Northport Creek Golf Course LLC,
Petitioner,

v

Leelanau Township,
Respondent.

MICHIGAN TAX TRIBUNAL

MAHS Docket No. 15-002908-R
COA Docket No. 337374

Presiding Judge
Preeti P Gadola

FINDINGS ON REMAND FROM MICHIGAN COURT OF APPEALS

DOCKET NO. 337374

INTRODUCTION

On May 27, 2015, Petitioner filed an appeal with the Tribunal contending the subject property, a nine-hole golf course, is exempt from ad valorem property taxation under MCL 211.7m, as property owned by a Village or Township. Further, Petitioner alleged it was not required to pay the tax under MCL 211.181, because it was not the lessee or "user" of the property. Respondent had assessed tax to Petitioner under MCL 211.181(1) as it found the property was "leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit." Petitioner contended, however, that MCL 211.181(1) did not apply in this instance, because subsection (2) states: "Subsection (1) does not apply to all of the following: (b) Property that is used as a concession at a public airport, park, market, or similar property and that is available for use by the general public."

The parties filed cross motions for summary disposition and the Tribunal granted Respondent's motion, finding Petitioner conducted a for-profit business and the property was not used as a concession under MCL 211.181(2)(b). However, the parties and the Tribunal did not engage in an analysis as to whether Petitioner was user of the property under MCL 211.181(1).

The Michigan Court of Appeals (COA) reversed and remanded the Tribunal's final opinion and judgment and ordered it to enter summary judgment in favor of Petitioner. The Court wrote,

> In sum, we conclude that a governmental entity may contract with a private, for-profit business to manage property owned by the governmental entity without the private business necessarily becoming a "user" under MCL 211.181. Because neither respondent nor the tax tribunal has presented any analysis that petitioner is a "user" under MCL 211.181 beyond petitioner's being a for-profit business, the tax tribunal erred in denying summary disposition to petitioner. Petitioner was entitled to summary disposition and an order from the tax tribunal directing respondent to recognize that exemption under MCL 211.7m and recognizing that petitioner is not subject to tax under MCL 211.181.[1]

Respondent filed an application for leave to appeal the COA decision to the Michigan Supreme Court (MSC). In lieu of granting leave, the MSC vacated the portion of the COA analysis which stated, "[b]ecause neither respondent nor the tax tribunal has presented any analysis that petitioner is a "user" under MCL 211.181 beyond petitioner's being a for-profit business, the tax tribunal erred in denying summary disposition to petitioner." Because, as noted above, the Tribunal did not directly address the issue when it was before the Tribunal, the MSC remanded the case to the COA for further consideration. It ordered,

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[1] Cite

> On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Tax Tribunal to conduct a hearing to answer the following questions as posed in the Court of Appeals analysis: "whether the golf course is 'used by' petitioner 'in connection with a business conducted for profit' and petitioner is the 'user of the real property.'" MCL 211.181(1).

On February 28, 2019, the Tribunal held a hearing as ordered by the higher Courts. Timothy J. Clulo and Catherine B. Ballard, Attorneys, represented Petitioner, and Michael D. Homier and Leslie A. Dickinson, Attorneys, represented Respondent.

Petitioner's witnesses were William Collins, sole Member of Petitioner, and Christopher McCann, manager of the golf course. Respondent did not call any witnesses or present a case-in-chief. It did, however, participate in cross-examination of Petitioner's witnesses.

PETITIONER'S CONTENTIONS

Petitioner contends that in 2014, Northport Creek, LLC, "donated the subject golf course to the Village of Northport for the charitable purpose of providing the general public with access to high-quality golf that is neither prohibitively expensive nor exclusive."[2] At that time, however, the Village did not have the staffing or financial capability to operate the public golf course, and therefore, hired Northport Creek Golf Course, LLC (NCGC) to operate the course, on its behalf.

Petitioner contends NCGC has not profited from its management of the golf course and that it does not have a profit motive. Moreover, Petitioner contends it is not using the golf course, as its role "is to operate and manage the golf course on the

[2] The Tribunal requested the parties file pre-hearing briefs before the commencement of the hearing of this matter. See Petitioner's Pre-Hearing Brief at 1.

Village's behalf, under extensive Village oversight, . . ."[3] Petitioner contends "it is not a 'user' of the golf course 'in connection with a business conducted for profit,' and the lessee-user statute does not apply."

PETITIONER'S ADMITTED EXHIBITS

P-1: Donation Agreement Between the Village of Northport and Northport Creek, LLC, dated October 3, 2014.

P-2: Management Agreement between the Village of Northport and Northport Creek Golf Course, LLC, dated October 3, 2014.

P-3: 2014 Northport Creek Golf Course, LLC IRS Form 1040 Schedule C.

P-4: 2015 Northport Creek Golf Course, LLC IRS Form 1040 Schedule C.

P-5: 2014 Northport Creek Golf Course, LLC Profit and Loss Statement.

P-6: 2015 Northport Creek Golf Course, LLC Profit and Loss Statement.

PETITIONER'S WITNESSES

William Collins

Mr. Collins is the sole Member of Northport Creek, LLC, the former owner of the subject golf course which was donated to the Village of Northport. He is also the sole Member of Northport Creek Golf Course, LLC, the manager of the subject golf course. He testified he purchased the course land and hired an expert to build the course, with the sole intent of donating it the Village of Northport, "to stimulate business and get more people coming to the Village."[4] He testified he never had the desire to make money from the golf course's operation.

[3] See Petitioner's Brief at 4.
[4] Transcript (Tr.) at 8.

Mr. Collins shared his idea with the Village and it replied, "We don't like that idea." "You go ahead and build the golf course and then we'll talk about it." "They said they didn't want to run it."[5] "[T]here was a lot of concern about the village might lose money if they had it. So, I agreed in the management contract that we would handle any losses that occurred during the term of the five-year contract."[6] Ultimately, the Village agreed to accept the donation if Petitioner managed the golf course. The Donation Agreement asserted that if a management agreement was executed, NCGC would continue to pay all property taxes, special assessments, utilities, payroll taxes and withholdings for its employees, "absent exemptions acquired by Northport Creek Golf Course, LLC."[7] Mr. Collins testified he would be happy to turn over control of the golf course to the Village at any time, as he would like to retire.

Mr. Collins filed tax returns for Petitioner as part of his personal returns. His profit and loss statement for NCGC showed a loss of $355,413 in 2014 and a loss of $162,872 in 2015. He testified he has a half-dozen LLCs that manage his individual interests in the Village of Northport, all reported on his personal tax return.[8] He contends that income from the LLCs is passed through to him, his losses offset income, and he personally made money in 2014 and 2015.[9] Mr. Collins testified that while the golf course lost money, if it generated revenue in excess of costs, NCGC would make a profit.[10]

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[5] Tr. at 9.
[6] Tr. At 10
[7] Tr. at 24, See R-1 at 004.
[8] Tr. at 19, 23.
[9]Tr. at 22, 32.
[10] Tr. at 35.

Collins testified that NCGC is not set up as a nonprofit because "LLCs are such an easy way nowadays to start these little businesses to keep track of them, and that's why I've done half a dozen that way."[11] However, in 2017, management of the golf course was transferred to a non-profit entity, Northport Golf Course, Inc., and the management contract was extended for an additional five years.[12]

Petitioner read into the record paragraph six of the Management Agreement between NCGC and the Village, which states, "All revenue generated by operation of the golf course shall be collected by NCGC as agent for the village and reported to the village on a monthly basis no later than the 10th day following the end of each calendar month." "As consideration for its services hereunder, NCGC shall receive 95 percent of the gross revenue."[13] Also in the Agreement, it states, 5% of the gross revenue was to be paid to the Village, to reimburse it for the property taxes it lost, previously paid by Northport Creek, LLC, when it operated the golf course.[14] Mr. Collins was questioned:

> Q: So you didn't believe that you should pay township taxes, but you had no problem paying village taxes?
>
> A: Because the property belongs to the village and the village doesn't have to pay real estate taxes.
>
> Q: Well, if the property belonged to the village, why are you paying village taxes?
>
> A: I was paying them that to make up for the loss of money that they would have had.[15]

[11] Tr. at 23.
[12] Tr.at 26, 33, R-8.
[13] Tr. at 27, R-2 at 005.
[14] Tr. at 28, R-2 at 005.
[15] *Id.*

Mr. Collins testified he wished to relinquish control of the golf course to the Village, but NCGC has current control.[16] Mr. Collins was questioned regarding Petitioner's control and use of the golf course.

> Q: Well, sir, how do you manage a golf course without using the golf course property?
>
> A: The people that play are using it.
>
> Q: Well, don't you maintain it?
>
> A: Yes.
>
> Q: Okay. And you have to incur all of the costs to maintain it?
>
> A: Yes.
>
> Q: Okay. You have the control over how its maintained?
>
> A: Yes.
>
> Q: Okay. And that includes not only the golf course, but the fairways, the greens, the clubhouse, the carts, the solar, --[17]
>
> A: Yes.
>
> Q: --everything; correct?"
>
> A: Yep.
>
> Q: Isn't that control?
>
> A: Of those items.
>
> Q: Is it possible to run a golf course without using the property?
>
> A: No.[18]

[16] Tr. at 29.
[17] Mr. Collins is the sole Member of a solar LLC that, "is generating electricity for the golf course." He testified, "When I get the bills for the solar LLC, I end up paying them." The electricity runs the clubhouse, golf course irrigation system, generally all electrical needs of the golf course. See Tr. at 19-20.
[18] Tr. at 30.

Christopher McCann

Mr. McCann is employed by Petitioner as the Director of Golf and Grounds. "[He manages] all of day-to day aspects of the golf course, from the clubhouse management, employees and staffing there, to the day-to-day operations of the maintenance staff, green keepers and such."[19] He also completes the bookkeeping, including profit and loss statements. He completed the 2014 and 2015 Profit and Loss Statements. In 2014, there was a loss of $81,847.08, and in 2015, a loss of $154,907.14.[20]

Mr. McCann was questioned regarding Petitioner's use of the golf course:

> Q: You described your title or your position as managing the golf course; is that right?
>
> A: I oversee the operations, the day-to-day operations of the golf course.
>
> Q: And you couldn't operate a golf course without using the golf course, could you?
>
> A: I guess no.[21]
>
> Q: You use the building; correct? The clubhouse?
>
> A: Sure.
>
> Q: Do you use the golf course?
>
> A: We do.[22]

Mr. McCann testified it was NCGC's goal to make a profit and provide the Village with a blueprint on how to operate the golf course. The goal was for the Village to see that it could generate revenue, or at least break even, so it would take over operations

[19] Tr. at 39.
[20] See P-5 and P-6.
[21] See Tr. at 53-54.
[22] Tr. at 61.

of the course.[23] Mr. McCann testified that on April 10, 2017, the management of the golf course was transferred to Northport Golf Course, Inc., in the First Amendment to the Management Agreement. Mr. McCann was questioned regarding the First Amendment to the Management Agreement, which he read into the record:

> Paragraph 6 of the management agreement is amended to add the following at the end of the paragraph: "In addition to the 5 – percent of gross revenues payable to the Village, Northport Golf Course shall pay all net income to the Village on or before December 31st of each year. Net income shall mean all revenue in excess of expenses." "The intention of this provision shall be for Northport Golf Course to transfer all profits of operation of the golf course to the Village."
>
> Q: So prior to April the 10th, it was not the intention to transfer all profits to the village, because it was amended to pay otherwise; true?
>
> A: That's what it says here.[24]

Mr. McCann was questioned as to why the 2014 loss on his books shows $81,847.08, but Mr. McCann's personal tax return lists losses for NCGC of $355,413. He testified that he does not know. [25]

RESPONDENT'S CONTENTIONS

Respondent contends that Petitioner is a for-profit company, maintains day-to-day financial and physical control over the subject golf course, and uses it in connection with a business conducted for profit. Respondent contends Petitioner maintains the fairways, greens, golf carts, clubhouse, and solar electricity system which operates the irrigation system and provides for all other electrical needs. Respondent contends Petitioner retains 95% of the gross revenue from the course and returns 5% to the

[23] Tr. at 44, 54.
[24] See Tr. at 57. R-8 at 001.
[25] Tr. at 59.

Village of Northport to reimburse it for the property taxes it lost when the course became publicly owned. However, Petitioner refuses to reimburse Respondent. Further, Mr. Collins, sole Member of NCGC, offsets his half-dozen LLC gains with NCGC's losses. Respondent contends the donation of the golf course to the Village of Northport was not predicated on Petitioner's management of the course as the purchase agreement stated the conveyance was "not conditioned on execution of the Management Agreement."[26] Further, the Management Agreement indicated NCGC was willing to operate and manage the golf course "as its own enterprise."

RESPONDENT'S ADMITTED EXHIBITS

R-1: Purchase Agreement Between Northport Creek, LLC and the Village of Northport.

R-2: Management Agreement between Petitioner and the Village of Northport.

R-3: Petitioner's Articles of Incorporation.

R-4: Respondent's Valuation Disclosure.

R-5: 2015 Valuation Report.

R-6: 2015 Property Record Card.

R-7: 2015 Notice of Assessment, Taxable Valuation and Property Classification.

R-8: First Amendment to Management Agreement.

R-9: News Article from March 2018 Leelanau Enterprise.

RESPONDENT'S WITNESSES:

Respondent did not call any witnesses in this matter.

FINDINGS OF FACT

1. The subject property is a nine-hole golf course located in the Village of Northport.

[26] See R-1 at 006.

2. It was donated from Northport Creek, LLC, a for-profit organization, of which Mr. William Collins is the sole member, to the Village of Northport on October 3, 2014.
3. A five-year Management Agreement was entered into on October 3, 2014 between the Village of Northport and Northport Creek Golf Course LLC, of which Mr. William Collins in the sole member. The Management Agreement was not a requirement relative to the donation of the property.
4. NCGC managed all operations of the golf course and completed its bookkeeping and profit and loss statements. In compensation for the management, it retained 95% of the generated revenue. Per the management agreement, NCGC paid 5% of the revenue to the Village of Northport to reimburse it for the property taxes it lost when Northport Creek LLC donated the golf course to the Village.
5. NCGC did not reimburse Respondent for the taxes it lost when Northport Creek LLC donated the golf course to the Village.
6. A Nonprofit Corporation was formed in 2017, Northport Golf Course, Inc. of which Mr. William Collins is the Resident Agent.
7. On April 10, 2017, the management of the golf course was transferred to Northport Golf Course, Inc. A management agreement was entered into entitled "First Amendment to Management Agreement," putting forth that all net income generated by the subject golf course would be payable to the Village of Northport on December 31st of each year, in addition to 5% of gross revenues. The Management Agreement was extended by five years.

8. Mr. Collins reported all profit and losses from NCGC and several other LLCs on his personal income tax return, and in 2014 and 2015, offset profits with losses, and personally made money.
9. Mr. McCann testified NCGC used the property clubhouse and golf course.
10. Mr. Collins testified NCGC incurs all costs to maintain the golf course and has control over how it is maintained, including fairways, greens, clubhouse, carts, and solar energy. He testified it is not possible to run a golf course without using it.

CONCLUSIONS OF LAW

The subject property is a golf course exempt from taxation under MCL 211.7m. However, pursuant to MCL 211.181(1), Petitioner may be subject to the tax due if the property is used by Petitioner in connection with a business conducted for profit and Petitioner is the user of the property.[27] MCL 211.181 "generally applies to taxation of lessees or users of tax-exempt property. It provides that if real property is exempt from ad valorem property tax, but that property is subject to a lease, then the lessee or user of the real property is subject to taxation as if that lessee was the owner or user of the property."[28] As the COA recognized in *Skybolt Partnership v. City of Flint,*[29] pursuant to petitioner's use of property at a public airport:

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[27] MCL 211.181(1) states, Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessee or user of the real property is subject to taxation in the same amount and to the same extent as though the lessee or user owned the real property.

[28] *Lucre, Inc v City of Grand Rapids*, Unpublished Opinion of the Michigan Court of Appeals, (Docket No. 319781) 2015.

[29] *Emory Worldwide v Cascade Township*, Unpublished Per Curiam Opinion of the Court of Appeals (Docket No. 251416) 2005, quoting *Skybolt Partnership v. City of Flint,* 205 Mich.App 597, 601; 517 NW2d 838 (1994)

> The lessee-user tax is intended to ensure that lessees of tax-exempt property will not receive an unfair advantage over lessees of privately owned property." However, the tax is not applicable to every *use* of such property. "Property that is used as a concession at a public airport, park, market, or similar property and that is available for use by the general public" is expressly exempt from taxation under the act.[30] Thus, petitioner's use of the property at issue here, being located at a public airport, is subject to taxation under the LUTA unless that property is both "used as a concession" and is "available for use by the general public.[31]

There is no definition in the General Property Tax Act of "use," "used by," or "user."[32] Without statutory guidance, higher Courts have turned to dictionary definitions. "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory."[33] However, Courts give undefined statutory terms their plain and ordinary meanings.[34] In those situations, Courts may consult dictionary definitions.[35]

Black's Law Dictionary, 10th edition, puts forth the following definition of use:

> The application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional <the neighbors complained to the city about the owner's use of the building as a dance club>."
> The definition of "user" is: "[t]he exercise or employment of a right or property <the neighbor argued that an easement arose by his continuous **user** over the last 15 years>."

Webster's New World Dictionary, 5th edition, defines "use," in pertinent part, as:

> "to put or bring into action or service; employ for or apply to a given purpose," "the right or permission to use; to grant a neighbor the use of one's car," or from law: "the enjoyment of a property, as from occupying, employing or exercising it."

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[30] *Id.* quoting, MCL 211.181(2)(b).
[31] *Id.* quoting *Skybolt, supra* at 602.
[32] Act 206 of 1893, MCL 211.1, *et seq*
[33] *Koontz v Ameritech Services, Inc and Unemployment Agency of the Michigan Department of Consumer and Industry Services, Formerly Employment Security Agency, Appellee,* 466 Mich 304, 312 645 NW2d 34, (2002) quoting, *Wickens v Oakwood Healthcare System*, 465 Mich 53, 631 NW2d 686 (2001).
[34] *Donajkowski v Alpena Power Co*., 460 Mich 243,248, 596 NW2d 574 (1999).
[35] *Id.*

"User" is defined as "a person or thing that uses something," or from law, "the exercise of a right of use."[36] The Tribunal finds that these definitions of users or use are consistent with NCGC's operations at the subject property. Mr. Collins, the sole Member of Northport Creek, LLC, the owner of the subject golf course before its donation to the Village of Northport, purchased the land, constructed and ran the for-profit course, and paid property taxes to Leelanau Township and the Village of Northport. On the same day of its donation, Mr. Collins, sole Member of NCGC, signed a Management Agreement with the Village. NCGC was not paid a fee for its management services but was given 95% of the gross revenue from the course. Plus, it agreed to pay 5% of the gross revenue back to the Village in order to reimburse it for the property taxes it lost from Northport Creek LLC. Pursuant to Black's Law Dictionary, NCGC had "long-continued possession and employment of a thing for the purpose for which it is adapted." Pursuant to Webster's New College Dictionary, NCGC had "permission to use" the golf course, brought it into service and employed it "for a given purpose." It also enjoyed the property, "as from occupying, employing or exercising it."

NCGC had continued financial and physical control over maintenance of the fairways, greens, clubhouse, golf carts, and electricity source for the golf course. Further, both Mr. Collins and Mr. McCann testified that NCGC used the golf course. The Tribunal finds there is little chance that Petitioner, who was in charge of the day-to-day operations of the golf course, tried to create a blueprint for its operation to turn over to the Village, and attempted to make it profitable, but did not use the golf course. The

[36] *Webster's New World College Dictionary*, 5th ed. (2014)

Tribunal finds Petitioner used the subject golf course and is the user of the real property, by exercising its "right of use" bestowed by the Management Agreement.

The next query is whether Petitioner used the subject golf course in connection with a business conducted for profit. In its original opinion and judgment, the Tribunal found Petitioner was a for-profit business and was not a concession but did not consider whether the property was used in connection with a business conducted for profit. Mr. Collins testified he constructed the golf course to bring business into the Village. He contends Petitioner was formed to manage the golf course until it made a profit, then ideally, pass on management to the Village. Mr. Collins testified NCGC does not have a profit motive and operated at a loss. However, the higher Court already found that "operating at a loss does not establish non-profit status; for-profit businesses can and do sustain operating losses, as evidenced by the existence of Bankruptcy Court."[37] Further, in order to avoid future issues with the lessee-user statute, Mr. Collins testified that in 2017, he formed a nonprofit corporation to manage the golf course.

The subject golf course may operate at a loss, but Mr. Collins, the sole member of Petitioner, offset his "half-dozen" LLC gains with the losses from NCGC on his personal income tax returns.[38] This is not a mere contract with a private, for-profit business for which a set compensation is paid for management, but an arrangement where Petitioner uses the golf course to collect and retain 100% of the revenue but returns 5% to the Village of Northport to reimburse it for the property taxes it lost when the golf course became publicly owned. Yet, Petitioner refuses to reimburse the

[37] *Northport Creek Golf Course, LLC v Leelanau Township*, unpublished per curiam opinion of the Court of Appeals (Docket No. 337374) 2017.
[38] For example, Mr. McCann's profit and loss statement for the golf course for 2014 listed a loss of ($81,847.08), but his 2014 tax return put forth a loss of ($355,413).

Township for the property taxes it lost when the golf course was donated. Northport Creek LLC, a for-profit company, built, maintained, and had the potential to profit from the operation of the golf course. It donated the course to a municipality, yet formed another for-profit company to perform all the same day-to-day functions and realize any profit by using the course. Based on the facts gathered at the hearing of this matter, the Tribunal finds the subject golf course is used by NCGC in connection with a business conducted for profit and Petitioner is the user of the real property.

By Preeti Gadola

Entered: April 9, 2019