STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM – MICHIGAN TAX TRIBUNAL

NACG Leasing, f/k/a
Celtic Leasing, LLC,
Petitioner,

MTT Docket No. 338928

v

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

I. INTRODUCTION

Petitioner, NACG Leasing, LLC, f/k/a Celtic Leasing, LLC[1], is appealing Final Assessment No. N971045 issued by Respondent, Michigan Department of Treasury, on April 28, 2006. The Final Assessment established that Petitioner owes use tax in the amount of $414,000.00, plus penalty of $103,500.00, and interest on the purchase of an aircraft acquired on April 19, 2005. The assessment is the result of Respondent's claim that Petitioner made "use" of an airplane it owned, and leased to a corporate affiliate, so as to be liable to pay use tax on the plane pursuant to MCL 205.92(b). Petitioner asserts it purchased the aircraft contemporaneously with the execution of a pre-negotiated lease and that at no time did Petitioner have possession of or exercise any right or power with respect to the subject aircraft. As such, Petitioner claims it never "used" the aircraft as that term is defined in the Michigan Use Tax Act and, therefore, Respondent erred in assessing the tax. The Tribunal agrees and vacates the assessment in its entirety, and waves all interest and penalty assessed by Respondent.

[1] Celtic Leasing, LLC changed its name to NACG Leasing, LLC in order to avoid confusion with another Michigan business using the name "Celtic Leasing."

II. BACKGROUND

Petitioner was organized as a Michigan limited liability company in September 2003, for the purpose of engaging in the activity of aircraft leasing and operations. Prior to January 2005, Petitioner purchased at least two aircraft and entered into lease agreements with its 50% member, Murray Air, Inc. ("Murray," fka Murray Aviation, Inc.). On April 19, 2005, Petitioner purchased the subject aircraft, a DC-8, and simultaneously entered into a 5-year lease agreement with Murray.

The DC-8 aircraft was previously owned by AerCoUSA ("AerCo"), an affiliate of Debis AirFinance Ireland PLC ("Debis"), a worldwide aircraft leasing company. In January 2005, Murray was approached by Debis to lease the aircraft from AerCo, providing Murray with a detailed Letter of Intent setting forth the terms pursuant to which Murray would lease the DC-8. The Letter of Intent provided, among other things, that Debis was to service the lease on behalf of Murray. In anticipation of its receipt and execution of the Letter of Intent, Murray took possession of the aircraft on January 7, 2005, when its personnel ferried the plane from Arkansas to Murray's facilities in Ypsilanti, Michigan, for inspection and reconfiguration.[2]

Prior to closing the lease transaction, Debis notified Murray that, for various reasons, it could not service the lease as contemplated by the parties. Murray then approached Petitioner with a proposal whereby Petitioner would purchase the subject aircraft and contemporaneous with the purchase, immediately lease the aircraft to Murray. On April 19, 2005, Petitioner and AerCo entered into an Aircraft Sale Agreement and on that same day, Murray and Petitioner executed a lease agreement subject to terms virtually identical to those set forth in the Letter of Intent. Flight records for the subject aircraft establish that Murray took possession of the aircraft in January 2005, and that it has maintained uninterrupted possession since that date.

On April 28, 2006, Respondent issued a Bill for Taxes Due (Intent to Assess) in the amount of $414,000.00, plus penalty of $103,500.00 and interest of $18,216.00 for use tax on the purchase

[2] Petitioner's Reply Brief in Support of its Motion of Summary Disposition, p. 2.

of the aircraft. Petitioner responded on August 1, 2006, with a letter to Respondent explaining that it was not subject to use tax because mere ownership of an aircraft by a lessor does not constitute "use" within the meaning of the Use Tax Act. Respondent replied on May 25, 2007, with a letter to Petitioner stating that Petitioner had "use" when it entered into the lease with Murray; therefore, its acquisition of the aircraft is subject to use tax. On June 29, 2007, Petitioner filed this Petition with the Tribunal and on November 27, 2007, Petitioner filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Respondent filed an untimely Response to Petitioner's Motion on December 13, 2007, asking the Tribunal to deny Petitioner's motion and enter summary disposition in favor of Respondent pursuant to TTR 210 and MCR 2.116(I)(2). Petitioner filed a Reply Brief in Support of Its Motion for Summary Disposition on January 2, 2008.

III. STIPULATED STATEMENT OF FACTS

The parties agree on, and the Tribunal acknowledges, the following facts relative to the above referenced matter:

1. Celtic Leasing, LLC ("Petitioner") was formed as a Michigan limited liability company by filing Articles of Organization with the State of Michigan on September 29, 2003.

2. At the time of its formation, Petitioner designated 816 Willow Run Airport, Ypsilanti, Michigan 48198 as its registered address.

3. The initial members of Petitioner were Murray Aviation, Inc., a Michigan corporation, whose offices were also located at Willow Run Airport in Ypsilanti, Michigan, and HBJ Leasing, LLC, a Michigan limited liability company, owned by William Larkin and Martin J. McInerney.

4. In June, 2004, HBJ Leasing, LLC conveyed all of its interest in Petitioner to Powwow, LLC, a separate Michigan liability company formed by William Larkin in February, 2004, that does business as "Professional Air Charter Service."

5. On November 3, 2006, Murray Aviation, Inc. assigned all of its membership interest in Petitioner to Murray Air, Inc. incident to a corporate restructuring.

6. On December 6, 2006, Murray Air, Inc. filed a Certificate of Amendment with the State of Michigan to change its legal name to "National Air Cargo Group, Inc."

7. National Air Cargo Group, Inc. and Powwow, LLC each own 50% of Petitioner's outstanding membership interest.

8. Petitioner's Operating Agreement states that: "The purpose of the Company is to engage in any activity for which limited liability companies may be formed under the ACT [1993 P.A. 23], including aircraft leasing and operations." (*Citation added.*)

9. Petitioner's first transaction was the purchase of a British Aerospace Jetstream 32 aircraft (N370MT) from Britannia Aviation Services International, Inc., of Venice, Florida. The official purchase date was November 13, 2003, pursuant to a Used Aircraft Purchase Agreement between Britannia Aviation Services International, Inc., as Seller, and Petitioner, as Purchaser, dated September 15, 2003. The aircraft was leased to Murray Aviation, Inc. for a five year term beginning October 1, 2003.

10. On August 31, 2004, Petitioner purchased a BAE Jetstream J31/JS3101 aircraft (N743PE) from HBJ Leasing, LLC. Under a pre-existing arrangement, Petitioner immediately leased this aircraft to Murray Aviation, Inc. by a lease dated October 1, 2003, and effective September 1, 2004.

11. In January, 2005, Murray Air, Inc. was approached by debis AirFinance Ireland plc to lease a DC-8-71F cargo aircraft (N872SJ) owned by AerCoUSA, Inc. debise AirFinance Ireland PLC provided Murray Air, Inc. with a detailed Letter of Intent to lease the aircraft in January, 2005.

12. The letter of intent provided that debis AirFinance Ireland PLC was to service the lease on behalf of Murray Air, Inc.

13. In anticipation of the execution of the Letter of Intent, Murray Air, Inc. took possession of the DC-8 on January 7, 2005, when Murray Air personnel ferried the aircraft from Arkansas to Murray Air's facility in Ypsilanti, Michigan.

14. Prior to closing the lease transaction for the DC-8 aircraft, debis AirFinance Ireland PLC notified Murray Air, Inc. that it could not service the lease as contemplated by the parties.

15. Murray Air then approached Petitioner with a proposal whereby Petitioner would purchase the subject aircraft from AerCoUSA, Inc. and lease it to Murray Air, Inc.

16. Petitioner entered into an Aircraft Sale Agreement with AerCoUSA, Inc. on April 19, 2005.

17. At the time of the execution of the Aircraft Sale Agreement, possession of the subject aircraft had already been given to Murray Air, Inc. by the Seller.

18. The log book/flight records for the subject DC-8 aircraft establish that Murray Air took possession of the aircraft on January 7, 2005, and has maintained uninterrupted possession of the aircraft since that date.

19. Immediately upon closing of the purchase of the subject aircraft, Petitioner leased it to Murray Air, Inc. for a five-year term.

IV. PETITIONER'S CONTENTIONS

Petitioner contends that the entire assessment is incorrect. It asserts that the use tax in question was assessed based on the acquisition by Petitioner of a DC-8 aircraft that was purchased on April 19, 2005, solely for the purpose of re-leasing to another party. It argues that at no time did Petitioner ever have possession of the subject aircraft nor did it exercise any right or power with respect to the aircraft. Petitioner contends that it purchased the aircraft with the intent to lease it to Murray Air, Inc. and therefore was not subject to tax.

Petitioner argues that the purchase and simultaneous lease of an aircraft to a third party in a prearranged transaction is not a taxable "use" of the aircraft by the taxpayer, as defined by MCL 205.93. In support, Petitioner looks to *WPGPI, Inc. v Department of Treasury*, 204 Mich App 414; 612 NW2d 432 (2000). Petitioner argues that in *WPGPI*, the Court of Appeals determined that when a party purchases an aircraft subject to an existing lease and subsequently leases that aircraft to the same lessee, the purchaser does not "use" the aircraft. However, Petitioner contends that the "crucial" fact in the *WPGPI* opinion is not that the aircraft were already leased when the taxpayer purchased them, but rather that "the control of the aircraft had already been ceded to. . . [the lessee] at the time they were purchased. While it is true that the control was ceded by virtue of a preexisting lease, it is control that is pertinent here, and not the fact that the lease itself existed." [3]

Petitioner argues that "[t]he only difference between the *WPGP1, Inc*. case and the instant case is that there is no lease document formalizing the grant of possession. However, every other

[3] Petitioner's Reply Brief in Support of its Motion for Summary Disposition, p. 3.

characteristic of a lease arrangement is present in this case."[4] Petitioner points out that Murray Air had possession of the aircraft with the owner's (AerCo) full consent prior to Petitioner's purchase. Petitioner purchased the aircraft with AerCo's existing approval of Murray Air's possession and with full knowledge of that possession, which ". . . establishes that the parties never intended . . . [Petitioner] to have 'use' of the plane as that term is defined in . . ." the Use Tax statute.[5]

In further support of its position, Petitioner cites *M & M Aerotech, Inc v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued 11/23/1999 (Docket No. 211460). In that case, the petitioner and lessee entered into a lease arrangement on the same day the aircraft was purchased. The Court determined that the petitioner had validly relinquished "operational control" over the subject aircraft. In the Court's view, "the terms of the lease in question and circumstances of this case demonstrate that plaintiff intended to and did relinquish total control of the aircraft to [the lessee] during the lease term."[6] Petitioner argues that the *M & M* case is virtually identical to the instant case in every respect, in that a leasing company purchased an aircraft and simultaneously leased that aircraft to a third party. Petitioner points out that in both cases the parties negotiated the lease in anticipation of the purchase. Petitioner contends that, "[a]s in *M & M Aerotech*, the lease and the circumstances surrounding that lease clearly show the parties' intention that Murray Air remain in control and possession of the DC-8."[7]

Petitioner also lists a number of provisions set forth in the January 2005, Letter of Intent upon which Murray Air held possession of the subject aircraft prior to Petitioner's purchase and which became similar terms of the lease executed with Murray Air on the date of purchase. The terms noted by Petitioner are:

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[4] Petitioner's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(10), p. 8.
[5] *Id.* at 8.
[6] *M & M Aerotech, Inc v Department or Treasury*, unpublished opinion per curiam of the Court of Appeals, issued 11/23/1999 (Docket No. 211460).
[7] Petitioner's Brief, p. 11.

a. Murray Air is responsible for repairs and maintenance to the DC-8 except those to the gears, engine and propeller;
b. Murray Air is responsible for insuring the DC-8;
c. Murray Air has the option of subleasing the DC-8;
d. Murray Air is responsible for all taxes on the DC-8, specifically mentioning Michigan use tax;
e. Celtic Leasing [Petitioner] promises that Murray Air shall have quiet and peaceable enjoyment of the DC-8;
f. Celtic Leasing assigns all warranties in the DC-8 to Murray Air; and
g. Murray Air bears all risk of loss to the DC-8. [Citations omitted.]

Petitioner argues that based on the terms of the lease as well as the location of the DC-8, it clearly relinquished control over the aircraft prior to the April 2005, purchase date. It states "[r]elinquishment of control is key in determining whether a purchaser of an aircraft used that aircraft for purposes of . . ." Michigan use tax.[8]

Petitioner also looks to the case of *Glieberman Aviation LLC v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 261599), in its assertion that relinquishing control of an aircraft and the type of control relinquished are important factors in determining whether a purchaser actually "used" the aircraft pursuant to the statute. In *Glieberman*, the Court of Appeals affirmed the Tribunal's determination that the taxpayer, incident to its ownership of the planes, reserved the right to use the planes under the lease, and, in fact, had exercised that right. The Tribunal concluded that "any use by [the taxpayer] demonstrates . . . that [the taxpayer] in fact did not relinquish total control of the subject property."[9] Petitioner contends that "[l]ike the purchasers in *WPGP1* and *M & M Aerotech*, [Petitioner] never used the DC-8 and the lease between Murray Air and [Petitioner] did not retain any control of the DC-8 for [Petitioner]."[10]

[8] Petitioner's Brief, p. 11.
[9] *Glieberman Aviation LLC v Department of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 261599).
[10] Petitioner's Brief, p. 13.

V. RESPONDENT'S CONTENTIONS

Respondent contends that under the plain meaning of the unambiguous statute, Petitioner made "use" of the airplane that it owned and leased to a corporate affiliate, so as to be liable to pay use tax on the plane pursuant to MCL 205.92(b). Respondent acknowledges that Petitioner purchased the subject aircraft, which was located in Michigan and in the physical possession of Murray, and immediately entered into a lease agreement with Murray. However, Respondent contends that Petitioner made "use" of the plane by exercising control over it when it entered into the lease, thereby subjecting Petitioner to use tax.

Respondent asserts that "[t]he fact that Murray had physical possession of the plane when [Petitioner] bought it from AerCo and then leased it to Murray is irrelevant to the question of [Petitioner's] 'use' of the plane, for purposes of MCL 205.92(b)."[11] It argues that "[a]lthough Murray may have had physical possession of the plane, it did not own it, or even have a lessee interest in it, until [Petitioner] leased the plane to it." *Id.* Respondent states that, "[o]nly someone who owns something can lease it; hence, the lease was 'incident to [Petitioner's] ownership of that property.' To lease something you own to someone else, determining who is able to use it is 'the exercise of a right or power over tangible personal property.'"[12] Respondent contends that Petitioner exercised a right or power over the aircraft when it leased the plane to Murray.

Respondent disputes Petitioner's reliance on case law in support of its contention that it did not "use" the aircraft in Michigan. Respondent argues that this case is distinguishable from *WPGP1, Inc, supra,* in that there was no pre-existing lease when Petitioner bought the airplane. It cites *WPGP1, Inc.* by stating "[T]he *WPGP1* Court ruled that a taxable use, in the sense in which the term is used by MCL 205.92(b), 'means the exercise of a right or power over tangible personal property incident to the ownership of that property.' 204 Mich App 417 (emphasis added by the Court)." (Internal quotations omitted.)[13] As such, Respondent asserts that Petitioner did exercise

[11] Respondent Department of Treasury's Brief in Opposition to Petitioner's Motion for Summary Disposition (Respondent's Brief), p. 3.
[12] Respondent's Brief, p. 3.
[13] Respondent's Brief, p. 5.

a right or power over the airplane when it entered into the lease with Murray. Respondent further argues that Petitioner's "attempt to substitute some vague intuitive discernment of what the parties appeared to intend for an actual contractual [lease] agreement ignores the fact that the law requires an actual contract, not an implicit understanding, before an enforceable contract can be found to exist."[14]

Respondent also believes that *M & M Aerotech, Inc, supra*, fails to support Petitioner's position. It argues that *M & M Aerotech, Inc*, is an unpublished decision, and therefore not precedentially binding, pursuant to MCR 7.215(C)(1). It also argues that the facts of that case are very different from the facts in this case. Specifically, Respondent notes that in *M & M Aerotech, Inc*, 1) the plane was located in Washington State when it was purchased, 2) it was flown from there to North Carolina, the lessee's locality, 3) only some time later did the lessee have the plane flown to Michigan to have some equipment installed on the plane, and 4) so "when the owner of the plane exercised control over the plane, by leasing it, there was no connection with Michigan."[15] By contrast, Respondent notes that this case involves a Michigan owner who leased a plane located in Michigan to a Michigan lessee.

Respondent addresses *Glieberman Aviation LLC, supra*, noting again that it is an unpublished decision and therefore also not precedentially binding. It further argues that *Glieberman* does not address the central issue in this case, that being the fact that there was no pre-existing lease at the time Petitioner purchased the aircraft. As such, Respondent asserts that it cannot be used to support either party's position.

And finally, Respondent refers to the ruling in *Longranger II Corp v Michigan Department of Treasury*, MTT No. 304076 (decided March 30, 2005), quoting the Tribunal by stating "Executing a lease and delivering possession of the property to the lessee within Michigan is a taxable use in this state."[16]

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[14] Respondent's Brief, p. 5.
[15] Respondent's Brief, p. 6.
[16] Respondent's Brief, p. 4.

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

Petitioner 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. Storage, use, or consumption of an aircraft in Michigan is taxable. MCL 205.93. The terms "use" and "storage" are defined under the Use Tax Act as follows:

> "Use" 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)
>
> "Storage" means a keeping or retention in this state for any purpose after losing its interstate character. MCL 205.92(c)

In this case, Respondent's imposition of tax on the airplane purchased by Petitioner is predicated on the argument that Petitioner made "use" of the airplane when it entered into the lease agreement. It is undisputed that the airplane was physically located in Michigan and Murray Air had possession at the time and uninterrupted since the date of Petitioner's purchase. However, Respondent argues that because Murray did not own or even have a lease interest in it, Petitioner exercised a right or power over the aircraft establishing a taxable use when it executed the lease agreement.

Respondent relies on a ruling made by the Tribunal that "[e]xecuting a lease and delivering possession of the property to the lessee within Michigan is a taxable use in this state," citing *Longranger II Corp v Michigan Department of Treasury,* MTT No. 304076, March 30, 2005. The Tribunal finds that not only are prior Tribunal decisions not precedential, the facts in this case are distinguishable in that Petitioner did not deliver the aircraft to the lessee in this state or any other state, for that matter. The lessee already had possession and control of the plane, given to it by the previous owner under the terms of the letter of intent. Respondent also attempts to distinguish the case at issue from *WPGP1, supra,* noting that although both involve leases of airplanes, the way the leases were entered into were totally different. Respondent argues that in "*WPGP1*, the taxpayer had purchased the 'airplanes subject to pre-existing leases with' another airline, Southwest." In this case, the lease was executed contemporaneous with Petitioner's purchase. The Tribunal finds that regardless of whether or not there was a pre-existing lease, the fact that Petitioner 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, it did not use the airplane.

Although an "unpublished opinion is not precedentially binding under the rule of stare decisis," MCR 7.216 (C)(1), unpublished decisions can be considered a persuasive authority when appropriate. The ruling in *M & M Aerotech, Inc v Department or Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 1999 (Docket No. 211460), is certainly persuasive given that the facts and law in the two cases are both similar and relevant to this matter. Similar to *M & M Aerotech,* Petitioner purchased the subject aircraft with the specific intention of immediately leasing it to Murray Air, and in fact, did enter into a lease. Furthermore, Petitioner never took physical possession or control of the aircraft and did not use or store it in the state.

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 the 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). Petitioner did not bring the aircraft into Michigan after its purchase. It was already in Michigan. And there is no indication as to why Respondent did not attempt to assess sales tax upon the seller, AerCo. Clearly, it had nexus with the state because it owned property in Michigan up to and until April 19, 2005, when it sold the subject aircraft to Petitioner. Further, if Respondent truly believed the purchase was taxable, it would have been a sales taxable transaction. There is no reason it would have been a use tax transaction.

VIII. JUDGMENT

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Petitioner's request for tax relief is GRANTED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties as finally shown in this Final Opinion and Judgment within 20 days of the entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

By Cynthia J. Knoll

Entered: June 10, 2011