STATE OF MICHIGAN

COURT OF APPEALS

M & M AEROTECH, INC.,	UNPUBLISHED November 23, 1999
Plaintiff-Appellee,	
V	No. 211460 Court of Claims
DEPARTMENT OF TREASURY,	LC No. 97-016575 CM
Defendant-Appellant.	

Before: O'Connell, P.J., Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right a judgment for plaintiff, requiring defendant to pay $13,730.97 in use tax, penalties, and interest improperly collected from plaintiff under the Use Tax Act (UTA), MCL 205.91 *et seq*.; MSA 7.555(1) *et seq*. We affirm.

The parties have stipulated to the following facts. Plaintiff M & M Aerotech Inc., is a Michigan corporation engaged in the business of aircraft leasing.[1] Plaintiff has no employees and has operated no airplanes. Merit Services, Inc. (Merit) is a North Carolina corporation engaged in the operation of Goodyear auto service and tire sales stores in North Carolina.[2] Richard Mendler and Clifford Maine, two of plaintiff's three officers also serve as two of Merit's five officers.[3] On May 1, 1996, plaintiff purchased the subject aircraft in the State of Washington with a certified check signed by its president Richard Mendler. On or about the same date, plaintiff leased its only aircraft to Merit pursuant to an Aircraft Lease Agreement. The lease was drafted in anticipation of the aircraft's purchase.

Following the purchase and delivery[4] of the aircraft in Washington, Merit flew it from Washington to California, Arizona, Texas, and Tennessee before it arrived in North Carolina on May 2, 1996, where it has been hangared and based at all times relevant to the instant matter. After a total of nine Merit flights, on May 7, a Merit employee who was not a Michigan resident, flew the aircraft from North Carolina to Grand Rapids, Michigan, for the purpose of having avionics equipment installed.[5] The parties concede that the aircraft was flown into Michigan numerous times within ninety days of the purchase date and numerous times thereafter.[6]

On December 2, 1996, defendant Department of Treasury, issued plaintiff a bill for use tax due on the aircraft, including penalties and interest in the total amount of $12,715.47, which plaintiff paid under protest. Plaintiff filed this action to recover the amount paid plus interest, alleging that, as lessor, it did not "use" the aircraft in Michigan because it did not exercise any rights or powers of ownership in Michigan, that it did not "store" the aircraft in Michigan, that the aircraft never "came to rest" in Michigan before becoming an instrumentality of interstate commerce, and that it qualified for certain exemptions for payment of the use tax under the UTA. Both parties filed motions for summary disposition pursuant to MCR 2.116(C)(10) and agreed to have the matter resolved based on their stipulation of facts. The Court of Claims granted plaintiff's motion for summary disposition, concluding that the use tax was improperly assessed on the aircraft apparently on grounds that the aircraft was neither used nor stored in Michigan under the UTA.

On appeal, defendant first argues that the Court of Claims erred in granting plaintiff's motion for summary disposition on grounds that plaintiff did not "use" its aircraft in Michigan as that term is defined in the UTA MCL 205.91 *et seq*.; MSA 7.555(1) *et seq*. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the trial court must consider the documentary evidence in the light most favorable to the nonmoving party. *Id.* Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

The use tax complements the sales tax and is designed to cover those transactions not covered by the General Sales Tax Act. MCL 205.41 *et seq*.; MSA 7.521 *et seq*.; *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). The UTA, MCL 205.91 *et seq*.; MSA 7.555(1) *et seq*., applies to every person in this state "for the privilege of using, storing, or consuming tangible personal property in this state." MCL 205.93(1); MSA 7.555(3)(1). Under the UTA, property is presumed subject to the use tax if brought into Michigan within ninety-days of purchase and is considered as acquired for storage, use, or other consumption in the state:

> For the purpose of the proper administration of this act and to prevent the evasion of the tax, *it is presumed that tangible personal property purchased [elsewhere] is subject to the tax if brought into the state within 90 days of the purchase date and is considered as acquired for storage, use, or other consumption in this state.* [MCL 205.93(1); MSA 7.555(3)(1) (Emphasis added).]

There is no dispute that the aircraft was brought into Michigan within ninety days after it was purchased in the State of Washington. Therefore, it is presumed that the aircraft is subject to the use tax, and plaintiff has the burden of rebutting the presumption of taxation or establishing that an exemption applied. *Czars, Inc v Dep't of Treasury*, 233 Mich App 632, 638; 593 NW2d 209 (1999), citing *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 493; 516 NW2d 108 (1994).

Defendant contends that plaintiff failed to rebut this presumption because the uncontested evidence established that plaintiff "used" the aircraft in Michigan within the meaning of the UTA by exercising rights and powers over the aircraft incident to its ownership. In support of its position,

defendant asserts that plaintiff holds legal title to the aircraft, plaintiff exercised incidents of ownership by leasing the aircraft to Merit and allowing it to operate the aircraft commercially, plaintiff drafted the lease, the lease only relinquished "operational control" to Merit, the lease did not prevent plaintiff or its officers from renting the aircraft, plaintiff and Merit are related companies with related officers actively involved in the operation of both companies, and plaintiff had prior knowledge and ultimate control of the aircraft's use in Michigan.

The UTA defines "use" as follows:

> "Use" means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. [MCL 205.92(b); MSA 7.555(2)(b).]

Several panels of this Court have applied this definition to determine whether an aircraft owner "used" its aircraft in Michigan and was therefore liable for the use tax imposed under the UTA. In *Master Craft Engineering, Inc v Dep't of Treasury*, 141 Mich App 56, 70; 366 NW2d 235 (1985), this Court held that the plaintiff clearly exercised its powers of ownership over the aircraft when it was in Michigan because "it directed and alone determined" that the aircraft should be repaired and hangared in Michigan. Similarly, in *Kellogg, supra*, this Court held that the plaintiff failed to rebut the presumption that the aircrafts at issue were used in Michigan because the plaintiff exercised its rights and powers of ownership "in determining that the aircraft should be kept in a hangar and registered in Michigan." *Id.* at 493.

Czars, supra, is the most recent case addressing the issue of an aircraft owner's use under the UTA. In *Czars*, the petitioner, a Delaware corporation not engaged in any business activity, and Grand Aire Express, a Michigan corporation in the business of air cargo transportation, were both owned by the same shareholder. *Id.* at 635. The petitioner was incorporated in Delaware for the purpose, at least in part, of purchasing cargo aircraft to be used by Grand Aire in an effort to shield Grand Aire from the use tax liability that cargo aircraft were subject to at the time the petitioner was incorporated. *Id.* at 636. Following incorporation, the petitioner purchased an aircraft in Arizona and registered it with the Federal Aviation Administration in its name. *Id.* Less than three weeks after purchase, a Grand Aire pilot flew the aircraft from Arizona to Michigan, and the petitioner allowed Grand Aire to use the aircraft in its air cargo business. *Id.* Grand Aire subsequently modified and operated the aircraft as a cargo plane, paid taxes on the income it made from those flights, held the license, and maintained the flight logs. *Id.* at 636-637. The petitioner, which was not licensed to operate the aircraft, never prepared a lease agreement, never received any consideration, and never applied for a use tax registration. *Id.*

In rejecting the petitioner's claim that its "passivity" with respect to the aircraft as opposed to Grand Aire's "active" use rebutted the presumption of taxable use under the UTA, the majority of this Court held:

> Petitioner concedes that there is no lease or other documentary evidence showing that it totally or permanently relinquished control of the aircraft to Grand Aire in

> Arizona. In addition to allowing Grand Aire to fly the plane to Michigan (thereby exercising ownership rights in Arizona), petitioner also permitted Grand Aire in Michigan to modify the plane extensively, to obtain FAA approval to fly the plane, and to make use of the plane in Grand Aire's cargo transport business. Under these circumstances, petitioner failed to rebut the presumption that it exercised rights and powers of ownership both in Arizona and in Michigan and, therefore, is liable for use tax. See *Master Craft Engineering, Inc v Dep't of Treasury*, 141 Mich App 56, 70-72 (1985) (plane repaired in Michigan). The fact that Grand Aire was the only active user of the plane does not serve to rebut the presumption. [*Id.* at 639.]

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

In addition, Merit as lessee, was solely responsible for insuring the aircraft, indemnifying plaintiff against any and all damage to the aircraft, paying all storage and related costs at the North Carolina airport where the aircraft was hangared and the same costs when the aircraft was away from that airport. While plaintiff maintained certain remedies in the case of default, such as taking possession of the aircraft and all equipment, and terminating the lease, the lease provided that upon Merit's compliance with the lease terms, it shall "possess and use the aircraft . . . free of any interference or hindrance." Further, the parties stipulated that, although the lease was silent, it did not expressly prohibit plaintiff's officers, directors, or shareholders from renting the aircraft from Merit.

In our view, the terms of the lease in question and circumstances of this case demonstrate that plaintiff intended to and did relinquish total control of the aircraft to Merit for the lease term. Cf. *Czars, supra* at 639. Contrary to defendant's contention, there is no indication that plaintiff maintained control of Merit's use of the aircraft in Michigan. Nor is there any indication based on the parties stipulation of facts that, as in *Master Craft, supra* and *Kellogg, supra* plaintiff used, hangared, or registered the aircraft in Michigan. While we are mindful that, as in every lease, a lessor or owner maintains the ultimate right or power over the property incident to its ownership once possession and use of the property is transferred to the lessee, we cannot conclude that plaintiff "exercised" its "right or power over [the aircraft] incident to [its] ownership of that property" within the meaning of the UTA while it was in Merit's possession.

Defendant asserts that plaintiff had control and knowledge of the aircraft's use in Michigan because plaintiff and Merit are corporations with related officers actively involved in the operation of both companies. However, it is well-established that a corporation is an entity separate from that of its individual shareholders, officers, and directors, *Schusterman v Employment Security Comm'n*, 336

Mich 246, 259-260; 57 NW2d 869 (1953), and defendant has neither briefed nor provided authority to support its suggestion that both corporations should be regarded as a single unit in this case. *Shirley v Drackett Products Co*, 26 Mich App 644, 649; 182 NW2d 726 (1970). Accordingly, we conclude that plaintiff rebutted the presumption of taxable use in Michigan and the Court of Claims properly granted summary disposition in plaintiff's favor.[7]

Defendant also argues that the trial court improperly expanded the parties' stipulation of facts when it relied on plaintiff's counsel's unsupported assertion that all flights into Michigan were for the purpose of maintenance and repair. Assuming without deciding that the trial court erred, the error does not require reversal in this case. In light of our previous conclusion that plaintiff is not liable for the use tax because it did not use the aircraft in Michigan, the reasons for which Merit flew the aircraft into Michigan are inconsequential for purposes of this appeal. *Hawkins v Dep't of Corrections*, 219 Mich App 523, 528; 557 NW2d 138 (1996).

Because we hold that plaintiff rebutted the presumption of taxation, we need not address the applicability of plaintiff's claimed exemptions under the UTA.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] Plaintiff was incorporated in Michigan in 1989 and became licensed to transact business in North Carolina in 1997.

[2] Merit was incorporated in North Carolina in 1991.

[3] Mendler and Maine also serve as two of three officers of Hi-Tech Services, Inc., a Michigan corporation engaged in the operation of Goodyear auto service and tire sales stores in Michigan.

[4] Plaintiff asserts on appeal that while it purchased the aircraft, the seller delivered it to Merit in Washington and therefore plaintiff was never in actual possession of the aircraft. However, the parties' stipulation of facts do not indicate whether plaintiff or Merit took delivery of the aircraft from the seller.

[5] Mendler served as copilot on six of the nine original flights and as pilot on one of those flights. He also served as copilot on the May 7, 1996 flight to Michigan.

[6] We note that the exact number or duration of the flights cannot be deciphered from the aircraft log itself, which is written in code without a key and contains some illegible dates. Defendant however, asserts that the log shows that the aircraft was flown to Michigan about twelve times within ninety days of purchase, with half the flights involving overnight stays, and about eight times after the ninety-day period. In addition, while plaintiff asserts that all flights into Michigan were, like the initial flight, for the purpose of related maintenance, the parties did not stipulate to this fact and it cannot be verified from the aircraft log.

[7] Because defendant makes no argument regarding the "storage" of the aircraft, we express no opinion regarding whether plaintiff rebutted the presumption that the aircraft was stored in Michigan pursuant to MCL 205.92; MSA 7.555(2).