial transport of passengers as a business activity.

In 2000, the legislature amended the exemptions to aircraft use tax. The applicable statute provides that the following is exempt from use tax:

> The storage, use, or consumption of an aircraft by a domestic air carrier after September 30, 1996 for use solely in the transport of air cargo, passengers, or a combination of air cargo and passengers, that has a maximum certificated takeoff weight of at least 6,000 pounds. For purposes of this subdivision, the term 'domestic air carrier' is limited to a person engaged primarily in the commercial transport for hire of air cargo, and passengers as a business activity." MCL 205.94(x)[7].

Petitioner claims that pursuant to MCL 205.94(x), it is exempt from use tax liability. However, Petitioner is not a domestic air carrier as defined by Section 94(x). Petitioner is not engaged primarily in the commercial transport for hire of air cargo and passengers as a business activity. Rather, Petitioner purchased the subject aircraft ". . . solely for use by, and lease to, AeroGenesis Aviation, Inc."[8] Petitioner's subsidiary. Further, according to the lease agreement between Petitioner and Aviation, Petitioner is only entitled to use the subject aircraft for its ". . . own purposes at any time not conflicting with other flights or uses already scheduled by or through the Lessee."[9] These facts show that Petitioner was not entitled to the exemption from use tax under MCL 205.94(x).

Further, although possession of a federal air carrier certificate is not statutorily required to qualify as a domestic air carrier, under MCL 205.94(x), the Tribunal concluded in *Longranger*

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[7] In 2004, the Legislature amended this section again and it is now identified as MCL 205.94(u). However, this version of the statute does not apply in this case because the Legislature did not include language making the 2004 exemption retroactive. Therefore, the 2000 version of the statute still applies to this case.
[8] Petitioner's Brief in Lieu of Motion for Summary Disposition at p 4
[9] *Supra*

II Corp v Michigan Department of Treasury, MTT Docket No. 304076 (2005) that the Michigan Use Tax Act contemplated that a domestic air carrier entitled to the exemption would be operating legally. Federal law requires an air carrier to obtain an air carrier certification through the FAA. The Tribunal, in *Longranger*, found that the legislature likely did not intend to award a tax exemption to a person operating an air carrier business in violation of federal law. Here, Petitioner was not a domestic air carrier; only Aviation, Petitioner's subsidiary, held a federal air carrier certificate, authorized to operate as an air carrier and conduct common carriage operations in accordance with the FAA.

Petitioner is not entitled to an exemption from use tax based on its subsidiary's exempt status. The Michigan Court of Appeals has considered whether a taxpayer can claim an exemption based on the fact that its subsidiary may have been entitled to an exemption. In *Czars, Supra*, the Court of Appeals affirmed the Tribunal's decision that the petitioner was required to pay use tax. The petitioner in that case argued that the aircraft was exempt by virtue of its subsidiary, Grand Aire's, exempt use of the aircraft. The Court applied a "control test" (i.e., petitioner would have to demonstrate that it was wholly owned and controlled by the entity entitled to the exemption) to determine whether Grand Aire and Czars were one entity for tax purposes. The Court determined that Czars was not entitled to a tax exemption because ". . . a taxpayer who creates multiple corporations to conduct different functions of a business enterprise could avoid tax liability for all of them by structuring just one to benefit from a statutory exemption. Such a ruling would grossly undermine the policy and intent of the tax law."[10] The Tribunal subsequently applied the *Czars* case in the previous, *AeroGenesis* case. The Tribunal found that the petitioner, AeroGenesis Inc, was not entitled to claim its subsidiary, AeroGenesis

[10] *Id*. at 642.

Aviation, Inc.'s, exemption because AeroGenesis Aviation, Inc. did not control the petitioner. These cases support the Tribunal's conclusion herein that Petitioner may not utilize its subsidiary's exemption as its own.

The Tribunal further finds that Petitioner was required to be registered for use tax or sales tax before it acquired the subject aircraft in order to make a Rule 82 election to forego paying use tax on the acquisition. This case is factually similar to *Terryl Masse v Michigan Department of Treasury*, MTT Docket No. 10087 (1989). In *Masse*, the petitioner purchased a Cessna aircraft from an Oklahoma retailer. The petitioner signed an agreement with Skybolt Aviation under which Skybolt was to lease the aircraft to third parties, paying an hourly rental charge to petitioner. The Tribunal determined that the petitioner was not registered under the sales/use tax acts when it purchased the aircraft and remitted no tax on rentals received from Skybolt, therefore, the petitioner had not elected to pay use tax on rental receipts, and was liable for use tax measured by the purchase price paid. As in *Masse*, Petitioner is liable for use tax measured by the purchase price paid.

Petitioner argues that the doctrine of equitable estoppel applies to bar Respondent's tax assessment. Specifically, Petitioner alleges it relied on Respondent's April 7, 1997, letter indicating Petitioner was exempt from use tax and would not be billed. Petitioner argues it has suffered injury in reliance of Respondent's letter and therefore, Respondent should be precluded from assessing use tax and interest attributable to the acquisition of the subject aircraft. The Tribunal finds Petitioner's argument meritless. Specifically, Petitioner purchased the subject aircraft in November 1996, and did not seek exemption from the tax until December 30, 1996, after being notified by Respondent of its reporting requirement. Respondent's letter indicating Petitioner would not be billed for use tax was issued approximately six months after the acquisition

of the subject aircraft. As indicated above, Petitioner was required to pay the use tax or elect to pay the use tax on rental proceeds before or at the time of the purchase of the subject aircraft. Petitioner could not and did not rely on Respondent's letter in its determination of whether it would purchase the subject aircraft or the price it would pay, as Petitioner alleges. The Tribunal finds that Petitioner did not detrimentally rely on the erroneous letter and therefore the doctrine of estoppel does not apply.

As to Petitioner offering a Settlement Agreement entered into by the parties in a similar tax dispute, the Tribunal finds the evidence irrelevant. Petitioner argues that the Tribunal should find that the tax assessed in this case be abated because the Settlement Agreement resulted in the cancellation of use tax assessments issued under similar circumstances. The Tribunal finds that the Settlement Agreement pertains to a different case and the statute does not support the cancellation of the assessment at issue here, regardless of the outcome of the Settlement Agreement.

Finally, Summary Disposition can be granted under MCR 2.116(C)(10), only where the parties' documentary evidence demonstrates that there are no genuine issues of material fact. Petitioner states in its Brief in Lieu of Motion for Summary Disposition that material facts are not at issue despite the lack of a factual stipulation. The facts unambiguously show that Petitioner was not registered prior to the purchase of the subject aircraft in order to elect to pay use tax on rental proceeds rather than pay use tax on the purchase price of the subject aircraft. Further, Petitioner was not a domestic air carrier and therefore, did not meet the statutorily mandated elements for exemption under MCL 205.94(x). As such, the Tribunal finds that the aircraft was subject to use tax. However, a material issue of fact does exist. Petitioner alleges that the use tax of $114,750 over-estimates the purchase price of the subject property by almost one million dollars. Petitioner claims to have purchased the subject aircraft for $999,000 and

claims that the proper amount of use tax is $59,940. Respondent assessed Petitioner $114,750 of use tax, which is 6% of $1,912,500 (i.e., Respondent's assertion of the purchase price). As such, the Tribunal requires the parties to either stipulate to the purchase price of the subject aircraft or attend a hearing, limited to determining the purchase price of the subject aircraft, in order to expeditiously resolve this remaining issue.

VII. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is PLACED IN ABEYANCE.

IT IS FURTHER ORDERED that the parties have 45 days from the entry of this order to file a stipulation as to the purchase price of the subject aircraft.

IT IS FURTHER ORDERED that if the parties do not file a stipulation, the above-captioned case is scheduled for a date certain limited hearing commencing at 11:00 a.m. on July 15, 2010 to be held at the office of the Michigan Tax Tribunal, 611 W. Ottawa Street, 2nd Floor, Lansing, Michigan.

MICHIGAN TAX TRIBUNAL

Entered: May 12, 2010 By: Cynthia J Knoll