STATE OF MICHIGAN

COURT OF APPEALS

SERVICE SYSTEM ASSOCIATES, INC, Petitioner-Appellee, v CITY OF ROYAL OAK, Respondent-Appellant.	UNPUBLISHED December 6, 2005 No. 256632 Tax Tribunal LC No. 00-292153
SERVICE SYSTEM ASSOCIATES, INC, Petitioner-Appellee, v CITY OF HUNTINGTON WOODS, Respondent-Appellant.	 No. 256649 Tax Tribunal LC No. 00-292152

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In these consolidated appeals regarding property tax disputes, respondents appeal as of right from orders of the Michigan Tax Tribunal denying respondents' motions for summary disposition and granting summary disposition in favor of petitioner. We affirm.

I. Background

Petitioner is a for-profit corporation providing food and catering services to the general public for the City of Detroit at the Detroit Zoological Park (Detroit Zoo) pursuant to a formal agreement. The Detroit Zoo is located in the cities of Royal Oak and Huntington Woods. Accordingly, respondents sought to tax petitioner for its property, including equipment, buildings and building improvements, located at the Detroit Zoo. Petitioner filed separate petitions against respondents, alleging that it did not owe personal property taxes to respondents for the subject property because it did not own the property at the Detroit Zoo, rather the property belonged to the City of Detroit and the Detroit Zoo. Petitioner claimed that the concession exemption in MCL 211.181(2)(b) applied.

Respondents moved for summary disposition, denying petitioner's assertion that the property was entirely owned by the City of Detroit and arguing that the agreement created a landlord-tenant relationship and that petitioner's claim that the concession exemption applied was incorrect because that statute applied to real property, and the subject property constituted personal property for taxation purposes. Petitioner filed separate motions for summary disposition against respondents, contending that it was exempt from taxation pursuant to MCL 211.181(2)(b) since it provided a concession at the Detroit Zoo that was open to the public. Petitioner further contended that it did not own or lease any of the buildings or building improvements at the Detroit Zoo and that the Detroit Zoo did not relinquish any control or possession of the property to it.

After review of the parties' motions and the agreement in dispute, the Tax Tribunal granted summary disposition in favor of petitioner pursuant to MCR 2.116(C)(10). The Tax Tribunal found that petitioner and the City of Detroit formed a concession agreement and that the City of Detroit, through its counterpart the Detroit Zoo, "heavily regulated" the petitioner's operation at the Detroit Zoo. The Tax Tribunal also found that petitioner's operation was held open and usable to the general public. Subsequently, the Tax Tribunal denied respondents' motions for reconsideration after concluding that respondents merely reasserted arguments addressed in its previous orders and that their objections lacked merit.

II. Analysis

A. Designation as a Concession Agreement

Respondents assert that the Tax Tribunal erred in determining that the agreement between petitioner and the City of Detroit for food and catering services at the Detroit Zoo was a concession, and therefore, exempt from taxation pursuant to MCL 211.181(2)(b). We disagree.

We review de novo a decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating such a motion, a reviewing court must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. *Id*. When the evidence demonstrates that no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law. *Id*. Moreover, our review of a ruling of the Tax Tribunal is limited to determining whether the tribunal made an error of law or adopted an incorrect legal principle. *Meijer, Inc v Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000).

Tax exemptions are disfavored, and the burden of proving an entitlement to an exemption rests on the party asserting a right to the exemption. *Guardian Industries Corp v Dep't of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000). "However, this rule does not permit a strained construction adverse to the Legislature's intent." *Holland Home v Grand Rapids*, 219 Mich App 384, 396; 557 NW2d 118 (1996). The General Property Tax Act (GPTA), MCL 211.1 *et seq*., provides that all real and personal property within the jurisdiction of this state and not expressly exempted is subject to taxation. The Lessee-User Tax Act (LUTA), MCL 211.181 *et seq*., provides for taxation of leased property. However, MCL 211.181(2)(b) exempts from taxation property "that is used as a concession at a public airport, park, market, or similar

property and that is available for use by the general public." The LUTA seeks to eliminate the unfair advantage that private-sector users of tax-exempt property would otherwise exert over their competitors who lease privately owned property. *Seymour v Dalton Twp*, 177 Mich App 403, 410; 442 NW2d 655 (1989).

A concession has been defined as "'a privilege or space granted or leased for a particular use within specified premises.'" *American Golf of Detroit v Huntington Woods*, 225 Mich App 226, 230; 570 NW2d 469 (1997), quoting *Detroit v Tygard*, 381 Mich 271, 275; 161 NW2d 1 (1968). Incident to a concession is the concept of a concession holder's responsibility to uphold specific obligations and to maintain particular services at specified times and under specified terms of the concession agreement. *Id*. at 275-276; *American Golf*, *supra* at 230. These obligations of the concession holder must "bear a reasonable relationship to the purposes" of the facility being operated. *Tygard*, *supra* at 276; *American Golf*, *supra* at 230. To be a concession, the operation should be a "subsidiary business incidentally related to a public-oriented operation, rather than a privatized, self-contained operation." *Id*. at 231.

The question of what constitutes a concession for taxation purposes has been addressed in several cases. In *Seymour*, *supra* at 408-410, which involved a public golf course owned by the City of Muskegon and operated by a private manager, this Court ruled that the Tax Tribunal properly determined that Muskegon did not grant the petitioner a concession. The *Seymour* Court reasoned that the agreement did "little to impose obligations and restrictions" on the petitioner that were "stated with the requisite degree of specificity." *Id*. at 409. This Court further reasoned that "conspicuously absent" from the agreement were provisions characteristic of a concession, such as minimum hours, standards of service or oversight of operations by the city. *Id*. This Court stated that the petitioner "had an unacceptable degree of discretion to run the golf course and related facilities as he saw fit, without the imposition of obligations directed toward the fulfillment of a public purpose." *Id*.

Similarly, in *Golf Concepts v Rochester Hills*, 217 Mich App 21, 23; 550 NW2d 803 (1996), this Court reviewed the terms in a lease agreement between the City of Rochester Hills that owned a public golf course and the petitioner that leased the course. The *Golf Concepts* Court concluded that Rochester Hills "merely privatized the operation of the golf course," and thus, it did not confer a concession under the LUTA. *Id*. at 29. This Court stated:

> The provisions in the lease contract between the parties do not rise to the level of specific obligations on the part of petitioner, the privileged party, to maintain particular services at specified times. The provisions do not include requirements for minimum hours of operation, for petitioner's standards of service, or for respondent's oversight of the golf course operations. While the lease provisions demonstrate that respondent had some control over the operations, the provisions address broader management issues rather than specific obligations. [*Id*.]

However, in *Kalamazoo v Richland Twp*, 221 Mich App 531, 532-533; 562 NW2d 237 (1997), this Court looked to the provisions of agreements between Kalamazoo, the owner of a public golf course, and the petitioner, the manager of the course. The *Kalamazoo* Court held that the agreements created a concession for purposes of the LUTA. *Id*. at 539-540. This Court noted that the agreements required the petitioner to "provide to the general public open golf,

league, and tournaments at reasonable times, to operate food and golf-equipment concessions, and to maintain the golf course to a specified standard." *Id*. at 539. This Court determined that "[t]he specificity of the management agreements satisfied the requirement of specific obligations to maintain particular services at specified times." *Id*. This Court noted that merely privatizing the operation of the golf course would be contrary to the purpose of the LUTA, but held that, in contrast to *Golf Concepts* and *Seymour*, the City of Kalamazoo did not merely privatize the operation of the course, but instead, entered into management agreements with the petitioner that allowed Kalamazoo to retain "extensive oversight in order to protect the public purpose of providing the general public a recreational opportunity to play golf." *Id*. Given the above-mentioned cases, the relevant inquiry into what constitutes a concession for taxation purposes is whether the city specifically retained a sufficient degree of control over the lessee's operation of the facility to constitute a concession as in *Kalamazoo*, or instead, relinquished meaningful control and in so doing privatized the operation of the facility as in *Seymour*, and *Golf Concepts*. *American Golf, supra* at 233.

Here, it is undisputed that the subject property is at a public park and is available for use by the general public. The issue then becomes whether the property satisfies the definition of a concession pursuant to MCL 211.181(2)(b). To determine this issue, the Tax Tribunal was required to interpret this exemption statute. Statutory interpretation is a question of law properly interpreted by the agency that administers the statute. *Golf Concepts, supra* at 26. Moreover, the Tax Tribunal was required to interpret the provisions of the agreement between the petitioner and the City of Detroit. The interpretation of a contract is also a question of law. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

In this case, the Tax Tribunal looked to the terms of the agreement between the City of Detroit and petitioner to determine whether the City and its counterpart, the Detroit Zoo, maintained the level of control necessary for the grant of a concession within the meaning of the LUTA. The Tax Tribunal found that the concession agreement "heavily regulates [p]etitioner's abilities to conduct business freely without limitations on everyday services" and "rise[s] to the level of imposing specific obligations on the part of [p]etitioner." Specifically, the Tax Tribunal found that the agreement "impose[s] standards of service, minimum hours of operation, and oversight of [p]etitioner's concession stand at the Detroit Zoological Institute" and "infringes on the control of [p]etitioner's rights, the hours that can be worked, the foods that can be sold, and provides for unilateral termination by the Detroit Zoo." The Tax Tribunal concluded that "[p]etitioner is a concession that is heavily regulated by the Detroit Zoo."

The agreement contained numerous provisions to support this determination. As in *Kalamazoo*, the City of Detroit maintained substantial controls and restrictions over petitioner's operation. Under the agreement, the City of Detroit, through the Detroit Zoo, had daily oversight of petitioner's operations, including the brands of items to be sold, pricing of items for sale, locations where items were to be sold, manner in which items were to be sold, hours of operation and cash control procedures. As the Tax Tribunal determined, the clear language of the agreement satisfied the statutory requirement of specific obligations to maintain particular services at specified times. See *Tygard, supra* at 275-276; *American Golf, supra* at 230.

Therefore, we conclude that the Tax Tribunal did not err as a matter of law in ruling that, according to the provisions of the agreement, the City of Detroit used the property as a concession for purposes of the LUTA.[1]

Furthermore, we decline to address respondents' related assertion that a finding that an agreement is a concession is inconsistent with a finding that a party held independent contractor status. Respondents failed to cite legal authority to support this position. This Court will not search for authority to sustain a party's position. *Lionel Trains, Inc v Chesterfield Twp,* 224 Mich App 350, 354; 568 NW2d 685 (1997). Nevertheless, we note that there is legal authority contrary to respondents' position. In *Kalamazoo*, *supra* at 533, this Court found that the management agreements between Kalamazoo that owned the golf course and the petitioner that managed the course specified that the petitioner and its employees were independent contractors. Yet, this Court concluded that the same agreements created a concession for purposes of the LUTA. *Id*. at 539-540. Accordingly, it is not inconsistent for a party to a concession agreement to hold independent contractor status.

B. Categorization of Property for Taxation Purposes

Respondents contend that the Tax Tribunal erred in determining that the concession exemption applied to the subject property because the exemption only applies to real property. Respondents argue that the equipment, buildings and building improvements that petitioner used were personal property based on MCL 211.8(d) and (h) and MCL 211.14(5) and because the City of Detroit did not exert meaningful control over petitioner's operation as required for ownership. We disagree.

First, we address respondents' argument that the buildings and improvements are taxable as personal property under MCL 211.8(d) and (h). Personal property owned by a lessee is not tax exempt:

> For the purposes of taxation, personal property includes all of the following:

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[1] We reject respondents' argument that summary disposition was improper. Although a reviewing court is prohibited from making factual findings or weighing credibility in deciding a motion for summary disposition, *Burkhardt*, *supra* at 646-647, both statutory and contract interpretation are questions of law. *Id*. at 646; *Golf Concepts*, *supra* at 26. The determination of whether contract language is clear and unambiguous is also a question of law. *Mahnick v Bell Co*, 256 Mich App 154, 157, 159; 662 NW2d 830 (2003). At issue in the instant cases was whether the concession exemption applied to petitioner to exempt it from taxation for the subject property. The resolution of this issue involved the interpretation of the pertinent tax statutes, namely, MCL 211.181, 211.8, and 211.14, as well as the terms of the agreement. The Tax Tribunal reviewed all the terms of the agreement and concluded that the clear contract terms provided for a concession. Because we conclude that there was no legal error in the Tax Tribunal's determinations as to the meaning of the contract, summary disposition in favor of petitioner was proper.

> (d) For taxes levied before January 1, 2003, buildings and improvements located upon leased real property, except if the value of the real property is also assessed to the lessee or owner of those buildings and improvements . . . .
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> (h) During the tenancy of a lessee, leasehold improvements and structures installed and constructed on real property by the lessee, provided and to the extent the improvements or structures add to the true cash taxable value of the real property notwithstanding that the real property is encumbered by a lease agreement, and the value added by the improvements or structures is not otherwise included in the assessment of the real property or not otherwise assessable under subdivision (j). The cost of leasehold improvements and structures on real property shall not be the sole indicator of value. Leasehold improvements and structures assessed under this subdivision shall be assessed to the lessee.

This statute was intended to collect taxes on buildings located on leased property:

> The obvious purpose of the Legislature in the enactment of the above statute was to reach for taxation buildings erected on leased lands, such as airports, federal and state lands or any other lands where title to the underlying properties remains in the owners and the use is granted by, usually, long-term ground leases. The purpose of this statute is not to define what is personal property. [*Dick & Don's Greenhouses, Inc v Comstock Twp*, 112 Mich App 294, 298; 315 NW2d 573 (1982).]

Ownership of the improvements and buildings on a property is related to categorization of the property for tax purposes. Inquiry into whether property is defined as personal property for tax purposes requires consideration of MCL 211.8 and the question of the amount of control relinquished in the contract at issue. *Golf Concepts*, *supra* at 33. Both statutory interpretation and contract interpretation are questions of law properly determined by the Tax Tribunal. *Burkhardt*, *supra* at 646; *Golf Concepts*, *supra* at 26.

In *Skybolt Partnership v City of Flint*, 205 Mich App 597, 599; 517 NW2d 838 (1994), the City of Flint leased to the petitioner property located at an airport. The lease required the petitioner to make permanent improvements that would become Flint's property at the expiration or termination of the lease. *Id*. The petitioner constructed three hangars and office space. *Id*. The tribunal held that the improvements were the real property of Flint and were exempt from taxation. *Id*. This Court affirmed the tribunal's ruling that the improvements were not owned by the petitioner, and therefore, were not subject to taxation as the petitioner's personal property. *Id*. at 600. This Court cited *Air Flite & Serv-A-Plane v Tittabawassee Twp*, 134 Mich App 73; 350 NW2d 837 (1984), which relied on the statutory and common-law rule that "buildings placed upon real property become a part of the real property" and the "bundle of sticks" theory of ownership. *Skybolt*, *supra* at 600. This Court also reasoned that the improvements were Flint's property because Flint "exerted ultimate control over the property," and because the petitioner's "rights as lessee were strictly limited." *Id*.

However, in *Golf Concepts*, *supra* at 23, the City of Rochester Hills leased three distinct parcels of land to the petitioner. The lease provided that the petitioner surrender the property to Rochester Hills for no consideration except fair market value of the golf course equipment, maintenance and office equipment, and trade fixtures and furnishings when the lease ended. *Id*. The tribunal ruled that the land and improvements on one of the parcels was real property, and because Rochester Hills owned the land and improvements, the property was tax exempt. *Id*. at 24. The tribunal further ruled that the other two parcels were likewise tax exempt because they consisted of a public park, and the petitioner operated the golf course as a concession. *Id*. This Court reversed the tribunal's holding. *Id*. at 34. This Court cited *Kalamazoo*, *supra* at 712 n 2, as confirming that the improvements to the property constituted personal property under the GPTA. This Court distinguished *Skybolt*, reasoning that the respondent "does not exert ultimate control of the property, and because [the] petitioner's rights as a lessee are not strictly limited." *Golf Concepts*, *supra* at 33. This Court also reasoned that the lease "provided petitioner with a high degree of independence in operating the golf course and managing the property" and that "neither *Skybolt* nor *Air Flite* considered in any detail MCL 211.8, . . . which directly affects the decision se." *Id*.

The tribunal analyzed the issue regarding the ownership of the property for tax purposes. Relying on the provisions of the agreement, the tribunal found:

> The agreement clearly stipulated that all concessionaire and catering equipment remained at the Detroit Zoo; Petitioner would lower a percentage of the profits it receives by agreeing to level the capital investment that would remain at the Detroit Zoo following the end of the contract. Petitioner's depreciation of the equipment does not constitute ownership of the questioned property. Petitioner's use of the property concerning hour requirements and services, specified in the agreement, strictly limited Petitioner's scope of control.

Therefore, the tribunal determined that the clear terms of the agreement demonstrated that the City of Detroit owned the property, including the equipment, buildings and building improvements.

The agreement and an affidavit provided by petitioner supported the Tax Tribunal's ruling. The agreement stated that SSA was hired to perform certain food and catering services at the Detroit Zoo. As in *Skybolt*, the terms of the agreement demonstrated that the City of Detroit, through the Detroit Zoo, never relinquished control of its buildings and building improvements to petitioner. With regard to the equipment, the agreement provided, "Estimated equipment expenses are based upon the assumption that the successful bidder will inherit <u>all</u> of the existing equipment." (Emphasis in original.) However, the agreement also provided that the Detroit Zoo would "buy-back" any remaining un-amortized value of the investment if the contract ended after three years, and thereby, retain the investment. In his affidavit, Mark A. Schroeder, the Chief Financial Officer for petitioner, explained that petitioner was able to reduce "the percentage of its sales it ha[d] to pay to the Detroit Zoo by agreeing to a level of capital investments that would remain at the zoo when the agreement concluded." Schroeder averred that the agreement provided that "upon its expiration all of the concessionaire and catering equipment remains at the Detroit Zoo." Accordingly, the evidence established that petitioner did not own any personal property at the Detroit Zoo.

Although the fact that petitioner was required to surrender the property to the City of Detroit at the termination of the contract alone is not indicative of the City's ownership, when combined with the fact that petitioner's rights were strictly limited under the terms of the agreement, it supports the Tax Tribunal's determination that all of the property was under the ownership of the City. In addition, all of the concession stands were available for use by the public. See *Skybolt*, *supra* at 603. Therefore, we conclude that the Tax Tribunal did not err as a matter of law in ruling that the City of Detroit owned the subject property and that it was not the personal property of petitioner for taxation purposes.

Next, we address respondents' argument that the buildings and improvements are taxable as personal property under MCL 211.14(5). This statute provides:

> Tangible personal property under the control of a trustee or agent, whether a corporation or a natural person, may be assessed to the trustee or agent in the local tax collecting unit in which the trustee or agent resides, except as otherwise provided. Personal property mortgaged or pledged is considered the property of the person in possession of that personal property and may be assessed to that person. Personal property not otherwise taxed under this act that is in the possession of any person, firm, or corporation using that property in connection with a business conducted for profit is considered the property of that person, firm, or corporation for taxation and shall be assessed to that person, firm, or corporation. [MCL 211.14(5).]

"This section *presumes* that the property at issue is personal property." *Golf Concepts*, *supra* at 33 (emphasis in original). Therefore, this statute does not aid in determining whether the property at issue is personal or real. *Id.* at 33-34. Where the property is personal, the petitioner is responsible for taxes pursuant to MCL 211.8(d) and (h). *Id.* at 34. However, where the property is real, the statute is inapplicable. *Id.* Because the Tax Tribunal did not err as a matter of law in determining that the property at issue was real property belonging to the City of Detroit, we conclude that the above section is immaterial to these cases. In sum, we affirm the Tax Tribunal's orders granting summary disposition in favor of petitioner because the Tax Tribunal's interpretation of the statutes at issue and application of the clear terms of the contract did not amount to an error of law. *Meijer*, *supra* at 5.[2]

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

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[2] At oral argument, respondents asserted that summary disposition was improper because petitioner failed to provide evidence that the City of Detroit owned the subject property. Respondents did not raise this argument in their primary briefs, and their subsequent assertion of the matter in a reply brief was too late to invoke review. See MCR 7.212(G); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004).