STATE OF MICHIGAN

COURT OF APPEALS

ZANTOP INTERNATIONAL AIRLINES, INC., Plaintiff-Appellant,	UNPUBLISHED April 24 2001
v	No. 217513 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 91-013365-CM

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the Court of Claims' order granting defendant summary disposition in this use tax dispute. We affirm.

Plaintiff brought this action seeking a refund of use taxes paid under protest on parts that were delivered in Michigan and installed on planes used in interstate commerce. The Court of Claims granted summary disposition to defendant, finding that the parts were used or stored in Michigan, and the imposition of the tax did not violate the Commerce Clause.

The use tax is complementary to the sales tax and is designed to cover those transactions not covered by the General Sales Tax Act, MCL 205.51 *et seq.*; MSA 7.551(1) *et seq. Honeywell, Inc v Dep't of Treasury*, 167 Mich App 446; 423 NW2d 223 (1988). The Use Tax Act provides in pertinent part:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state….For the purpose of the proper administration of this act and to prevent the evasion of the tax, it is presumed that tangible personal property purchased shall be subject to the tax if brought into the state within 90 days of the purchase date and is considered as acquired for storage, use, or other consumption in this state. [MCL 205.93(1); MSA 7.555(3)(1)].

The terms use and storage are defined in § 2 of the act:

(b) 'Use' means 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.

(c) 'Storage' means a keeping or retention in this state for any purpose after losing its interstate character. [MCL 205.92; MSA 7.555(2)].

Where items are brought into the state within ninety days of purchase, it is presumed that they are subject to the use tax, *Kellogg Co v Dept of Treasury,* 204 Mich App 489, 493; 516 NW2d 108 (1994), and the taxpayer has the burden of overcoming the presumption of taxation, or showing that an exemption applies. *Id.*

Initially, we observe that we are in agreement with defendant that plaintiff is barred from relitigating the issue whether the parts were "used" within the meaning of the act This issue was decided adversely to plaintiff in prior litigation involving virtually identical facts. While plaintiff argues that it has tightened up its "just in time" scheduling so that the parts are installed as quickly as possible upon arrival, this change would apply to the "storage" issue, rather than the "use" issue.

Moreover, we agree with defendant that the Court of Claims was correct in its conclusion that the parts were used in Michigan. For the purpose of the statute, the parts were used when plaintiff exercised its right and power over them by taking possession of them and installing them in plaintiff's planes. This occurred in Michigan.

The question, then, is whether taxation under the act violates the Commerce Clause of the United States Constitution, art I, § 8, cl 3. A taxpayer is exempt from the use tax if the imposition of the tax would violate the Commerce Clause, which forbids the burdening through taxation of interstate commerce. MCL 205.94(b); MSA 7.555(4)(b). The four-part test of *Complete Auto Transit, Inc v Brady,* 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977), has replaced the taxable moment test for purposes of constitutional analysis. *Kellogg, supra* at 494. The four factors are: (1) the activity taxed must have a substantial nexus to the taxing state; (2) the tax must be fairly apportioned; (3) it may not discriminate against interstate commerce; and (4) it must be fairly related to services provided by the state. *Id.* at 495.

As the Court of Claims observed, plaintiff seeks to focus on the interstate character of the planes in which the parts were installed, rather than the installation of the parts themselves. The activity in question is the use of the parts. Where the parts are shipped to Michigan and installed in Michigan, there is a discrete and identifiable use of the parts in Michigan that has a substantial nexus with the state.

A tax is not unfairly apportioned where it is internally and externally consistent. *Goldberg v Sweet,* 488 US 252; 109 S Ct 582; 102 L Ed 2d 607 (1988). A tax is internally consistent if structured so that if every state were to impose an identical tax, no multiple taxation would result. *Id.* at 260. Here, if every other state had an identical act, no other state would impose the use tax because the parts were installed (used) in Michigan alone. The only other state that had a relationship to the parts did not collect a sales tax, and if it had, the act would

have afforded plaintiff a credit. MCL 205.94(e); MSA 7.555(4)(e). A tax is externally consistent if it taxes only revenue that reasonably reflects the in-state component of the activity being taxed. *Goldberg, supra* at 262. Here, the tax is only imposed on the parts delivered and installed or stored in Michigan. No interstate activity is taxed.

Plaintiff does not contest the third factor. The use tax applies equally to intrastate and interstate commerce and does not discriminate against interstate commerce. The fourth factor focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the activity at issue. *Goldberg, supra* at 266. Plaintiff operates a substantial repair facility at Willow Run airport. It receives benefits from services provided by the state, satisfying the fourth requirement of the test. The trial court did not err in its application of the four-part *Complete Auto* test.

Plaintiff further asserts that notwithstanding *Complete Auto, supra,* and *Kellogg, supra,* the "taxable moment" test still applies in determining whether the statutory nexus is satisfied. Assuming this test is still viable as a matter of state law, we are satisfied that the test is satisfied. The parts came to rest in Michigan where their interstate journey as parts came to an end. They were then used by plaintiff when they were installed in plaintiff's aircraft in Michigan. Thereafter, they became part of the aircraft, the taxation of which is not at issue. We do not agree that defendant's levy of the use tax on the use of the new parts in Michigan through their installation in the aircraft is the equivalent of taxing the aircraft. The parts were separate from the aircraft until plaintiff used them by installing them in the aircraft. The Court of Claims did not err in granting summary disposition to defendant.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Helene N. White