STATE OF MICHIGAN

COURT OF APPEALS

FISHER & COMPANY, INC, Plaintiff-Appellee, v DEPARTMENT OF TREASURY, Defendant-Appellant.	FOR PUBLICATION January 29, 2009 9:05 a.m. No. 280476 Court of Claims LC No. 06-000020-MT
FISHER & COMPANY, INC, Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 280498 Court of Claims LC No. 06-000020-MT Advance Sheets Version

Before: Murray, P.J., and O'Connell and Davis, JJ.

DAVIS, J.

Each of the parties separately appealed as of right the same summary disposition order. We consolidated the appeals. This case involves a dispute between the parties regarding the applicability of the Michigan Use Tax Act (UTA), MCL 205.91 *et seq*., to plaintiff's purchase of a partial interest in an aircraft. The Court of Claims held that the nature of the transaction constituted a purchase of tangible personal property rather than services, but it also held that plaintiff was entitled to a refund of three percent. I would affirm in part, reverse in part, and remand.

The parties do not dispute the bare facts, although, as will be evident later, the legal implications of those facts are not so straightforward. Plaintiff is a Michigan corporation. It

purchased a "25% undivided interest" in a small turbofan jet airplane.[1] That partial interest was formally considered to be a tenant-in-common ownership interest, along with several other part owners; plaintiff was designated as the "buyer." Each part owner, including plaintiff, was entitled to share in the airplane's depreciation, gain, loss, deduction, or other tax benefit that might arise therefrom. The seller's sister company, NetJets Aviation, Inc., (NJA), maintained the airplane and coordinated its use by plaintiff and by the other part owners, and the "owner's agreement" precluded plaintiff from placing any lien on the airplane without approval by the maintenance entity. The airplane was specifically identified, and that particular airplane never entered Michigan. However, part of the benefit to plaintiff was the use of other airplanes in the NJA fleet, consistent with plaintiff's rights under the six "operative documents" that made up the transaction.[2] Plaintiff did utilize that benefit for transportation in Michigan.

The Use Tax Act is complementary to the Michigan General Sales Tax Act, MCL 205.51 *et seq.*, and is designed to cover those transactions not subject to the sales tax. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). This tax is collectable from each taxpayer in Michigan and is assessed "for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price." MCL 205.93(1). "'"A sales-use tax scheme is designed to make all tangible personal property, whether acquired in, or out of, the state subject to a uniform tax burden. Sales and use taxes are mutually exclusive but complementary, and are designed to exact an equal tax based on a percentage of the purchase price of the property in question."'" *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 52; 703 NW2d 822 (2005), quoting *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 19 n 3; 678 NW2d 619 (2004), quoting 85 CJS2d, Taxation, § 1990, p 950.

Critically, the use tax applies, by its plain language, to *tangible personal property*. It does not apply to services. The most significant issue in this case is whether plaintiff *actually* purchased an *actual* airplane (albeit as a co-owner). Plaintiff argues that it only purchased "nominal" title. Rather, it claims that the "purchase" was merely a convenient way to express plaintiff's purchase of a particular number of hours of flight time to be provided by a corporate travel services provider. Indeed, plaintiff argues that this was the only way the provider would permit a purchase of more than 200 hours of flight time to be structured. Moreover, plaintiff stresses the fact that, once all the required transaction documents were executed, plaintiff's practical rights to the airplane fell far short of anything a lay person would recognize as "ownership." Defendant argues that the contractual documents all reflect a purchase of the airplane itself, albeit only as a part owner, and further points out that plaintiff actually did, in fact, claim depreciation for the airplane on its taxes. Defendant does not seem to dispute that

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[1] It purchased an interest in one airplane from Executive Jet Sales, Inc. (EJS), in 2001, and in 2003 it then traded that interest for another interest in a different airplane from NetJets Sales, Inc. (NetJets). We are only concerned with the 2003 transaction, because the subject of this dispute is the use tax plaintiff paid regarding the 2003 contract.

[2] These documents consisted of the purchase agreement, the owner's agreement, an interchange agreement, a management agreement, an acceptance form, and a bill of sale.

some services were involved in the transaction, but it asserts that the partial purchase of the airplane itself was a fundamental part thereof. Furthermore, defendant points out that contracting to relinquish control over something is itself the exercise of an ownership right.

We appreciate the fact that, at the end of the day, plaintiff ultimately just wanted to have on-demand corporate jet transportation without the need to purchase and maintain a whole airplane. However, the dispositive issue is not so much plaintiff's motivation as what *actual transaction* plaintiff entered into. The documents involved all reflect a sale of an ownership interest in an airplane, coupled with a contractual arrangement under which multiple airplane owners shared maintenance, administration, and access to their airplanes. In effect, this is a time share in an item of tangible personal property; in this case, an airplane.

Traditionally, time shares involve real property, where "a purchaser would buy occupancy rights in one or more week-long 'intervals,' along with a corresponding undivided interest in the property . . . [a]s is typical in time-sharing arrangements, interval owners could place their occupancy rights in commercial pools that facilitate trades with those who have occupancy rights in homes at other resorts." *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 338; 591 NW2d 216 (1999).[3] The airplane fleet involved in this case appears to be precisely such a commercial-pool time share.

The transaction involved was, therefore, a purchase of tangible personal property coupled with a contract controlling how that personal property would be used. The fact that plaintiff has contracted away some (or even most) of its practical control over its airplane does not preclude plaintiff from having purchased it. It is therefore clear that there was a transfer of tangible personal property and a contemporaneous but nevertheless separate contract for services involving that property.

Plaintiff further argues that the use tax does not apply because even if it purchased tangible personal property in the form of an interest in the airplane, the airplane was not used "in this state" because it never entered this state. We note that, under MCL 205.93(1)(a), it will be presumed that property is intended for use in this state if it is brought into the state within 90 days of purchase. However, that provision only sets forth a presumption. More importantly, "use" is defined very broadly by MCL 205.92(b) as "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." Thus, "use" in the context of the UTA is not limited to physical actions performed directly on the property. It includes any exercise of a right that one has to that property by virtue of having an ownership interest in it. Something need not necessarily be physically present in Michigan for it to be "used" in Michigan.

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[3] In that case, our Supreme Court concluded that a week-long time share did not really constitute a residential purpose because of the lack of permanence, or at least the right for owners to come whenever they want to. It did not suggest in any way that a time share was not a real ownership interest.

We are persuaded that plaintiff "used," within the meaning of the UTA, its fractional ownership interest in the airplane in Michigan. The right to control what happens—in layman's terms—to one's property is one of the most fundamental rights incident to ownership. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534-535; 676 NW2d 616 (2004); see also *People v Gallagher*, 4 Mich 244, 262 (1856) (Pratt, P.J., dissenting).[4] Entering into a contract to give up some of one's rights to possession or control is, itself, an exercise of those rights. It would be an exercise of an ownership right for a person in a time share-pooling arrangement to use someone else's share in exchange for that person's own share. We conclude that plaintiff's use of *any* airplane in the fleet at issue was *pursuant to* its contracts to share ownership rights to its own airplane. Therefore, we conclude that plaintiff "used" its property in Michigan within the meaning of the UTA.

We therefore affirm the ruling of the Court of Claims that the transaction entailed a transfer of tangible personal property to which the use tax applied by virtue of its use in this state.

However, I would hold that the Court of Claims erred in calculating the amount of the tax refund to which plaintiff was entitled. Pursuant to MCL 205.94(1)(e):

> If the sale or use of property was already subjected to a tax under the law of any other state or local governmental unit within a state in an amount less than the tax imposed by this act, this act shall apply, but at a rate measured by the difference between the rate provided in this act and the rate by which the previous tax was computed.

The relevant purchases were made in North Carolina, which imposed a sales tax at the "rate of three percent" up to a maximum of $1,500. NC Gen Stat § 105-164.4(a)(1b) (2008). The UTA does not specifically address the implications of an out-of-state purchase where the amount of sales or use tax collected has a cap.

Nevertheless, I find the intent of the Legislature clear: as discussed above, the UTA is part of the Legislature's scheme to impose a uniform and equal tax burden. *By Lo Oil Co*, *supra* at 52. In that context, MCL 205.94(1)(e) is clearly designed to ensure that a taxpayer is only liable for the use tax to the extent the taxpayer has not already remitted to a sister state the sister state's own sales or use tax. The word "rate" is undefined in the UTA, I therefore turn to the dictionary.

According to the *Random House Webster's College Dictionary* (2001), "rate" means "the amount of a charge or payment with reference to some basis of calculation"; it can also mean, in relevant part, "a certain amount of one thing considered in relation to a unit of another thing" or

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[4] The *Gallagher* case involved a challenge to the "prohibitory liquor law" of 1855. The majority in *Gallagher* did not dispute Justice Pratt's point, but rather held that the courts could only declare a legislative enactment void if it is unconstitutional, not for violating "natural rights."

"a fixed charge per unit of quantity." Black's Law Dictionary (8th ed) defines "rate" either as "the proportion by which quantity or value is adjusted" or "[a]n amount paid or charged for a good or service." Any of these definitions, however, would produce the same result: both the proportional amount and the absolute amount of sales tax paid in North Carolina was $1,500. Black's Law Dictionary defines the more specific term "tax rate" as "[a] mathematical figure for calculating a tax, usu. expressed as a percentage." Although this latter definition could support the view that only the three percent calculation should be considered, that view would be inconsistent with the known purpose of Michigan's statute: taxpayers are not entitled to credits or refunds for money they have not actually paid.

Therefore, I would include North Carolina's sales tax cap in our computation of plaintiff's refund entitlement in order to give effect to the *entirety* of both North Carolina's statute and our own. And, finally, this is the only way to accomplish the Legislature's goal of making the tax burden uniform. Plaintiff was entitled to a refund of $1,500 because that sum was "the rate by which the previous tax was computed."

The holding of the Court of Claims that the UTA applies to the transactions at issue should be affirmed. The computation by the Court of Claims of the amount of refund to which plaintiff was entitled should be reversed. I would remand for further proceedings as the Court of Claims deems necessary. We do not retain jurisdiction. No costs, a public question being involved.

/s/ Alton T. Davis