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

Lakeshore Leasing, Ltd.,
Petitioner,
v MTT Docket No. 361200

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Cynthia J Knoll

FINAL ORDER AND JUDGMENT

On June 16, 2010, Administrative Law Judge (ALJ) Thomas A. Halick issued a Proposed Order granting Petitioner's Motion for Summary Disposition and denying Respondent's Motion for Summary Disposition in the above matter. The Proposed Order provided, in pertinent part:

> The parties shall have 20 days from date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281).

Neither party filed exceptions to the Proposed Order within the allotted time.

The Tribunal, haven given due consideration to the case file, adopts the June 16, 2010 Proposed Order as the Tribunal's Final Decision in this case pursuant to MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law in the Proposed Order in this Final Order and Judgment.

IT IS SO ORDERED.

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

MICHIGAN TAX TRIBUNAL

Entered: January 24, 2011 By: Cynthia J Knoll

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

Lakeshore Leasing, Ltd.,
Petitioner,

v

Michigan Department of Treasury,
Respondent.

Michigan Tax Tribunal
MTT Docket No. 361200

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

Petitioner appeals Respondent's assessment of use tax upon an aircraft. A prehearing conference was held on March 10, 2010. Petitioner was represented by Wayne D. Roberts, Dykema Gosset PLLC. Respondent was represented by Amy M. Patterson, Assistant Attorney General. At the Prehearing Conference, the parties agreed that the facts were not in material dispute and that the case should be presented to the Tribunal on cross motions for summary disposition. On May 4, 2010, each party filed a motion for summary disposition. On May 18, 2010, Respondent filed a written response to Petitioner's motion. Upon review of the motions, briefs, documentary evidence, and affidavits, it is determined that the tax, penalty, and interest set forth in the following final assessment shall be cancelled.

Assessment No.	**Tax**	**Penalty**	**Interest**
P922035	$69,374	$17,343.65	$6,061.30

Facts

1. Petitioner has been in the business of leasing airplanes since 1977.
2. Petitioner possessed a valid use tax registration at the time the aircraft was purchased.
3. On December 29, 2007, Petitioner took delivery of an Eclipse EA500 #N539RM ("aircraft").
4. On December 19, 2007, Petitioner entered into a non-exclusive lease pertaining to the subject aircraft ("Aircraft Hourly Rental Agreement") with Air Eagle, LLC. (Respondent's Exhibit 1 and Petitioner's Exhibit 4).
5. On December 29, 2007, Petitioner entered into a non-exclusive lease ("Aircraft Hourly Rental Agreement") with Apollo Plating, Inc. (Respondent's Exhibit 2 and Petitioner's Exhibit 4).
6. On May 19, 2008, Petitioner entered into an Aircraft Hourly Rental Agreement with Palmer Promotional Products. (Respondent's Exhibit 3).
7. October 27, 2008, Petitioner entered into an Aircraft Hourly Rental Agreement with Rocky Mountain Sport Jets. (Respondent's Exhibit 4).
8. From January 2008 through May 2008, Petitioner used the subject aircraft for training flights for its own pilots, flights to maintenance facilities, and to "reposition" the aircraft, according to the flight logs (Respondent's Exhibit 5.) There is no evidence to establish that the flights to "reposition" the aircraft, training flights, or maintenance flights were for purposes unrelated to Petitioner's aircraft leasing business.
9. The first revenue producing flight occurred on May 14, 2008 (under lease to Palmer Promotional Products).

10. Petitioner's President and sole owner is Richard Mertz.
11. Richard Mertz used the aircraft for training purposes from January 2008 to May 2008.
12. Richard Mertz became one of approximately 200 pilots certified to fly an Eclipse EA500 aircraft at that time.
13. The aircraft required maintenance during January through May 2008, which only could be performed at certain maintenance facilities located in New Mexico, Florida, or New York.
14. Petitioner believes that the law required that the aircraft shall only be flown by pilots who are certified by the Federal Aviation Administration to fly that particular model aircraft.
15. Petitioner contracted with a pilot who was certified to fly an Eclipse AE500 aircraft for purposes of obtaining training for Richard Mertz and another pilot employed by or associated with Petitioner. Affidavit of Richard Mertz, Petitioner's Exhibit A, paragraphs 16, 17.
16. The aircraft flight logs during January through May 2008 do not indicate that any of the flights were for the personal use of Richard Mertz or anyone else.
17. Respondent issued Final Assessment P922035 to Petitioner on March 27, 2009.

Documentary Evidence submitted with the motions:

Petitioner's Exhibits:

P-A. Affidavit of Richard Mertz

P-1. Rules and Regulations

P-2. Aircraft Maintenance Record

P-3. Customer Technical Communication ("CTC"), Customer Pilot Communications, Service Bulletins ("SB"), and Airworthiness Directives ("AD")

P-4. Rental Agreements (same as R-1 and R-2)

P-5. Flight Log – EA500 #00101, N 539 RM

P-6. Invoices for Mentor Training and Contract Pilot Services

P-B. Wikipedia article re: Eclipse 500

P-C. Monthly Use Tax Return and cancelled check in remittance of use tax, Jan. 20, 2009; Annual Sales Use and Withholding Tax Return for 2008

P-D. MCL 205.95; Rule 82; case law

Respondent's Exhibits:

R-1. Rental Agreement (Air Eagle LLC, December 19, 2007)

R-2. Rental Agreement (Apollo Plating, Inc., December 29, 2007)

R-3. Rental Agreement (Palmer Promotional Products, May 19, 2008)

R-4. Rental Agreement (Rocky Mountain Sport Jets, October 27, 2008)

R-5. Flight Logs

R-6. Corporate Entity Details, Lakeshore Leasing, LTD; Articles of Incorporation; Corporate Information Updates 2007, 2008; Final Assessment P922035

R-7. Certificate of Graduation, Richard C. Mertz Jr., Higher Power Aviation Eclipse EA500 Type Rating Course, May 2008; 17 Invoices from Rocky Mountain Sport Jets issued to Jeff Mertz (5) and Richard Mertz, dated January 9, 2008 through October 14, 2008, related to pilot training

R-8. Pilot Warranty Endorsement

Petitioner's Contentions

Petitioner argues that the material facts are undisputed and that it is entitled to judgment as a matter of law under MCR 2.116(C)(10), the dispositive issue being: "Whether Lakeshore

Leasing's validly made election to pay use tax on rental receipts can be disregarded and invalidated retroactively by the Department based on mandatory maintenance and pilot certification flights that were required to be made before leasing revenue could be earned during the period from December 29, 2007 through May 2008." Petitioner's Motion, p 2. Petitioner claims the following facts are not in dispute:

1. Petitioner possessed a valid use tax registration at the time the aircraft was purchased.
2. Petitioner possessed a valid use tax registration as of the date set for first payment of use tax under the lease agreement.
3. Petitioner possessed a valid use tax registration within 90 days after the lessor brought the aircraft into Michigan.
4. Petitioner remitted use tax on all rental receipts that it received from leasing the aircraft.
5. Petitioner's operation of the aircraft was not "personal use."

Petitioner claims that federal law required it to operate the aircraft for maintenance and pilot certification purposes before the aircraft could be put into service as a leased aircraft, and that such use does not defeat its right to elect to pay use tax on rental receipts under Rule 82. Petitioner claims that it could not lawfully earn rental income from the aircraft until it completed maintenance and pilot certification requirements, which requirements were satisfied on our about May 14, 2008.

Respondent's Contentions

Respondent states that the material facts are not in dispute, and that it is entitled to judgment as a matter of law. Respondent claims that Mr. Mertz operated the aircraft "for his own personal use and therefore was subject to use tax on the purchase price of the aircraft." Respondent's Brief, p 4. Respondent argues that Petitioner was not required by federal law to obtain training and certification for its pilots, including Richard Mertz, and that the training was for the benefit of those individual pilots and constituted a taxable use. Such use indicates that Petitioner "did not relinquish total control of the aircraft" but "used" the aircraft, citing *Glieberman Aviation, LLC v Dep't of Treasury*, unpublished per curiam opinion of Court of Appeals Docket No. 242532, issued February 19, 2004, and *M&M Aerotech, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 1999 (Docket No. 211460). Respondent does not contend that Petitioner is subject to use tax based on the flights to and from maintenance facilities, or other use related to maintenance of the aircraft.

Conclusions of Law

Petitioner seeks summary disposition under TTR 230 and MCR 2.116(C)(10). Respondent seeks judgment under MCL 2.116(C)(8) and (10). Judgment shall be granted under the standards applicable to MCRL 2.116(C)(10), there being no genuine issue of material fact, based on the well-plead facts, documentary evidence, and an affidavit. MCR 2.116(G)(5). Upon consideration of the facts and admissible evidence in the light most favorable to the nonmoving party, it is determined that Petitioner is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

Tangible personal property purchased outside of Michigan and brought into Michigan within 90 days of purchase is presumed to be acquired for storage, use, or other consumption in this state. MCL 205.93(1). There is no dispute that the subject aircraft was stored, used, or consumed within this state and therefore is subject to use tax.

The sole issue is whether Petitioner is eligible to pay use tax on rental receipts rather than to pay tax on the entire purchase price of the subject aircraft. The use tax act provides:

> (4) 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. MCL 205.95(4).

The department's administrative rule, 1979 AC, R 205.132 ("Rule 82") provides:

> Rule 82. (1) 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 the purchase price as a purchaser-consumer or remitting tax on rental receipts as a lessor, shall follow 1 or the other methods of remitting for his entire business operation. 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. 1979 AC, R 205.132.

There is no dispute that Petitioner was registered for use tax at the time it purchased the aircraft and when it first received rental revenue, and that it actually remitted use tax on all rental receipts. The question centers upon whether Petitioner used the aircraft for a purpose other than as a "lessor," disqualifying it from the election under Rule 82.

In order to qualify to pay use tax on rental receipts, the taxpayer must be a "lessor" as that term is used in MCL 205.95(4). Under Rule 82, an eligible "lessor" must be "A person engaged in the business of renting or leasing tangible personal property to others. . . ." *Id.* Neither the statute nor the rule includes specific criteria for what constitutes a "lessor" that is "engaged in the business of renting or leasing." The use tax act defines "business" as follows:

> "Business" 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. MCL 205.92(h).

Therefore, in order to be eligible for the election under Rule 82 and MCL 205.95(4), Petitioner must be engaged in the leasing of aircraft with the "object of gain, benefit, or advantage. . . ." The gain benefit or advantage may be "direct or indirect." There is no dispute that Petitioner was a "lessor" within the meaning of the above cited statute and Rule 82, in that it was engaged in the business of leasing aircraft to others. However, there remains an issue as to whether Petitioner used the aircraft outside the scope of its business activity as a lessor.

Petitioner asserts that once an election under Rule 82 is made, the choice is "irrevocable" but cites no authority for this position. This is not an accurate statement of the law. The mere fact that Petitioner had a use tax registration and leased an aircraft to another person does not establish an "irrevocable" election under Rule 82. If the facts demonstrate that Petitioner or its officers, employees, or others operated the subject aircraft for purposes unrelated to Petitioner's aircraft leasing business, such facts could result in imposition of use tax. The right to pay use tax

on rental receipts applies to a person engaged in the business of renting or leasing property to others. A person who uses the property outside the scope of its leasing business may be found to "use" the property within the meaning of MCL 205.92(b), thus subjecting it to tax on the purchase price, regardless of whether it invoked or attempted to invoke the election under Rule 82.

The limited issue in this case is whether Petitioner's use of the aircraft for training and pilot certification purposes for its own pilots disqualifies it from the election under Rule 82, where Petitioner did not receive rental income until approximately 5 months after it purchased the aircraft, but where Petitioner otherwise met the requirements under Rule 82.

Respondent relies primarily upon *Glieberman, supra*, for the proposition that the taxpayer (lessor) must relinquish total control of the aircraft in order to avoid a taxable "use" of the aircraft. That case is distinguishable. On February 12, 1996, Glieberman Aviation, LLC purchased an aircraft in Florida and immediately leased it to a separate entity, Corporate Air Management, Inc. The aircraft was brought into Michigan within 90 days of purchase, thus giving rise to the statutory presumption that the aircraft was subject to use tax under MCL 205.93(1). The lease provided for an hourly rental fee for the lessee, but specifically granted Bernie Glieberman, in his individual capacity, and his related companies the right to charter the aircraft without paying an hourly rental fee. The department imposed use tax upon Glieberman Aviation, LLC, based primarily upon Bernie Glieberman's use of the aircraft. Although not expressly stated, the case implies that the petitioner could have rebutted the presumption with proof that it relinquished total control of the aircraft outside this state to Corporate Air

Management, Inc. The mere fact that the lessee brought the aircraft to this state would not constitute "use" by the owner-lessor.

In *Glieberman,* the Tribunal found that the petitioner, Glieberman Aviation, LLC, was engaged in the business of leasing aircraft, but failed to invoke the election under Rule 82 because it was not properly registered for use tax. The issue was whether Petitioner used the aircraft in Michigan where its 50% member (Bernie Glieberman) and "related companies" operated the aircraft without paying the standard hourly rate. It was clear that Glieberman Aviation, LLC did not qualify for the Rule 82 election because it was not registered for use tax at the time it purchased the aircraft. (That case applied to an aircraft purchased in 1996 and an assessment that was issued in 1999. *Glieberman* was decided prior to 2002 PA 255, which amended the registration requirements now found in MCL 205.95(4) to specify that registration must occur "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.") It was held that such use gave rise to use tax on the price of the aircraft. In our case, there is no question that Petitioner was registered for use tax prior to the date it purchased the aircraft. Petitioner does not dispute that it used the aircraft and is subject to use tax, but challenges the method of payment. *Glieberman* is distinguishable and does not control the outcome of our present case.

Respondent also cites *M&M Aerotech, Inc. v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 1999 (Docket No. 211460). In that case, the taxpayer was engaged in the business of leasing aircraft, but had no employees and operated no airplanes. On May 1, 1996, the taxpayer purchased an aircraft outside Michigan and immediately

leased it to Merit Services, Inc., a tire sales and service business located outside Michigan. Two of the taxpayer's officers were also officers of Merit. Merit took possession of the aircraft and operated it outside Michigan and stored it in North Carolina. On May 7, 1996, a Merit employee flew the aircraft to Michigan to have avionics equipment installed, and subsequently flew it into Michigan numerous times during the 90-day period following purchase. This case did not involve a Rule 82 election, but the issue was whether the lessor used the aircraft within Michigan based on the flights into Michigan by the lessee. The court held that the presumption of use arose under MCL 205.93(1) because the aircraft was brought into this state within 90 days of purchase. However, the taxpayer rebutted the presumption because the terms of the lease and the circumstances of the case demonstrated that the taxpayer (lessor) relinquished total control of the aircraft to the lessee. This ruling is not relevant to our present case where it is not disputed that Petitioner used the aircraft in Michigan and is subject to use tax. The issue in our present case turns upon whether Petitioner used the aircraft outside the scope of its leasing business, thus disqualifying it as a "lessor" entitled to elect to pay the tax on rental receipts under Rule 82.

Both parties raise arguments pertaining to the rules of statutory construction applicable to tax statutes or exemptions, with each arguing that the statute at issue must be construed in their favor. However, there is no need to reach this issue, because no ambiguity has been demonstrated to exist with regard to the statute or rule at issue, and therefore, there is no need to resort to rules of statutory construction.

Respondent claims that Petitioner was not required by federal law to use the aircraft to obtain pilot certification for its own pilots, citing Federal Aviation Regulation (FAR) sec. 61.31, which

Respondent claims only applies to a pilot who "would be the captain in a typical two or three pilot crew or the pilot if there is only one certified and qualified pilot at the controls of the aircraft." Respondent's Response to Petitioner's Motion for Summary Disposition, p 3. This is based on a definition of "pilot in command" found in FAR sec. 1.1, which Respondent claims does not apply to Petitioner's pilots. Respondent argues that Petitioner could have operated the aircraft without obtaining the certification, and that the training only benefited the individual pilots and was not relevant to the leasing business. This argument is unpersuasive. Even if true, Petitioner has cited valid reasons for training its own pilots to operate the aircraft within the scope of its leasing business, irrespective of any requirements under federal law. Further, Petitioner's affidavit states that every new owner of this type of aircraft was required by the FAA to obtain pilot certification, which required training flights, not only pilots who flew the aircraft with others on board. Respondent's Exhibit A, paragraph 12. Respondent has offered no facts to contradict this statement. It is reasonable to believe that an owner-lessor of a sophisticated aircraft would need to obtain necessary training in the operation of that aircraft as a necessary incident to its leasing business, whether such training and certification was required by federal law or not.

In this case, Petitioner's use of the subject aircraft for pilot training purposes was consistent with its business activity of renting or leasing aircraft to others within the meaning of Rule 82, and MCL 205.95(4). Nothing in the Rule 82 or MCL 205.95(4) requires the lessor to immediately and totally relinquish possession of an aircraft under a lease, or prohibits the lessor from ever taking possession of its aircraft for purposes related to its leasing business. Under the facts presented in this case, where Petitioner entered into several non-exclusive leases with others, it

would be expected that Petitioner would take possession of the aircraft from time to time when the lessees were not operating it, and such possession and use does not defeat the Rule 82 election.

Petitioner's affidavits and documentary evidence contain admissible facts that have not been rebutted, which indicate that Petitioner had valid business reasons for operating the aircraft from January to May 2008. The Eclipse EA500 had a history of certification difficulties and maintenance problems. The aircraft required modifications and pilot certification. Petitioner's Exhibit A, Affidavit of Richard Mertz. Maintenance could only be performed at facilities located in New Mexico, Florida, and New York, which required that the lessor fly the aircraft or hire a pilot to fly the aircraft to such locations. Petitioner reasonably determined that it could not fly the aircraft as needed to obtain maintenance or modification services without a properly trained pilot. Petitioner's Exhibit A, paragraph 12, 15.

This is not a case where the taxpayer's officers or employees used the aircraft for their own private purposes unrelated to the taxpayer's leasing business. Nothing in the flight logs (Exhibit R-5) supports a finding that the flights were for personal use. It appears in this case that the department issued the assessment based on the fact that no rental income was earned from January to May 2007, immediately after Petitioner acquired the aircraft, when the aircraft was leased to others, and where Petitioner's President, Richard Mertz and other pilots, operated the aircraft for pilot training purposes. Such facts raised reasonable doubts regarding whether Petitioner qualified as a person engaged in the business of leasing aircraft. Furthermore, the flights by Petitioner's president raised questions as to whether the flights were for his own

personal benefit unrelated to the leasing business. However, based on the motions, documentary evidence and affidavit of Richard Mertz, neither of the foregoing circumstance that led to this assessment can be established as a fact. To the contrary, Petitioner's use of the aircraft was related to its leasing business and the aircraft in fact began to generate rental revenue in May 2008 and thereafter.

It is concluded that oral argument is not necessary. Upon review of the motions, supporting briefs, documentary evidence, and affidavits, it is concluded that there is no genuine issue of material fact, and Petitioner has established as a matter of law that it properly invoked the election under Rule 82 and MCL 205.95(4) allowing it to remit use tax on rental receipts rather than the entire purchase price. Petitioner did not use the aircraft in a manner that disqualifies it from that method of remitting use tax. As such, the assessment of tax, penalty, and interest shall be cancelled.

Judgment

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

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Petitioner's request for Oral Argument is DENIED.

IT IS FURTHER ORDERED that Final Assessment No. P922035 is CANCELLED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters addressed in the motions. This Proposed Order, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act [MCL 205.726].

MICHIGAN TAX TRIBUNAL

Entered: June 16, 2010

By: Thomas A. Halick
Administrative Law Judge