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
Steven H. Lasher

FINAL OPINION AND JUDGMENT ON REMAND

On June 10, 2011, the Tribunal entered an Order granting Petitioner's Motion for Summary Disposition, finding 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," and cancelled the assessment. After consideration of *Fisher & Co v Dep't of Treasury*, 282 Mich App 207; 769 NW2d 740 (2009), cited in Respondent's Motion for Reconsideration, the Tribunal issued an Order granting summary disposition in favor of Respondent on August 10, 2011, finding that:

> . . . by Petitioner entering into a lease with Murray Air, Inc., Petitioner gave up its right to possession, and thus control, over the aircraft. The Tribunal concludes that *Fisher & Co* supports the Tribunals determination that it erred in its Final Opinion and Judgment. Specifically, Petitioner did use the aircraft as that term is defined in the Michigan Use Tax Act and was, therefore, properly assessed use tax.

Subsequently, Petitioner filed a Motion for Reconsideration of the Tribunal's August 10, 2011 Order which was denied by the Tribunal on October 5, 2011. As a result, Petitioner filed a claim of appeal with the Michigan Court of Appeals.

On October 16, 2012, the Court of Appeals issued an opinion reversing the Tribunal's ultimate determination to affirm the assessment. The Court of Appeals held:

> *Fisher* did not present the issue of whether there was a "use" of the particular airplane . . . . Here, by contrast, it is undisputed that plaintiff never did anything with the aircraft other than lease it to Murray, which it did simultaneously with its purchase of the aircraft . . . . Thus, for the purposes of the UTA, a transfer of property unaccompanied by a transfer of possession is simply not "use" that is subject to the tax . . . . [H]ere the only action by plaintiff that could have resulted in tax liability was the purchase and simultaneous lease of an aircraft that was already in possession of the lessee. Such a transaction (provided that total control over the aircraft is ceded to the lessee) simply does not incur use tax liability. See *WPGP1*, 240 Mich App at 419. *Fisher* does not alter this result, and the Tribunal therefore erred in relying on *Fisher* in reversing its previous decision.

Respondent appealed the Court of Appeals' decision to the Michigan Supreme Court. On February 6, 2014, the Supreme Court issued an opinion reversing the determination made by the Court of Appeals and remanding the appeal to the Court of Appeals for consideration of Petitioner's challenge to the amount assessed. Specifically, the Supreme Court stated:

> [B]ecause the right to allow others to use one's personal property is a right incident to ownership, and a lease is an instrument by which an owner exercises that right, it follows that the execution of a lease is an "exercise of a right or power over tangible personal property incident to the ownership of that property . . . ." *NACG Leasing v Dep't of Treasury*, 495 Mich 26, 29; 843 NW2d 891 (2014).

Further, the Supreme Court held that the cases relied on by the Court of Appeals were "factually distinguishable" because they did not involve an execution of a lease in Michigan. The Supreme Court concluded that:

> The execution of a lease in Michigan is the exercise of a right incident to property ownership and, therefore, falls squarely within the statutory definition of "use." We hold that petitioner "used" the aircraft in question for purposes of the UTA when it executed a lease of the aircraft in Michigan, regardless of whether it ever had actual possession of the aircraft. *Id* at 31.

On June 5, 2014, the Court of Appeals issued its decision on remand, finding that the amount of the tax assessed, $414,000, "was not supported by competent, material, and substantial evidence." The Court of Appeals remanded the case to the Tribunal "with instructions that the Tribunal recalculate the use tax and provide a statement explaining its calculations."

Following the Court of Appeals' decision, on June 9, 2014, Respondent filed its Statement on Remand, stating that under MCL 205.93(1), the proper amount of use tax due is $162,000, based on the $2,700,000 purchase price of the aircraft and the 6% tax rate. Respondent further states that MCL 205.23(4) provides for a penalty of 25% of the total amount of the deficiency in tax, if any part of that deficiency was due to intentional disregard of the law or rules promulgated by the Department. Respondent asserts that the 25% penalty is appropriate in this case in the amount of $40,500, as Petitioner used the aircraft under the "plain terms" of the Use Tax Act but "chose not to remit the appropriate tax on such use."

On July 11, 2014, Petitioner filed a response to Respondent's Statement on Remand, stating that Petitioner accepts Respondent's concession that the correct amount of tax is $162,000. Petitioner disputes the 25% penalty, arguing that it did not intentionally disregard the law "because a fair reading of the law at the time of the purchase was that the transaction was not subject to tax." Petitioner cites *Wisne v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2008 (Docket No. 270633) in support of its argument that "it is completely inappropriate to charge a taxpayer with intentional disregard of the law when the meaning of the law is contested and is ultimately decided, contrary to prior precedent, by litigation involving that very taxpayer." In addition, Petitioner argues that the interest should be calculated without inclusion of the time period from March 30, 2008 (the date alleged by Petitioner that a decision on its Motion for Summary Disposition should have been rendered by the Tribunal) to June 11, 2011 (the date on which the Tribunal issued its Order granting Petitioner's Motion for Summary Disposition).

Pursuant to the determination of the Supreme Court and the Court of Appeals' directive on remand, and after consideration of Respondent's Statement on Remand, the response, and the

case file, the Tribunal finds that MCL 205.93(1) provides that "there is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property." The purchase price of the aircraft at issue was $2,700,000, as evidenced by the April 19, 2005 Aircraft Sale Agreement submitted by the parties. When the 6% rate is applied to the purchase price of $2,700,000, the resulting tax liability under MCL 205.93(1) is $162,000.

The assessment also included penalties under MCL 205.23(4), which states:

> If any part of the deficiency or an excessive claim for credit is due to intentional disregard of the law or of the rules promulgated by the department, but without intent to defraud, a penalty of $25.00 or 25% of the total amount of the deficiency in the tax, whichever is greater, plus interest as provided in subsection (2), shall be added. The penalty becomes due and payable after notice and informal conference as provided in this act. If a penalty is imposed under this subsection and the taxpayer subject to the penalty successfully disputes the penalty, the department shall not impose a penalty prescribed by subsection (3) to the tax otherwise due.

The Tribunal finds that there was no intentional disregard of the law or rules of the Department in the present case. Respondent argues that "NACG Leasing used the aircraft under the plain terms of the Use Tax Act when it executed a lease of the aircraft in Michigan . . . ." However, the appellate history of this case reflects that the ultimate outcome of the issue in the present case was not clear at the time of purchase of the aircraft or at the time this appeal was originally filed with the Tribunal. Initially, the Tribunal found, relying on *WPGPI, Inc. v Dep't of Treasury*, 204 Mich App 414; 612 NW2d 432 (2000) 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), that Petitioner was not liable for use tax. After more recent case law (*Fisher*) was submitted on reconsideration, the Tribunal found that Petitioner was liable for the use tax. Next, the Court of Appeals, relying on *WPGPI* and *M & M Aerotech*, found that Petitioner was not

liable for the use tax. It was not until the Supreme Court's ruling on this issue that it was conclusively determined under the law that Petitioner was, in fact, liable for the use tax on the purchase of the aircraft. Petitioner purchased the aircraft in 2005, at that time *WPGPI* and *M & M Aerotech* were the most recent Court of Appeals' decisions, and each held (under a similar fact pattern) that there was no "use" that would subject the taxpayer in each case to the payment of use tax. In the present case, it cannot be said that Petitioner "intentionally" disregarded the law as the history of this appeal shows that Petitioner's liability for use tax was unclear up until the time the Supreme Court issued its ruling. Accordingly, the Tribunal finds that Petitioner is not liable for a 25% penalty under MCL 205.23(4).[1]

Lastly, with respect to Petitioner's argument for "mitigation" of the interest, the Tribunal finds that Petitioner has cited no Tribunal rule, statute, case law, or other authority for the exclusion of the requested time frame (March 30, 2008 to June 10, 2011) from the statutory calculation of interest. Under MCL 205.23(2), interest accrues on the unpaid deficiency "at the current monthly interest rate of 1 percentage point above the adjusted prime rate per annum <u>from the time the tax was due, and until paid</u> . . . ." [Emphasis added.] There is no provision for waiver, suspension, or mitigation of the interest during the time the assessment is under appeal, regardless of the timeframe in which the Tribunal, Court of Appeals, or Supreme Court renders a decision.

Therefore,

[1] Petitioner has cited to the only case to address the issue of the appropriateness of a penalty under MCL 205.23(4), *Wisne v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2008 (Docket No. 270633). In *Wisne*, the Court of Appeals recognized that at the time the taxpayer requested an extension, there was no promulgated rule or appellate precedent with respect to the effect of an amendment to the applicable statute in that case (MCL 206.110(2)(b)). The Court of Appeals indicated that there was nothing in the record to support a finding of intentional disregard of the law.

IT IS ORDERED that Assessment Number N971045 is MODIFIED to reflect tax due of $162,000, penalty of $0, and interest to be computed in accordance with 1941 PA 122, as amended.

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

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Opinion within 28 days of entry of this Final Opinion and Judgment.

This Opinion resolves the last pending claim and closes the case.

By _____

Entered:
klm