STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION, Plaintiff-Appellee,	UNPUBLISHED July 14, 2009
v	No. 286600 Court of Claims
DEPARTMENT OF TREASURY, REVENUE DIVISION OF THE DEPARTMENT OF TREASURY, and THE COMMISSIONER OF REVENUE, Defendants-Appellants.	LC No. 04-000167-MT

Before: Zahra, P.J., and Whitbeck and M.J. Kelly, JJ.

PER CURIAM.

Defendants the Department of Treasury, the Revenue Division of the Department of Treasury, and the Commissioner of Revenue (collectively, the Department) appeal as of right the Court of Claims' orders granting plaintiff Auto Club Insurance Association (Auto Club) summary disposition under MCR 2.116(C)(10). We reverse.

I. Basic Facts And Procedural History

During the years at issue, February 1993 through December 2006, Auto Club leased tangible personal property for use in its insurance business from various lessors, some located in Michigan, and others located outside Michigan. The lessors did not pay Michigan sales or use tax on the property when they acquired it. Auto Club agreed in the lease agreements to pay all required sales and use taxes due in connection with the leases. Auto Club paid to the lessors the lease rental amounts plus an amount equal to 6 percent (4 percent before the use tax was increased in 1994)[1] of the aggregate lease proceeds to cover the lessors' use tax liability. The lessors then paid the use tax to the Department.

[1] In 1993, MCL 205.93(1), as amended by 1990 PA 86, effective June 6, 1990, stated:

> 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, which tax shall be equal to 4% of the price of the property, or services specified in section 3a, and to the tax there shall be added penalties

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In January 2001, Auto Club filed a claim with the Department for refund of the use taxes that it paid for tax years February 1, 1993 through December 31, 1999. Auto Club contended that because it was an insurance company, exempt from paying privilege taxes by the now-repealed single business tax act,[2] it should not have paid the use tax. More specifically, contrary to the Department's "apparent position that the use tax is not a tax on the lessee/user, but rather a tax on the lessor[,]" Auto Club contended that "the use tax is a privilege tax on the lessee, as the actual user of the equipment, and not on the lessor."

In March 2001, the Department notified Auto Club of its intent to deny the request. Auto Club then timely requested an informal conference, which was held in March 2003. The referee assigned to the matter determined that the Use Tax Act imposed a tax on a lessor, not the lessee, of tangible personal property. In so concluding, the referee first noted the operative statutory language: "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 at a rate equal to 6% of the price of the property[.]"[3] The referee opined that in interpreting this language, the threshold inquiry was to determine who was "using" the property. The Use Tax Act defines "use" 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."[4] According to the referee, the use tax was properly applied to lessors when they exercised their right over tangible personal property to transfer possession of the property to another.

The referee added that this interpretation of the statute was supported by the Department's administrative rules, which stated:

> A person engaged in the business of renting or leasing tangible personal property to others shall pay the Michigan sales or use tax at the time he purchases tangible

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(…continued)

> and interest where applicable as provided in this act. 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.

In 1994, the statute was amended to change the applicable tax rate to six percent. 1993 PA 326, effective May 1, 1994.

[2] The single business tax act was repealed, effective for tax years beginning after December 31, 2007. MCL 208.151. Before repeal, MCL 208.22a(3), as amended by 1996 PA 578, retroactively effective to January 1, 1991, stated with respect to insurance company tax liability:

> The tax calculated under this section is in lieu of all other privileges or franchise fee or taxes imposed by any other law of this state, except taxes on real and personal property and except as otherwise provided in this act and in Act No. 218 of the Public Acts of 1956[, MCL 500.1200 *et seq*.].

[3] MCL 205.93(1), as amended by 2004 PA 172, effective September 1, 2004 (emphasis added).

[4] MCL 205.92(b), as amended by 2004 PA 172, effective September 1, 2004.

> personal property, or he may report and pay use tax on the rental receipts from the rental thereof. A person remitting tax on the purchase price as a purchaser-consumer or remitting tax on rental receipts as a lessor, shall follow 1 or the other methods of remitting for his entire business operation. 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.[5]

The referee concluded that implicit in the rule was an understanding that the use tax was a tax on the lessor because the rule gave the lessor the choice of paying tax on the amount received from the lessee in rent or on the amount the lessor originally paid to the supplier of the property. As the person authorized to choose how to pay the tax and as the person obligated to "compute and pay" the tax, the lessor must be the person on whom the tax was imposed. The referee added that the language of the Sales Tax Act and the Use Tax Act both similarly suggested the same conclusion by referring to taxing rental receipts under the use tax act as an alternative to taxing the lessor's original purchase of the leased property under sales or use tax acts.[6] In other words, as stated by the referee, the lessor

> has the option of structuring the timing of the purchase and lease so that he or she could pay tax on either the initial purchase or on the rental receipts. If the transferee/lessor does not want to pay use tax on the rental receipts, he or she could structure the lease to take effect after the initial purchase, not claim the "sale for lease" exemption, and pay tax on the initial purchase price. If the transferee/lessor does so, the . . . language in the definition of "price" then provides that he or she would not be subject to use tax on the rental receipts. On

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[5] 1979 AC, R 205.132(1) ("Rule 82").

[6] Citing MCL 205.51(1)(b), as amended by 2000 PA 390, effective January 8, 2001:

> "Sale at retail" means a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose *other than for resale, or for lease, if the rental receipts are taxable under the use tax act*, 1937 PA 34, MCL 205.91 to 205.111, in the form of tangible personal property to a person licensed under this act . . . . [Emphasis added.]

And citing MCL 205.92(f), as amended by 2000 PA 390, effective January 8, 2001:

> "Price" means the aggregate value in money of anything paid or delivered, . . . by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property or services are purchased or rented for storage, use, or other consumption in this state, without a deduction for the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense. . . . *The tax imposed under this act shall not be computed or collected on rental receipts if the tangible personal property rented or leased has previously been subjected to a Michigan sales or use tax when purchased by the lessor*. [Emphasis added.]

> the other hand, if the transferee/lessor wants to pay use tax on the rental receipts, he or she could structure the lease to take place at or before the time of the initial purchase, provide the transferor with the appropriate exemption form, and not pay tax on the initial purchase. The "lessor's choice" is thus provided for by application of the relevant provisions of the STA and the UTA to a lease transaction; Rule 82 simply recognizes and codifies this choice in the Administrative Code.

Moreover, the referee added, MCL 205.95 of the Use Tax Act, as then recently amended by 2002 PA 255, stated that "[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[,]" which explicitly supported that the tax was on the lessor.

Based on his determination that the use tax was imposed on the lessor, not on Auto Club, the referee concluded that Auto Club was not eligible for a refund on the taxes that the lessors collected from Auto Club. According to the referee, the lessors' choice to collect the tax on the rental receipts from Auto Club simply resulted in Auto Club sharing the economic burden of the tax, which was similar to transactions in which sales tax was imposed on a retailer, who then collected the tax from the consumer. That is, the referee explained, just as a consumer is not entitled to a refund of sales tax paid, Auto Club was not entitled to claim a refund of the use tax.

Last, the referee addressed Auto Club's claim that it was nevertheless entitled to a refund of the use taxes paid because it was exempt from the tax under MCL 208.22.[7] However, the referee accepted the Department's understanding that

> the "in lieu of" language in MCL 208.22 to mean that sales or use tax cannot be imposed upon an insurance company that MCL 208.22 applies to, but that the economic burden of sales and use tax can be borne by an insurance company. In short, the "in lieu of" language prohibits sales or use tax from being imposed upon an insurance company, but does not prohibit a lessor upon whom the tax is imposed from collecting use tax from the insurance company in accordance with the provisions of the [Sales Tax Act] and the [Use Tax Act].

Accordingly, in June 2004, the Department issued its written decision and order of determination, denying Auto Club's requested use tax refund in the amount of $3,037,015, exclusive of interest, for the period of February 1, 1993 through December 31, 1999.

In September 2004, Auto Club filed a complaint in the Court of Claims,[8] seeking a refund of use taxes for tax years February 1, 1993 through December 31, 1999. In its complaint, Auto

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[7] MCL 208.22, as amended by 1987 PA 262, effective December 28, 1987, stated, in pertinent part: "The tax calculated thereon shall be in lieu of all other privilege or franchise fees or taxes imposed by another law of the state, except taxes on real and personal property." Repealed, MCL 208.151.

[8] See MCL 205.22.

Club alleged its belief that its lessors either "(a) informed their sellers that the sale transactions were exempt from the tax levied on their privilege of engaging in the business of selling at retail in the State of Michigan under Section 1 of the Sales Tax Act (MCL 205.51 [*et seq*.]) (the 'Sales Tax') because [the] Lessors were engaging in a purchase for resale or lease or (b) that [the] Lessor's sellers were not subject to the sales tax because not exercising [sic] the privilege of selling at retail in Michigan." Auto Club further alleged that the use taxes here were "computed with respect to the 'price' . . . paid by [Auto Club], as the 'consumer,' to its Lessors, as the 'sellers,' NOT by the 'price' paid by [Auto Club's] Lessors to their sellers." According to Auto Club, the only statutory authority under the Use Tax Act[9] permitting the Department to require a lessor to remit use taxes on property leased to Michigan consumers was MCL 205.95(1),[10] which merely required each such lessor to "collect the tax imposed by this Act [sic] from the consumer."

In its responses to Auto Club's request for admissions, the Department clarified that its position on this matter was that the use tax was properly levied on lessors, who may then elect to pay the tax as a "lessor consumer" or a "lessor retailer," the former being "liable for use tax on the purchase price of the tangible personal property" and the latter being "liable for the use tax on the rental receipts."

Auto Club moved for partial summary disposition under MCR 2.116(C)(9) and (10), arguing that Auto Club, rather than the lessors, was the actual taxpayer with respect to the leased tangible personal property and was entitled to a refund of the use taxes paid since it was exempt from the use tax. According to Auto Club, "[t]he pivotal legal issue looks to the legal incidence of the use tax. If the legal incidence is on [Auto Club]/lessee, the tax must be refunded; if on [the] lessors, the tax will stand." And, as Auto Club pointed out, this Court has previously stated that the legal incidence of the use tax is on the consumer/purchaser,[11] which Auto Club contended meant that the legal incidence of the use tax was clearly on the lessee as the "final user/consumer" of the subject leased property. More specifically, Auto Club raised seven

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[9] MCL 205.91 *et seq*.

[10] In 1993, MCL 205.95(a), as amended by 1959 PA 272, effective January 1, 1960, stated:

> Every person when engaged in the business of selling tangible personal property for storage, use, or other consumption in this state, shall register with the department . . . . Every such seller shall collect the tax imposed by this act from the consumer.

In 2002, MCL 205.95 was amended to add the following subsection:

> (d) 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. . . . [2002 PA 255, effective May 1, 2002.]

Another amendment later that year changed the subsection designations from letters to numbers. 2002 PA 580, effective October 14, 2002.

[11] *Terco, Inc v Dep't of Treasury*, 127 Mich App 220, 226; 339 NW2d 17 (1983) ("The legal incidence of the use tax falls on the consumer or purchaser.").

arguments in support of its motion: (1) case law established that the legal incidence of the use tax was on the lessee, who, in this case, was exempt; (2) the Use Tax Act defined the "price" by which the tax was measured as the amount paid by the user of the good; the "price" is not defined by rental receipts; (3) accepting the Department's currently asserted position would be contrary to its longstanding position on the use taxation of sale leaseback transactions; (4) the Department could not point to any statutory authority permitting it to impose that use tax on the lessor; (5) accepting the Department's currently asserted position would render the provisions of the Use Tax Act requiring the lessor to collect the use tax from the user/lessee superfluous; (6) the Use Tax must be applied according to its plain language and construed in favor of the taxpayer; and (7) the Department's own internal rules supported its currently asserted position.

The Department responded, seeking summary disposition in its favor under MCR 2.116(I)(2) and arguing that the lessors, not Auto Club, were liable for the use taxes and that Auto Club was not entitled to a refund. The Department contended that leasing tangible personal property was the exercise of a right over that property incident to the ownership of that property and, therefore, was a "use," triggering use tax liability on the lessor.

In its written opinion and order, the Court of Claims held that Auto Club was entitled to a refund of the use taxes paid with respect to leased tangible personal property. The Court of Claims did not address the merits of the parties' legal arguments, holding instead that the Department failed to demonstrate a genuine issue of material fact requiring trial. Accordingly, the court granted Auto Club's motion for partial summary disposition.

The parties then stipulated that Auto Club be permitted to file an amended complaint, seeking a refund of use taxes for tax years February 1993 through December 2006 in the amount of $2,973,640, exclusive of interest. After reviewing Auto Club's documentation, the parties stipulated that under the Court of Claims' opinion and order, Auto Club was entitled to a refund of taxes in the amount of $2,790,263 for the combined tax period of February 1993 through December 2006, plus statutory interest. Additionally, the parties stipulated that there remained a dispute concerning certain transactions, in which Auto Club purchased computer software from Compuware Corporation and Parallax Technologies Corporation, as to whether the taxes remitted on the amounts paid by Auto Club were levied and collected under the Sales Tax Act or under the Use Tax Act. The parties stipulated that the amount of taxes in dispute with respect to the computer software purchases was $175,767, plus statutory interest.

Auto Club then filed its second motion for partial summary disposition under MCR 2.116(C)(10), arguing that the taxes levied and collected as the result of two licensing agreements between Auto Club and Compuware and Auto Club and Parallex, were use taxes, not sales taxes. According to Auto Club, the tax payments that Auto Club made to each of the licensors/lessors was for the specified use of computer software under the terms of the licensing agreements, which stated that ownership of and title to the computer software was retained by the licensor/lessor and, therefore, the transactions did not give rise to imposition of a sales tax. Again, Auto Club argued that because it was exempt from use taxes, it was entitled to a refund on use taxes paid in conjunction with those software transactions. However, Auto Club

conceded that if the taxes at issue were sales taxes, then it would not be entitled to a refund because the legal incidence of the sales tax is on the seller for the privilege of engaging in retail sales and the seller was entitled to pass on the tax to the consumer.[12]

The Department again sought judgment in its favor under MCR 2.116(I)(2), arguing that a Michigan company acquiring canned software from a Michigan supplier pays sales tax on the transaction, not use tax. According to the Department, the fundamental question was whether Auto Club acquired tangible personal property or only a license to use the tangible personal property. Despite Auto Club's assertions in support of the latter, the Department contended that Auto Club in fact acquired tangible personal property. According to the Department, the agreements at issue, while titled as licenses, were licenses only in the sense that they served to protect the proprietary owners from the loss of their copyright protections; such agreements are found in almost all software purchase agreements, especially software sold for use by the general public. Indeed, the Compuware agreements specifically stated that they were or may be subject to sales tax.

Ruling from the bench, the Court of Claims ruled:

> [J]ust looking at [MCL 205.52], which is unambiguous here, it says canned software, such as that acquired by Plaintiff [from] Compuware and Parallax, was subject to sales tax, but only if ownership or title to the software was transferred to Plaintiff or was intended to be transferred to Plaintiff later. And the license agreement between the Plaintiff and Compuware in effect throughout the 1993 though the 2006 period, however, explicitly states that title and full ownership rights to the software furnished under this agreement remain with Compuware. And the licensing agreement further provides that in the event of default by Plaintiff, the Plaintiff is required to return the software and to certify in writing that all copies had been destroyed.
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> And the agreement also provided that the customer shall be liable for payment of all taxes, however designated or levied based on the software, its charges or its use under this agreement, including, without limitation, state or local tax—state or local sales, use and personal property taxes, exclusive of taxes based on Compuware's ownership rights to the software. And that—so the last sentence is really the important part. It's exclusive to the taxes based on Compuware's ownership rights to the software.
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> And the second lease agreement during the second period also explicitly provided that—um—not during the entire lease period, also provided that Parallax represents the owner of the software and all portions thereof, and that title would remain with Parallax. And the agreement further provided that Plaintiff was allowed to make one backup copy of the software and this copy was the exclusive property of Parallax.

[12] See MCL 205.52; MCL 205.73.

> So in light of the express language set forth in each of the agreements indicating that title or ownership of the software remained with the provider, rather than with the Plaintiff, no transfer of ownership of tangible personal property occurred in connection with either agreement. So, accordingly, the Court finds that the licensing agreements between the Plaintiff and Compuware and between Plaintiff and Parallax did not constitute a sale at retail as required by MCL 205.52 in order for Plaintiff to be liable for sales tax on the transaction.
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> So the Court finds that the taxes paid were not sales tax, but rather, use taxes. And if you look at the use tax statute, that also supports that finding because use tax is a tax levied on the privilege of using, storing, or consuming tangible personal property in Michigan, and it's assessed based on the price of the property or services being taxed. And, thus, the Use Tax Act makes a specific provision for tax to be imposed based on a license to use tangible personal property without, um, involving a transfer of title, which appears to be the situation here.

The court also found that the post-amendment version of the statute continued to support that sales tax be imposed on transactions that involve transfer of ownership of tangible personal property, not license agreements where the licensor retains ownership. Accordingly, the Court of Claims granted Auto Club's motion for summary disposition and awarded Auto Club stipulated damages in the amount of $175,767, plus statutory interest.

The Court of Claims then entered a final order awarding Auto Club a total of $2,966,030, plus statutory interest. The Department now appeals.

II. The Use Tax Act

A. Standard Of Review

The Department argues that the trial court erred in granting Auto Club's motion for summary disposition because Auto Club's lessors were liable for use taxes on their leases of tangible personal property to Auto Club and Auto Club was not entitled to a refund of the taxes that it voluntarily paid.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[13] The lower court must consider all the documentary evidence in the light most favorable to the nonmoving party.[14] We review de

[13] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[14] MCR 2.116(G)(5); *Maiden*, *supra* at 120.

novo the lower court's ruling on a motion for summary disposition.[15] We also review de novo issues of statutory interpretation.[16]

B. Liability For Use Tax In Lease Transaction

The Use Tax Act imposes a tax on the privilege of the using, storing, or consuming tangible personal property in Michigan.[17] The Use Tax Act is complementary to the Sales Tax Act and is designed to cover those transactions not covered by the Sales Tax Act.[18] The use tax exempts from taxation property on which a sales tax is paid.[19]

As stated by Auto Club, the pivotal legal issue here looks to the legal incidence of the use tax; that is, whether the lessor or the lessee bears the obligation to pay the tax imposed under the Use Tax Act. We conclude that under the Use Tax Act, unlike in purchase transactions where the consumer clearly bears the obligation to pay the use tax,[20] in a lease transaction the lessor bears the obligation of paying the use tax based on its unique position as both a "consumer" and a "seller."

Under the general terms of the Use Tax Act, the "consumer" clearly bears the obligation of paying the tax,[21] which the "seller" is obligated to collect from the consumer.[22] As stated, the Use Tax Act imposes a tax on the use of tangible personal property, and the act defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that

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[15] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[16] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

[17] MCL 205.93(1); *Terco*, *supra* at 226.

[18] *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994); *Terco*, *supra* at 226.

[19] At all relevant times during this case, MCL 205.94, as amended by 1989 PA 141, effective June 29, 1989, provided various exemptions to levy of the use tax, including:

> (a) Property sold in this state on which transaction a tax is paid under the general sales tax act . . . , if the tax was due and paid on the retail sale to a consumer.

[20] See *Terco*, *supra* at 226 ("The legal incidence of the use tax falls on the consumer or purchaser.").

[21] MCL 205.108 (imposing penalties on "[a]ny consumer who refuses to pay the tax").

[22] MCL 205.99(1) (providing for imposition of personal liability on sellers who fail to collect the tax); MCL 205.106 (imposing penalties on "[a]ny seller who fails, neglects or refuses to collect the tax"); MCL 205.109 (naming the state as the beneficiary of "[t]he tax collected by the seller from the consumer or lessee"); MCL 205.96 (referring to "every seller collecting the tax from the purchaser"). See also *World Book, Inc v Revenue Division*, 459 Mich 403, 408; 590 NW2d 293 (1999); *Michigan Bell Tel Co v Dep't of Treasury*, 229 Mich App 200, 215; 581 NW2d 770 (1998).

property including transfer of the property in a transaction where possession is given."[23] Thus, indisputably, in the usual sales transaction it is the purchaser/consumer who is liable for the tax based on his or her "use" of the property by exercising a right or power over tangible personal property incident to ownership. However, when a lease transaction is involved, the lessor stands in the both the position of a "consumer"[24] when initially "purchasing"[25] the property to be leased and as a "seller"[26] when making a "sale"[27] of the property by leasing it, or transferring possession of it to the lessee.[28]

The Legislature specifically recognized this unique position of the lessor when, in 2002, it amended MCL 205.95 to add the following subsection:

> (d) 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. . . .[29]

Thus, there can be no reasonable dispute that, post-2002, the use tax is a tax imposed on the lessor. However, a significant portion of the tax periods at issue here preceded and is not subject to application of the 2002 amendment. Nevertheless, as explained by the referee in his opinion (as we have as recounted above and now herein adopt), even before this explicit amendment,

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[23] MCL 205.92(b), as amended by 1988 PA 506, effective December 29, 1988. This definition remained unchanged at all times relevant to this case.

[24] The Use Tax Act defines "consumer" as "the person who has purchased tangible personal property or services for storage, use, or other consumption in this state . . . ." MCL 205.92(g), as amended by 1988 PA 506, effective December 29, 1988. This definition remained unchanged at all times relevant to this case.

[25] The Use Tax Act defines "purchase" as "to acquire for a consideration, whether the acquisition is effected by a transfer of title, of possession, or of both, or a license to use or consume; whether the transfer is absolute or conditional, and by whatever means the transfer is effected; and whether consideration is a price *or rental in money*, or by way of exchange or barter." MCL 205.92(e), as amended by 1988 PA 506, effective December 29, 1988 (emphasis added). This definition remained unchanged at all times relevant to this case.

[26] The Use Tax Act defines "seller" as "the person from whom a purchase is made and includes every person selling tangible personal property or services for storage, use, or other consumption in this state. . . ." MCL 205.92(d), as amended by 1988 PA 506, effective December 29, 1988. This definition remained unchanged at all times relevant to this case.

[27] In 2004, MCL 205.92 was amended to add a definition for the term "sale" as "a transaction by which tangible personal property or services are purchased *or rented* for storage, use, or other consumption in this state." MCL 205.9(p), as amended by 2004 PA 172, effective September 1, 2004 (emphasis added).

[28] See MCL 205.92(b).

[29] 2002 PA 255, effective May 1, 2002.

other provisions of the Use Tax Act,[30] the Sales Tax Act,[31] and the Department's administrative rules[32] all supported the understanding that the lessor was the party responsible for payment of the use tax. And as Auto Club conceded below, "If the legal incidence is on . . . [the] lessors, the tax will stand."

Because the use taxes paid by Auto Club's lessors to the Department were those lessors' liabilities, which Auto Club voluntarily contracted to pay, we conclude that the trial court erred in concluding that Auto Club was entitled to a refund of those use taxes paid. Accordingly, we conclude that the trial court erred in granting Auto Club's motion for partial summary disposition on this ground.

III. The Sales Tax Act

A. Standard Of Review

The Department argues that the software sales to Auto Club were subject to the Sales Tax Act and that Auto Club was not entitled to a refund of the sales tax that Auto Club paid when it purchased the canned computer software. As stated previously, we review de novo issues of statutory interpretation[33] and the lower court's ruling on a motion for summary disposition.[34]

B. Taxation Of Computer Software

Sales tax is imposed on a seller for the privilege of engaging in the business of making sales of tangible personal property at retail within Michigan.[35] "The retailer may include the amount of the tax in the selling price, but is not required to do so."[36] Thus, although the purchaser ordinarily pays the sales tax, the direct legal incidence of the sales tax falls on the retailer.[37]

The pivotal legal issue here is whether the transactions between Auto Club and Compuware and Auto Club and Parallax were sales at retail, subject to the sales tax, or merely

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[30] See MCL 205.92(f), as amended by 2000 PA 390, effective January 8, 2001 (stating that "[t]he tax imposed under this act shall not be computed or collected on rental receipts if the tangible personal property rented or leased has previously been subjected to a Michigan sales or use tax when purchased by the lessor.").

[31] MCL 205.51(1)(b), as amended by 2000 PA 390, effective January 8, 2001 (defining "[s]ale at retail" as not including leases, "if the rental receipts are taxable under the use tax act").

[32] 1979 AC, R 205.132(1) ("Rule 82").

[33] *Putkamer*, *supra* at 631.

[34] *Tillman*, *supra* at 48.

[35] MCL 205.52; *Terco*, *supra* at 225-226.

[36] *Terco*, *supra* at 226; see MCL 205.73.

[37] *Terco*, *supra* at 226.

license agreements, subject to use tax. Auto Club argues that the transactions were the latter because ownership of the computer software was not transferred.

Between 1993 and 2004, MCL 205.51(b) defined "sale at retail" as:

> a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any purpose other than for resale, or for lease, when the rental receipts are taxable under the use tax act . . . .[38]

Further, MCL 205.51(f) stated:

> "Sale at retail" includes computer software offered for general sale to the public or software modified or adapted to the user's needs or equipment by the seller, only if the software is available for sale from a seller of software on an as is basis or as an end product without modification or adaptation. Sale at retail does not include specific charges for technical support or for adapting or modifying prewritten, standard, or canned computer software programs to a purchaser's needs or equipment if those charges are separately stated and identified. Sale at retail does not include computer software originally designed for the exclusive use and special needs of the purchaser.[39]

In 2004, MCL 205.51 was amended and the definition of "sale at retail" was changed as follows: "(b) 'Sale at retail' or 'retail sale' means a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or subrent."[40] In that same amendment, the reference to computer software in MCL 205.51(f) was omitted.[41] However, subsection MCL 250.51a(p) was added to define "tangible personal property" as "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, *and prewritten computer software*."[42] The act further defined "prewritten computer software" as "computer software, including prewritten upgrades, that is delivered by any means and *that is not designed and developed by the author or other creator to the specifications of a specific purchaser*."[43]

Here, it is undisputed that the transactions between Auto Club and Compuware and Parallax involved the purchase of canned, prewritten computer software; that is, it was not designed or developed by Compuware or Parallax to Auto Club's specifications. Although titled

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[38] 1987 PA 259, effective December 28, 1987.

[39] *Id*.

[40] MCL 205.51, as amended by 2004 PA 173, effective September 1, 2004.

[41] *Id*.

[42] As amended by 2004 PA 173, effective September 1, 2004 (emphasis added).

[43] MCL 205.51a(n), as amended by 2004 PA 173, effective September 1, 2004 (emphasis added).

as licenses, the agreements at issue here were only licenses in the sense that they served to protect the proprietary owners from loss of their copyright protection. It is commonplace for computer software to come with software "licensing" agreements to protect the creator's copyright-protected interests, by prohibiting the copying, sharing, or distribution of the software. Indeed, the Legislature explicitly stated that prewritten or "canned" computer software is subject to the sales tax.

Accordingly, we conclude that the trial court erred in concluding that the transactions were subject to the use tax and erred in granting Auto Club's motion for partial summary disposition no this ground.

Reversed and remanded for entry of an order vacating the award of refunded tax payment to Auto Club. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly