STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Free Enterprises, LLC,
Petitioner,

v MTT Docket No. 379030

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Kimbal R. Smith III

FINAL OPINION AND JUDGMENT

The Tribunal, having given due consideration to the file in the above-captioned case, finds:

1. Administrative Law Judge Thomas A. Halick issued a Proposed Opinion and Judgment on June 10, 2011. The Proposed Opinion and Judgment states, in pertinent part, "[t]he parties have 20 days from date of entry of this Proposed Opinion and Judgment to file any written exceptions to the Proposed Opinion and Judgment. The exceptions must be stated and are ***limited*** to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion and Judgment." (Emphasis added.)

2. On June 30, 2011, Respondent filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Respondent states:

    a. "The Administrative Law Judge erred when he found that the exemptions from use tax provided in the Use Tax Act apply in this matter despite the fact that Petitioner displayed a clear intent to evade the payment of use tax."

    b. "The Administrative Law Judge also misapplied the 'economic substance theory' to the facts of this case."
    c. "Respondent agrees that the Use Tax Act provides certain presumptions, but those presumptions are designed 'to prevent the evasion of tax.'"

d. "It is because of Petitioner's intent to evade Michigan tax that the presumption of exemption from use tax found in MCL 205.93(1)(b)(i) is not applicable in this case."

e. "The Administrative Law Judge erred when he limited his analysis of the 'economic substance theory' to the formation of the LLC rather than applying it to the transaction as a whole."

3. On July 12, 2011, Petitioner filed a response to Respondent's exceptions. In the response, Petitioner states:

a. "The facts of this case do not demonstrate an intent to evade tax and satisfy the qualification for the Michigan Use Tax exemption."

b. Petitioner purchased the R.V., in Florida, on May 7, 2007.

c. "[T]here was no physical contact with the State of Michigan which would precipitate any type of Sales or Use Tax at the commencement of the initial purchase of the R.V . . . . The Petitioner was able to avail itself of a Florida statute which permitted it to avoid the payment of Florida Sales Tax . . . . [and] there was clearly no basis for imposing Michigan Use Tax . . . when the vehicle was purchased outside the state of Michigan and did not enter the State of Michigan" until May 30, 2008.

d. "The Michigan Use Tax Act provides for an exception [to otherwise recognized use tax liability] under the Act. The Act provides 'that tangible personal property used solely for personal, nonbusiness purposes that is purchased outside this state and that is not an aircraft is exempt from the tax levied under this act if 1 or more of the following conditions are satisfied: . . . (ii) The property is purchased by a person who is a resident of the state at the time of purchase and is brought into this state more than 360 days after the date of purchase. MCL 205.93(1).'"

e. "The mere fact that one invokes an opportunity and a method to avoid having to pay taxes is not tax evasion as is interchangeably being used by the Respondent."

f. "The economic substance theory is not applicable to the matter at hand, as it is a specific exemption by statute in which the Petitioner satisfies the criteria . . . . The matter in question is the use of personal property for personal use and not an economic venture."

4. The Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. Although Petitioner is not technically correct that the property automatically falls under a traditional "exemption," based on the well established timeline of events, the property is presumed to be exempt from use tax under a full reading of MCL 205.93(1). Respondent failed to overcome the presumption.

5. First, Petitioner's analysis fails to read the entirety of MCL 205.93, and as a result, appears to describe a per se "exemption" from use tax where none exists. Michigan law provides a number of property tax exemptions that include measureable criteria to determine eligibility. Where those exemption statutes are silent as to a particular factual scenario, case law has provided further guidance. However, MCL 205.93 provides neither an outright exemption nor bright line criteria for an exemption, when it states:

> (1) . . . For the purpose of the proper administration of this act and to prevent the evasion of the tax, *all of the following shall be* ***presumed***:
>
> ***
>
> (b) That *tangible personal property* used solely for personal, nonbusiness purposes that is purchased outside of this state and that is not an aircraft *is exempt from the tax levied under this act if 1 or more of the following conditions are satisfied*:
>
> ***
>
> (ii) *The property is purchased by a person who is a resident of this state at the time of purchase and is brought into this state more than 360 days after the date of purchase*. (Emphasis added)

Therefore, certain tangible personal property is "presumed . . . exempt [from use tax] . . . if [t]he property is purchased by . . . a resident of [Michigan] at the time of purchase and is brought into this state more than 360 days after the date of purchase." Clearly, the legislature did not create an exemption, but created a presumption of exemption. Based on the facts of this case, the ALJ began his analysis with the *presumption that the property at issue is exempt from use tax.* While legal presumptions are subject to rebuttal, Respondent failed to sufficiently rebut the presumption. Petitioner established that the personal property, an R.V., was purchased in Florida and used in Florida and across the United States for more than a year prior to its entry into Michigan.

6. Respondent's use of the term "evasion" is not useful or persuasive. Evasion connotes an illegal failure to pay a tax; a concept that is distinct from an attempt to minimize tax liability. An illegal failure to pay a tax first requires a finding that payment of the tax was, in fact, required. In labeling Petitioner's actions "evasion," rather than focusing on a factual basis for liability, Respondent's logic is circular; Respondent attempts to establish use tax liability by stating that Petitioner had use tax liability.

   In this case, Petitioner did not evade tax, but in full compliance with existing laws in three states, minimized its tax liability. Petitioner's "privilege of using, storing, or consuming" the R.V., for the first 389 days following the purchase, was exercised exclusively *outside* Michigan. While the timing of the vehicle's entrance into Michigan may raise questions, Respondent cannot simply point to the timing to establish liability. Neither understanding tax law, nor minimization of tax liability based on that knowledge, are illegal.

7. Given the above, Respondent has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing. See MCL 205.762. As such, the Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment. As a result:

a. The taxes, interest and penalties as levied by Respondent are as follows:

Assessment Number: 0676922

Taxes	Interest	Penalties
$39,253	$0	$3,187.97

b. The final taxes, interest and penalties are as follows:

Assessment Number: 0676922

Taxes	Interest	Penalties
$0	$0	$0

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

MICHIGAN TAX TRIBUNAL

Entered: August 26, 2011 By: Kimbal R. Smith III

* * *

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM – MICHIGAN TAX TRIBUNAL

Free Enterprises, LLC
Petitioner,

v

Michigan Department of Treasury,
Respondent.

MTT Docket No. 379030

Administrative Law Judge Presiding
Thomas A. Halick

PROPOSED ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

On May 6, 2011, the parties filed cross motions for summary disposition, and supporting briefs.

On May 6, 2011, the parties filed a stipulation of facts signed by each party.

On May 20, 2011, Petitioner filed a written response to Respondent's Motion.

On May 26, 2011, Respondent filed a written response to Petitioner's Motion.

Summary of Petitioner's Legal Arguments

Petitioner did not use, store, or consume the subject property in Michigan within the meaning of the Use Tax Act. The temporary presence of the property in Michigan was not sufficient to impose use tax. *Florida Leasco, LLC v Dep't of Treasury*, MTT No. 264860 (2005); 2005 WL 3837688 (on remand from 250 Mich App 506; 655 NW2d 302).

The Use Tax Act specifically exempts Petitioner from use tax where the property was brought to Michigan more than 90 days after acquisition (and more than 360 days). MCL 205.93(b)(i) and (ii).

Petitioner is a "person" as defined under the Use Tax Act, MCL 205.92(a), that resided in Montana and, therefore, is exempt under MCL 205.93(b)(ii).

There is no legal basis for piercing the corporate veil. *Bitar v Wakim*, 456 Mich 428; 572 NW2d

191 (1998), *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201; 530 NW2d 505 (1995). Petitioner was formed for a lawful, nonbusiness purpose, and not to commit fraud or to unjustly injure another. Under Montana law, a limited liability company need not be formed for a business purpose.

Petitioner was formed for "investing in real and personal property in Montana." Petitioner invested in personal property in Montana when it purchased the subject RV in Florida and titled it in the state of Montana.

Petitioner has the legal right to attempt to minimize taxes. *Stone v Stone*, 319 Mich 194, 199; 29 NW2d 271 (1947) (citing *Gregory v Helvering*, 293 US 465; 55 S Ct 266 (1935)), *Fuller v Bassett's Estate*, 246 Mich 440; 224 NW 639 (1929).

Petitioner never intended to use or store the RV in Michigan. The RV was mainly used for traveling around the country and when not in use, it was stored in Florida.

Even if Petitioner's sole member is treated as the owner or user, he did not store or use the RV in Michigan in a manner that would give rise to use tax liability, and he would be exempt under MCL 205.93(b)(ii), because the RV came to Michigan more than 360 days after purchase.

Summary of Respondent's Legal Arguments

Respondent asserts that Petitioner bears the burden to prove that it is entitled to an exemption or refund of use tax. The exemptions under MCL 205.93(1)(b)(i) and (ii) do not apply because the taxpayer purchased the property with intent to evade use tax. The statute expressly provides that the presumptions are intended to facilitate proper administration of the tax and to prevent tax evasion. Petitioner may not claim an exemption from use tax where its sole intent was to evade use tax.

Petitioner's sole member, Frank Richard Rudlaff, hired the Bennett Law Office, PC, to organize Free Enterprises, LLC. The address of the LLC is the same as the Bennett Law Office, PC. Respondent claims that the Bennett Law Office encourages clients to engage in tax evasion by acquiring and registering vehicles in the name of a Montana limited liability company. The only asset owned by Petitioner, Free Enterprises, LLC, was the subject vehicle. Petitioner never conducted any business activity. The subject vehicle was used only for personal, non-business, recreational purposes.

The vehicle was parked on a lot in the Traverse Bay RV Park in Acme, Michigan for the majority of the summers of 2008, 2009, and 2010, where it was discovered by Respondent on July 31, 2008. The lot at the Traverse Bay RV Park is owned by the "Rudlaff Janis S. Grantor Trust." Janis Rudlaff is the spouse of Petitioner's sole member.

Respondent argues that a business transaction that lacks all substance other than to avoid taxes may be disregarded for tax purposes. *Gregory v Helvering*, 293 US 465; 55 S Ct 266; 79 L Ed 596 (1935).
In support of its tax evasion argument, Respondent cites *Bailey v Muskegon County Bd of Commissioners*, 122 Mich App 808; 333 NW2d 144 (1983).

> The Michigan Use Tax Act of 1937 was intended to complement the General Sales Tax Act by imposing a tax on tangible personal property purchased out of state for use, storage or consumption in Michigan. *National Bank of Detroit v Dep't of Revenue,* 334 Mich 132; 54 NW2d 278 (1952). Its purpose was to counteract the trend of consumers purchasing tangible personal property outside this state to avoid the three percent sales tax in effect at that time. Imposition of the use tax equalized the competitive status of Michigan and non-Michigan merchants. *Id*.

Standard of Review

Petitioner seeks summary disposition under MCR 2.116(C)(10). Respondent seeks judgment under MCR 2.116(C)(8) and (10). Judgment shall be granted under the standards applicable to MCR 2.116(C)(10), there being no genuine issue of material fact, based on the well-pled facts, documentary evidence, and an affidavit. MCR 2.116(G)(5). The facts and admissible evidence must be considered in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A court may not make findings of fact or weigh credibility when deciding the motion. *In Re Handleman*, 266 Mich App 433 (2005).

Discussion of Facts and Law

The Stipulation of Facts is incorporated herein by reference.

Petitioner's sole member, Frank Richard Rudlaff, was a Michigan resident as of April 11, 2007, when Free Enterprises, LLC was formed. He was also a Michigan resident when the subject recreational vehicle ("RV") was stored and used in Michigan in the summer of 2008. Stip 22.

The stipulated facts do not include the address of the residence of Mr. Rudlaff. However, Respondent's Exhibit B (RV Insurance Coverage Summary) lists Mr. Rudlaff's address as 6941 Deep Lagoon Lane, Ft. Myers, Florida. The insurance policy was effective May 7, 2007. The policy includes Free Enterprises, LLC as an "additional interest" and lists the same address for the LLC (6941 Deep Lagoon Lane, Ft Myers, Florida). Exhibit B also includes an RV Insurance Coverage Summary – Renewal Declarations Page, indicating coverage for the vehicle from

February 12, 2008 through February 12, 2009, which also lists the same Ft. Myers, Florida address for Mr. and Mrs. Rudlaff and the LLC.

Exhibit 1 (Stip) includes a cover letter dated April 11, 2007, from the Bennett Law Office, PC addressed to Richard Rudluff (sic) at 6941 Deep Lagoon Lane, Ft. Myers, Florida.

Respondent's Exhibit D is an "Assessment Record for Grand Traverse County" for 2007 pertaining to the lot in the Traverse Bay RV Park where the vehicle was sometimes used and stored in Acme, Michigan. That document lists the address of the lot's owner, Rudlaff Janis S. Trust, as 6941 Deep Lagoon Ln, Fort Myers, Florida. This indicates that property tax notices and bills pertaining to the lot were mailed to Janis Rudlaff, Trustee at the Ft. Myers, Florida address.

Petitioner claims, and there is no evidence to the contrary, that Mr. Rudlaff became a Florida resident on March 24, 2009. Stip 25. Prior to that date, he was a Michigan resident. Stip 22.

While still a Michigan resident in 2007, Mr. Rudlaff consulted with the Bennett Law Office, PC, to create Free Enterprises, LLC. Mr. Rudlaff intended to acquire an RV without paying sales or use tax to any state.

The Bennett Law Office drafted the Articles of Organization for Petitioner, which were signed by the organizer, John M. Bennett, on April 11, 2007. Frank Richard Rudlaff signed the Operating Agreement on May 7, 2007, the same day the subject RV was purchased. Also on that same date, a policy of insurance for the RV was issued, with the named insureds being Mr. and Mrs. Rudlaff.

On May 7, 2007, Petitioner acquired the vehicle from a dealership in Seffner, Florida, and registered it in Montana. The vehicle never entered the state of Montana and was primarily stored at Metro Self Storage in Ft. Meyers, Florida, from May 12, 2007 until July 14, 2007, during other extended periods during the second half of 2007, and during the winter and spring of 2008.

The first question is whether Petitioner exercised the privilege of using, storing, or consuming the subject property in this state so as to be liable for Michigan use tax under MCL 205.93(1), where Petitioner was a Montana limited liability company that purchased the property in Florida on May 7, 2007, registered it in Montana, stored it principally in Florida, and Petitioner's sole member brought it to Michigan for the first time on May 30, 2008.

Respondent's Exhibit C is a "Motor Coach Location Diary" which indicates that after purchase on May 7, 2007, the vehicle remained in Florida, and was driven to various locations within that state until approximately July 17, 2007 when it was driven to Biloxi, Mississippi. Thereafter, the vehicle traveled to various points in the southern United States, Midwest, Canada, Eastern United States, and back to Florida, over a period of approximately one year. The vehicle then spent the winter of 2007-2008 travelling and in storage in Florida, before travelling north and

arriving in Battle Creek, Michigan on or about May 30, 2008. The vehicle was operated only by Mr. or Mrs. Rudlaff in Florida during the winter of 2008.

Florida law allows a person who purchases an RV in that state to avoid Florida sales tax in whole or in part if the vehicle is registered in another state within 45 days after the date of purchase. See, Florida Department of Revenue form DR-123, "Affidavit for Partial Exemption of Motor Vehicle sold for Licensing in Another State." Petitioner signed an affidavit of partial exemption. Petition, paragraph 4. e. A copy of the affidavit is attached to the Petition as Exhibit D. In order to claim the exemption, the affidavit form requires an officer or partner of a non-resident corporation or partnership to affirm that either: 1) the vehicle will be removed from Florida within 45 days of purchase and not returned to Florida for a minimum of 180 days; or, 2) no officer or stockholder with a 10% or greater ownership interest, or no partner with 10% or greater ownership interest, is a resident of Florida. The second provision applies where the vehicle is not removed from Florida. If Mr. Rudlaff was actually a resident of Florida in May 2007, Petitioner would have been required to pay Florida sales or use tax at the time of purchase. However, there is no dispute in this case that Mr. Rudlaff was a Michigan resident at that time, although he spent considerable time living in Florida.

In order to take advantage of this provision of Florida law, the vehicle must be registered in another state. This is the only apparent reason why Petitioner was formed as a Montana LLC with a Montana address for its registered office and agent. This allowed Petitioner to register the vehicle in Montana and pay only a minimal registration fee there. Florida grants a "partial exemption" by permitting the owner to pay the tax rate of the home state to the home state. If the home state's tax rate is lower than the Florida rate, Florida exempts the tax in excess of the home state rate. There is no claim that Petitioner evaded tax in Florida.

Neither the vehicle nor Petitioner's member ever entered the state of Montana. Petitioner conducted no business or investment activity in Montana, and it must be concluded that the sole purpose of the LLC was to adopt a Montana address, residence, and/or domicile so as to ostensibly qualify to register the vehicle there and thereby avoid Florida sales tax. The Montana Department of Justice – Motor Vehicle Division, issued a certificate of title to Free Enterprises, LLC for the subject vehicle on June 29, 2007. Respondent does not argue that registration in Montana or the activity of the LLC violated the laws of that state.

From the date of acquisition until May 30, 2008, there is clearly no basis for imposing Michigan use tax. Notwithstanding the fact that Mr. Rudlaff was a Michigan resident, there could be no use tax liability where the vehicle was purchased outside this state and did not enter Michigan.

The question is whether use tax liability arose when the non-resident LLC permitted its sole member (and his spouse) who was a Michigan resident to operate and store the vehicle in this state from approximately May 30, 2008 until September 30, 2008.

Respondent discovered the RV parked at a lot at the Traverse Bay RV Park in Acme, Michigan on July 31, 2008. Stip 19. The lot was owned by the Rudlaff Janis S. Grantor Trust. The operator of the vehicle, Mr. Rudlaff, was a Michigan resident at that time. Stip 22.

Respondent sent a letter of inquiry to Frank and Janis Rudlaff dated August 28, 2008, with regard to potential use tax liability. That letter is addressed to the Rudlaff's at 236 Horizon Rd., White Lake, Michigan.

The use tax assessment that was issued to Free Enterprises, LLC on October 5, 2009 and was addressed to the Rudlaff's at 263 Horizon, White Lake, Michigan. Exhibit H attached to the Petition.

Attached to Petitioner's original Petition is a copy of Respondent's informal conference recommendation, which states the address of Free Enterprises, LLC and Frank Richard Rudlaff as 263 Horizon, White Lake, Michigan. This document states that at the time of purchase, Mr. Rudlaff had a Michigan driver's license, voter's registration, and filed a Michigan income tax return from White Lake, Michigan.

As stated above, the vehicle first came to Michigan on May 30, 2008, over one year after the date of acquisition, and remained in Michigan until September 30, 2008 (except for three days in early August). A similar pattern was repeated during the summers of 2009 and 2010.

The undisputed facts of this case demonstrate that the property was acquired in a transaction that was carefully constructed to avoid payment of sales or use tax to any state. Under Florida law, the RV could be purchased tax free because it was to be registered in Montana, notwithstanding that it remained in Florida for several months. There is no evidence that Florida attempted to assess use tax on the vehicle. It is apparent that the policy behind the Florida partial exemption is that if a non-resident desires to purchase an RV in Florida but register it in his or her home state, Florida will treat the transaction as being taxable in the owner's home state so as to remove any incentive to purchase the vehicle from a dealer in a low-tax or no-tax state. This opens up a "tax planning" opportunity that is being exploited by Petitioner.

The question is whether Petitioner exercised the privilege of using, storing, or consuming the subject tangible personal property within this state within the meaning of MCL 205.93(1) and whether Respondent can rebut the presumption that the vehicle is "exempt" from use tax. This requires an analysis of the facts relevant to Petitioner's use of the property in this state and elsewhere from the date of acquisition and thereafter. Although a critical point in time is the date that Respondent discovered the vehicle at the RV park near Acme, Michigan, the use before and after that date is also relevant.

Petitioner is a holding company that purchased the property as a means to allow its sole member to use the property and avoid use tax. Petitioner offers no other plausible legal or business reason for structuring the transaction in this manner. Petitioner's plan was to allow Mr. and Mrs. Rudlaff to use the property for no charge for their personal use. The property was not used within the scope of any business activity conducted by Petitioner or anyone else. In fact, Petitioner conducted no business activity.

Petitioner was dissolved as a legal entity upon filing of Articles of Termination with the Montana Secretary of State on April 1, 2009. This is documented in the "Minutes of The Meeting of Free Enterprises, LLC." Stip, Exhibit 5. Pursuant thereto, the vehicle was transferred to Mr. Rudlaff. That resolution states: "This resolution is made and delivered in order to induce the Florida DMV to re-register the vehicle in Florida, sale/use tax free, pursuant to the exemptions found in Florida Administrative Rule Sec. 12A-1.007(25)(a). . . " [pertaining to transfer of title by a dissolved corporation to one of its stockholders].

The next question is whether it is relevant that Free Enterprises, LLC lacks any economic substance, conducted no business activity or investment activity, and was created principally, if not solely, for tax avoidance purposes. If the LLC were disregarded or pierced, the result would be that Mr. Rudlaff would be treated as the owner and user without insulation from the LLC. In such case, the only legal difference is that the RV would be owned by a Michigan resident individual, in which case the 360-day time period would apply under MCL 205.93(1)(b)(ii). This would also undercut the argument that the exemptions do not apply because Petitioner is an LLC that cannot have a "residence" as a matter of law.

The inquiry under the Use Tax Act is whether Free Enterprises, LLC, by and through its sole member, purchased the property for storage, use, or consumption in this state, notwithstanding the presumption of exemption that arose because the property came here more than 90 (and 360) days after purchase.

In order to determine whether Petitioner stored, used, or consumed the vehicle in Michigan, it is relevant to examine the documents that created and defined the purposes of the LLC. The purpose of the LLC was to "acquire, by purchase, lease or otherwise, any real and/or personal property and to dispose of it, in any manner." Exhibit 3, Articles of Organization. Petitioner's "principal place of business" is stated to be 135 W. Main Street, Missoula, Montana, which is also the address of the Bennett Law Office, which provided the registered office and served as registered agent for the LLC. There is no evidence that Petitioner conducted any activity at that location. There is no evidence that the subject property or the sole member of the LLC ever entered the state of Montana and the vehicle was certainly not purchased for storage or use there.

Petitioner's Operating Agreement states that the "Company is primarily involved in the business of investing in real and personal property in Montana. . . ." This statement, disingenuous at best, because the LLC has no connection to Montana other than it was formed under the laws of that state and used the Bennett Law Office as its registered office and agent. It did not "invest" in any property, real or personal, in Montana. It purchased a vehicle in Florida, and the vehicle never entered Montana. It could only be said that Petitioner's alleged investment activity occurred in Montana based on the address of its registered office. However, there is no indication that the Bennett Law Firm is involved in the operation or management of the LLC. The location of a

resident office or agent does not indicate that the entity conducted any activity at that address. The investment activity, if any, would be conducted by the sole member, which would most likely be attributable to Florida where the vehicle was purchased and primarily stored, or to Michigan, where Petitioner's sole member resided until 2009. It is also highly questionable as to whether the purchase of an RV asset can properly be characterized as an *investment*. Therefore, it is highly doubtful that Petitioner was actually formed to invest in property in Montana, where the purchase of the RV was not an investment and where the sole member and the property never entered Montana. Notwithstanding the foregoing, under Montana law, an LLC may be created solely for the purpose of holding title to an asset without a business or investment purpose.

According to Petitioner's Articles of Organization, Petitioner was formed "to invest in real and personal property in Montana." The stipulated facts also state that Petitioner did not invest in any property in Montana "other than the RV." Although these "facts" were stipulated, the determination of whether Petitioner "invested" in property is a legal one that cannot be dictated by the parties. "Invest" means "to apply (money) for profit" and "to make an outlay of money for profit." Black's Law Dictionary (7th ed abridged), p 665. The facts do not support a legal conclusion that Petitioner actually acquired the subject property in anticipation of realizing a profit. There is no evidence that Petitioner leased the property or otherwise earned any income or gain from its ownership, use, or resale. Rather, Petitioner's sole member and his spouse used the property for personal, recreational purposes. Stip 18, Stip 26.

The provisions in the Operating Agreement regarding allocation and distribution of profits and losses are misleading in that there is no evidence that Petitioner generated any income whatsoever, and neither the manager nor the sole member ever intended that the LLC would generate income.

The Articles of Organization authorize the sole member and "member-appointed persons" to "drive, operate, and control" the RV. Frank Rudlaff has been the sole owner of the vehicle since April 1, 2009 (when the LLC dissolved and transferred the RV to Mr. Rudlaff.)

The Use Tax Act provides:

> (1) 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 specified in section 3a or 3b. The tax levied under this act applies to a person who acquires tangible personal property or services that are subject to the tax levied under this act for any tax-exempt use who subsequently converts the tangible personal property or service to a taxable use, including an interim taxable use. If tangible personal property or services are converted to a taxable use, the tax levied under this act shall be imposed without regard to any subsequent tax-exempt use. Penalties and interest shall be added to the tax if applicable as

> provided in this act. For the purpose of the proper administration of this act and to prevent the evasion of the tax, all of the following shall be presumed:
>
> (a) That tangible personal property purchased is subject to the tax if brought into this state within 90 days of the purchase date and is considered as acquired for storage, use, or other consumption in this state.
>
> (b) That tangible personal property used solely for personal, nonbusiness purposes that is purchased outside of this state and that is not an aircraft is exempt from the tax levied under this act if 1 or more of the following conditions are satisfied:
>
> (i) The property is purchased by a person who is not a resident of this state at the time of purchase and is brought into this state more than 90 days after the date of purchase.
>
> (ii) The property is purchased by a person who is a resident of this state at the time of purchase and is brought into this state more than 360 days after the date of purchase. MCL 205.93(1).

The vehicle was not brought to Michigan within 90 days of acquisition, and therefore, there is no presumption of use, storage, or other consumption in this state. MCL 205.93(1)(a). The statute also states that the property is presumptively exempt from use tax if it is used solely for personal, nonbusiness purposes and is purchased outside of this state by a *person who is not a Michigan resident* and brought to Michigan more than 90 days after the date of purchase. MCL 205.93(1)(a) and (b). Petitioner, Free Enterprises, LLC, was not a "resident" of this state at the time it acquired the property. The term "resident" is not defined in the use tax act. "Person" is defined as follows:

> (a) "Person" means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether or not organized for profit, company, limited liability company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. MCL 205.92(a).

The above definition recognizes that the context may indicate that "person" is intended to apply more narrowly, for example, to an individual, and not a business entity. At the informal conference level, the department argued that the exemptions do not apply to a business entity such as an LLC, because only an individual (natural person) can be a "resident." In this proceeding before the Tax Tribunal, Respondent's brief does not raise this argument and Respondent has, therefore, abandoned it. In any event, the term person is expressly defined in the

Act to include an LLC, and the choice of the term "resident" does not disclose a legislative intent to give the term a more limited meaning. Had the legislature so intended, it could have used the term "individual" or "natural person." It also could have stated "a person other than" certain types of business organizations or entities.

Petitioner is a "person" who was not a Michigan resident at the time of purchase and the property was used for "personal, nonbusiness purposes." Therefore, the property is presumptively exempt under MCL 205.93(1)(b)(i). Assuming that Mr. Rudlaff was determined to be the "person" who was a resident of this state at the time of purchase, and he brought the vehicle into this state more than 360 days after the date of purchase, the presumptive exemption set forth in MCL 205.93(1)(b)(ii) would arise, because he drove the vehicle to this state 389 days after the date of purchase. Therefore, under either of the foregoing interpretations, there is a *presumption* that the property is exempt from use tax. The question is whether Respondent's analysis and legal theories are sufficient to rebut the presumption.

Respondent argues that the exemption does not apply because the purpose of the presumption is to facilitate "the proper administration of this act and to prevent the evasion of the tax. . . ." MCL 205.93(1). Petitioner (Free Enterprises, LLC) and its sole member (a Michigan resident) allegedly attempted to evade use tax by acquiring the vehicle in the name of the Montana LLC, registering it in Montana, and storing and using it outside this state for over 360 days before bringing it to Michigan, for storage, use, or consumption here.

While the facts speak for themselves regarding the tax *avoidance* motive, the statutory language regarding *evasion* of tax does not render the presumptions inapplicable merely because Petitioner intended to avoid tax. The Use Tax Act does not define tax evasion. Black's Law Dictionary defines "Tax Evasion" as "The willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability." Black's Law Dictionary (7th ed abridged), p 1187. Respondent has not persuasively argued under our present facts that Petitioner evaded tax in either Florida or Montana. Petitioner did not "illegally reduce" its tax liability, but rather claimed an exemption under Florida law, and paid a registration fee to Montana. It has not been established that Petitioner violated Montana law by operating as an LLC that owned an RV. Neither has it been established that Petitioner "evaded" Michigan tax laws. It has not been demonstrated that it is unlawful to purchase property tax-free in another state and also to claim an exemption under Michigan law when the property is brought here. In fact, Michigan law expressly adopts a policy that property is presumptively exempt when it is brought here after passage of a certain number of days. If Respondent were to discover that a taxpayer has illegally failed to pay tax to another state, this raises a question as to whether it would be more appropriate for Respondent to notify the other state so it could properly enforce its tax laws, rather than for Michigan to take advantage of the other state's loss by imposing its own tax.

In support of its tax evasion argument, Respondent cites *Bailey v Muskegon County Bd of Commissioners*, 122 Mich App 808; 333 NW2d 144 (1983). That case stands for the general

proposition that the Use Tax Act is intended to capture transactions that escape sales tax due to the "immunity of interstate commerce. . . ." *Id*. In that case, a seller of tangible personal property located in Chicago made sales to persons in Michigan, and the title to the property transferred in Chicago when a common carrier took possession. The Court held that Michigan could not require the Chicago merchant to collect Michigan use tax from the Michigan customer. The transaction was clearly not subject to sales tax. This case says nothing about the use tax liability of the purchasers in Michigan. This case is legally and factually distinguishable and does not support imposition of use tax in our present case.

The longstanding 90-day presumption of taxation is designed to prevent tax evasion. This language has been in the use tax act at least since 1949. Any property purchased for *delivery* to this state was presumed to be purchased for use here and subject to tax, without limitation as to the number of days after purchase. The "90 day" presumption was enacted by 1962 PA 219. The gist of that provision is that if a person brings property to Michigan within 90 days after purchase, it is likely that it was purchased for use here. This would be especially true for a Michigan resident who travels to a tax-free state to purchase property and brings it home. Had it been purchased here, it would have been subject to sales tax. Where property was purchased tax-free outside this state and promptly brought here, the use tax should apply, otherwise, the sales and use tax scheme could be too easily avoided. The use tax was enacted precisely for this reason. The tax evasion language originally applied to the presumption of taxation.

In 2003, the legislature amended the act to create an opposite presumption *against* taxation. That is, if the property is brought to Michigan after a certain number of days (90 days for non-residents and 360 days for residents) the property is presumed not to have been purchased for use, storage, or consumption here, and the tax does not apply. This provision is stated as an exemption from tax. The introductory language states that "the following shall be presumed," which indicates that the presumption applies to the "exemptions" set forth in MCL 205.93(1)(b)(i) and (ii). Therefore, these provisions are presumptive exemptions that may be rebutted by appropriate evidence that the property was in fact purchased for storage, use, or consumption in this state, notwithstanding that it was brought here 389 days after purchase. The structure of the transaction and the taxpayer's intent are relevant to this inquiry.

Arguably, Respondent could have assessed tax to Free Enterprises, LLC or Mr. Rudlaff. The use tax shall be "collected from every person in this state" for the privilege of "using, storing, or consuming tangible personal property in this state. . . ." MCL 205.93(1). The act does not require the tax to be collected from the owner of the property. Any person who uses, stores, or consumes the property here may be subject to use tax.

Free Enterprises, LLC was a "person in this state" by virtue of the fact that it authorized its sole member and his spouse to use, store, and consume the property here. However, because the nonresident owner brought the property to Michigan more than 90 days after purchase, it is presumed that the property was *not* purchased for use, storage, or consumption here.

The fact that a trust controlled by Mrs. Rudlaff owned a lot in an RV park and the Rudlaff's owned a home in Michigan is evidence that Petitioner purchased the property with knowledge and intent that it would be used and stored here, at least in part. Therefore, the statement in Petitioner's brief that, ". . . Petitioner never intended to use or store the RV in Michigan" rings rather hollow. It is likely that Mr. Rudlaff knew that the RV would eventually be brought to Michigan for the summer of 2008, but this alone does not result in a Michigan use tax liability.

The Rudlaffs also own a residence in Ft. Myers, Florida, and spent considerable time there. This establishes that Petitioner also purchased the vehicle for "use, storage, or consumption" in Florida, as well as for traveling throughout North America. The RV was used and stored in Florida to a much greater degree than in Michigan. There is no evidence that any other state or jurisdiction has assessed use tax upon the vehicle. Therefore, the question becomes, when a vehicle is stored, used, and consumed in more than one state, including Michigan, and no other state has imposed a sales or use tax, does this constitute a taxable use in Michigan?

This is not a case where a resident of another state with no sales tax purchased property there, and then several years later decided to move to Michigan with the property. In such case, the presumptive exemption would clearly apply because the property was not purchased outside this state to avoid Michigan sales tax. Neither was the property purchased by a resident of a tax-free state who happens to vacation in Michigan during the summer months. Under such circumstances, the Michigan Use Tax Act does not apply to property owned by non-resident tourists who bring property to Michigan for the summer.

However, when property purchased outside this state is stored and used in this state by a Michigan resident, use tax may apply. The fact that the owner of the property is a Montana LLC does not detract from the fact that the individual using the property was a Michigan resident.

Conclusion

Regardless of whether Mr. Rudlaff or Petitioner are considered to be the "user" of the RV, the presumption of exemption arose because the RV was brought to Michigan more than 360 days after purchase. MCL 205.93(1)(b)(i) and (ii). Upon consideration of the stipulated facts, documentary evidence, affidavits, and factual matters that are not subject to a genuine dispute, it is concluded that Respondent has not rebutted the presumption of exemption. Respondent has not demonstrated that Petitioner purchased the RV for use, storage, or consumption in Michigan or that it actually used, stored, or consumed it here within the meaning of the Use Tax Act.

Petitioner purchased the RV for storage and use in Florida, Michigan, and throughout North America. Florida had the power to impose a sales tax on the purchase, but has legislatively opted to defer the power of taxation to the state of registration for property owned by a non-resident. The RV was not subject to sales or use tax in Florida where it was purchased or in Montana where it was registered. The reason why no sales or use tax was paid to any other state is largely

irrelevant. It has not been demonstrated that Petitioner unlawfully evaded tax.

The fact that Petitioner allowed its sole member, who was a Michigan resident, to bring the property here during the entire summer of 2008, to be stored and used on a lot effectively owned or controlled by the member's spouse, presents the issue as to whether this overcomes the presumption of exemption. Had the property been brought to Michigan 89 days after purchase, it would be presumptively subject to use tax. However, an opposite presumption exists.

Petitioner's sole member was a Michigan resident who spent considerable time in 2007 and 2008 living in Florida. The RV spent more time in Florida, other states, and Canada than in Michigan. Merely bringing the RV to Michigan for the summer in 2008, 2009, and 2010 is not the type of storage or use that results in imposition of use tax, where the property is presumptively exempt under MCL 205.93(1)(b)(i) or (ii).

Respondent's case rests upon its theory that the exemptions do not apply because they are intended to prevent tax evasion, and that Petitioner evaded tax by creating a Montana LLC and purchasing the property in Florida, before bringing it Michigan. However, there is no basis for a ruling that Petitioner "evaded" tax in Florida, Montana, or Michigan. Rather, Petitioner took advantage of a Florida sales and use tax exemption, a low registration fee in Montana (and no sales tax), and a presumptive exemption in Michigan for property brought here more than 90 (or 360) days after purchase. In the final analysis, there is insufficient factual and legal basis to support a ruling that Respondent has overcome the presumption under MCL 205.93(1)(b)(i) or (ii) that Petitioner did *not* "store, use, or consume" the RV in Michigan.

IT IS ORDERED that Petitioner's Motion for Summary Disposition is GRANTED, assessment no. Q676922 is CANCELLED, and this appeal is DISMISSED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Disposition is DENIED.

IT IS FURTHER ORDERED that the parties shall have 20 days from date of entry of this Proposed Order to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281). The exceptions and written arguments shall be limited to the matters addressed in the motions. This Proposed Order, together with any exceptions and written arguments, shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act (MCL 205.726).

MICHIGAN TAX TRIBUNAL

Entered: June 10, 2011

By: Thomas A. Halick