STATE OF MICHIGAN

COURT OF APPEALS

CCXLS, L.L.C., Petitioner-Appellant,	UNPUBLISHED October 11, 2012
v DEPARTMENT OF TREASURY, Respondent-Appellee.	No. 297902 Tax Tribunal LC No. 00-358530

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Petitioner appeals as of right from an April 15, 2010, order of Michigan Tax Tribunal, which denied petitioner's motion for summary disposition, granted respondent's motion for summary disposition, affirmed respondent's assessment of use tax "based on the purchase price of a 2007 Cessna Citation 560XLS," and affirmed respondent's imposition of penalty interest. For the reasons set forth in this opinion, we reverse the Michigan Tax Tribunal and remand for further proceedings consistent with this opinion.

This Court reviews a summary disposition ruling de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Id.* "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Constitutional standards of review in Const 1963, art 6, § 28 govern review of Tax Tribunal decisions. *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).

> In the absence of fraud, an appellate court's review of a Tax Tribunal decision is confined to determining if the tribunal erred in applying the law or adopting a wrong principle. Any factual findings made by the tribunal are

> conclusive if supported by competent, material, and substantial evidence on the whole record. [*Kaiser Optical Sys, Inc v Dep't of Treasury*, 254 Mich App 517, 520; 657 NW2d 813 (2002).]

"But when statutory interpretation is involved, this Court reviews the tribunal's decision de novo." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006).

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of the statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. [*Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (internal quotation and citation omitted).]

"The proper interpretation of a contract is also a question of law that this Court reviews de novo." *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. . . . Generally, if the language of a contract is unambiguous, it is to be construed according to its plain meaning." *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010) (internal quotation and citation omitted).

We initially address petitioner's contention that the agreements concerning the aircraft between petitioner and Air Services, Inc. (ASI) show a "lease" of the aircraft, as defined in MCL 205.92b(k). The Use Tax Act, MCL 205.91 *et seq*., defines a "lease," in pertinent part, as follows:

> "Lease or rental" means *any transfer of possession or* control of tangible personal property *for a fixed or indeterminate term for consideration* and may include future options to purchase or extend. This definition applies only to leases and rentals entered into after September 1, 2004 and has no retroactive impact on leases and rentals that existed on that date. . . . [MCL 205.92b(k) (emphasis added).]

Our review of the several petitioner-ASI agreements establish the existence of a lease: a "transfer of possession or control," "for a fixed or indeterminate term," and "for consideration." One relevant portion of the September 1, 2007, petitioner-ASI lease/management agreement, paragraph 4, entitled "Operations," states as follows:

> *ASI will have exclusive possession* of the Aircraft which will be operated solely under ASI's FAR Part 135 Air Carrier Certificate. On all flights, ASI, and not the owner, will have "operational control.["] Operating standards will comply with all applicable Federal Aviation Administration ("FAA") Regulations. . . .

> ASI will schedule all flights, provide an itinerary as needed and maintain a posted schedule in the ASI scheduling office. OWNER shall schedule its use of the AIRCRAFT . . . with ASI's scheduling office, and ASI will attempt to accommodate OWNER's requests. . . . *ASI is leasing the Aircraft* to use it under ASI's FAR Part 135 Air Carrier Certificate. *ASI shall pay to Owner a lease rental rate as disclosed on the attached Rental Rate Agreement*. [Emphasis added.]

The petitioner-ASI rental rate agreement of November 27, 2007, specifies that ASI will, on a monthly basis, pay petitioner consideration amounting to $2,700 for each flight hour "of use by ASI." The lease/management agreement envisions that the agreement's terms "shall commence on September 1, 2007 . . . and end[] on August 31, 2008 . . . and annually thereafter, unless earlier terminated as provided herein." Additionally, a November 1, 2007, operational agreement between ASI and petitioner references that petitioner agrees "to surrender exclusive operational control of the . . . aircraft to" ASI.

Respondent maintains that the petitioner-ASI agreements come within the statutory exception to "lease or rental" in MCL 205.92b(k)(*iii*), which provides, in relevant part:

> The provision of tangible personal property along with an operator for a fixed or indeterminate period of time, where that operator is necessary for the equipment to perform as designed. To be necessary, an operator must do more than maintain, inspect, or set up the tangible personal property.

According to respondent, by virtue of petitioner's "agreement with ASI, . . . ASI is managing the aircraft for" petitioner, and aircraft operator ASI "'is necessary for the equipment (the aircraft) to perform as designed.'" Even assuming that ASI, the operator, "is necessary for the . . . [aircraft] to perform as designed," no facts in this case suggest that petitioner provided "tangible personal property *along with an operator [ASI]*." MCL 205.92b(k)(*iii*) (emphasis added).

The Tax Tribunal correctly recognized that on September 1, 2007, when petitioner and ASI entered their lease/management agreement, petitioner did not yet hold an ownership interest in the aircraft. The tribunal also properly found that petitioner and ASI finalized their lease agreement on November 27, 2007, when they signed a rental rate agreement. But the tribunal committed an error of law when it refused to consider the content of the lease/management agreement in ascertaining the full scope of the parties' intended agreement. "Where one writing references another instrument for additional contract terms, the two writings should be read together." *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). "Although neither physical attachment nor specific language is necessary to incorporate a document by reference, the incorporating instrument must clearly evidence an intent that the writing be made part of the contract." *Id*. at 307 n 21 (internal quotation and citation omitted); see also *Omnicom of Mich v Giannetti Investment Co*, 221 Mich App 341, 346; 561 NW2d 138 (1997) ("[w]hen there are several agreements relating to the same subject matter, the intention of the parties must be gleaned from all the agreements"). Even accepting the Tax Tribunal's implicit conclusion that

the September 1, 2007, agreement constituted an executory agreement that conveyed no leasehold interest in the aircraft to ASI,[1] an interest that could not transfer until petitioner became the owner of the aircraft in November 2007, the lease/management agreement and the rental rate agreement still plainly reference one another, and the tribunal should have read them together.

In conclusion, the terms of the agreements between petitioner and ASI unambiguously reflect the presence of the requisite elements for a "lease" under MCL 205.92b(k). Furthermore, respondent identifies no authority for the proposition that for use tax purposes a lease cannot exist in the context of a management agreement. See, *In re Mich Consol Gas Co's Compliance with 2008 PA 286 & 295*, 294 Mich App 119, 139; 818 NW2d 354 (2011) (an appellant party may not merely "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position") (internal quotation and citations omitted). Consequently, the plain language of both the petitioner-ASI agreements and MCL 205.92b(k) demand a grant of summary disposition in petitioner's favor with respect to the issue of its lease of the aircraft to ASI. MCR 2.116(C)(10).

We next consider petitioner's claim that it properly and timely elected "to pay use tax on rental receipts in accordance with MCL 205.95(4)." Subsection 5(4), which applies to use tax elections made by a lessor of tangible personal property, provides:

> A lessor may elect to pay use tax on receipts from the rental or lease of the tangible personal property in lieu of payment of sales or use tax on the full cost of the property at the time it is acquired. For tax years that begin after December 31, 2001, in order *to make a valid election under this subsection, a lessor of tangible personal property that is an aircraft shall obtain a use tax registration by the earlier of the date set for the first payment of use tax under the lease or rental agreement or 90 days after the lessor first brings the aircraft into this state*. [Emphasis added.][2]

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[1] An executory contract is one "[t]o be performed at a future time; yet to be completed." Black's Law Dictionary (7th ed), p 592.

[2] Administrative Rule 82, applicable to sales and use tax matters, similarly provides, in pertinent part:

> (1) A person engaged in the business of renting or leasing tangible personal property to others shall pay the Michigan sales or use tax due at the time he purchases tangible personal property, or he may report and pay use tax on the rental receipts from the rental thereof. . . . A person remitting tax on rental receipts shall be the holder of a sales tax license, or a registration as is provided in the use tax act. Each month such lessor shall compute and pay use taxes on the total rentals charged. . . . [Mich Admin Code, R 205.132.]

The Tax Tribunal rejected petitioner's invocation of MCL 205.95(4) as a proper basis for its use tax election, explaining, in relevant part:

> The Tribunal disagrees that Petitioner's use tax registration was timely under MCL 205.95(4)[.] MCL 205.95(4) states . . . .
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> * * *
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> The language "at the time it is acquired" indicates that the "rental receipts" election must be made at the time of acquisition of the tangible personal property. As noted above, November 14, 2007, the date of assignment of the Purchase Agreement, was the date that Petitioner acquired an interest in the Aircraft. The Aircraft Maintenance/Lease Agreement only indicated that "ASI shall pay to Owner a lease rental rate as disclosed on the attached Rental Rate Agreement." The Aircraft Maintenance/Lease Agreement only indicated that "ASI will pay all taxes . . . relating to their use or operation of the AIRCRAFT excluding . . . State Use or Sales Tax." There was no Rental Agreement, on November 14, 2007, which specified the amount of payment date of rental or lease payments. Therefore, Petitioner did not make a valid and timely election under MCL 205.95(4).

The Tax Tribunal misconstrued the plain import of MCL 205.95(4). The second sentence of the tribunal's analysis reflects an incorrect interpretation of the first sentence of MCL 205.95(4): "A lessor may elect to pay use tax on receipts from the rental or lease of the tangible personal property *in lieu of* payment of sales or use tax on the full cost of the property *at the time it is acquired*." (Emphasis added). Specifically, the tribunal misapplied the phrase "at the time it is acquired" to the first part of the first sentence in MCL 205.95(4) regarding a lessor's opportunity "to pay use tax on receipts from the rental or lease of the tangible personal property," because the phrase "at the time it is acquired" plainly applies only to the immediately preceding, alternative option to pay "sale or use tax on the full cost of the property." The tribunal disregarded the statutory construction principle that "[q]ualifying words and phrases in a statute refer solely to the last antecedent in which no contrary intention appears." *Weems v Chrysler Corp*, 448 Mich 679, 700; 533 NW2d 287 (1995), overruled in part on other grounds in *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 97, 105-106, 110; 643 NW2d 553 (2002). The remainder of the Tax Tribunal's analysis, including its focus on the aircraft's acquisition date, essentially writes out of MCL 205.95(4) its second sentence, which clearly and unambiguously envisions that the lessor of an aircraft, "to make a valid election under this subsection," must "obtain a use tax registration by [1] the earlier of the date set for the first payment of use tax under the lease or rental agreement or [2] 90 days after the lessor first brings the aircraft into this state." *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) (restating the rule of statutory construction cautioning courts against construing a statute in a manner "that would render any part of the statute surplusage or nugatory") (internal quotation and citation omitted).

The parties stipulated that petitioner "obtained a Michigan use tax registration on November 21, 2007," and that "[t]he aircraft first entered Michigan on November 27, 2007." The petitioner-ASI "lease/management agreement" "effective as of September 1, 2007," references an "attached Rental Rate Agreement," which declares that "effective November 27,

2007," ASI will "pay to Owner [petitioner] . . . $2,700 . . . per flight hour . . . for each hour of use by ASI," "commencing the 27th day of November, 2008 [sic]," and that "all lease payments shall be paid within thirty . . . days of the last day of each month." Pursuant to the plain language of the aircraft lessor election in the second sentence of MCL 205.95(4), petitioner timely made its use tax election on November 21, 2007, a date that occurred "by the earlier of the date set for the first payment of use tax under the lease or rental agreement [December 1, 2007] or 90 days after the lessor first brings the aircraft into this state [November 27, 2007]."

In conclusion, the Tax Tribunal incorrectly granted respondent's motion for summary disposition. Our conclusion is based on our prior finding that the petitioner-ASI agreements unambiguously establish the existence of a lease, MCL 205.92b(k), and that the agreement language and undisputed facts establish that petitioner timely elected to pay use taxes on rental payments it received from ASI. Consequently, the tribunal should have granted petitioner's motion for summary disposition under MCR 2.116(C)(10).[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded to either party. MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan

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[3] Petitioner additionally asserts that the Tax Tribunal mistakenly "determined that the effective purchase date was November 14, 2007, the date ER-One assigned its interest in the Purchase Agreement to" petitioner. Petitioner points to MCL 205.92(e), which defines "purchase" as an acquisition for consideration, "whether the acquisition is effected by a transfer of title, of possession, or of both . . . ." As petitioner observes, Cessna transferred title in the aircraft to petitioner on November 27, 2007, the same date that the aircraft arrived in Michigan. Notwithstanding that the tribunal may have committed an error of law in arriving at the date petitioner bought the aircraft, the aircraft purchase date plays no part in the analysis of a proper use tax election under MCL 205.95(4). Therefore, no further discussion of this or attendant issues raised before the tribunal is required of this Court.