STATE OF MICHIGAN

COURT OF APPEALS

NORTHPORT CREEK GOLF COURSE LLC, Petitioner-Appellant,	UNPUBLISHED November 28, 2017
v	No. 337374 Tax Tribunal
TOWNSHIP OF LEELANAU, Respondent-Appellee.	LC No. 15-002908-TT

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Petitioner appeals from an order of the tax tribunal granting summary disposition in favor of respondent of the parties' cross-motions for summary disposition on petitioner's claim that certain real property located in respondent's township is exempt from the ad valorem property tax under MCL 211.7m. We reverse and remand.

This dispute involves a nine-hole golf course located in the Village of Northport in Leelanau County. It had been previously owned by a private entity, Northport Creek, LLC, which is related to petitioner. Northport Creek wished to donate the golf course to the village. According to petitioner, while the village wanted to see the golf course remain in operation, it was not in a position to operate the course at that time. An agreement was reached by which the village accepted the donation and Northport Creek's affiliate, petitioner, would operate the course under a five-year management agreement with the village. It is undisputed that the property is owned by the village and that when respondent refused to remove the property from the tax rolls, it was petitioner rather than the village that pursued the matter. This case presents questions of statutory interpretation which we review de novo. *Spartan Stores, Inc v City of Grand Rapids*, 307 Mich App 565, 569; 861 NW2d 347 (2014).

The first issue on appeal is whether the tax tribunal had jurisdiction over petitioner's appeal. Respondent claims that it did not and the tax tribunal agreed. The tax tribunal ruled that it did not have jurisdiction over the matter because petitioner is not a "party in interest." The tax tribunal went on to conclude that, even if it does have jurisdiction over petitioner's appeal, petitioner's claim for exemption lacks merit. We disagree on both these points.

MCL 205.735a(6) requires that the tribunal's jurisdiction be invoked by a "party in interest." Both the tax tribunal and respondent rely on our decision in *Spartan Stores,* 307 Mich

App 565. In *Spartan Stores*, we interpreted MCL 205.735a(6) and the term "party in interest" to include not only a property owner, but also a party with a leasehold interest. *Id.* at 567. In that case, there were two petitioners, Spartan Stores and Family Fare. Family Fare is a wholly owned subsidiary of Seaway Food Towns, which is itself a wholly owned subsidiary of Spartan Stores. Family Fare rented the subject property in a shopping center owned by Jade Pig Ventures—Breton Meadows. This Court concluded that Family Fare was a "party in interest" under MCL 205.735a(6) because it had a leasehold interest, but Spartan Stores was not because it had neither an ownership interest nor a leasehold interest. *Id.* at 567.

But respondent and the tax tribunal overlook something else in the *Spartan Stores* opinion: that MCL 205.735a(6) provides a mechanism by which a property tax assessment may be challenged directly before the tax tribunal instead of first protesting it before the board of review. *Id.* at 566 ("MCL 205.735a allows a 'party in interest' to a tax-assessment dispute that involves specified types of property to bypass the board of review and protest the assessment directly before the tax tribunal."); see also MCL 205.735a(4)(a) ("the assessment may be protested before the board of review or appealed directly to the tribunal without protest before the board of review as provided in subsection (6)."). Respondent acknowledges in its brief that petitioner protested the assessment before the board of review. Accordingly, MCL 205.735a(6) does not apply to this case and, therefore, it does matter whether petitioner is a "party in interest" under that section.

Respondent also argues that MCL 205.735a(3) requires compliance with MCL 205.735a(6) even for those appeals to the tax tribunal that follow a protest before the board of review. We disagree. First, such an interpretation contradicts the discussion in *Spartan Stores* that the purpose of MCL 205.735a was to provide a mechanism for certain appeals to bypass the board of review. Second, we read subsection (3), and its introductory phrase "Except as otherwise provided in this section or by law" as making it clear that only property in those classifications outlined in the statute may bypass the board of review; all others must first go before the board of review.

But, even if we accept respondent's interpretation that MCL 205.735a(3) does require that the tax tribunal only has jurisdiction over appeals brought by a "party is interest," given respondent's position on the substantive question presented, we conclude that petitioner is a "party in interest." Respondent's position is that, even if the golf course would otherwise be exempt under MCL 211.7m, it falls within the scope of the lessee user statute, MCL 211.181(1). MCL 211.181(1) provides as follows:

> Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessee or user of the real property is subject to taxation in the same amount and to the same extent as though the lessee or user owned the real property.

The plain language of MCL 211.181(1) does not provide a basis to deny the tax exempt status of property owned by a village; rather, it provides a basis to impose a tax on the lessee or

user of that property when the property is used to conduct a business for profit. That is, because the tax is imposed upon the lessee or user, i.e., in this case petitioner, there must be a basis for petitioner to challenge that tax. See *American Golf of Detroit v City of Huntington Woods*, 225 Mich App 226, 228; 570 NW2d 469 (1997), wherein the city-owned property was treated as tax exempt and the proper analysis was whether the lessee/user is subject to tax under the lessee-user statute and that the lessee-user is the proper party for any tax assessment. More to the point, the Court specifically stated that the tax tribunal had jurisdiction over whether the golf course property involved in that case was taxable to the petitioner under the lessee-user statute. *Id.* at 229. This is a situation that simply was not present before the Court in *Spartan Stores*. As that Court noted, 207 Mich App at 574, the term "party in interest" is not defined by statute. While we have no particular disagreement with the Court's analysis in *Spartan Stores* with respect to the status of an entity that is not the property owner, lessee, or taxpayer, we do not believe that its analysis extends to entities upon whom the tax is imposed. *American Golf* answers that question and, therefore, we conclude that petitioner is a "party in interest."

This point, that petitioner, assuming that the lessee-user statute applies, is the taxpayer also goes to the merits of the issue. The plain language of MCL 205.181(1) does *not* affect the tax exempt status of the property. That is, by its express terms, MCL 205.181(1) only applies to "real property exempt for any reason from ad valorem property taxation." Therefore, to the extent that the board of review and the tax tribunal concluded that the property was not exempt under MCL 205.7m, they erred.

So we must now turn to the question whether the lessee-user statute applies. Respondent relies upon three opinions of this Court involving municipal golf courses, *American Golf,* 225 Mich App 226*, Golf Concepts v City of Rochester Hills*, 217 Mich App 21; 550 NW2d 803 (1996), and *Seymour v Dalton Twp*, 177 Mich App 403; 442 NW2d 655 (1989). But those cases provide limited assistance. All three focus on whether the lessee-user was entitled to the concession exemption under MCL 211.181(2)(b) rather than the question whether the lessee-user was using the property as part of a business conducted for profit, a necessary element to trigger the tax in the first place. Indeed, although the tax tribunal also relied on those cases, it did so only to reject petitioner's argument that it too was entitled to the concession exemption.

Petitioner relies upon our decision in *City of Kalamazoo v Richland Twp*, 221 Mich App 531; 562 NW2d 237 (1997). That case is somewhat more helpful, but the analysis under it is lacking on both sides. Petitioner largely argues that it is not operating the golf course for profit as evidenced by the fact that every year since the beginning of the management agreement the golf course has operated at a loss. But operating at a loss does not establish non-profit status; for-profit businesses can and do sustain operating losses, as evidenced by the existence of Bankruptcy Court.

The tax tribunal endeavored to distinguish away *Richland Twp* by pointing out that the entity was established by the city to operate the golf course as a non-profit. But this ignores that it was not, in fact, a non-profit organization, nor had any obligation to continue as such. See *id.* at 537. Moreover, the logical extension of this argument is that a governmental entity could never privatize operations of a government-owned facility with a for-profit management

company without triggering the imposition of a significant tax bill upon the management company.

But, even more fundamentally, the tax tribunal put the burden on petitioner to establish that it was not operating the golf course as a for-profit business and thus not subject to the tax. The tribunal's opinion notes that "Petitioner has not submitted any such documentation [like that in the Kalamazoo case]" and that the "Tribunal finds this is not sufficient to demonstrate that the subject is not operated by Petitioner 'for profit' under MCL 211.181(1)." But as *Richland Twp*, 221 Mich App at 536, notes, statutes imposing a tax must be strictly construed in favor of the taxpayer. Because, as discussed above, the lessee-user statute imposes a tax, it must be strictly construed in favor of the taxpayer (petitioner). Thus, it is not petitioner's burden to establish that the statute does not apply (i.e., that it is not operating the golf course for profit), but the burden is upon respondent to prove that petitioner is operating it as a for-profit business.

None of the analysis takes into consideration the structure of the agreement between the petitioner and the village. It is a management agreement, not a lease. Indeed, as discussed above under the jurisdiction question, respondent has clearly pointed out that petitioner is not a lessee of the property. Thus the question is whether the golf course is "used by" petitioner "in connection with a business conducted for profit" and petitioner is the "user of the real property." MCL 205.181(1). Again, we must interpret this strictly in favor of petitioner.

This analysis becomes easy because respondent ultimately presents no argument that petitioner is, in fact, using the real property. Indeed, respondent and the tax tribunal commit the same fundamental error: that if MCL 211.181 applies then the property is not entitled to an exemption under MCL 211.7m. But as discussed above, even if MCL 211.181 applies, the property remains exempt under MCL 211.7m, it is just that MCL 211.181 imposes a tax on the lessee or user. Respondent then argues that petitioner has failed to establish that it is entitled to an exemption under MCL 211.7m. Of course, technically, this is correct as it is the village, not petitioner, that is entitled to the exemption under MCL 211.7m. But, because of respondent's fundamental misunderstanding of this point, it fails to establish that petitioner is a "user" of the property to conduct a for-profit business. Rather, respondent merely circles back to discussing the cases that analyzed whether the concession exemption to MCL 211.181 applies and, additionally, that petitioner is a "for profit" business. But neither of these points establish petitioner as a "user" under MCL 211.181.

In sum, we conclude that a governmental entity may contract with a private, for-profit business to manage property owned by the governmental entity without the private business necessarily becoming a "user" under MCL 211.181. Because neither respondent nor the tax tribunal has presented any analysis that petitioner is a "user" under MCL 211.181 beyond petitioner's being a for-profit business, the tax tribunal erred in denying summary disposition to petitioner. Petitioner was entitled to summary disposition and an order from the tax tribunal directing respondent to recognize that exemption under MCL 211.7m and recognizing that petitioner is not subject to tax under MCL 211.181.

In light of our conclusion on this issue, we need not address the question whether petitioner is entitled to the concession exemption under MCL 211.181(2)(b).

Reversed and remanded to the tax tribunal with instructions to enter an order consistent with this opinion. We do not retain jurisdiction. Petitioner may tax costs.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey