

STATE OF MICHIGAN
COURT OF APPEALS

FISHER & COMPANY, INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

FOR PUBLICATION

January 29, 2009

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

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

O’CONNELL, J. (dissenting).

I respectfully dissent, because I believe that plaintiff Fisher & Company, Inc., (“Fisher”) purchased transportation services, not tangible personal property. Therefore, I would hold that Fisher should not be subject to Michigan’s use tax.

In my opinion, the majority errs when it attempts to fit this transaction under the definition of a “sale of goods” so the transaction can be taxed under the Michigan Use Tax, MCL 205.91 *et seq.* Instead, this panel should accept this transaction for what it really is: a sale of transportation services. Admittedly, Fisher signed an agreement to “purchase” a 25-percent interest in an airplane from NetJets Sales, Inc., (“NetJets”). However, this purchase agreement cannot be divorced from the larger contractual agreement that Fisher and NetJets entered into and the purpose of this agreement. Fisher’s intent in entering into this contract was not to own part of an airplane; in fact, Fisher never used the airplane of which it was technically a partial owner. Instead, Fisher wanted NetJets to provide it with transportation services, and Fisher’s acquisition of partial ownership of one of the jets in the NetJets fleet was one aspect of the overall agreement that NetJets required Fisher to enter into in order to receive transportation

services. The trial court should have analyzed the transaction using the “incidental to services” test set forth in *Catalina Marketing Sales Corporation v Department of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), to determine whether the transaction involved the sale of services or the transfer of tangible personal property.

In *Catalina*, *supra* at 24, our Supreme Court adopted the “incidental to services” test that this Court had articulated in *University of Michigan Board of Regents v Department of Treasury*, 217 Mich App 665; 553 NW2d 349 (1996), to determine whether a business transaction involved the sale of services or the transfer of tangible personal property. Under the “incidental to services” test, a court must look objectively “at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or incidental to the provision of a service.” *Catalina*, *supra* at 24-25. The *Catalina* Court identified six factors to consider when making this determination:

[1] what the buyer sought as the object of the transaction, [2] what the seller or service provider is in the business of doing, [3] whether the goods were provided as a retail enterprise with a profit-making motive, [4] whether the tangible goods were available for sale without the service, [5] the extent to which intangible services have contributed to the value of the physical item that is transferred, and [6] any other factors relevant to the particular transaction. [*Id.* at 26.]

After applying these factors to this case, I conclude that the transaction between Fisher and NetJets was an agreement for transportation services and, therefore, is not subject to the Michigan Use Tax. The first *Catalina* factor asks us to consider what the buyer (in this case, Fisher) sought as the object of the transaction. Fisher makes quite clear its object in entering into this agreement with NetJets: Fisher wanted NetJets to provide transportation services to the company. Fisher presented no other evidence indicating that the company wanted to own or otherwise have responsibility for an airplane. Fisher did not hire a pilot and crew, store, or maintain the airplane. Instead, Fisher assigned these duties to NetJets as part of the transportation services agreement. In fact, Fisher’s employees and agents never even used the airplane that Fisher technically co-owned; instead, they were content to use whatever airplane NetJets sent to them.

The second *Catalina* factor asks us to consider what NetJets is in the business of doing. NetJets is not in the business of selling airplanes. Instead, NetJets offers transportation services to corporate clients like Fisher, and it advertises itself as a provider of these services.

The third *Catalina* factor asks us to consider whether the goods were provided as a retail enterprise with a profit-making motive. NetJets’ motive was not to make money by simply selling interest in an airplane—this company is in the transportation services business, not the airplane sales business. Instead, the sale of partial interest in an aircraft was a component of a larger agreement to provide transportation services that NetJets offered to corporations like Fisher. NetJets’ motive was not to profit from the sale of interest in an airplane, but to profit from providing transportation services.

Fourth, we must consider whether the tangible goods (namely, the interest in an airplane) were available for sale without the associated transportation services. Fisher wanted to purchase a particular package of transportation services from NetJets. In order to receive the level of

services from NetJets that it wanted, Fisher was required to enter an agreement that included the purchase of a partial interest in an airplane.¹ Further, NetJets was not in the business of selling interest in airplanes; it only “sold” airplanes as part of a larger transportation services package that it offered its clients.

The fifth *Catalina* factor requires us to consider the extent to which the intangible services offered by NetJets contributed to the value of the physical item (the interest in an airplane) that Fisher received in the transaction. The acquisition of 25-percent interest in an airplane held no value to Fisher without the associated transportation services. None of Fisher’s agents knew how to fly an airplane, nor did Fisher indicate that it had any desire to oversee the maintenance and upkeep of an airplane, either independently or in conjunction with another entity. In fact, in the bundle of agreements that Fisher signed when it purchased transportation services from NetJets, it signed away its right to exert control over the airplane that it partially “owned” back to NetJets, and none of Fisher’s agents ever set foot on that airplane. The airplane over which Fisher had partial ownership had no value to Fisher except as a conduit to receive what it really wanted: transportation services provided by NetJets.

These factors, considered together, lead to one inescapable conclusion: the purchase of a 25-percent interest in a NetJets airplane was simply an incidental component of the principal transaction for transportation services that the parties entered into. And in light of the sixth *Catalina* factor, which permits consideration of any other factors relevant to this transaction, I note that two additional points support this conclusion.

First, Fisher never exerted any sort of actual control over the airplane in which it held a partial ownership interest. NetJets’ records indicate that Fisher’s agents did not use this airplane; in fact, the records indicate that the airplane was never even flown in the state of Michigan. Further, the parties provide no indication that Fisher ever attempted to exert any control over the airplane or requested that NetJets dispatch that airplane for Fisher to use. The ambivalence that both Fisher and NetJets expressed regarding Fisher’s use of the airplane over which it had partial ownership supports the conclusion that neither Fisher nor NetJets cared whether Fisher used the specific airplane in question, but whether NetJets provided Fisher with the transportation services it needed.

Second, several other jurisdictions have determined that this purchase would be considered an agreement for services and not a sale of tangible personal property. Of particular note are the rulings of the IRS and the United States Court of Appeals for the Federal Circuit: both entities have found that such a transaction is for the sale of transportation services. See IRS

¹ If Fisher wanted to receive the level of transportation services that it needed from NetJets, Fisher’s only option was to enter into a service agreement with NetJets that included acquiring partial ownership in a NetJets airplane. Although NetJets apparently had a Marquis Jet Card Program that offered NetJets transportation services without acquisition of an ownership interest in an airplane, each Marquis Jet Card only provided 25 hours of occupied flight time. NetJets did not offer an option for purchasing the amount of transportation services that Fisher required without acquiring partial ownership of a NetJets plane.

Priv Ltr Rul 9314002 (Dec 22, 1992), IRS Priv Ltr Rul 9404006 (Oct 12, 1993); *Executive Jet Aviation, Inc v United States*, 125 F3d 1463 (CA Fed, 1997). In addition, advisory opinions issued by both Texas and New York have recognized that such a transaction is for the purchase of transportation services and not a sale of tangible personal property. NY Advisory Op TSB-A-00(3)S (Jan 28, 2000); Tex Policy Ltr Rul 200011036L (Nov 9, 2000).

Because Fisher purchased transportation services, not tangible personal property, it is not be subject to the Michigan Use Tax. I would reverse the trial court on this ground.

/s/ Peter D. O'Connell