STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS CORPORATION, Petitioner-Appellee,	UNPUBLISHED April 19, 2012
v	No. 303822 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC Nos. 00-321091; 00-328925

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Respondent appeals by right the Tax Tribunal's final order granting petitioner's motor fuel tax refund claims. We affirm.

Petitioner filed motor fuel tax refund claims for the years 2004 and 2005 for fuel placed in the tanks of newly manufactured vehicles at the end of the assembly process. Some of this fuel was used to power the vehicles as they went through final testing and quality control, and some fuel remained in the tanks after the vehicles were transferred to a carrier for shipment out of state. The remaining fuel was intended to ensure that the vehicles could be driven off of the carriers upon arrival at their destinations. Respondent denied petitioner's claims, but the Tax Tribunal granted the claims.

On appeal, respondent argues that petitioner did not qualify as an "end user" of motor fuel, and therefore should not be entitled to a refund under the Motor Fuel Tax Act, MCL 207.1001 *et seq*. We disagree.

Absent fraud, appellate review of a Tax Tribunal decision is limited to a determination of whether the tribunal erred in applying the law or adopted a wrong principle. *Czars, Inc v Dep't of Treasury*, 233 Mich App 632, 637; 593 NW2d 209 (1999).

MCL 207.1033 provides:

> An end user may seek a refund for tax paid under this act on motor fuel used by the person for nonhighway purposes. However, a person shall not seek and is not eligible for a refund for tax paid on motor fuel used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act . . . .

MCL 207.1039 provides:

> An end user may seek a refund for tax paid under this act on motor fuel or leaded racing fuel used in an implement of husbandry or otherwise used for a nonhighway purpose not otherwise expressly exempted under this act. However, a person shall not seek and is not eligible for a refund for tax paid on gasoline or leaded racing fuel used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act . . . .

Under either MCL 207.1033 or MCL 207.1039, a taxpayer may be entitled to a refund for motor fuel tax previously paid if that fuel was used for non-highway purposes, the person qualifies as an "end user," and the refund is not otherwise disallowed by the act.

An "end user" is "the party who uses the fuel to power the motor vehicle into which the fuel was placed." *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528, 536; 708 NW2d 461 (2005). In *DaimlerChrysler*, the auto manufacturer/petitioner purchased fuel at retail, placed the fuel in the tanks of new vehicles, and transferred the vehicles to dealerships without using the fuel. *Id.* Because the petitioner in that case did not use the fuel and simply passed it on to a purchaser, petitioner was not an "end user" and did not qualify for a refund of motor fuel taxes paid under either MCL 207.1033 or MCL 207.1039. *DaimlerChrysler*, 268 Mich App at 537.

Subsequently, in *AutoAlliance Int'l, Inc v Dep't of Treasury*, 282 Mich App 492, 503; 766 NW2d 1 (2009), this Court applied the definition of "end user" from *DaimlerChrysler* and held that the petitioner was an end user of motor fuel that was used for non-highway purposes. In *AutoAlliance*, it was undisputed that the petitioner placed 3.2 gallons of motor fuel in each vehicle manufactured in order to move vehicles through final testing and quality control, to drive the vehicles to a facility for installation of after-market parts, and to drive the vehicles to the place of loading for final shipment. *AutoAlliance*, 282 Mich App at 503. Not every vehicle required the full 3.2 gallons, but that amount was properly chosen to ensure that production would not be interrupted by vehicles running out of fuel. *Id.* The *AutoAlliance* Court determined that the petitioner qualified as an "end user" with respect to fuel placed in the vehicles at the end of the assembly process. *Id.* Moreover, even though not all fuel was actually burned during the process, this Court held that "use" within the meaning of the statute could mean "to employ for some purpose" or to "apply to one's own purposes," as well as to "consume, expend, or exhaust." *Id.* at 505. Thus, the petitioner in *AutoAlliance* qualified as an end user even with respect to the incidental amounts of fuel remaining in the vehicles when they were shipped. *Id.*

In the present case, as in *AutoAlliance*, petitioner placed fuel in the tanks of newly manufactured cars at the end of the assembly process, and used that fuel during quality control and testing. The amount of fuel used in each vehicle was calculated to be the minimum amount necessary to start the vehicle during the loading and transit process. As the Tax Tribunal succinctly stated, "[t]he facts of *AutoAlliance* are indistinguishable from our own." Given the factual similarities between *AutoAlliance* and the instant case, we conclude that the Tax Tribunal did not err by finding that petitioner was entitled to a motor fuel tax refund as the end user of fuel for a non-highway use.

Respondent's argument that *AutoAlliance* conflicts with *DaimlerChrysler* lacks merit. Although respondent contends that the *AutoAlliance* Court did not apply the definition of "end user" set forth in *DaimlerChrysler*, the language of *AutoAlliance* belies that argument:

> We do not agree that whether one qualifies as an end user should depend on whether one uses the fuel in a manner that is consistent with the typical use of a particular machine. Rather, whether a person qualifies as an end user should depend on whether the person acts as a typical middleman (such as a jobber or retailer) and sells the fuel to third parties or acts as a typical consumer and puts the fuel to his or her own use. Nevertheless, because the decision in *DaimlerChrysler* is directly applicable to the facts of this case, we must apply it. [*AutoAlliance*, 282 Mich App at 502-503.]

It is clear that the *AutoAlliance* Court employed the *DaimlerChrysler* definition of "end user," in spite of any apparent reservations. The facts of *DaimlerChrysler* were distinguishable from those of *AutoAlliance* because, in the former case, the petitioner was not using motor fuel to power vehicles. As the Tax Tribunal correctly noted:

> Although *DaimlerChrysler* held that the taxpayer in that case did not use the fuel to power the vehicle, this does not mean that it was impossible for the taxpayer to meet its burden. In other words, the ruling in *DaimlerChrysler* does not preclude a taxpayer from offering proofs to establish "end use" of fuel without actually combusting the fuel in the engine's cylinders. *AutoAlliance* establishes that with appropriate proofs, a taxpayer may meet this burden. Note that the *DaimlerChrysler* [C]ourt's ruling in this regard was limited to the "circumstances presented in this case."

In short, the decisions in *DaimlerChrysler* and *AutoAlliance* do not conflict. Under the *DaimlerChrysler* definition, as applied in *AutoAlliance*, petitioner was an "end user" of motor fuel and consequently entitled to a refund.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher