STATE OF MICHIGAN

COURT OF APPEALS

AEROGENESIS, INC., Petitioner-Appellant,	UNPUBLISHED November 10, 2011
v	No. 300266 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-272692

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Petitioner appeals as of right the final opinion and judgment of the Michigan Tax Tribunal (MTT) denying a use tax exemption. Because the MTT properly determined that petitioner is not entitled to an exemption and respondent was not equitably estopped from assessing the tax, we affirm.

Petitioner is a Michigan corporation formed in 1994 to operate as an air carrier/charter business. In early November 1996, petitioner purchased the aircraft at issue in this appeal, a Beech King Air 200, which it leased to subsidiary, AeroGenesis Aviation, Inc. (Aviation) on November 4, 1996, for use in Aviation's cargo and passenger transport business. Aviation was certified to operate as a "Part 135" carrier under Federal Aviation Administration (FAA) regulations, but petitioner was not. Although petitioner purchased the aircraft and took title and possession outside the state of Michigan, it was hangared in Mason, Michigan.

On December 30, 1996, respondent notified petitioner of a six-percent use tax on the aircraft. Petitioner responded that the aircraft was exempt because it was "being used by a domestic air carrier in the scheduled transport of passengers" and had a "maximum certificated take-off weight of at least 12,500 pounds." After petitioner provided supporting documentation, respondent informed petitioner via an April 7, 1997, letter that the aircraft was exempt and that petitioner would not be billed. Thereafter, respondent determined it had erroneously allowed the exemption and sent petitioner a final assessment for taxes due.

Petitioner appealed the assessment to the MTT, which determined that petitioner was not exempt from use tax liability because it was not a "domestic air carrier" entitled to the exemption under MCL 205.94(x). The MTT further determined that petitioner was not entitled to an exemption by virtue of Aviation's exempt status as a "domestic air carrier." Petitioner appeals

the MTT's decision denying its motion for summary disposition pursuant to MCR 2.116(C)(10) and granting summary disposition for respondent under MCR 2.116(I)(2).

Absent fraud, our review of the MTT's decision is limited to determining whether it erred in applying the law or adopted an incorrect legal principle. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). The MTT's factual findings are conclusive and will not be disturbed if they are supported by competent, material, and substantial evidence on the whole record. *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). "Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 388; 576 NW2d 667 (1998). The term "substantial" connotes "evidence that a reasonable mind would accept as sufficient to support the conclusion." *Id.* at 389. Further, we review de novo summary disposition rulings. *A & E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 643; 723 NW2d 223 (2006).

The Use Tax Act (UTA), MCL 205.91 *et seq.*, complements the General Sales Tax Act (GSTA), MCL 205.51 *et seq.*, and is designed to cover transactions not covered under the GSTA. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). MCL 205.93(1) of the UTA provides, in relevant 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 at a rate equal to 6% of the price of the property or services[.]

The UTA provides an exemption applicable to certain aircraft. The version of MCL 205.94(x) applicable to this case[1] granted an exemption for :

> [t]he storage, use, or consumption of an aircraft by a domestic air carrier after September 30, 1996 for use solely in the transport of air cargo, passengers, or a combination of air cargo and passengers, that has a maximum certificated takeoff weight of at least 6,000 pounds. For purposes of this subdivision, the term "domestic air carrier" is limited to a person engaged primarily in the commercial transport for hire of air cargo, passengers, or a combination of air cargo and passengers as a business activity.

Petitioner first argues that the MTT erroneously determined that petitioner was not entitled to rely on Aviation's tax exemption because the MTT did not have competent, material, and substantial evidence to make this determination. Specifically, petitioner contends that the

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[1] The Legislature amended the statute in 2000 and added the retroactivity language that makes this version of the statute applicable in this case. 2000 PA 200. The Legislature's 2004 amendment of the exemption is not applicable because it eliminated the retroactivity language. 2004 PA 172. The current version of the exemption is found at MCL 205.94(u).

MTT did not have evidence before it to determine whether petitioner controlled Aviation and vice versa for tax exemption purposes.

In *Czars, Inc v Dep't of Treasury*, 233 Mich App 632; 593 NW2d 209 (1999), this Court addressed whether two separate entities should be considered one entity for purposes of determining use tax liability. In that case, the petitioner purchased an aircraft and registered it with the FAA in its own name but allowed its sister corporation, Grand Aire, to use the aircraft in Grand Aire's cargo business. Because Grand Aire was entitled to a use tax exemption and the petitioner was not, the petitioner argued that both entities should be considered one company for determining the applicability of the tax exemption. *Id.* at 635-636, 640. This Court rejected this argument, stating:

> To benefit from the control test, petitioner would have to demonstrate that it was wholly owned and controlled by Grand Aire. Petitioner has not done so. Rather, the evidence here establishes that [the sole shareholder] owned and controlled both Grand Aire and petitioner. Were we to accept petitioner's claim of shared tax exemption among "sister corporations" that are controlled by a common entity, a taxpayer who creates multiple corporations to conduct different functions of a business enterprise could avoid tax liability for all of them by structuring just one to benefit from a statutory exemption. Such a ruling would grossly undermine the policy and intent of the tax law. [*Id.* at 642.]

In *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414; 612 NW2d 432 (2000), this Court again examined tax use liability among related entities. In that case, the plaintiff purchased at a foreclosure sale two aircraft that were subject to preexisting leases with Southwest Airlines, Inc. (Southwest) and were being used by the latter company as commercial passenger planes. *Id.* at 415. The defendant assessed use taxes on the plaintiff pursuant to the UTA for its "use" of the aircraft in Michigan. *Id.* at 416. The plaintiff paid the assessment under protest and appealed. *Id.* at 415. This Court determined that the plaintiff did not use, store, or consume the aircraft in Michigan within the meaning of the UTA because it purchased the aircraft subject to preexisting leases with Southwest pursuant to which Southwest completely controlled the flight schedules and routine maintenance. The leases also required Southwest to ensure that the aircraft remain registered with the FAA. *Id.* 417-418. This Court reasoned:

> Despite plaintiff's ownership interest in the airplanes, the leases gave exclusive authority over the use, storage, and consumption of the airplanes during the duration of the leases to Southwest, and thus plaintiff exercised no right or power over the airplanes. In other words, by virtue of the leases, plaintiff ceded control of the airplanes to Southwest, and therefore could not have "used" the airplanes for purposes of use tax liability under the UTA. [*Id.* at 418.]

This Court opined that its decision was consistent with *Czars* because, unlike *Czars* where there was no documentary evidence showing relinquishment of control, in *WPGP1* there were lease agreements that gave Southwest total control, albeit not permanent control, of the aircraft. *Id.* at 418-419.

The MTT's determination in this case is consistent with both *Czars* and *WPGP1*. Petitioner is not wholly owned and controlled by Aviation, the entity entitled to the use tax exemption. See *Czars*, 233 Mich App at 642. To the contrary, Aviation is a subsidiary of petitioner. Further, the terms of the lease agreement whereby petitioner leased the aircraft to Aviation reveal that petitioner retained substantial control over the aircraft. Specifically, the lease agreement provides that the lease is exclusive, "except that [petitioner] reserves the right to use the aircraft for its own purposes, subject to availability[.]" The agreement states that petitioner "will allow" Aviation "to have access to and, as needed, take possession of" the aircraft. Further, the agreement requires petitioner, at its own expense, to service, maintain, and repair the aircraft, and prohibits Aviation from altering, modifying, or making improvements to the aircraft. Accordingly, Aviation had no control over petitioner, and the documentary evidence establishes that petitioner did not cede control of the aircraft to Aviation. As such, petitioner is not exempt from use taxes by virtue of Aviation's tax exempt status, and the MTT properly granted summary disposition for respondent.

Petitioner also argues that equitable estoppel barred the tax assessment and that the MTT did not have competent, material, and substantial evidence to determine that petitioner did not rely to its detriment on respondent's April 7, 1997, letter allowing the exemption. We review de novo the applicability of the doctrine of equitable estoppel. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998). Equitable estoppel precludes "the opposing party from asserting or denying the existence of a particular fact." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). The doctrine applies when "(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Id.* at 141.

Petitioner argues that it purchased the aircraft at issue in this appeal as well as several other planes relying on the notion that the aircraft were exempt from use taxes. Although petitioner contends that it relied on MCL 205.94(x) in determining that the exemption was applicable, it fails to explain how its interpretation of the statute estopped respondent from assessing the use tax. Petitioner also argues that it relied on respondent's letter stating that the exemption applied. This argument fails because petitioner could not have relied on the April 7, 1997, letter when it purchased the aircraft at issue in this case in November 1996. To the extent that petitioner may have relied on the letter when it purchased other aircraft, those tax assessments are not at issue in this appeal, and petitioner is entitled to no relief.

Affirmed.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio