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

Ponderosa Farms LLC,
Petitioner,

v MTT Docket No. 358038

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R Smith III

FINAL OPINION AND JUDGMENT

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

1. Administrative Law Judge Thomas A Halick issued a Proposed Opinion and Judgment on March 11, 2011. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment. The exceptions must be stated and are ***limited*** to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion and Judgment." (Emphasis added.)

2. On March 31, 2011, Petitioner filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Petitioner states ". . . the only comment I have relates to the Petitioner's representative on the first page as Robert E. Lewis of the law firm of Finkel Whitefield Selik. The Petitioner's representative is Eric. T. Weiss of the law firm of Finkel Whitefield Selik."

3. Respondent has not filed exceptions to the Proposed Opinion and Judgment or a response to Petitioner's exceptions.

4. The Administrative Law Judge (ALJ) properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. However, the ALJ erred in the recording of Petitioner's representative. The ALJ erroneously identified Petitioner's representative as Robert E. Lewis.

The Proposed Opinion and Judgment should have reflected Petitioner's representative as Eric T. Weiss.

5. Given the above, Petitioner has shown good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing. See MCL 205.762. As such, the Tribunal modifies the Proposed Opinion and Judgment, as indicated herein, and adopts the modified Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment, as modified herein, in this Final Opinion and Judgment. As a result:

   a. The taxes, interest and penalties as levied by Respondent are as follows:

Assessment Number: P698817

Taxes	Interest	Penalties
$270,000.00	$21,986.78	$67,500

   b. Assessment number P698817 is cancelled. As such, the final taxes, interest and penalties are as follows:

Assessment Number: P698817

Taxes	Interest	Penalties
$0.00	$0.00	$0.00

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment 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 Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: April 11, 2011 By: Kimbal R Smith III

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

Ponderosa Farms LLC,

v

Michigan Department of Treasury,
Respondent.

Michigan Tax Tribunal
MTT Docket No. 358038

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

Petitioner appeals Respondent's assessment of use tax upon an aircraft. A prehearing conference was held on April 13, 2010. Petitioner was represented by Robert E. Lewis, of the law firm of Finkel Whitefield Selik. Respondent was represented by Amy M. Patterson, Assistant Attorney General. On May 27, 2010, Petitioner and Respondent filed cross motions for summary disposition, supporting briefs, and exhibits. Each party filed a written response. The parties filed a "Stipulation of Facts" consisting of 41 paragraphs and 16 exhibits. Pursuant to this Order, the following assessment of tax, penalty, and interest shall be cancelled:

Assessment No.	**Tax**	**Penalty**	**Interest***

P698817	$270,000.00	$67,500	$21,986.78

*As of the date of assessment.

Further, Petitioner is entitled to a refund of use tax paid as indicated herein.

Summary of Stipulated Facts

General Stipulations

1. Petitioner is a Michigan limited liability company with its resident office located at 7065 N. Kings Highway, Luther, Michigan 49656.
2. Petitioner's members include Warren (Tom) Wamberg (80% interest) and Diane A. Wamberg (20% interest).
3. Exhibit 1 is Petitioner's limited liability company agreement.
4. Petitioner is an Aircraft Dealer who has been registered as such since October 10, 2006.1
5. Exhibit 2 are aircraft dealer certificates for 2006, 2007, and 2008.
6. Exhibit 3 is the Amended and Restated Limited Liability Company Agreement of Wamberg Asset Management, LLC ("WAM").
7. WAM was an investment advisor firm founded and managed by Tom Wamberg, Chuck French, and Tom Dodd.
8. Exhibit 4 are pages from WAM's website describing its services.
9. Shortly after July 1, 2008, WAM ceased all business operations.

10. Petitioner entered into a purchase agreement dated July 18, 2007 with Meisner Aircraft, Inc. to purchase a 1996 Citation 560 N831MM, Serial No. 560-0362 ("the aircraft").
11. The purchase price was $4,400,000.
12. Exhibit 5 is the Purchase Agreement.
13. The closing occurred July 24, 2007 and the aircraft was delivered to Petitioner at KPDK Airport in Atlanta, Georgia.
14. Exhibit 6 are closing documents related to the acquisition of the aircraft.
15. On August 6, 2007, WAM pilots flew the aircraft form Atlanta, Georgia, to Lakeland, Florida where it received new paint and interior to increase its value for resale.
16. Exhibit 7 is the aircraft's flight log through June 30, 2008.
17. The aircraft remained in Lakeland, Florida for several weeks while undergoing repairs and improvements and remained under the control of Petitioner.
18. Exhibit 8 are invoices from Foster's Aircraft Refinishing, Inc. and RDI, LLC dated September 15, 2007 and September 17, 2007 respectively for repairs and improvements.
19. On September 21, 2007, WAM and Petitioner entered into an "Aircraft Dry Lease" ("the lease").
20. The lease is Exhibit 9.
21. On September 24, 2007, WAM executed a Certificate of Acceptance of the aircraft.
22. WAM took possession of the aircraft at Lake in the Hills, Illinois.
23. Exhibit 10 is the Certificate of Acceptance.

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1 This stipulated fact is taken to mean that the state of Michigan issued an Aircraft Dealer certificate to Petitioner,

24. Pursuant to the Lease, WAM agreed to pay Petitioner consideration in the amount of $36,500 per month for use and possession of the aircraft.

25. The lease terminated on June 30, 2008.

26. Under the Lease, WAM agreed to pay all taxes associated with the Lessee's use of the aircraft, including landing fees, fuel taxes, sales taxes, federal income taxes, excise taxes and any other taxes which may be assessed against a specific flight or use by WAM.

27. Under the Lease, WAM was solely responsible for all the Aircraft's maintenance, airworthiness, regulatory compliance and overall general condition of the aircraft during the term of the Lease and was required to house the aircraft in a hangar at all times.

28. Exhibit 11 are monthly invoices.

29. The aircraft first entered the state of Michigan on October 19, 2007 and remained in Michigan through October 21, 2007.

30. The aircraft also entered Michigan a second time for a few hours on November 25, 2007.

Assessment of Use Tax

31. In October, 2007, Respondent assessed a use tax of $270,000 plus penalty and interest against Petitioner relative to the aircraft, assessment number P698817.

32. Petitioner believed it owed use taxes on rental receipts, and paid $9,264 upon filing annual sales, use, and withholding tax return in February, 2008 for rental receipts of $154,400 for 2007.

33. Exhibit 12 is a copy of the 2007 Annual Return for Sales, Use, and Withholding taxes.

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but does not support a finding that Petitioner was actively engaged in the business of buying and selling aircraft.

34. Petitioner obtained a use tax registration in January 2008.

35. Petitioner filed monthly Combined Return for Michigan taxes for January through May, 2008, and paid $2,190 per month for rental receipts.

36. Respondent assessed use taxes of $772 for the months of January, 2007 through September, 2007 relative to the aircraft.

37. Exhibit 13 are copies of the assessments for January 2007 through September 2007.

38. Exhibit 15 are invoices for advertising placed with Aircraft Shopper On-Line and Controller and photos submitted to Trade-A-Plane.

39. Exhibit 16 is an e-mail exchange and letter of intent dated on and around October 15, 2008 between Petitioner's principal and agent regarding its intent to sell the aircraft.

40. Petitioner has not sold the aircraft.

41. Exhibit 17 is an Aircraft Offer from Corporate Aircraft with an offered purchase price of $2,190,000.

Documentary Evidence submitted with the motions:

Petitioner's Exhibits:

P-A. Affidavit of Warren T. ("Tom") Wamberg

P-B. Affidavit of Kent Seaver

P-C. Affidavit of Chad Stoerp

P-D. Amended and Restated Limited Liability Company Operating Agreement

P-E. *ACI Holdings, Inc v Township of Sylvan*, unpublished opinion per curiam of the Court of Appeals issued June 17, 2008 (Docket No. 278263).

P-F. *M & M Aerotech v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals issued November 23, 1999 (Docket No. 211460).

P-G. *Glieberman Aviation, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals issued February 19, 2004 (Docket No. 242532).

Respondent's Exhibits:

R-A. Respondent's First Set of Interrogatories and Request for Production of Documents

R-B. Decision and Order of Determination and Informal Conference Recommendation

R-C. Final Assessment issued 9/25/08

R-D. *Glieberman Aviation, LLC v Dep't of Treasury*, MTT Docket No. 281362

R-E. *Mack LLC v Dep't of Treasury*, MTT Docket No. 272776

R-F. *Eastern Michigan University v Dep't of Treasury*, MTT Docket No. 211031

R-G. *AeroGenesis, Inc v Dep't of Treasury*, MTT Docket No. 258603

R-H. *Glieberman Aviation, LLC v Dep't of Treasury*, MTT Docket No. 266539

R-I. *CCXLS v Treasury*, MTT Docket No. 358530

R-J. National Law Review article re: Codification of Common Law Economic Substance

Petitioner's Claims

While the aircraft was leased to WAM, the aircraft entered Michigan for two days (October 19 through 21, 2007) for business purposes. WAM also brought the aircraft to the airport at Cadillac, Michigan for a few hours on November 25, 2007.

As of mid-2010, the aircraft was on charter with a company called Planemasters, Inc. based out of Dupage County Airport in Aurora, Illinois. Planemasters had operational control of the aircraft. Petitioner received $1,200 per flight hour for Planemaster's use of the aircraft.

Petitioner registered the aircraft with the Federal Aviation Administration (FAA), listing Luther, Michigan as its mailing address. (Ponderosa Farms, LLC, 7065 N. Kings Hwy. Luther, MI 49656.) Exhibit 6 is a copy of the FAA "Bill of Sale" dated July 24, 2007.

In October 2007, Respondent issued a use tax assessment No. 698817 to Petitioner for $270,000.

Petitioner's motion is based solely upon the claim that it did not "use" the aircraft in Michigan and therefore is not subject to use tax.

Petitioner raised alternative claims in its petition: 1) that tax would be due on the rental receipts under MCL 205.95(4) and Rule 82 and, 2) that the aircraft is exempt because it was purchased for purposes of resale. These claims are not at issue in Petitioner's motion.

Respondent's Claims

Respondent states that the material facts are not in dispute, and that it is entitled to judgment as a matter of law.

Petitioner, Ponderosa Farms, LLC, is a limited liability company owned 80% by Warren T. Wamberg (a.k.a. "Tom Wamberg") and 20% by Diane A. Wamberg. Ponderosa took delivery of the aircraft on July 24, 2007 in Atlanta, Georgia. Kent Seaver, an employee of Wamberg Asset Management ("WAM"), inspected the aircraft and took possession. (In answers to interrogatories, Petitioner identified Kent Seaver as its "broker.")

Petitioner and WAM entered into the lease on September 21, 2007. WAM had possession of the aircraft from July 24, 2007 until September 21, 2007, when WAM signed a certificate of acceptance, which renders that document a mere formality.2 The aircraft was advertised for sale by Kent Seaver on October 24, 2007. The lease terminated June 30, 2008, when WAM ceased operations and terminated its flight department. Ponderosa has not sold the aircraft.

Respondent claims that Petitioner is subject to use tax on the $4.4 million purchase price, because it does not qualify to pay tax on rental receipts under Rule 82.

Respondent counters Petitioner's claim that the *lessee* (not Petitioner, the lessor) brought the aircraft to Michigan by arguing that "the department contends that the 'lease' is a sham transaction and that the aircraft should be considered to have been brought into this state by Ponderosa." Respondent's Brief, p 5.

Respondent states that Petitioner did not purchase the aircraft with intent to resell it, and the resale exemption does not apply. The aircraft was offered for sale for only two months. It leased the aircraft to a related company and attempted to pay use tax on rental receipts. Petitioner later claimed that no use tax was due.

Petitioner does not qualify for the lessor election under MCL 205.95(4) because 1) it was not registered for use tax at the time it acquired the aircraft, 2) it did not register for use tax until January 2008 (more than 90 days after acquisition and after the tax on the first rental payments was due), 3) it did not pay use tax on a monthly basis, and 4) the lease agreements lack economic substance and are sham transactions, solely motivated by the desire to avoid tax. Ponderosa has paid little more than $20,000 in use tax on an aircraft valued at over $4 million.

Conclusions of Law

Each party seeks judgment under TTR 230 and MCR 2.116(C)(10). Judgment shall be granted under the standards applicable to MCR 2.116(C)(10) if there is no genuine issue of material fact, based on the well-plead facts, documentary evidence, and affidavits. MCR 2.116(G)(5). The facts and admissible evidence must be considered in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A court may not make findings of fact or weigh credibility when deciding the motion. *In Re Handleman*, 266 Mich App 433

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2 This assertion conflicts with Stipulated Fact 17.

(2005).

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). The aircraft was brought to Michigan within 90 days of acquisition (87 days, to be exact) and therefore, the presumption arose.3

Petitioner claims that it did not store, use, or consume the aircraft within this state because the aircraft was brought to this state by the lessee. Respondent counters this assertion by stating that "the 'lease' is a sham transaction and that the aircraft should be considered to have been brought into this state by Ponderosa." Respondent's Brief, p 5. Respondent does not raise any genuine factual dispute that Petitioner used, stored, or consumed the aircraft in Michigan, but only that the lease was a sham. In other words, Respondent does not advance an argument that use tax would apply if the lease were not a sham.

Assuming the lease is valid and Petitioner relinquished all dominion and control over the aircraft to WAM before WAM brought it to Michigan, the case law indicates that Petitioner did not use, store, or consume it in Michigan. The use tax is imposed upon each person *in this state* who uses, stores, or consumes property *in this state*. "The use tax is a tax for the privilege of using, storing and consuming tangible property brought from out of the state after it has come to rest." *Honeywell, Inc v Department of Treasury*, 167 Mich App 446, 449; 423 NW2d 223, 224 (1988). "It is the use [of the property] in Michigan that is taxed under the [UTA]." *WMS Gaming, Inc v*

Dep't of Treasury, 274 Mich App 440, 443; 733 NW2d 97 (2007). The use tax act defines "use" as "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" to another. MCL 205.92(b).

An owner of tangible personal property no longer exercises "a right or power over tangible personal property incident to the ownership of that property" when it has ceded total control of the property to a third party. *WPGP1, Inc v Department of Treasury*, 240 Mich App 414, 418-419; 612 NW2d 432, 435 (2000). Also see, *Ameritech Pub, Inc v Department of Treasury*, 281 Mich App 132, 137; 761 NW2d 470, 473 (2008).

Petitioner 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), which held that a lessor did not use an aircraft in Michigan where the lessee flew the aircraft to Michigan to have avionics equipment installed. In *M&M Aerotech*, the taxpayer was a Michigan-based leasing company that purchased an aircraft outside Michigan, and executed a lease outside Michigan to an affiliated corporation (Merit) that conducted business outside Michigan. The issue was whether M&M Aerotech, the Michigan-based leasing company, was liable for use tax on the purchase price of the aircraft. The lease was drafted "in anticipation of the aircraft's purchase." Merit took possession under the lease outside Michigan and began to use the aircraft in its business

3 The date of acquisition is the date the sale was closed and the aircraft was delivered to Petitioner on July 24, 2007, not the date the purchase agreement was executed. See Stipulated Facts 10 and 13.

operations outside Michigan. Shortly thereafter, Merit flew the aircraft to Grand Rapids, Michigan to have avionics equipment installed. The parties conceded that Merit flew the aircraft into Michigan numerous times within ninety days of the purchase date and numerous times thereafter, giving rise to the statutory presumption of use. The department assessed use tax and the taxpayer filed an action for a refund in the court of claims alleging that it did not "use" the aircraft in Michigan because it did not exercise any rights or powers of ownership in Michigan; it did not "store" the aircraft in Michigan; the aircraft never "came to rest" in Michigan before becoming an instrumentality of interstate commerce; and, that it qualified for certain exemptions. The Court of Appeals held that the lessor, M&M Aerotech, was "…not liable for the use tax because it did not use the aircraft in Michigan, the reasons for which Merit flew the aircraft into Michigan are inconsequential for purposes of this appeal." *Id*.

In *M&M Aerotech*, the court found that the presumption of taxation arose because the aircraft was brought into Michigan within 90 days of its acquisition. For purposes of the presumption, it did not matter that Merit (the lessee) physically brought the aircraft to Michigan, and not the owner and lessor M&M Aerotech. The mere presence of the aircraft in Michigan required M&M Aerotech to rebut the presumption that it "used, stored, or consumed" the aircraft in Michigan. The department argued that use occurred because M&M Aerotech held legal title to the aircraft, *exercised incidents of ownership by leasing the aircraft to Merit in Michigan*, and allowed it to operate the aircraft commercially. Furthermore, M&M Aerotech drafted the lease; the lease only relinquished "operational control" to Merit; the lease did not prevent M&M Aerotech or its officers from renting the aircraft; *M&M Aerotech and Merit are related companies with related officers actively involved in the operation of both companies*; and, M&M Aerotech had prior knowledge and ultimate control of the aircraft's use in Michigan. In rejecting the department's

arguments, the Court of Appeals distinguished *M&M Aerotech* from *Czars, Inc* v *Department of Treasury,* 233 Mich App 632; 593 NW2d 209 (1999), in which the owner of an aircraft (Czars) failed to rebut the presumption and was held liable for use tax based on its sister corporation's active use in Michigan, specifically noting that there was no written lease in *Czars*.

> …plaintiff and Merit entered into a lease on the date the aircraft was purchased and before it entered Michigan. The lease was stipulated valid and authentic, and provided that Merit pay plaintiff consideration in the amount of $1,100 a month for the use and possession of the aircraft. Pursuant to the lease, plaintiff relinquished all "operational control" of the aircraft to Merit during the period of possession including, but not limited to, qualifying the flight crew and assuming operational responsibilities such as flight following dispatch, communications and weather monitoring. The lease further provided that Merit was responsible for paying "all taxes, assessments, and charges imposed by any national, state, municipal or other public or airport authority relating to the use or operation of the Aircraft during the time of use of the Aircraft. *M&M Aerotech*.

In addition, Merit (the lessee) was solely responsible for insuring the aircraft, indemnifying the lessor against damage to the aircraft, paying all storage and related costs at the North Carolina airport where the aircraft was hangared. Merit had the right to "possess and use the aircraft ... free of any interference or hindrance." *Id*. The court held that the lease and circumstances of the case demonstrated that M&M Aerotech relinquished control of the aircraft to Merit for the lease term. There was no indication that M&M Aerotech maintained control of Merit's use of the aircraft in Michigan. Nor was there any indication, as there was in *Master Craft, infra* and *Kellogg, infra,* that M&M Aerotech used, hangared, or registered the aircraft in Michigan. The court concluded that M&M Aerotech (the lessor) did not exercise a right or power over the aircraft incident to its ownership of that property within the meaning of the UTA while it was in Merit's possession.

The most apparent distinguishing feature between *M & M Aerotech* and our case is that Petitioner

registered the aircraft with the FAA using a Michigan address. Respondent has cited no authority, and this hearing officer is aware of no statute, rule, or case supporting imposition of use tax merely because an owner of aircraft is an entity organized under Michigan law, licensed as an aircraft dealer in Michigan, and where the owner registered the aircraft with the FAA using a Michigan address. The use tax is not an aircraft registration tax. These facts, standing alone, do not indicate that the property was acquired for use, storage or consumption within this state.

Although the department argued that lessee and lessor in *M&M Aerotech* were related entities, it also stipulated "that the lease was authentic." Nevertheless, the fact that the lessor and lessee were related was not found to have any relevance with regard to the question of whether the lessor was liable for use tax.

The Court of Appeals has rejected the proposition that a lessor uses a leased aircraft in Michigan based on ownership and allowing the lessee to land the aircraft in Michigan. *WPGP1, Inc* v *Dep't of Treasury*, 240 Mich App 414, 416; 612 NW2d 432 (2000); *Glieberman Aviation, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals issued February 19, 2004 (Docket No. 242532). In *Glieberman*, the court noted that *M&M Aerotech* and *WPGP1* held that that the taxpayers (lessors) did not physically use the aircraft for their own purposes. "The MTT's legal analysis is correct. The cases cited by petitioner establish that ownership of an aircraft leased to another entity is not 'use' under the UTA." *Glieberman.*

There is no allegation that Petitioner operated or otherwise used the aircraft in Michigan aside from the claim that the lease is invalid and therefore Petitioner should be considered to be the

user.

In *Masse v Dep't of Treasury*, MTT Docket No. 100087, the department assessed a use tax deficiency after the taxpayer purchased a Cessna aircraft from a dealer in Oklahoma for use within Michigan. Masse took possession of the aircraft in Flint, Michigan on August 26, 1983, and on September 1, 1983 leased the aircraft to Skybolt, with the understanding that Skybolt would rent the aircraft to third parties. The Tribunal held:

> … Masse is distinctly liable for use tax on his purchase of the Cessna for the reason that he "used" the aircraft both by *taking delivery of it in Michigan* for use within this state, *as well as by exerting ownership rights in making it the subject of a lease arrangement with Skybolt*, see the California Supreme Court's holding in *Union Oil Co of California* v *State Board of Equalization*, 60 Cal2d 441; 386 P2d (1963) that a lease of tangible personal property constitutes a use of that property under California's use tax statute. [FN8] *Quite simply, Masse is required to pay use tax because he has used, stored or consumed the Cessna in Michigan*. *Id*. [emphasis added]

The facts in *Masse* are distinguishable from the present case. First, Masse (the taxpayer) purchased the aircraft outside Michigan and brought it to Michigan -- this alone creates a presumption of taxation. In addition, Masse subsequently leased the aircraft to Skybolt in Michigan. The lease transaction was entirely intrastate: it was executed in Michigan and it granted possession to the lessee within this state. The intrastate lease transaction was a separate, taxable use. Leasing property within Michigan is a taxable "use" under MCL 205.92, which provides the following definition:

> (b) 'Use' means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer thereof in any

transaction where possession is given. . . . MCL 205.92.

In *Masse,* the aircraft was stored in Flint, Michigan at all relevant times. In the present case, the lease granted possession to WAM outside Michigan and WAM (not Petitioner) had sole possession and control over the aircraft in Michigan. The subject aircraft was stored in another state.

In *Czars, Inc* v *Department of Treasury,* 233 Mich App 632; 593 NW2d 209 (1999), the Court of Appeals held that the taxpayer failed to rebut the presumption of use that arose when it purchased an aircraft outside Michigan for use by its affiliate in Michigan. In that case, Czars purchased an aircraft in Arizona on May 24, 1994 and registered it with the Federal Aviation Administration (FAA) in its own name. On June 10, 1994, a pilot employed by a related corporation, Grand Aire, flew the aircraft from Arizona to Michigan under a special permit the FAA issued to Grand Aire.

Czars allowed Grand Aire to use the aircraft in Grand Aire's cargo business but "*never prepared a lease agreement*, never received any consideration, and never applied for a use tax registration." *Czars,* 637 [Emphasis Added]. Grand Aire modified and operated the aircraft as a cargo plane. Grand Aire also held the license and maintained logs to comply with FAA regulations. Petitioner was not licensed to operate the plane. Nevertheless, the court found that the presumption arose that the aircraft's owner, Czars, used the aircraft in Michigan when Grand Aire brought the aircraft to Michigan for use in its air cargo business. "This presumption applies here because the aircraft was brought into Michigan less than three weeks after it was purchased and because it was purchased for use in Michigan." *Czars*, 638. *The aircraft was also principally stored in*

Michigan. It was incumbent upon Czars to prove that it did not use, store, or consume the aircraft in this state, which, absent a lease agreement, it could not do. "Petitioner concedes that there is no lease or other documentary evidence showing that it totally or permanently relinquished control of the aircraft to Grand Aire in Arizona." *Czars*, 639.

Tahir Cheema was the sole shareholder of both Czars, a Delaware corporation, and Grand Aire, a Michigan corporation. The court did not directly address the legal significance, if any, of the fact that Czars (the owner) and Grand Aire (the user) were commonly controlled by Mr. Cheema. However, it is implicit that common ownership would not have prevented Czars from avoiding use tax had there been a written lease agreement between Czars and Grand Aire, and if Czars had thereby ceded total control of the aircraft to Grand Aire. The court's ruling implies that, had there been a written lease executed outside Michigan that granted possession outside Michigan, no use tax would have fallen upon Czars, notwithstanding the common ownership. However, the court did not directly reach that issue.

If Respondent could establish that the lease should be disregarded, our case would be similar to *Czars*. However, *Czars* would not necessarily support imposition of use tax on Petitioner, because in *Czars* the aircraft was stored and used in Michigan in Grand Aire's cargo business. It cannot be concluded that the court would have ruled the same way if the taxpayer stored and used its aircraft outside Michigan, and only brought it here for a few days.

The Court of Appeals revisited the issue of aircraft leasing in *WPGP1, Inc v Department of Treasury*, 240 Mich App 414, 418-419; 612 NW2d 432, 435 (2000). In that case, the taxpayer, WPGP1, was a Delaware corporation based in Illinois. WPGP1 was a wholly owned subsidiary of Whirlpool Financial Corporation (WFC), which had offices in Benton Harbor, Michigan. In March 1994, WPGP1 acquired title to two airplanes from the secured lender (WFC) at a public foreclosure sale in Illinois. WPGP1 registered the aircraft with the Federal Aviation Administration (FAA), listing Benton Harbor, Michigan as its permanent mailing address. At the time WPGP1 purchased the aircraft, they were under lease to Southwest Airlines, Inc. (Southwest) and were used as commercial passenger planes. The department assessed use tax upon WPGP1. The court held that "Plaintiff's acquisition of the aircraft did not interrupt Southwest's continuous use of the airplanes in interstate commerce." *WPGP1, Inc v Department of Treasury*, 240 Mich App 414, 415-416; 612 NW2d 432, 433 (2000). The court distinguished the case from *Czars* based on the written lease agreement.

> In the instant case, unlike in *Czars*, there were indeed lease agreements that were originally executed in Texas between the entity flying the airplanes and the previous owners of the airplanes. While the leases did not give Southwest *permanent* control of the airplanes, we conclude that the leases gave Southwest *total* control of them, because pursuant to the leases Southwest was responsible for the flight schedules and general maintenance of the planes. Plaintiff did not direct Southwest's routes or otherwise exercise dominion over Southwest's use of the planes. Therefore, unlike the situation in *Czars*, plaintiff in the instant case did not "use" the planes for purposes of the UTA, and the trial court properly invalidated the use tax imposed. *WPGP1, Inc v Department of Treasury*, 240 Mich App 414, 418-419; 612 NW2d 432, 435 (2000).

The court rejected the department's position that WPGP1 "used" the aircraft in Michigan by

"owning them, leasing them to Southwest, allowing Southwest to fly them into and out of a Detroit airport, and deciding to use a Michigan mailing address when registering the airplanes with the FAA." *Id*, 434. Therefore, the mere fact that Petitioner has a Michigan mailing address is not sufficient to impose use tax. The court further held that:

> Despite plaintiff's ownership interest in the airplanes, the leases gave exclusive authority over the use, storage, and consumption of the airplanes during the duration of the leases to Southwest, and thus plaintiff exercised no right or power over the airplanes. In other words, by virtue of the leases, plaintiff ceded control of the airplanes to Southwest, and therefore could not have "used" the airplanes for purposes of use tax liability under the UTA. *WPGP1*, 418.

Although the court in WPGP1 mentioned the fact that the leases were executed in Texas, it did not decide the case merely based on the location where the leases were executed. Our present case is not a case like *Masse*, *supra*, where the lease transaction occurred in the state of Michigan, including execution of the lease and delivery of the property.

Although *M&M Aerotech* is unpublished, the reasoning is persuasive and consistent with other authorities cited herein. Applying that reasoning to this case, Petitioner acquired the subject aircraft outside Michigan, such that the sale was not subject to sales tax. Furthermore, Petitioner leased the aircraft to WAM under a lease that took effect in Georgia where WAM took possession. Merely registering the aircraft in Michigan is not sufficient local activity to impose use tax upon the lessor of the property, but the Tribunal must also consider the place where "possession is given" under the lease, and the subsequent use, storage or consumption of the property within this state. The lessor's retention of the right to direct or control the use of the property in Michigan under the terms of a lease is also relevant. The undisputed facts demonstrate that the subject aircraft is a corporate type jet that was used exclusively within the scope of the business activities of Wamberg Asset Management (WAM). There is no indication that Ponderosa Farms, LLC, Mr. Tom Wamberg, or any member, officer, or employee of WAM operated the aircraft for

personal use. There is no indication that Ponderosa Farms, LLC or Mr. Tom Wamberg in his individual capacity exercised control over the aircraft while it was under the lease.

On July 24, 2007, Petitioner acquired title and possession of the subject aircraft in Atlanta, Georgia. Stip 13. On August 27, 2007, pilots employed by WAM flew the aircraft from Atlanta to Lakeland, Florida, where certain improvements were made. The aircraft remained under the control of Petitioner in Lakeland, Florida while undergoing improvements in September 2007. Stip 17. Petitioner (lessor) and WAM (lessee) executed the lease on September 21, 2007. WAM took possession under the lease in Lake in the Hills, Illinois on September 24, 2007.

Neither the lease nor the stipulated facts indicate the place where the lease was executed. However, the lease was signed on September 21, 2007, while the aircraft was located either in Lakeland, Florida; Lake in the Hills, Illinois; Tulsa, Oklahoma, or somewhere in between. WAM took possession of the aircraft in Illinois on September 24, 2007. Stip 22. It is most likely that the lease was entered into and took effect outside Michigan. It has been held that merely entering into a lease in this state does not constitute a taxable "use" in this state, where the leases took effect outside this state at the time the lessee took possession of the property outside this state. See, *Florida Leasco, LLC v Dep't of Treasury*, MTT Docket No. 264860 (2005).

In our case, payments under the lease were made by wire transfer to a bank account at Chemical Bank, located in Big Rapids, Michigan. Exhibit 9, paragraph 4.2. Notices under the lease were to be mailed to the lessor at an address in North Barrington, Illinois, and to the lessee at Lake in the Hills, Illinois. There is no evidence that the lease was executed in the state of Michigan. According to the flight log (Exhibit 7) the aircraft traveled to the following locations:

8/27/2007 Atlanta (KPDK) to Lakeland, Florida (KLAL)

9/18/2007 Lakeland to Tulsa, Oklahoma (KBVO)

9/24/2007 Tulsa to Lake in the Hills, Illinois (3CK) - WAM takes possession

9/24/2007 Lake in the Hills to Teterboro, New Jersey (KTEB)

9/24/2007 Teterboro to Lake in the Hills

9/27/2007 Lake in the Hills to Naples, Florida (KAPF)

After September 27, 2007, the aircraft was flown regularly by WAM, and first came to Michigan on October 19, 2007, when it was flown from White River, New Hampshire to Cadillac, Michigan. Two days later on October 21, 2007, it was flown from Cadillac to Grand Rapids, Michigan, and then to Lake in the Hills, Illinois on that same date. The affidavits and admissible evidence indicate that this flight was for WAM's business purposes.

WAM continued to regularly operate the aircraft, which again entered Michigan on November 25, 2007, when it was flown from Lake in the Hills to Cadillac, and on that same day, it flew to Naples, Florida. After numerous flights to various destinations, the aircraft again came to Cadillac, Michigan from Lake in the Hills, Illinois on June 8, 2008, and departed that same day for Bedford, Massachusetts.

In *Florida Leasco, supra*, the petitioner claimed that it did not use or consume the property (trailers and headracks) within this state and that the property was not "stored" in Michigan "after it lost its interstate character." MCL 205.92(c). The trailers were purchased for immediate use in interstate commerce, and approximately 50% of them were used to make interstate shipments when first entering Michigan. The car-haulers were brought to Michigan for less than

14 days for inspections, which did not constitute "storage" or "use" under the use tax act. The property in *Florida Leasco* came to Michigan temporarily and was destined for trucking terminals located outside this state. Florida Leasco, a Michigan corporation with its principal place of business in the state of Florida, leased the property to a related, commonly controlled entity, which brought the trucks to Michigan temporarily before taking them to terminals in another state.

In our present case, the subject aircraft had less contact with this state than the car haulers in *Florida Leasco*. Under the foregoing cases, assuming that Petitioner was a lessor of the subject aircraft, it is concluded that Petitioner did not use, store, or consume the property in this state.

Respondent's arguments regarding the "sham transaction" doctrine and the "economic substance" of the lease are set forth at pages 13 to 15 of its Brief. Respondent cites the alleged fact that WAM pilots flew the aircraft from Georgia to Florida on August 27, 2007, before the lease agreement was in effect. However, even if WAM operated the aircraft before execution of the lease, this does not prove that the lease that was executed on September 21, 2007 was a sham.

Respondent then asserts that "If WAM had purchased this aircraft, tax would have been due because there would be no applicable exemption." However, it is a fact that WAM did not purchase the aircraft, but Ponderosa did.

Respondent's arguments are unavailing. It cannot be concluded that the lease was a sham or lacked economic substance merely because Mr. Tom Wamberg was the majority member of both

Ponderosa and WAM. Furthermore, Respondent presents no credible argument and cites no facts to prove that the lease did not reflect arm's length terms, conditions, and rentals. Respondent has not presented any affidavits or documentary evidence to create a genuine issue of material fact with regard to this claim. This case is distinguishable from the Proposed Opinion and Judgment in *Devonair Enterprises v Department of Treasury*, MTT Docket No. 358558. In that case, it was found, *inter alia*, that a lease between the taxpayer and its individual member was not an arm's length transaction because the lease rate was insufficient for the lessor to recover its costs, and therefore, Petitioner was not "engaged in the business of leasing tangible personal property to others" so as to qualify for the rental receipts option under Rule 82. In this case, we do not reach any issues under Rule 82 or MCL 205.95(4), because it is determined that use tax does not apply. The legal basis for examining the economic substance of the lease is found in Rule 82's requirement that the taxpayer be engaged in the *business* of leasing. That specific legal issue does not arise here when determining whether the taxpayer has entered a valid lease for purposes of determining whether that person used, stored, or consumed the property in this state under MCL 205.93(1).

Even assuming that a lease could be disregarded as a sham such that use by the purported lessee would be attributed to the owner, Respondent has failed to create a genuine issue of fact to support this claim. On its face, the subject lease is what it purports to be. The lease rate of $36,500 per month for exclusive use and the other terms and conditions cannot be held to lack economic substance as a matter of law in this case. The facts indicate that the rentals were regularly invoiced and paid. Respondent has failed to come forward with any affidavit or documentary evidence to demonstrate a genuine factual dispute that the rental rate was not reflective of an arm's length transaction, or that the common membership invalidates the lease. Respondent's legal arguments are not persuasive.

The "Aircraft Dry Lease" (Exhibit 9) required Petitioner to deliver the aircraft to WAM, which it did on September 24, 2007, and required WAM to return the aircraft to Petitioner upon termination of the lease. Exhibit 9, paragraph 2.0. The lease granted the lessee exclusive possession of the aircraft upon delivery, and the lessee retained that right until termination of the lease.

> Wamberg Asset Management as Operator is leasing the Aircraft for the purpose of transporting its members, directors, officers, employees and guests in furtherance of its primary non transportation business. As Operator Wamberg Asset Management will be in Operational Control of Aircraft at all times. Operator will maintain possession of Aircraft at all times, and shall be solely responsible for its possession, use, and operation." Exhibit 9, paragraph 8.

The rental of $36,500 per month was due on or before the first day of each month.

The aircraft first came to Michigan for two days, October 19 through 21, 2007. In October 2007, the department issued the subject use tax assessment of $270,000, plus penalty and interest. Stip 31. The aircraft next came to Michigan to the airport at Cadillac, Michigan for a few hours on November 25, 2007. The flight logs indicate that Wamberg Asset Management was the "operator of aircraft" and that on both flights to Michigan, the aircraft was piloted by "CW" (Christopher Wickham, WAM Chief Pilot) and "JS" (John Slater, WAM First Officer). See, Exhibit A, attached to Respondent's Brief.

Petitioner claims that:

> Throughout the term of its lease, WAM used the Aircraft to meet with its business contacts. The aircraft's flight schedule was predicated on meetings organized by WAM's three executive directors, Mr. Wamberg, Mr. French and Mr. Todd. While under control of WAM, the Aircraft entered the State of Michigan for 2 days (October 19th through 21st) for business purposes. Petitioner's Brief in Support.

WAM also brought the Aircraft to Michigan for a few hours on November 25, 2007. The affidavit of Mr. Wamberg states that a business meeting was held in Grand Rapids, Michigan on October 19, 2007. (Exhibit B, paragraph 15, attached to Petitioner's Motion). Petitioner alleges that the aircraft was flown to Cadillac, Michigan on November 25, 2007, "to pick up a client of WAM and on June 8, 2008 to pick up an executive of WAM. Petition, paragraph 4 L. Respondent has asserted no contrary facts to demonstrate that the aircraft was used in this state by any entity other than WAM (the lessee) or that Petitioner (Ponderosa, the lessor) or Petitioner's members used the aircraft here for personal reasons.

The Court of Appeals has upheld the taxation of aircraft acquired in interstate transactions. *Kellogg Co* v *Dep't of Treasury*, 204 Mich App 489; 516 NW2d 108 (1994) and *Master Craft* v *Dep't of Treasury*, 141 Mich App 56; 366 NW2d 235 (1985). However, neither case supports Respondent's position. In *Kellogg*, the court upheld imposition of use tax upon two aircraft that a Michigan-based taxpayer purchased in another state and then brought to Michigan. The taxpayer took delivery of the aircraft outside Michigan, used them briefly outside Michigan, and then brought them to Michigan three days after acquisition. Kellogg registered the aircraft and *kept them in a hangar in Michigan while not in use*. There was no leasing transaction involved. Kellogg failed to rebut the statutory presumption that it used the aircraft in Michigan. The court rejected the petitioner's constitutional arguments, rejected the taxable moment test, and found the tax to be constitutional under *Complete Auto Transit v Brady,* 430 US 274 (1977).

In the present case, the aircraft was not based in Michigan as were the aircraft in *Kellogg.* Although the subject aircraft was registered with the FAA using a Michigan address, Respondent

does not contend that registration alone supports imposition of Michigan sales or use tax.

In *Master Craft*, *supra*, the court upheld use tax on a Cessna airplane that the taxpayer owned and used extensively in Michigan.

> Thereafter, Master Craft purchased a Cessna 412C. This plane was bought in Illinois, registered in Alabama, and, immediately after its purchase, flown to Michigan where petitioner took delivery of it. The plane contained little instrumentation. It was first flown to Detroit, and later to Tri-City Airport in Freeland, Michigan. The plane was taken to Freeland in order to have an experienced mechanic install the salvaged MU-2 equipment in the Cessna. From June 30, 1977, to December, 1977, repairs were made at Tri-City Airport, Willow Run Airport, and the Cessna dealership located in Illinois. After the repairs were completed--and it is unclear whether the last repairs were made in Illinois--the plane was hangared in Georgia. Master Craft paid no out-of-state sales or use taxes on either of these planes prior to the Michigan assessment.

Master Craft was a Michigan-based taxpayer that purchased the aircraft outside Michigan and took delivery in Michigan. There was no lease. From the date of purchase on June 30, 1977, and for at least six months thereafter, the aircraft spent time primarily in Michigan and also in Illinois to have avionics equipment installed before being taken to Georgia. The taxpayer argued that the storage and use in Michigan were insufficient to impose use tax upon the Cessna under the U.S. Constitution. The court held that "…the Cessna came to rest in Michigan immediately after purchase and before its interstate journey began. This action created a presumption under the use tax which Master Craft failed to rebut." *Id*. Furthermore, "…Master Craft exercised ownership rights over the Cessna while in this state, in conjunction with the fact that the Cessna came to rest in Michigan *before* becoming an instrumentality of interstate commerce." *Id*. The court also held, "While in this state, Master Craft clearly exercised its powers of ownership over the plane since it directed and alone determined that the plane should be repaired in Freeland and later kept at Willow Run." *Id*. The aircraft in *Master Craft* was used and stored in Michigan by its owner upon whom the tax was imposed.

Neither *Kellogg* nor *Master Craft* support the imposition of use tax on Petitioner in this case. Even if the lease is disregarded, it could not be held that Petitioner used the aircraft in Michigan. The aircraft was used in interstate commerce before it came to Michigan. The aircraft was brought to Michigan for business purposes in interstate commerce. The aircraft was in Michigan for less than four days in 2007 and was stored in a hangar outside Michigan, whereas the aircraft in *Master Craft* was in this state for six months.

The subject's significant contacts with this state are as follows: 1) the aircraft is registered to Petitioner, a limited liability company organized under Michigan law, 2) Petitioner registered the aircraft with the federal aviation administration using a Michigan address, 3) Petitioner holds an aircraft dealer license issued by the State of Michigan, which lists its place of business as 7065 N. Kings Hwy, Luther MI 49656, 4) Petitioner entered an "Aircraft Dry Lease Agreement" with Wamberg Asset Management on September 25, 2007 (execution of the lease occurred outside Michigan), 5) communications and notices under the lease are to be mailed to Petitioner at an address in North Barrington, Illinois, 6) the lease agreement is governed by the law of Illinois, and 6) payments under the lease are to be made to Chemical Bank, Big Rapids, Michigan, and 7) the aircraft was brought to Michigan on October 19 through 21, 2007, November 25, 2007, and one day in 2008.

Based upon the above case law as applied to the present facts, Petitioner did not use, consume, or store the aircraft in this state, and therefore, no use tax liability arose under MCL 205.93.

Respondent has failed to demonstrate the existence of a genuine issue of material fact to support its argument that the lease should be disregarded as a sham transaction that lacks economic substance. There is no evidence to support a conclusion that the lease rates and terms did not reflect an arm's length transaction. The mere fact that Petitioner and the WAM are commonly controlled is not sufficient to support Respondent's claim. *Czars, M&M Aerotech, supra*.

However, even assuming that Respondent was able to present facts to create a genuine factual issue for trial with regard to the economic substance of the lease, the undisputed facts do not support a conclusion that Petitioner used, stored, or consumed the aircraft in this state within the meaning of MCL 205.93. Even if there was no lease, the facts demonstrate that the aircraft was purchased outside this state and used in interstate commerce before coming to Michigan for a few days in 2007 and one day in 2008. The aircraft also was brought to several other states, within 90 days of acquisition, both before and after it came to Michigan. Assuming those states also have a use tax, each state would have a claim that use tax applies in that state. It appears that the aircraft was purchased for use, storage, or consumption in Indiana where it was hangared, and was also used in many other states to transport WAM personnel.

AC, R 205.62(4) states that aircraft "*purchased for consumption or use in Michigan* from individuals for retailers outside the state of Michigan are subject to the . . . use tax." (Emphasis added). Upon consideration of the facts and circumstances of this case, it is concluded that the subject aircraft was not purchased for consumption or use in Michigan, and no use tax applies.

The facts indicate that after Respondent assessed use tax upon the entire price, it issued nine assessments for the months of January through September of 2007 in the amount of $772 per month (use tax). Exhibit 13, Stip 36 and 37. The stipulated facts also indicate that Petitioner paid use tax on rental receipts when it filed an annual use tax return for 2007 (filed February, 2009). Petitioner's verified petition filed October 21, 2008, alleges that it erroneously paid use tax on rental receipts for the period September 21, 2007 through December 31, 2007, in the amount of $9,264, and by subsequent tax payments based on rentals paid for January, February, March, and April of 2008 totaling $8,760 for those months. Petition, paragraph 5, and Stip 32 through 35. The petition constitutes a claim for a refund of these tax payments. MCL 205.30. Petitioner also raised this claim at the informal conference held August 14, 2008. As a result of this ruling, Petitioner is entitled to a refund of these use tax payments together with interest as provided by MCL 205.30. Or, reaching the same result on alternative grounds, had the subject use tax assessment (no. 922035) been affirmed, Petitioner would have been entitled to a credit for the use tax that it had erroneously remitted on the rental payments. Having ruled that no use tax is due, Petitioner is entitled to this credit.

Stipulated Exhibit 13 includes nine assessments of use tax ($772), penalty ($193) and interest, issued to Petitioner on July 8, 2008 (Nos. Q142228, Q142229, Q142230, Q142231, Q142232, Q142233, Q142234, Q142235, and Q142236). The assessments apply to the periods 01/07 through 09/07. These assessments were issued on July 8, 2008, after the assessment at issue in

this proceeding (No. 698817) was issued in October 2007, but apply to periods before October 2007. The parties stipulated that these nine assessments apply to the subject aircraft. Stip 36. Seven of the assessments apply to periods before Petitioner acquired the subject aircraft on July 24, 2007, and all of them apply to periods prior to the date payments were due under the lease (first lease payment was due October 1, 2007). The subject assessment was issued in October 2007 in the amount of $270,000, based on a price of $4,500,000. Petitioner was required to, and apparently did, request an informal conference to contest the subject assessment within 60 days. MCL 205.21(2)(c). Thereafter, Petitioner filed an annual use tax return in February 2008 and paid use tax on rentals received for the months of September 2007 through December 2007. As indicated above, Petitioner then remitted monthly use tax payments for rentals received in January through April of 2008, but apparently not for any periods thereafter. Petition, paragraph 5. On July 8, 2008, Respondent issued the nine above referenced assessments. Exhibit 13. There is no indication that Petitioner requested a separate informal conference for these nine assessments. The informal conference was held on August 14, 2008. The final Decision and Order of Determination, dated September 18, 2008, and the informal conference recommendation only reference the subject assessment No. P698817. The hearing referee acknowledged that Petitioner had remitted use tax on rental receipts in March 2008, but did not account for those payments, and upheld the assessment in full. Again, there was no mention of the above-referenced nine assessments that had been issued one month before the informal conference. Petitioner alleges that the issues discussed at the informal conference were whether Petitioner owed use tax on rental receipts or qualified for a dealer exemption. Petition, paragraph

6 and 7. It is clear that the issuance of the nine assessments on July 8, 2008, for periods 01/07 through 09/07, are inconsistent with Respondent's position in this case that use tax was due on the entire price, and that Petitioner did not qualify to pay tax on rental receipts. Assuming that the nine assessments remained in effect, they would have been properly at issue in the informal conference. Apparently, there was no need to address them because the referee concluded that use tax was due on the entire purchase price. However, it is not clear whether these assessments were paid, cancelled by the department, or otherwise resolved in another proceeding. Petitioner's responsive brief, at page 10, mentions a settlement reached pursuant to an action in the Court of Claims pertaining to use taxes related to the subject aircraft. Based on the foregoing, the record is insufficient to allow this hearing officer to render a proposed judgment with regard to the validity of assessment numbers Q142228, Q142229, Q142230, Q142231, Q142232, Q142233, Q142234, Q142235, and Q142236. (However, it is clear that no use tax could be due on the subject aircraft for periods prior to the date Petitioner acquired it, and further, no use tax liability ever arose because there was no taxable use in Michigan.) The most efficient way to address this issue is to render this proposed judgment cancelling the subject assessment No. P698817, and to allow the parties to address any issue pertaining to the other assessments in the exceptions process, or to otherwise resolve those assessments in a manner consistent with this ruling.

Upon review of the motions, supporting briefs, documentary evidence, and affidavits, it is concluded that there are no genuine issues of material fact, and Petitioner is entitled to judgment under MCR 2.116(C)(10). Having so ruled, it is unnecessary to reach the remaining issues set

forth in the Tribunal's Prehearing Conference Summary pertaining the rental receipts option and the resale exemption.

Judgment

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED and assessment No. P698817 is CANCELLED.

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

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: March 11, 2011 By: Thomas A. Halick