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

C.D.M. Leasing, L.L.C.,
Petitioner,

v

MTT Docket No. 440908

Michigan Department of Treasury,
Respondent.

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

PROPOSED OPINION AND JUDGMENT

INTRODUCTION

Petitioner, C.D.M. Leasing, L.L.C., is appealing Final Assessment No. Q339576 issued by Respondent, Michigan Department of Treasury, on May 11, 2012, imposing use tax in the amount of $316,230.00, plus penalty of $79,057.50, and statutory interest, on the purchase of an aircraft acquired on May 26, 2008. The assessment results from Respondent's disallowance of Petitioner's lessor election and its claim that Petitioner and others used the subject aircraft for personal flights outside the scope of a leasing business.

On May 7, 2013, Respondent filed a Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10) arguing that Petitioner was not in the business of

leasing the subject aircraft and used the aircraft for personal use which supports the disallowance of the lessor election. On May 21, 2013, Petitioner filed a response to Respondent's Motion.

On May 9, 2013, Petitioner filed a Motion for Summary Disposition under MCR 2.116(C)(10) arguing that it was in the business of leasing the subject aircraft because it is a substantial leasing company, and the purported market rents, charged through the leases, resulted in rental income in 2008. On May 17, 2013, Respondent filed a response to Petitioner's Motion.

The Tribunal finds that granting Respondent's Motion for Summary Disposition, under MCR 2.116(C)(10), and denying Petitioner's Motion for Summary Disposition is warranted. As such, the Tribunal finds that no genuine issues of material fact exist and a judgment on the merits shall be rendered, in favor of Respondent, at this time.

RESPONDENT'S CONTENTIONS

Respondent moves for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there is "no genuine issue of material fact, and [it] is entitled to judgment upholding the subject assessment as a matter of law. Respondent disallowed Petitioner's lessor election on the purchase of a 2008 Hawker Beechcraft King Air B200GT aircraft and assessed use tax on the purchase price.

Respondent cites factors set forth in both *Devonair Enterprises, LLC v Dep't of Treasury*, 297 Mich App 90; 823 NW2d 328 (2012), and *Heidrich Aviation, LLC v Dep't of Treasury*, 20 MTTR 481 (Docket No. 358557, December 9, 2011), that should be evaluated to determine whether an entity is engaged in the business of leasing property to others. In analyzing the factors, Respondent argues that CDM was not in the business of leasing the aircraft because Petitioner did not engage in the leasing of the aircraft with the 'object of gain, benefit, or advantage," as defined by MCL 205.92(h). Respondent argues that "it is also undisputed that the 'leasing' activity of the aircraft was so minimal that it failed to cover the maintenance and insurance expenses of the aircraft, let alone beginning to recover any of the multi-million dollar purchase price for the aircraft." (Respondent's Brief, p 8.) Respondent also states that "CDM neither sought to nor maximized rental hours," and "[i]t did not advertise that the aircraft was available for lease to the general public. Instead, it let the aircraft sit idle, kept the lease rates at $400, [a]nd it let its members take the aircraft to the Bahamas without a lease." (Respondent's Brief, p 9.)

Respondent also contends that "CDM's personal use of the aircraft supports Treasury's disallowance of the lessor election and conclusively establishes CDM's liability to pay use tax on the price of the aircraft." (Respondent's Brief, p 6.) Respondent cites to flight logs that show "CDM, as well as its members, routinely

used the aircraft at issue for personal use." *Id*. Respondent contends that the personal use is taxable use as it "is well outside the scope of any leasing activity." *Id*. Respondent argues that the "lessor election is an election for lessors—not the end users. And CDM and its members were unequivocally the users of the aircraft." (Respondent's Brief, p 7.)

Finally, Respondent asserts the facts of this case are similar to that presented in *Devonair, supra*. Thus, Respondent states, "the facts of this case present a stronger basis for denial of a lessor election than those presented in *Devonair*." *Id*.

PETITIONER'S CONTENTIONS

Petitioner moves for summary disposition under MCR 2.116(C)(10), arguing that the assessment should be cancelled because "it is a business and may elect to pay use tax on rental receipts as opposed to a sales tax on the purchase price at time of acquisition." (Petitioner's Motion, p 1) Petitioner states that it leased the subject aircraft to Dan's Excavating, Inc. and CP Ventures, LLP ("Lessee"), both related entities with Petitioner. Petitioner states that it entered into separate leases with Lessee, effective on May 26, 2008. The "[L]essee paid an hourly rate of $400 to Petitioner for time the airplane was used by Lessee." (Petitioner's Motion, p 3.) Petitioner contends this rate was "determined by ascertaining what independent airplane leasing companies would charge on an hourly basis for the full service rental." *Id*. Then, Petitioner deducted the estimated cost per hour for fuel and pilot

since the leases were dry. Thus, Petitioner contends, the hourly rate "was the market rate charge for use of the airplane for a dry lease and the rate specified in the Aircraft Leases." *Id*.

Petitioner also states that "[a]lthough the Lessor and Lessee are affiliated by family, there is nothing to prevent Petitioner from leasing the airplane to others and no evidence can be presented to show that under appropriate circumstances that Petitioner would not enter into such a lease with an unrelated party." (Petitioner's Brief, p 3.) Petitioner also cites *Caledesi Holdings, LLC v Michigan Dep't of Treasury*, 21 MTTR 226 (Docket No. 358183, March 13, 2012), in support of its position that " merely because the Lessor and Lessee are affiliates, does not make the leasing activity any less of a business." (Petitioner's Brief, p 3.)

Petitioner contends that it was a business eligible for the lessor election. Specifically, Petitioner states that "[t]he relationship between Petitioner and the lessees were very favorable to Petitioner on an overall basis. In fact, it had earned over $300,000 in rental income in 2008 from the relationship." *Id*. Further, Petitioner argues that the actual financial result of the leasing activity is irrelevant; rather, it is the "original intent of the Lessor [that] is the relevant and determining factor." (Petitioner's Brief in Opposition, p 3.) Therefore, Petitioner requests that the Tribunal find that it was engaged in the business of renting or leasing tangible personal property to others and grant summary disposition in its favor.

Finally, Petitioner disputes Respondent's contention that any personal use of the aircraft prohibits the lessor election. Rather, Petitioner states that "[n]othing in [MCL 205.95(4)] even remotely indicates a prohibition of personal use." *Id*.

STANDARD OF REVIEW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(8). Motions for summary disposition under MCR 2.116(C)(8) are appropriate when the opposing party has failed to state a claim on which relief can be granted. Summary disposition should be granted when the claim, based solely on the pleadings, is so clearly unenforceable that no factual development could possibly justify a right to recovery. *Transamerica Ins Group v Michigan Catastrophic Claims Ass'n*, 202 Mich App 514, 516; 509 NW2d 540 (1993). In reviewing a motion for summary disposition under this subsection, the court must accept as true all factual allegations in support of a claim, as well as all inferences which can fairly be drawn from the facts. *Meyerhoff v Turner Constr Co*, 202 Mich App 499, 502; 509 NW2d 847 (1993).

Respondent also moves for summary disposition pursuant to MCR 2.116(C)(10), which provides the following ground upon which a summary disposition motion may be based: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment

or partial judgment as a matter of law." The Michigan Supreme Court, in *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), provided the following explanation of MCR 2.116(C)(10):

> [T]he initial burden of production is on the moving party, and the moving party may satisfy the burden in one of two ways.
>
> First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.
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> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 361-363. [Citations omitted.]

In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

CONCLUSIONS OF LAW

The Tribunal has considered the Motions, the responses, and the case file, and finds that there are no genuine issues of material fact and that Respondent is entitled to judgment as a matter of law under MCR 2.116(C)(10).

Petitioner's Motion for Summary Disposition shall be denied because it has failed to support its position with an affidavit or sufficient documentary evidence. Although Petitioner submitted the Affidavit of Douglas George, the Affidavit does not comply with the requirements set forth in the Michigan Court Rules. Specifically, MCR 2.119(B)(1)(b) states that, among other requirements, an affidavit must ". . . state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion." Here, the affidavit merely states that Douglas George is "personally familiar with the factual allegations in . . . Petitioner's Motion for Summary Disposition and that they are true to the best of his knowledge, information and belief." (Petitioner's Motion for Summary Disposition, Exhibit 1.) The Affidavit does not state any facts with particularity; it merely incorporates the facts contained in the Motion. Further, this violation is not harmless because the error is regarding the content of the Affidavit and not the

form; therefore, the Tribunal finds that Petitioner's affidavit of Douglas George is inadequate as a matter of law to create a genuine issue of material fact.

Even if the Affidavit of Douglas George had specifically set forth all of the factual allegations in Petitioner's Motion and Brief, there would be no genuine issue as to any *material* fact. Namely, the fact that Petitioner and certain individuals used the aircraft outside the scope of any leasing business is not subject to a genuine dispute, based on the flight logs. Furthermore, the facts pertaining to the terms of the lease are not genuinely disputed.

Petitioner challenges a Final Assessment for use tax, interest, and penalty in regard to the purchase and use of the subject aircraft. Under the Use Tax Act ("UTA"), tax is imposed on the privilege of using, storing, or consuming tangible personal property in this state. MCL 205.93(1). Further, for the purpose of the proper administration and to prevent the evasion of the tax, all tangible personal property purchased is presumptively subject to the tax if brought into this state within 90 days of the purchase date. See, MCL 205.93(1)(a). "The tax imposed . . . for the privilege of using, storing, or consuming a[n] . . . aircraft . . . shall be collected by the department of treasury." MCL 205.93(2). The issue in this case is not whether Petitioner is responsible for use tax; rather, the issue is whether Petitioner is eligible to pay use tax based on rental receipts rather than based on the entire purchase price of the subject aircraft.

Purchasers of aircraft "may elect to pay use tax on receipts from the rental or lease of the tangible personal property in lieu of payment of sales or use tax on the full cost of the property at the time it is acquired." MCL 205.95(4).The department's administrative rule, 1979 AC, R 205.132 ("Rule 82") provides:

> A person engaged in the business of renting or leasing tangible personal property to others shall pay the Michigan sales or use tax at the time he purchases tangible personal property, or he may report and pay use tax on the rental receipts from the rental thereof. . . . A person remitting tax on rental receipts shall be the holder of a sales tax license, or a registration as is provided in the use tax act. Each month such lessor shall compute and pay use taxes on the total rentals charged.

Petitioner argues that it made a valid Rule 82 election because it entered lease agreements with Lessee and because it was in the business of leasing the subject aircraft. Petitioner's Exhibits three and four prove that the leases were entered into between Petitioner and Lessee. Further, Petitioner possessed a sales and use tax registration.

The main issues are: (1) whether Petitioner's use of the subject aircraft disqualifies it from the Rule 82 election and (2) whether Petitioner was a lessor engaged in the business of leasing the subject aircraft to others, as defined by the UTA.

Respondent contends that Petitioner "disqualified itself from the benefit of the lessor election when it's member repeatedly used the aircraft for their own

personal use." (Respondent's Brief, p 6.) Respondent's Exhibit four consists of 28 flight logs evidencing that the lessee, CDM, used the aircraft for two flights and that the remaining 26 flights were for "Personal" use by non-lessees. Under the use tax act, any storage, use, or consumption of the property outside the scope of the leasing activity is taxable and defeats the Rule 82 election. MCL 205.93(1) states that "[t]he tax levied under this act applies to a person who acquires tangible personal property . . . that [is] subject to the tax levied under this act for any tax-exempt use who *subsequently converts the tangible personal property . . . to a taxable use, including an interim taxable use*." (Emphasis added.)

Rule 82 implements and harmonizes the imposition of sales and use taxes and explains how a lessor may claim an exemption from tax on the acquisition of property, as long as the property is leased to others in the scope of a leasing business and tax is remitted on the rental receipts.

The use tax act provides an exemption for rental receipts if the rented property was previously subject to use tax or sales tax. MCL 205.94a(i) and (ii). Therefore, if the lessor pays 6% sales or use tax upon acquisition of the property, the rental receipts are exempt from use tax. Rental receipts are also exempt if the lessor pays a sales or use tax to another state "levied at the rate of 6% or more." The meaning conveyed by these provisions is that the exemption for rental receipts applies as long as the 6% sales or use tax is paid. If 6% of the purchase price is

remitted, the law is satisfied. If 6% of the stream of rental income is remitted, the law is satisfied. The use tax on the rental income from tangible personal property is intended to compensate for transactions to which the sales or use tax is not paid upon purchase of the property.

The sales tax act provides a similar exemption for property purchased for leasing. That is, the seller is exempt from sales tax upon sale to the leasing company, if the property is to be leased to others, as long as the rental receipts from that property are subject to use tax, or specifically exempt from use tax. MCL 205.54d(a). But for the existence of this exemption, the lessor would be required to pay sales or use tax on 6% of the purchase price. The interrelationship between the sales and use tax acts suggests that there is an equivalency between the two taxable events – the purchase of the property and leasing of the property – such that the tax implications are similar. Therefore, the Rule 82 election implements tax exemptions under the sales tax act and the use tax act. The exemptions are lost and the use tax is due in full if a taxpayer who claims an exemption on the purchase of the property "subsequently converts the tangible personal property to a taxable use . . . ." MCL 205.93(1). In our case, the personal use was a conversion to a taxable use.

Respondent presents copies of flight logs showing that certain individuals traveled in the aircraft on "personal" trips, which were clearly unrelated to the

purported leasing business activity. For example, one flight log states that "Me, Al, & Janet" used the aircraft for "personal" use and another states "vacation." (Respondent's Exhibit 4.) The log for a flight taken July 1, 2011, states that the aircraft was used for a "vacation" by "Chris, Michelle, Keegan, and Kayla" on July 1, 2011. The logs show that the destinations included vacations to Mackinac Island and the Bahamas, as well as a hunting trip to South Dakota. There is no evidence that these flights were made pursuant to a lease. No rentals were received and no taxes were remitted for the personal use. By permitting this personal use outside the scope of any leasing activity, Petitioner has disqualified itself from the Rule 82 election. This Beechcraft King Air is subject to use tax in the same manner as any other personal vehicle, boat, or aircraft that is "used, stored, or consumed" in this state. See, MCL 205.93(1).

Petitioner used, consumed, or stored the aircraft in the State of Michigan without paying sales or use tax on the price of the aircraft. Petitioner cannot hide behind its lessor election to avoid the payment of the use tax that arose from permitting its member and others to use the aircraft for personal flights. In that regard, Petitioner argues that "[p]ersonal use by the Lessor, if not the overriding purpose of the aircraft acquisition or a significant portion of its intended use, should not act, standing alone, to prevent an otherwise valid business/Lessor from making this election to pay tax on rental receipts rather than the acquisition cost."

(Petitioner's Brief, p 3.) However, the statute unambiguously states that even interim taxable use subjects a person to use tax. Thus, Petitioner's use[1] was taxable, even if the use was "not the overriding purpose of the aircraft acquisition or a significant portion of its intended use," as alleged by Petitioner.

The facts in this case are distinguishable from the Tribunal's decision in *Lakeshore Leasing LTD v Dep't of Treasury*, 20 MTTR 196 (Docket No. 361200, January 24, 2011). In that case, it was held that the taxpayer's use of an aircraft for five months prior to leasing it to others was not a taxable use, where the taxpayer flew the aircraft for pilot training and for maintenance purposes. Such use was found to be within the scope of a legitimate leasing business. In *Lakeshore Leasing*, the Tribunal noted that, "This is not a case where the taxpayer's officers or employees used the aircraft for their own private purposes unrelated to the taxpayer's leasing business. Nothing in the flight logs . . . supports a finding that the flights were for personal use." *Id* at 202. In our present case, the facts plainly establish personal use.

Petitioner further proposes that "[t]he proper remedy in this situation is to impute a lease charge on the user of the airplane and require the payment of the appropriate tax." (Petitioner's Brief in Opposition, p 4.) Petitioner cites no

[1] Petitioner permitted its member and others to use the aircraft and thereby "used" the aircraft within the meaning of the use tax act. See, *Czars, Inc v Department of Treasury*, 233 Mich App 632; 593 NW2d 209 (1999).

authority for this position. This Tribunal has consistently ruled in similar cases that an invalid Rule 82 election results in imposition of the tax on the purchase price. See, e.g., *Devonair, supra*. Accordingly, Petitioner's personal use of the aircraft was outside the scope of its lease and constitutes a taxable use under MCL 205.93(1), resulting in the revocation of Petitioner's Rule 82 lessor election and requires the imposition of use tax on the purchase price of the aircraft.

In addition to Petitioner's personal use of the aircraft, the Tribunal finds that Petitioner is also liable for use tax on the purchase price of the aircraft because it was not a lessor of the subject aircraft within the meaning of Rule 82 and MCL 205.95(4). In order to qualify to pay use tax on rental receipts, the taxpayer must be a "lessor" as that term is used in MCL 205.95(4). Under Rule 82, an eligible "lessor" must be "[a] person engaged in the business of renting or leasing tangible personal property to others. . . ." Rule 82. Neither the statute nor the rule includes specific criteria for what constitutes a "lessor" that is "engaged in the business of renting or leasing." However, the UTA defines "business" as "all activities engaged in by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect." MCL 205.92(h). Therefore, in order to be eligible for the election under Rule 82 and MCL 205.95(4), Petitioner must be engaged in the leasing of aircraft with the "object of gain, benefit, or advantage."

In *Devonair Enterprises, supra,* the Court of Appeals affirmed the Tribunal's consideration of the following factors as indicators of whether an entity is engaged in the business of renting or leasing tangible personal property to others: "(1) whether the rates and terms of the lease are consistent with leases resulting from an arm's-length transaction, (2) whether the taxpayer holds itself out to the public as a lessor, and (3) whether the amount of time that the property is leased is sufficient to produce revenue consistently with other leasing businesses." *Id*. at 93-94.

Petitioner alleges its $400 hourly rate was the market rate because it was "determined by ascertaining what independent airplane leasing companies would charge on an hourly basis for the full service rental of a King Air 200 in 2008." (Petitioner's Motion, p 3.) Petitioner specified that a full-service lease was about $1,100 an hour, inclusive of fuel and pilot. The subject leases were dry leases, meaning fuel, pilot, and other operating costs were assumed by Lessee. To account for the difference between the full-service lease and the dry lease, Petitioner deducted $600 per hour for fuel costs and $100 per hour for pilot costs. Petitioner alleges the "remaining $400 per hour . . . was the market rate charge for use of the airplane for a dry lease. . . ." *Id*. Although Petitioner did not substantiate its claims regarding the hourly rate with any documentary evidence, the Tribunal finds that

Respondent brought forth no evidence to the contrary. Therefore, the Tribunal views this evidence in a light most favorable to the non-moving party.

With respect to the second factor, Petitioner failed to provide evidence that it held itself out to the public as a lessor of the subject aircraft. Although two leases involving the use of the subject aircraft were executed when the aircraft was purchased, Petitioner did not advertise its leasing services to the general public and did not pursue additional lease agreements with nonaffiliated parties. Petitioner argues it was free to lease the aircraft to others and there was nothing preventing it from doing so. However, this argument is not compelling because the standard set forth in *Devonair* is not whether a lessor has the ability to pursue other lease agreements, but whether it held itself out to the public as a lessor of property, such as by advertising its leasing services. There is no evidence Petitioner advertised its services, even if it was free to do so.

Lastly, the Tribunal must determine whether the amount of time that the aircraft was leased was sufficient to produce revenue that is consistent with property of the same type that is leased by other leasing businesses under market conditions. Neither Petitioner nor Respondent provided evidence to establish the average amount of time other businesses leased aircrafts of the same type to determine whether the amount of time the subject aircraft was leased is consistent with the market. Regardless, Petitioner admits for the three and one half years

under the leases it received $179,437 in receipts. This would indicate the aircraft was flown approximately 10.7 flight hours per month over the 42 month period from June 2008 to December 2012. A leasing company operating with a true business motive would have an incentive to maximize the rental hours, in part to recover fixed costs, which accrue regardless of the hours of use. There is no evidence that leasing the aircraft for an average of only 10.7 hours per month is consistent with usage by a leasing business seeking to maximize profit, and it defies common sense to believe that this minimal usage was calculated to earn a profit. Leasing the aircraft for 10 hours per month at $400 per hour would amount to $4,000 per month in *gross* rents from an asset with a historical cost of $4.7 million. Further, at this rate of use, it would take Petitioner decades to pay the equivalent use tax that would have been due on the purchase price and also hindered Petitioner's ability to recover its fixed costs.

The lack of advertisement of its services, in conjunction with the minimal number of hours the aircraft was used, supports the Tribunal's conclusion that Petitioner did not lease the aircraft with the object of "gain, benefit, or advantage." See, *Heidrich Aviation, LLC, supra.* "The number of hours that the aircraft was leased is relevant . . . . In a case where a purported leasing business allows its sole asset to sit idle, it can hardly be said that the person is engaged in the business of leasing . . . ." *Id at 496*. The foregoing shows a lack of continuity and a lack of

profit motive that is not proven to be consistent with use by a genuine leasing business. The potential gain under the contracts was limited by the scarce use of the aircraft and supports the Tribunal's conclusion. Even though Petitioner's receipts totaled $179,436, the leasing business ultimately resulted in a net cash loss after taking into consideration $93,122.12 in expenses and $123,612.00 for insurance. Petitioner chose to forego potential revenue it could have earned in expanding its leasing business and it cannot be said that Petitioner was engaged in the "business" of leasing aircraft for use tax purposes.

There is no dispute that Petitioner leased construction equipment to related entities, Dan's Excavating, Inc. and CP Ventures, LLP, both of which are substantially owned and controlled by Chris Peyerk (Petitioner's member). The construction equipment is not at issue in this appeal. Petitioner argues that it was engaged two separate businesses: 1) equipment leasing and 2) aircraft leasing. This leasing business allegedly generated $6,000,000 in rental receipts and earned over $300,000 on these rentals. However, the fact that Petitioner engaged in the business of leasing construction equipment does not mandate a conclusion that it was engaged in the business of leasing the subject aircraft under MCL 205.95(4) and Rule 82. The issue here is limited to whether Petitioner was engaged in the business of leasing *the subject aircraft*, so as to avoid tax on the entire purchase price and instead pay use tax based on the rental receipts from the aircraft. Even a

genuine leasing business does not qualify for the Rule 82 election on all of its personal property. Petitioner's leasing of construction equipment has no bearing on whether Petitioner may elect to pay use tax on the rental receipts of the aircraft. MCL 205.95(4) requires that the person be a lessor of the tangible personal property being leased. This is supported by the language of the rule and the statute. As Respondent argues, if this were not so, "a business that legitimately leases a single piece of equipment could extrapolate the lessor election to a whole side business in which no property is leased but rather personally used or consumed." (Respondent's Brief , p 10.) Furthermore, it has been established herein that a leasing business may lose an otherwise valid Rule 82 election for any property that it uses or permits to be used outside the scope of the leasing business. Thus, Petitioner must be a bona fide lessor *of the subject aircraft* in order to qualify for the Rule 82 election for the aircraft.

Respondent properly assessed use tax on the purchase price of the aircraft through Final Assessment number Q339576. That being said, Respondent assessed use tax on the purchase price of $5,270,500, the original price alleged in the petition. However, Petitioner filed a second Affidavit of Douglas George that indicates the purchase price was $4,700,000, which stands unrefuted. Even though Mr. George testified that the Aircraft Purchase Agreement for the subject aircraft was "a true and accurate copy," the Tribunal finds that it contained an error with

regard to the trade-in credit allowance for the buyer's aircraft. Namely, the purchase agreement lists the trade-in credit allowance as $2,500,000. However, the remainder of the evidence shows that the trade-in credit allowance was actually $2,450,000. Nevertheless, the purchase price of the subject aircraft was $4,700,000 and not $5,270,500, as previously identified. Therefore, the Tribunal finds that recalculation of the Final Assessment is necessary to account for the revised purchase price.

JUDGMENT

IT IS ORDERED that Respondent's Motion for Summary Disposition, under MCR 2.116(C)(10), is GRANTED.

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

IT IS FURTHER ORDERED that Final Assessment No. Q339576 is REVISED as follows:

Tax Due	$282,000
Penalty**	$70,500
Interest	*

* Interest shall be calculated in accordance with sections 23 and 24 of 1941 PA 122.
** Originally a 25% penalty was imposed on the tax of $316,230. The 25% penalty is recalculated based on the revised tax amount.

IT IS FURTHER ORDERED that all use tax payments remitted on monthly rental receipts of the subject aircraft shall be credited toward payment of Final Assessment No. Q339576.

EXCEPTIONS

This POJ was prepared by the Michigan Administrative Hearings System. The parties have 20 days from date of entry of this POJ to notify the Tribunal **in writing and by mail** if they do not agree with the POJ and to state in writing why they do not agree with the POJ (i.e., exceptions). There is no fee for filing exceptions.

Exceptions filed by *e-mail or facsimile* will **not** be considered in the rendering of the Final Opinion and Judgment.

Exceptions are **limited** to the evidence submitted prior to or at the hearing and any matter addressed in the POJ.

A copy of a party's written exceptions **must be sent by mail** to the opposing party and proof must be submitted to the Tribunal that the exceptions were served on the opposing party. The opposing party has 14 days from the date the exceptions were mailed to that party, to file a written response to the exceptions.

By: Thomas A. Halick

Date Entered by Tribunal: June 28, 2013