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

John Podmajersky, et al,
Petitioners,

v — MTT Docket No. 410949

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

ORDER DENYING REQUEST FOR ORAL ARGUMENT

ORDER GRANTING SUMMARY DISPOSITION UNDER MCR 2.116(I)

ORDER OF DISMISSAL

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 Order on April 12, 2012. The Proposed Opinion and Judgment states, in pertinent part, "the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal. . . . The exceptions and written arguments shall be limited to the evidence admitted at the hearing."

2. On May 2, 2012, Petitioner filed exceptions to the Proposed Opinion and Judgment and a request for Oral Argument. In the exceptions, Petitioner states:

    a. "The ALJ erred in determining that Petitioners' intent was not a consideration in determining whether a presumption of tax arose from the vessel being 'brought' into Michigan within 90 days of its purchase."

b. "A critical aspect in this case is the Tax Tribunal's interpretation of 'brought' under MCL 205.93(1)(a). Despite the critical importance of the interpretation of 'brought' . . . the Proposed Order fails to directly address this issue. The act of something being 'brought' implies that the actor is causing that something to be carried or moved. One factor to be considered when determining whether something has been 'brought' into this state under MCL 205.93 should be the facts and circumstances surrounding the contact with the state and the actor's intent."

c. "The ALJ should have incorporated the uncontradicted sworn statements by Mr. Podmajersky regarding his intent. The Department submitted no evidence that draws into question the veracity of Mr. Podmajersky's statements."

d. "The ALJ's emphasis on Petitioners' use of the vessel in Michigan after 90 days from the date it was purchased in determining that the vessel was subject to Michigan use tax is misplaced and not relevant."

e. "In the Proposed Order, the ALJ outlines statements made regarding Petitioners' use of the vessel in Michigan after 90 days from the date it was purchased in a letter attached to the Department's Brief, filed March 9, 2012, as Appendix 10."

f. "A document is not admissible at hearing and therefore cannot be considered on a motion for summary disposition when that document has not and cannot be authenticated by the Department. . . . The Department has failed to demonstrate that it can support the authentication of the document through witness testimony or otherwise."

g. "Even if the Department could authenticate the document, it is still inadmissible as hearsay."

h. "Setting aside that it was error for the Tax Tribunal to rely on statements made in the letter the information in the letter is not

relevant and should not have been considered by the Tribunal . . . [a]s a nonresident using the vessel in Michigan for personal, nonbusiness purposes after 90 date from the days of purchase, the vessel is clearly exempt from Michigan use tax under MCL 205.93(1)(b)."

i. "The ALJ improperly relied on a Minnesota decision issued in 1910."

3. On May 16, 2012, Respondent filed a response to the exceptions. In the response, Respondent states:

    a. "The ALJ determined that . . . intent was not relevant in determining whether the presumption of taxation arose under MCL 205.93(1)(a). . . . The yacht came to Michigan within 90 days of purchase, where it was used and stored until it was temporarily removed from Michigan for approximately 2 weeks, only to return to Michigan for the bulk of the next 2 years."

    b. "Petitioner incorrectly asserts that 'a critical aspect in this case is the Tax Tribunal's interpretation of 'brought' under MCL 205.93(1)(a).' First, the yacht was brought to Michigan as soon as it entered Michigan's waters and certainly as soon as it stopped, refueled, and rested at Harbor Beach, Michigan and Presque Isle, Michigan in August of 2006, well before any mechanical problems occurred. . . Second, Petitioner's attempt to redefine or create ambiguity in the word 'brought' for its own tax avoidance purposes does not raise a non-factor to the status of 'critical.' Short of saying that the yacht was 'spirited' to Michigan's waters and 'carried by mystical powers' to Michigan's shores and marinas, one would have difficulty finding a verb that is not a synonym for 'brought' to describe how the yacht came to be in Michigan."

    c. "There is no question that Petitioner's actions – his choices of where to navigate, come to rest, and stay while traveling on the yacht – fall well within any definition of the word 'brought' as used in the Use Tax Act."

d. "Finally, the ALJ was correct in looking at Petitioner's use of the yacht, inside and outside Michigan, both before and after the 90th day of ownership. . . . In order to determine Petitioner's intent, and also to properly apply the Use Tax Act, the ALJ had to consider all of the surrounding circumstances and facts. . . . [W]hen determining a taxpayer's intent, context is essential. . . . This information is not only relevant, but also necessary in establishing intent."

e. "Petitioner's reference to and reliance on MRE 901, in stating that Petitioner's agent's admission should be deemed inadmissible for lack of authenticity, is unsound. Specifically, TTR 283 controls . . . MRE 901 does not apply where a Tax Tribunal Rule exists. It cannot be said that Petitioner's admission to the state of Illinois is irrelevant, immaterial, or unduly repetitious or that reasonably prudent persons would not rely on such a statement in the conduct of their affairs."

f. "Again, TTR 283 applies as to the alleged hearsay and reasonably prudent persons would rely upon the document. Regardless, the document is not hearsay because it is an admission by a party opponent under MRE 801(d)(2)."

g. "The ALJ's reference to Minnesota case law was not determinative and addressed Petitioner's request for equitable relief . . . irrespective of the case law cited by the Tribunal, equitable relief falls outside the Tribunal's powers."

4. The Administrative Law Judge properly considered the evidence and testimony in the rendering of the Proposed Opinion and Judgment. More specifically:

Petitioners contend that Petitioners' letter to the State of Illinois should be excluded as it was not properly authenticated, or in the alternative, as hearsay; however, TTR 111 provides that the Michigan Court Rules apply *if* an applicable Tribunal does not exist. As such, the controlling rule is TTR 283 which states, "[t]he tribunal may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial, or

unduly repetitious evidence may be excluded." The letter at issue is a statement by Petitioners' counsel to the Illinois Department of Revenue regarding the tax treatment of the boat at issue. Thus, the Tribunal finds that the Administrative Law Judge properly considered the letter as relevant evidence that a reasonably prudent person would rely upon.

Under the Use Tax Act, there is a rebuttable presumption that Petitioners' "[t]angible personal property is subject to tax if brought into this state within 90 days of the date of purchase and is considered as acquired for storage, use, or other consumption in this state." MCL 205.93(1)(a). Although this issue is thoroughly discussed in the Proposed Order, Petitioners contend that one critical issue was over looked: the definition of "brought" as used in MCL 205.93(1)(a). Petitioners further contend that to determine if Petitioners "brought" the vessel to Michigan, the Tribunal must consider Petitioners' intent.

Words and phrases in a statute are to be given their plain and ordinary meaning. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184, 188 (2007). Dictionary definitions may be helpful in construing statutory language according to its common and approved usage. *People v Bobek*, 217 Mich App 524, 529; 553 NW2d 18, 21 (1996). "Bring" is defined as "1) to carry or lead 'here' . . . 2) to cause to happen." *Webster's New World Dictionary* (1998).

When the boat first entered Michigan waters during its scheduled voyage, the presumption arose. The Captain was to "take delivery of the vessel and transit her from Rhode Island to Chicago." Podmajersky Affidavit, paragraph 6. As such, the Captain, on orders of Petitioners, navigated the boat into Michigan waters. The driving of the boat *caused* the boat to move and the Captain *carried or led* the boat into Michigan waters. Thus, the boat was clearly "brought" into Michigan. Further, as reflected in the "Summary of Delivery Costs" submitted by Petitioners, costs were incurred in Harbor Beach, Michigan[1] (August 14), Presque Isle, Michigan[2] (August 15), prior to the catastrophic breakdown on August 16, 2006. As such, the Tribunal finds that the boat was brought into Michigan prior to the breakdown and

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1 Official notice is taken that Harbor Beach, Michigan, is located on the shores of Lake Huron, approximately 130 miles north of Detroit, Michigan (traveling by land).
2 Official notice is taken that Presque Isle, Michigan, is located on or near the shores of Lake Huron, approximately 20 miles north of Alpena, Michigan.

the rebuttable presumption of taxation arose, regardless of the fact that the boat broke down and required an extended stay. Thus, assuming *arguendo* that intent is relevant to this determination, Petitioners did intend to *bring* the boat into Michigan waters during its voyage and *use* the boat in Michigan even if the intent was only to pass through. As such, the Administrative Law Judge properly found that the presumption of taxation under MCL 205.93(1)(a) applies in this case.

Petitioners further rely upon its intent to bring the boat to Chicago to claim the boat was not brought to Michigan; however, the intended final resting place is not determinative as to whether the boat was brought into Michigan. Rather, evidence of the intended final resting place would be relevant to rebut the presumption of taxation. Similarly, the actual use of the vessel in Michigan after 90 days is relevant, contrary to Petitioners' contention, to determine if the boat was purchased for use in Michigan. As such, the Tribunal finds that the Administrative Law Judge properly found that, under the circumstances of this case, the presumption arose by the physical presence of the boat in the State of Michigan, even if, as Petitioners contend, that the intent was not for the boat to remain in Michigan, but rather continue on to Illinois.

Petitioners contend that the "uncontradicted sworn statement by Mr. Podmajersky" regarding his intent, should be incorporated as a finding of fact. Petitioners also request that any evidence regarding the use of the boat after the first 90 days should not be considered. As indicated above, the evidence regarding the use of the boat in Michigan after 90 days of purchase is relevant, and specifically the letter regarding the boat's use is relevant and of the type a reasonably prudent person would rely upon, and as such is not to be excluded. With regard to Petitioners' statement of intent, the Tribunal finds that the statement is, in fact, contradicted by the evidence on record, including the evidence indicating the boat was primarily used in Michigan after 90 days. Further, as Respondent correctly points out, the statement of Petitioners are not the sole ways to determine intent. Intent is determined by actions and the facts and circumstances of the entire case. Even if Mr. Podmajersky intended to take the craft to Chicago, this does not mean the property is not subject to Michigan use tax; however, the fact that the boat was primarily used in Michigan does contradict Mr. Podmajersky's statement. Alternatively, as stated by the Administrative Law Judge, intent can change over time. There are abundant, indisputable facts demonstrating that Petitioners used and stored the subject

property in this state within 90 days of purchase, and for several years thereafter. As such, the Tribunal finds that it is clear that the boat was intended for use within Michigan and Petitioners have failed to rebut the presumption of taxation.

Further, it is irrelevant for what purpose the boat was used in Michigan more than 90 days after purchase. The Proposed Opinion and Judgment properly states, "[t]he presumption of exemption does not apply in this case. Neither Laughing Dolphin, LLC, nor Mr. Podmajersky are residents of Michigan. It could be said that the craft was brought to Michigan more than 90 days after the date of purchase when it arrived here on October 17, 2006. Petitioners' claim under this section fails because it cannot be disputed that the craft first entered Michigan waters and landed at Harbor Beach, Michigan, on or about August 14, 2006, approximately 38 days after purchase and remained here until October 1, 2006. The presumption of 'exemption' under MCL 205.93(1)(a) and (b) does not apply under these facts, where the craft first entered Michigan less than 90 days after purchase, left the state, and two weeks later re-entered Michigan more than 90 days after acquisition. Under such circumstances, the first entry is controlling – both presumptions cannot arise simultaneously."

With regard to Petitioners' contention that the Administrative Law Judge erred in citing a Minnesota decision entered in 1910, the citation was not a determinative point of law. Petitioners wish for the Tribunal to find that Petitioners had a "necessity" to enter Michigan upon the catastrophic breakdown of the boat; however, as indicated above, the boat was brought to Michigan prior to the breakdown. As such, Petitioners' request for the Tribunal to find "necessity" is irrelevant.

Further, the Administrative Law Judge fully and adequately addressed all of Petitioner's remaining exceptions in his Proposed Opinion and Judgment.

5. Given the above, Petitioners have failed to show 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 adopts the 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 in this Final Opinion and Judgment. Therefore,

IT IS ORDERED that Petitioners' Request for Oral Argument is DENIED.

IT IS FURTHER ORDERED that Summary Disposition is GRANTED pursuant to MCR 2.116(I).

IT IS FURTHER ORDERED the above captioned case shall be DISMISSED.

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

MICHIGAN TAX TRIBUNAL

Entered: Jun3 5, 2012 By: Kimbal R. Smith III

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

Laughing Dolphin LLC and John Podmajersky,
Petitioner, MTT Docket No. 410949
v

Michigan Department of Treasury, Administrative Law Judge Presiding
Respondent. Thomas A. Halick

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

PROPOSED ORDER GRANTING SUMMARY DISPOSITION UNDER MCR 2.116(I)

ORDER DENYING PETITIONER'S MOTION TO STRIKE, MOTION FOR COSTS, AND MOTION FOR IMMEDIATE CONSIDERATION

ORDER DENYING RESPONDENT'S OBJECTION TO ADMISSION OF THE "SECOND AFFIDAVIT OF JOHN PODMAJERSKY"

On February 17, 2011, Petitioner filed a motion for summary disposition and a brief in support. On March 9, 2012, Respondent filed an answer to the motion and a brief in support

Oral argument was held on March 15, 2011. Petitioner was represented by Jackie J. Cook and Gregory A. Nowak of the law firm Miller Canfield. Respondent was represented by Assistant Attorney General, Matthew B. Hodges.

Upon review of the motion, the response, and the case file, it is determined that for reasons stated on the record at oral argument, authorities cited in Petitioner's brief, and the legal conclusions in

this Order, Petitioner's motion shall be DENIED and judgment shall be entered as a matter of law in favor of the non-moving party.

Standard of Review

Petitioner seeks summary disposition under MCR 2.116(C)(10). Judgment shall be granted under the standards applicable to MCR 2.116(C)(10), there being no genuine issue of material fact, based on the well-pled facts, documentary evidence, and affidavits. MCR 2.116(G)(5). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . (a) when judgment is sought based on subrule (C)(10)." MCR 2.116(G)(3)(b).

"When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials in his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." 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 (2005). The trial court must give the benefit of any reasonable doubt to the nonmoving party. *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992). The court must then

determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992).

Procedural History

On October 12, 2009, Respondent issued the following assessment of Use Tax.

Assessment No.	Tax	Penalty	Interest*
R406448	$66,000	$16,500	

*Interest accrues as provided by law.

Admissibility of Evidence

On March 14, 2012, Petitioner filed a Motion to Strike documentary evidence that Respondent obtained pursuant to subpoenas issued by the Tribunal. This matter was argued and ruled upon on the record at the oral argument held March 15, 2012. The documents at issue consist mainly of invoices for repair services, parts, maintenance, restoration, and fuel purchases related to the subject watercraft. Respondent requested these documents via discovery. Petitioner objected and failed to provide them because the request was deemed "unduly burdensome" and the documents were in the possession of third parties. The third parties were The Irish Boat Shop in Harbor Springs, Michigan, and Eldean Shipyard in Macatawa, Michigan. It was determined at the oral argument that Petitioner has had a continuous business relationship with Eldean Shipyard over a period of several years, and that Eldean Shipyard has performed numerous repairs, maintenance, and restoration services for Petitioner. In addition, the subject watercraft was stored at Eldean

Shipyard during the winters of 2006-2007, 2007-2008, and 2008-2009.

Petitioner has presented no evidence or argument that the documents are irrelevant or would not be admissible at a hearing. It strains credibility for Petitioner to claim that it lacked possession or control of these service records when they were in the physical custody of independent contractors hired by Petitioner. These third parties promptly supplied the documents to Respondent when presented with a subpoena. The subpoenas were still in effect at the time Respondent obtained the documents. It would have been a small matter for Petitioner to have authorized the third parties to release this information to Respondent, and doing so would have avoided a discovery battle that wasted the resources of all involved.

The documents at issue should have been supplied via formal discovery or voluntarily provided out of common courtesy. Without revisiting the grounds for quashing the subpoenas, the salient facts are that the subpoenas were still valid and effective when Respondent used them to obtain the documents, and further, Respondent would have been entitled to an order to compel production of these relevant and admissible documents for purposes of a trial, had such a motion been filed prior to the close of discovery. The parties and the Tribunal were in possession of the documents prior to the March 15, 2012, oral argument. Under these circumstances, it would have been proper and just to extend discovery to allow Respondent to file a motion to compel production of the documents. At this point, it is apparent that Petitioner's objections to the discovery request were weak to say the least. Petitioner could have easily obtained the records,

but instead objected and foisted that burden on Respondent. Based upon the foregoing, justice requires that Petitioner's motion to strike the documents at issue is DENIED and that the documents at issue are properly considered for purposes of Petitioner's dispositive motion. The denial of the Motion to Strike renders moot the Motion for Costs and the Motion for Immediate Consideration.

Second Affidavit

On the record at the oral argument held on March 15, 2012, Respondent objected to the admission of the Second Affidavit of John Podmajersky. The affidavit was not filed at least 21 days in advance of the hearing as required by the Tribunal's rules. The statements in the affidavit are essentially supplemental to the matters stated in the first Affidavit of John Podmajersky, providing details regarding the journey of the Laughing Dolphin from Rhode Island to Michigan, and events in Michigan in 2006. Upon review of the affidavit, it was determined that it contained matters that Mr. Podmajersky would testify to at a hearing. Furthermore, the facts stated did not introduce any claims or information not already stated or implied in the first affidavit. It was determined that any prejudice to Respondent could be remedied by permitting Respondent to file a brief or a counter-statement of facts in response to the Second Affidavit. Furthermore, it is Respondent's position that none of the stated excuses as to why Petitioner used and stored the subject watercraft in this state constitute a valid defense to the assessment.

The court rules require the Tribunal to consider an affidavit that is ". . . then filed in the action or submitted by the parties . . . ." MCR 2.116(G)(5). The affidavit in question had not been timely

filed or submitted in conformity with the Tribunal's scheduling orders and, therefore, could have been excluded. The benchmark in such a determination is whether the opposing party would be unduly prejudiced by the untimely evidence. Under the circumstances of this case, given the limited scope of the Second Affidavit, any prejudice to Respondent is eliminated by permitting Respondent additional time to file a counter-statement to the Second Affidavit. Respondent filed its Response to Petitioner's Second Affidavit on March 29, 2012.

Facts

Petitioner Laughing Dolphin, LLC, is a Rhode Island limited liability company whose address is 11 Memorial Boulevard, Newport, Rhode Island.

Petitioner John Podmajersky is an individual whose address is in Chicago, Illinois. Mr. Podmajersky is the sole member and manager of Laughing Dolphin, LLC. A document entitled "United States of America, Certificate of Documentation," issued November 14, 2006, indicates that the owner of the subject vessel is an LLC "comprised of one member" (John Podmajersky). Appendix 1 to Respondent's brief.

Unless otherwise indicated, the moving parties, John Podmajersky and Laughing Dolphin, LLC, shall be referred to as "Petitioner."

On July 7, 2006, Laughing Dolphin, LLC, purchased and took delivery of a 65-foot Vicem Downcast yacht in the state of Rhode Island for $1,093,500. Petition, paragraphs 5 and 6.

Petitioner did not pay sales tax or use tax to the State of Rhode Island or any other state at the time of purchase or at any time thereafter. Petitioner refers to the subject vessel as the "Laughing Dolphin."

Petitioner hired Captain Pete Marcucci to take delivery and pilot the craft on a journey departing from Falmouth, Massachusetts, on July 31, 2006. Appendix 3 to Respondent's brief, Invoice for Delivery Services. Mr. Podmajersky did not board the Laughing Dolphin until it arrived in Cleveland, Ohio. Podmajersky Affidavit, paragraph 6.

A "Summary of Delivery Costs" from July 31, 2006, to August 18, 2006, enumerates costs incurred during the journey of the Laughing Dolphin. Appendix 4 to Respondent's brief. This document bears a handwritten date of "9/17/2006" and a signature (or mark) that matches the signature of John Podmajersky appearing on his affidavits submitted in this matter. The Summary of Delivery Costs includes charges incurred in the following places in the summer of 2006: Falmouth, Liberty Landing (July 31 – August 2), New York (August 2), Troy, New York (August 3), Whitehall, New York (August 4), Chambly (August 5), Port D'Escale (August 6), Marina 200 (August 7), Alexandria, NY (August 8), Marlon Marina (August 9-10), Lakeside YC (August 11-13), Crews Nest (August 13), Harbor Beach, Michigan[3] (August 14), Presque Isle, Michigan[4] (August 15), Harbor Springs, Michigan[5] (August 16-18). Captain Marcucci's services

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3 Official notice is taken that Harbor Beach, Michigan, is located on the shores of Lake Huron, approximately 130 miles north of Detroit, Michigan (traveling by land).
4 Official notice is taken that Presque Isle, Michigan, is located on or near the shores of Lake Huron, approximately 20 miles north of Alpena, Michigan.

were completed on or about August 18, 2006, in Harbor Springs, Michigan.

According to Mr. Podmajersky's affidavit, on August 16, 2006, a guest traveling on board the Laughing Dolphin mistakenly put several hundred gallons of water into the fuel tanks, causing both engines to shut down, and requiring the vessel to be towed to the Irish Boat Shop in Harbor Springs, Michigan. An invoice (work order 552056) from the Irish Boat Shop, dated August 30, 2006, consists of eight pages with details of the charges for towing the vessel from "just south of Gray's Reef-Cliff … to Harbor Springs" and for numerous repairs. Appendix 8 to Petitioner's brief. During oral argument, Petitioner's counsel verified that Petitioner retained some, but not all, service records for the Laughing Dolphin, including the August 30, 2006 invoice, which reflects repairs in the amount of $1,592.49 to "repair water in fuel." This same record is attached to Respondent's brief as Appendix 5, consisting of eight pages. The invoice shows total charges for all towing and repair services of $15,377.45. A copy of a credit card receipt included with this invoice indicates that Petitioner paid $12,496 on August 26, 2006, in payment on work order # 552056. The vast majority of the repairs were related to the water/fuel problem, but also included repairs to the onboard Direct TV system, air conditioning, the Bose stereo, and refinishing and polishing wood and metal surfaces. Appendix 5 to Respondent's brief.

An email from Peter Marcucci to John Podmajersky, dated August 25, 2006, includes a message from John Podmajersky that he was "[s]till trying to get a slip in Chicago. I don't know if we will

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5 Harbor Springs, Michigan is located in the northwestern region of the lower peninsula of Michigan on the shores of

be settling in Holland or closer to home." Appendix 8 to Respondent's brief.

On or about September 3, 2006, Mr. Podmajersky piloted the vessel out of Harbor Springs, Michigan, and proceeded south on the waters of Lake Michigan. Mr. Podmajersky's affidavits describe this journey. He claims that the engines did not operate properly and he determined that the cause was the failure to remove all the water from the fuel system.

On September 3, 2006, Mr. Podmajersky brought the vessel to "transient dockage" in Pentwater, Michigan. On September 4, 2006 , the Laughing Dolphin departed Pentwater and arrived at Macatawa, Michigan. There is documentary evidence indicating that the Laughing Dolphin was docked at Eldean Shipyard[6] in Macatawa, Michigan, from September 4, 2006, until October 1, 2006. Appendix 6, Respondent's brief.

Shortly after September 4, 2006, Mr. Podmajersky left the vessel docked at Eldean Shipyard [4] in Macatawa and returned to Chicago. According to his affidavit, he traveled from Chicago to Macatawa on weekends from September until October 1, 2006, during which time he personally operated the Laughing Dolphin on Lake Macatawa and replaced numerous water/fuel separator filters in an attempt to remove water from the fuel system. Second Affidavit, paragraph 9. There is no documentary evidence to show that Eldean Shipyard performed any repair work to address

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Lake Michigan (Little Traverse Bay).

6 "Eldean Shipyard" has also been referred to in these proceedings as "Eldean ship yard." This opinion shall use the name "Eldean Shipyard," which is the name that appears on the relevant invoices from Eldean Shipyard.

the water/fuel problem from September 4 to October 1, 2006.

Invoices from Eldean Shipyard show repairs performed on the Laughing Dolphin from September 26, 2006, to September 28, 2006, as follows: "Replace 24V Bilge Pump – Customer states sewage smell in boat – find and fix." The total charge for this repair was $133.18. Appendix 9, Respondent's brief.

On Sunday, October 1, 2006, 86 days after the date of purchase, Mr. Podmajersky and the Laughing Dolphin left Macatawa, Michigan, and arrived in Chicago on that same date, where it stayed for 15-16 days, before returning to Eldean Shipyard in Macatawa, Michigan, on October 17, 2006 (102 days after the date of purchase). The craft was stored at Eldean Shipyard for the winter. An invoice from Eldean Shipyard entitled "Winter Storage 2006-2007" indicates that the Laughing Dolphin was "hauled out" and placed in heated storage on November 7, 2006, for a total charge of $8,222.

The Affidavit of John Podmajersky states that he obtained a "permanent slip" in Chicago for the Laughing Dolphin prior to the start of the 2007 boating season, and that the slip "has been maintained ever since." *Id*, paragraph 23. The affidavits make no factual claim regarding how many days, if any, the craft actually used the boat slip in Chicago, although a letter from an attorney representing Petitioner claimed that the craft was in Chicago for less than 20 days in 2007.

A receipt from “Snug Harbor Marina” in Pentwater, Michigan, dated September 3, 2007, shows the purchase of 186.8 gallons of fuel and also 183.9 gallons of fuel, plus a dockage fee of $98.00, totaling $1,338.90. Respondent’s Appendix 7.

Appendix 10 is a copy of a letter dated April 15, 2009, written on the letterhead of “Dale & Gensburg, P.C.” and signed by Gary A. Kanter, who is also the attorney who signed and filed the petition on behalf of Petitioner in this matter. The letter is addressed to Illinois Department of Revenue, Attn: Mr. Glen Phillips, ROT Discovery Section, Springfield, Illinois. At the oral argument, Respondent’s counsel indicated that Respondent obtained the letter through an information sharing agreement between the states of Michigan and Illinois. In the letter, Mr. Kanter cites facts to support the claim that the subject watercraft is exempt from Illinois use tax.

> However, the taxpayer recognizes that the exception to the use tax does not apply if the watercraft is used in Illinois “over 30 accumulated days in any calendar year.” [citations omitted]. It is the taxpayer’s position that the Laughing Dolphin was never used more than 30 accumulated days in any calendar year in Illinois since its purchase in July 2006. . . . Appendix 10, Respondent’s brief.

The letter explains the story of the boat breaking down near Harbor Springs and then being taken to Macatawa, where it “underwent additional repairs.” The letter neglects to mention the nature of those additional repairs in Macatawa and does not affirmatively state that they were related to the water infiltration problem.

The letter does state, however, that the craft remained in Macatawa in 2007 due to continued

problems with water in the fuel. "In 2007, because the water infiltration of the boat's fuel system continued to plague the vessel, the boat was left in Macatawa, Michigan, to continue to address its maintenance needs." Appendix 10 to Respondent's brief. The letter states further that in 2007:

> . . . the Laughing Dolphin spent the majority of the boating season in Michigan. In late summer of 2007, the boat spent a significant amount of time in Harbor Springs, Michigan, Traverse City, Michigan, and Lake Charlevoix. The boat was only in Chicago for a total of approximately 20 days between September 27th and October 17, 2007.

During the winter of 2007 and 2008, the subject boat was again stored at Eldean Shipyard in Macatawa. The Laughing Dolphin visited Chicago from June 8, 2008, until June 15, 2008, and then returned to Eldean Shipyard where it underwent repairs related to a collision with two other watercraft while docked in Chicago. According to Mr. Kanter's letter, the boat underwent extensive repairs at Eldean Shipyard from June 2008 until mid-June 2009. The boat spent approximately one week in Harbor Springs, and then traveled to Bay Harbor, Michigan, on or about September 30, 2008. The Laughing Dolphin was in Chicago from October 2, 2008 until October 19, 2008, after which time it traveled back to Eldean Shipyard for winter storage. The letter concludes, "As you can see, the Laughing Dolphin spends most of its time in Michigan. Therefore, the taxpayer was not subject to the Illinois Use Tax in 2006 through 2008." Appendix 10 to Respondent's brief.

This opinion will now examine the facts pertaining to work performed on the Laughing Dolphin from the time it arrived at Eldean Shipyard in Macatawa until it departed for Chicago on October 1, 2006. In the first affidavit of Mr. Podmajersky, he states that "Further extensive repairs to fix

the continuing water damage to the fuel system were undertaken at Eldean ship yard in Macatawa, Michigan from September 4, 2006 through October 1, 2006." Affidavit of John Podmajersky, paragraph 21. This statement could be interpreted to mean that mechanics at Eldean Shipyard performed repair services to address the water/fuel problem; however, in his Second Affidavit, Mr. Podmajersky states that the vessel was taken to Macatawa on September 4, 2006, ". . . so that the problem could continue to be addressed safely via our own efforts and by assistance from marine professionals if necessary." Mr. Podmajersky further states that he personally replaced "numerous fuel/water separator filters" and operated the boat on test runs on "Lake Macatawa in order to drain the remaining water from the fuel system . . . ." He notes that these efforts appeared to be successful as he noticed a reduction in the amount of water being drained from the fuel filters. *Id*. paragraphs 5, 6, and 9. Also see paragraphs 18 and 22 from the first Affidavit of John Podmajersky. It is apparent from these facts that the Laughing Dolphin was stranded near Harbor Springs on August 17, 2006, but did not suffer "irreparable" damage to its diesel engines. The craft operated under its own power from Harbor Springs to Pentwater, and then to Macatawa, on September 3 and 4, 2006. The water infiltration caused problems, but it did not "irreparably" damage the engines. Once in Macatawa, the process of removing water from the fuel system involved operating the craft on the quieter waters of Lake Macatawa in order to run fuel through the system and to drain or replace the fuel/water separators. Second Affidavit of John Podmajersky, paragraph 9. Mr. Podmajersky affirms that this process appeared to be gradually but successfully removing water from the fuel tanks and fuel delivery system. *Id*. Again, Eldean Shipyard performed no "extensive repairs" to address the water infiltration

problem from September 4 to October 1, 2006, when Mr. Podmajersky determined that his efforts rendered the craft capable of crossing Lake Michigan to Chicago. The first work order # 60050 from Eldean Shipyard shows "date in" as September 22, 2006, and that the work was completed on September 28, 2006. The work order states that Eldean Shipyard replaced a "24V bilge pump" and that the "customer states sewage smell in boat." Appendix 9, Respondent's brief. The total cost for this repair was $133.18. Petitioner does not claim that this work was related to the water infiltration problem.

Work order # 60118 is an invoice from Eldean Shipyard for dockage from September 4 until October 1, 2006, for the total charge of $1,965.60.

Invoices from Eldean Shipyard from December, 2006, through November, 2007, indicate that the Laughing Dolphin underwent repairs and refurbishing, some of which Respondent characterizes as "vanity repairs." A review of the invoices does not reveal any work related to the water infiltration problem, which appears to have been substantially solved during September and October, 2006, during which time Mr. Podmajersky operated the boat on Lake Macatawa and Lake Michigan. Mr. Podmajersky, however, is prepared to testify that while the watercraft was at Eldean Shipyard after October 17, 2006, a subcontractor completed the "evacuation, cleaning and repair of the fuel tanks." Second Affidavit of John Podmajersky, paragraph 15. Petitioner claims that the insurance company selected and directly paid this contractor for the work. There is no documentary evidence regarding the work performed by the subcontractor, but it allegedly

involved draining and repairing the fuel tanks. This work was performed after the watercraft returned to Michigan from Chicago.

During February and March, 2007, work order #60694 shows that wood surfaces were refinished for a total charge of $14,027.91. Appendix 12 to Respondent's brief. Work order #60701 indicates that repairs to the hull were completed in May, 2007, for a charge of $3,101.51. Work order #61095 describes work to "repair fuel tank monitering [sic] system. Clean and repair water sensors for Racor fuel filters," which is presumed to have been related to the water infiltration problem. Work order # 61095 shows repairs to an engine block heater, "temp alarm," test coolant, adjust valves, and replace valve cover gaskets, and a tune-up, for a total charge of $6,982.89. Work order #60942 was for "detail work" completed May 22, 2007, for a total of $7,136.36.

Paragraph 9 of the Petition alleges that Mr. Podmajersky "has had a boat slip in Chicago since 2000." Other evidence shows that Mr. Podmajersky leased two boat slips in Chicago, neither of which was large enough to accommodate the 65-foot Laughing Dolphin. Petitioner was unable to obtain a boat slip in Chicago large enough for the subject in 2006. Upon inquiry with the Chicago Harbor System, Petitioner was advised that the vessel could utilize "transient dockage" in Chicago if Petitioner notified the Chicago Harbor System prior to arriving in Chicago in the summer of 2006. Affidavit of John Podmajersky, paragraph 8.

The Laughing Dolphin was stored in Michigan during the winter of 2006 – 2007. The craft spent most of the 2007 boating season in Michigan. Respondent's Appendix 10, p 2. The craft was in Wisconsin from July 9 to July 21, 2007, and visited Chicago from September 27, 2007, until October 17, 2007. The craft was again stored in Michigan during the winter of 2007-2008. Appendix 6, 10, 11, and 12, Respondent's brief.

Conclusions of Law

Petitioner claims there are no genuine issues of material fact and requests that the Tribunal enter a judgment cancelling the assessment.

Respondent claims that there are factual issues, specifically with regard to Petitioner's intent to use, store, or consume the subject property in Michigan. Alternatively, Respondent argues that the Tribunal should consider the entirety of the circumstances and Petitioner's actions, which indicate that Petitioner intended to and did use, store, and consume the property in this state, thereby subjecting it to use tax.

Caution must be taken to consider the admissible evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). Furthermore, a court may not make findings of fact or weigh credibility when deciding the motion. *In Re Handleman*, 266 Mich App 433; 702 NW2d 641 (2005). The trial court must give the benefit of any reasonable doubt to the nonmoving party. *Schultes v Naylor*, 195 Mich App 640, 645; 491

NW2d 240 (1992). The court must then determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992).

In this case there are facts in dispute, some of which involve a determination of the credibility of witnesses. All factual disputes, however, are not "genuine" and "material." If the facts that are not subject to a reasonable, genuine dispute support judgment in favor of one party or the other, "the court shall enter judgment without delay." MCR 2.116(I).

The Tribunal may consider documentary evidence that would be admissible at hearing, without regard to whether a foundation for admission was laid for purposes of the motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc,* 285 Mich App 362, 373-374; 775 NW2d 618, 625 (2009).

Presumption of Taxation

Under the Use Tax Act, there is a rebuttable presumption that "Tangible personal property is subject to tax if brought into this state within 90 days of the date of purchase and is considered as acquired for storage, use, or other consumption in this state." MCL 205.93(1)(a). This presumption has been part of the use tax act since the 1930's. Initially, no time limit was imposed. Any property purchased out of Michigan and brought here was presumptively subject to tax regardless of when it was brought here. In 1962, the "90 day" presumption was enacted. 1962 PA 219. The underlying rationale is that a person who brings property to Michigan within 90

days after purchase likely purchased it for use or storage here. This would be especially true for a Michigan resident who travels to a tax-free state, purchases property, and brings it home. Had it been purchased here, it would have been subject to sales tax. When a resident or non-resident of Michigan purchases property tax-free outside this state and promptly brings it here, the use tax presumptively applies, otherwise, the sales and use tax scheme could be too easily avoided. The use tax was enacted precisely for this reason.

In our case, the presumption of taxation arose when the subject watercraft entered this state and remained here in 2006. Depending on the circumstances, the mere physical presence of property in this state may be sufficient to give rise to the presumption. The intent of the law is to place an evidentiary burden on the person who is found in this state using, storing, or otherwise consuming property that the person recently acquired and brought to this state. The burden is on the taxpayer to rebut the presumption that the property was purchased for use or storage here. Petitioner claims that:

> It was never Petitioners' intention to use or store the boat in Michigan with the first 90 days of its purchase. Although at the time the Laughing Dolphin was purchased, it was not Petitioner's intent to use or store the boat in Michigan, after 90 days of the date the Laughing Dolphin was purchased, he began using the Laughing Dolphin in Michigan while in the state on vacation and have also had repairs and maintenance conducted on it in Michigan. . . . Although the watercraft has been in Michigan intermittently since 2006, the watercraft is considered to be a "Chicago yacht" and was recognized in 2010 as one of Chicago's Fifty Largest Private Motor Yachts. Petitioner's brief, p 6.

Under the statute, the mere physical presence of the craft in Michigan within 90 days of purchase is sufficient to create a presumption of taxation. The presumption could be rebutted, for example,

if a boat owner proves that his watercraft only made several overnight stops in Michigan on its way to another state, and never returned to Michigan. In such case, it would be clear that the property was not acquired for storage, use, or other consumption in Michigan, notwithstanding that it was bought here and used here. Respondent cites *Guardian Industries v Treasury*, 234 Mich App 244, 255; 621 NW2d 450 (2001), for the proposition that intent is "inferred from the totality of the circumstances . . . what actually happened rather than descriptive evidence of the subject state of mind of the actor." *Id*.

There are abundant, indisputable facts demonstrating that Petitioner used and stored the subject property in this state within 90 days of purchase, and for several years thereafter.

Petitioner cites *Free Enterprises* for the proposition that the presumption of taxation does not arise under MCL 211.93(1)(a), unless at the time of purchase the taxpayer intended to store or use the property in this state. *Free Enterprises, LLC v Dep't of Treasury*, MTT Docket No. 379030. The intent element discussed in *Free Enterprises* applied to the "presumption of exemption" for property brought to this state either 90 or 360 days after purchase. In that case, this hearing officer ruled that a non-resident taxpayer brought the property to Michigan more than 360 days after purchase, which gave rise to the presumption, without regard to the taxpayer's intent or reasons why the property was brought here. *The taxpayer's intent was relevant to the determination as to whether the presumption was rebutted, not as to whether the presumption arose*. The state failed to rebut the presumption of exemption.

In this case, where the presumption of taxation arose, it is relevant to consider the taxpayer's intent in order to determine whether the taxpayer can rebut the presumption of taxation that arose when the boat was used and stored here in 2006. A taxpayer's actions must be considered along with his stated intent. The taxpayer's stated intent at this singular point in time (the purchase on July 7, 2006) does not control all future incidents of taxation. Even if a person genuinely intends to take property to another state at the time of purchase, the taxpayer's intent may change after the date of purchase. Even if Mr. Podmajersky intended to take the craft to Chicago, this does not mean the property is not subject to Michigan use tax.

It is assumed for purposes of this motion that at the time of purchase on July 7, 2006, Petitioner intended to bring the boat to Chicago and only stop in Michigan for a few days along the way. It is also assumed that circumstances beyond his control prevented him from continuing on to Chicago until October 1, 2006. (It is beyond the scope of this motion to make findings of fact on these matters). On October 17, 2006, after spending approximately two weeks in Chicago, he piloted the Laughing Dolphin back to *Macatawa, Michigan, where it primarily remained docked and stored.* Whether or not that decision was dictated by the insurance company is irrelevant. Petitioner agreed to and did bring the watercraft back to Michigan for storage and use here. Petitioner claims to escape use tax because the craft was forced to land here in August, 2006, and that he proceeded to the intended destination as soon as possible in October, 2006. However, when the Laughing Dolphin finally made it to Chicago, it returned to Michigan 17 days later, and

stayed here for the next several years. Even if it is true that Petitioner initially intended to bring the boat to Chicago, he in fact brought it to Michigan and used and stored it here. Given these circumstances, the presumption of taxation arose and has not been rebutted.

Presumption of Exemption

In 2003, the legislature amended the use tax act to create an opposite presumption *against* taxation. That is, if the property is brought to Michigan after a certain number of days (90 days for non-residents and 360 days for residents) the property is presumed not to have been purchased for use, storage, or consumption here. Property (other than aircraft) that is used solely for personal, nonbusiness purposes and is purchased outside of this state by a person who is not a Michigan resident is presumed exempt if brought to Michigan more than 90 days after the date of purchase. MCL 205.93(1)(b)(i) and (ii). These provisions are presumptive exemptions that may be rebutted by appropriate evidence that the property was in fact purchased for storage, use, or consumption in this state, notwithstanding that it was brought here 91 days after purchase.

The presumption of exemption does not apply in this case. Neither Laughing Dolphin, LLC, nor Mr. Podmajersky are residents of Michigan. It could be said that the craft was brought to Michigan more than 90 days after the date of purchase when it arrived here on October 17, 2006. Petitioner's claim under this section fails because it cannot be disputed that the craft first entered Michigan waters and landed at Harbor Beach, Michigan, on or about August 14, 2006, approximately 38 days after purchase and remained here until October 1, 2006. The presumption of "exemption" under MCL 205.93(1)(a) and (b) does not apply under these facts, where the craft

first entered Michigan less than 90 days after purchase, left the state, and two weeks later re-entered Michigan more than 90 days after acquisition. Under such circumstances, the first entry is controlling – both presumptions cannot arise simultaneously.

Exemption for Persons Storing or Using Property While Temporarily in this State

The exemption at MCL 205.94(d) does not apply to this case. "Property that is brought into this state by a nonresident person for storage, use, or consumption while temporarily within this state, except if the property is used in this state in a nontransitory business activity for a period exceeding 15 days." MCL 205.94(d). In our case, the property was brought into this state on or about August 14, 2006, and remained here for the balance of the year, except for approximately 16 days in October. It is beyond dispute that the Laughing Dolphin was stored and used almost exclusively in Michigan during 2006, 2007, and 2008. The property was not "temporarily within this state." To suggest that Petitioner can avoid tax by a subjective pronouncement that there was a plan to bring the boat to Chicago cannot stand. The language of the exemption speaks to the *property*, the *person*, and the *use* of the property as being temporarily in this state. The exemption does not apply merely because a person is temporarily in this state. The fact that Mr. Podmajersky lived and worked in Chicago does not make his storage and use of the property here "temporary" where the property remained in this state and was used and stored almost exclusively here from the time it arrived in August, 2006.

Storage or Use in Michigan

Under Petitioner's view, Mr. Podmajersky had no choice but to use and store the craft in Michigan at least until it was taken to Chicago on October 1, 2006. Apparently, had the breakdown not occurred on August 16, 2006, the Laughing Dolphin would have continued to Chicago for use, storage, and consumption in that state; however, there is no "necessity defense" to a use tax assessment. It has been held that a person is liable for damages caused by a trespass notwithstanding that he or she was forced by a storm to remain moored to a dock on the property of another in order to prevent injury or loss of life. *Vincent v Lake Erie Transportation Co*, 109 Minn 456; 124 NW 221 (1910).

The use tax act was enacted to create parity between property purchased in this state (upon which sales tax is imposed) and property purchased outside this state for use in this state (upon which no sales or use tax was paid at the time of purchase). The subject property arrived in Michigan on or about August 14, 2006, approximately 38 days after purchase on July 7, 2006. Once it arrived at Harbor Beach, it never left Michigan for any appreciable time. There is evidence that Petitioner obtained a boat slip in Chicago where the Laughing Dolphin could be stored in 2007, but the craft spent very little time there. With few exceptions, the property remained in Michigan during 2007 and 2008. Even if it is true that Petitioner intended to take the craft to Chicago and keep it there in 2006, that intent clearly changed. Mr. Podmajersky chose to store the craft in Macatawa at Eldean Shipyard. He chose to hire Eldean Shipyard to repair, maintain, and refurbish the craft. He chose to store it at Eldean Shipyard in the winter of 2006-2007. Even if the boat had been "irreparably damaged" as Petitioner argues, the fact that the owner stored the

boat here and had repairs performed here during portions of 2006, 2007, and 2008, clearly subjects it to tax. Although it may have been a practical necessity to repair the boat in Michigan, that does not change the fact that keeping the boat here for those purposes constitutes storage and use.

The objective facts do not bear out the claims the Laughing Dolphin is a "Chicago vessel." It is not disputed that the Laughing Dolphin traveled under its own power to Chicago on October 1, 2006, and returned to Eldean Shipyard in Macatawa on October 17, 2006. It is quite evident that Mr. Podmajersky's decision to return the boat to Macatawa was not dictated by the exigent circumstances that arose on August 16, 2006, when the craft was stranded near Harbor Springs. Assuming arguendo that there is any validity to Petitioner's "break-down" defense, that defense vanished when the craft returned to Michigan after a brief trip to Chicago. Even if the water infiltration problems persisted in 2007, this is not a defense to the use tax assessment. In 2007, the craft was able to travel to Harbor Springs, Traverse City, Lake Charlevoix, Chicago, and back to Macatawa. Regardless of whether the craft experienced problems related to the water infiltration, Petitioner voluntarily chose to store and use it in Michigan in 2007. The Laughing Dolphin spent only 20 days, more or less, in Chicago in 2007. Respondent's Appendix 10.

Respondent's Appendix 10 (letter from Petitioner's attorney to the Illinois Department of Revenue) would be admissible at hearing. MCL 205.746(1). The facts asserted in that letter regarding the number of days the subject craft spent in Michigan during 2006, 2007, and 2008

are consistent with other documentary evidence submitted in this case.

Case Law

In *Master Craft v Dep't of Treasury*, 141 Mich App 56; 366 NW2d 235 (1985), the court upheld use tax on a Cessna airplane that the taxpayer owned and used extensively in Michigan.

> Master Craft purchased a Mitsubishi "MU-2" airplane in New Jersey and hangared it at Willow Run Airport in Ypsilanti. In April, 1977, the MU-2 crashed. The radios and other instruments were salvaged. 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 an aircraft outside Michigan and took delivery in Michigan. 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 where it was stored and used. The aircraft was in Michigan for purposes of installing avionics equipment salvaged from another aircraft that the taxpayer owned and stored in this state. The other aircraft was in this state because it had crashed. The fact that the aircraft was here for only six months in order to have the avionics equipment installed was no defense to the use tax assessment.

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, "[w]hile 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 clearly used and stored in Michigan by its owner upon whom the tax was imposed.

In *an unpublished opinion*, the court found that the presumption of taxation arose because an aircraft was brought into Michigan within 90 days of its acquisition. For purposes of the presumption, it did not matter that the lessee physically brought the aircraft to Michigan, and not the taxpayer, 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. *M&M Aerotech, Inc* v *Dep't of Treasury*, 1999 WL 33429980 (1999) [UNPUBLISHED].

In *Free Enterprises v Dep't of Treasury*, MTT Docket No. 379030, the taxpayer's sole member was a Michigan resident who spent considerable time in 2007 and 2008 living in Florida. The subject recreational vehicle was purchased in Florida and remained there for more than 360 days before being brought to Michigan. The RV spent more time in Florida, other states, and Canada than in Michigan. The RV was principally stored in Florida. It was held that merely bringing the RV to Michigan for the summer in 2008, 2009, and 2010 is not the type of storage or use that results in imposition of use tax, where the property is presumptively exempt under MCL 205.93(1)(b)(i) or (ii).

In *Free Enterprises* the users of the property owned a residence in Ft. Myers, Florida, and spent considerable time there. It was found that the recreational vehicle was purchased for "use, storage, or consumption" in Florida, as well as for traveling throughout North America, and actually was used extensively for this purpose before coming to Michigan. The RV was used and stored in Florida to a much greater degree than in Michigan. It was held that the department failed to overcome the presumption that the RV was exempt under MCL 205.93(1)(b)(i) or (ii).

Our present case is distinguishable from *Free Enterprises*. In our case, the presumption of exemption does not apply, but rather the presumption of taxation arose when the Laughing Dolphin came to Michigan and stayed here for the balance of the year, with the exception of 17 days in October 2006. Furthermore, even if the presumption did not arise, the Laughing Dolphin was extensively used and exclusively stored in this state over a period of several years, whereas the RV in *Free Enterprises* was brought to Michigan more than 360 days after purchase for seasonal use and spent the majority of the time in other states.

Storage

Another triggering event for use tax is "storage," which is defined as "keeping or retention of property in this state for any purpose after the property loses its interstate character." MCL 205.92. The inclusion of "storage" in the statute makes clear that property need not be physically used for its intended purpose or actually consumed in this state to be subject to tax. Mere "storage" is enough.

More than a brief or temporary presence is necessary to constitute storage. The statute contains the caveat that property is not "stored" in Michigan until "after the property loses its interstate

character." Therefore, property that briefly and temporarily comes to rest in Michigan while on an interstate journey is not "stored" in Michigan. While this may be a codification of a constitutional principle, it has independent statutory significance. In *Florida Leasco v Dep't of Treasury*, MTT Docket No. 264860, the tractor-trailers at issue were brought to Michigan for less than two weeks for the primary purpose of inspections while en route to terminals outside Michigan. Other property at issue in that case (car-haulers) passed through on their way to terminals outside Michigan where they would be based in between deliveries in interstate commerce. This was held not to constitute "storage" within the meaning of MCL 205.92(c). In our present analysis under MCR 2.116(C)(10), it is accepted as true that the Laughing Dolphin was initially passing through Michigan, but it remained here far beyond the "brief" two week period involved in *Florida Leasco*.

Conclusion

There is no genuine dispute as to any material fact that Petitioner exercised the privilege of using, storing, or consuming the subject watercraft in this state during 2006, 2007, and 2008. MCL 205.93(1). Petitioner did not pay sales tax to any other state. The reasons that Petitioner offers as to why the Laughing Dolphin arrived in Michigan and stayed for several years are no defense to this use tax assessment. The 90-day presumption of taxation arose, and is not rebutted. Furthermore, the presumption of exemption does not apply in this case because the watercraft was brought to this state within 90 days of acquisition and remained here almost exclusively for several years. The fact that the Laughing Dolphin left Michigan on October 1, 2006, and returned on October 17, 2006, does not entitle Petitioner to presumption under MCL 205.93(1)(b)(i). Even if the presumption of exemption did apply, the evidence is more than sufficient to rebut that presumption. Finally, Petitioner did not store and use the watercraft here temporarily and is not

exempt under MCL 205.94d. There is no genuine issue as to any material fact and the only judgment to be made is a legal one. This case shall be dismissed under MCR 2.116(I).

PROPOSED JUDGMENT

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

IT IS FURTHER ORDERED that Respondent's request for relief to dismiss this appeal is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion to Strike, Motion for Costs, and Motion for Immediate Consideration are 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: April 12, 2012 By: Thomas A. Halick