

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Entity Partners, LLC, and
Tulip City Air Services, Inc.,
Petitioner,

v

MTT Docket No. 317277

City of Holland,
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 John S. Gilbreath, Jr. conducted a hearing in this case on March 20, 2008, and issued a Proposed Opinion and Judgment on April 16, 2008. The decision provided, 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...[t]he 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.”
2. Respondent filed exceptions to the Proposed Opinion and Judgment on April 29, 2008. In support of its exceptions, Respondent states:
 - a. “[T]he Proposed Judgment improperly adds Tulip City Air Service, Inc. as a party to the proceedings after the trial was concluded. Tulip City Services is not the taxpayer, only Entity Partners is the taxpayer. The issue is whether the hangar, as owned and used by Entity Partners, the taxpayer, is exempt as a concession.”
 - b. “[T]he proposed judgment incorrectly determines that the hangar in question is exempt from taxation as a concession under MCL 211.181 (2)(b).”
 - c. “Exemptions from taxation are to be strictly construed in favor of the taxing unit. [citation omitted]. The Proposed Judgment liberally interprets the exemption from taxation in MCL 211.181 (2)(b), exceeding the statutory authority, and is based on mistakes of fact and mistakes of law.”
 - d. “In order to be a concession, the concession agreement...must impose specific obligation upon Entity Partners at specific times. ...In the present case, the lease does not impose specific obligations to be performed at specific times. Entity Partners is the building owner and land lessee. Its lease allows Entity Partners to use the hangar for any use that is not inconsistent with the FBO. There are no specific obligations to be performed at specific times.”

- e. “Entity Partners and Tulip City Air Services are free to use the hangar for any purposes as long as they do not violate their other agreements. Since no specific services are imposed by the City nor does the City impose specific times for those services to be performed, the hangar is not a concession.”
 - f. “[T]he Proposed Judgment correctly notes that the facility must be open to the general public in order to be exempt. MCL 211.181(2)(b). However, the Proposed Judgment ignores this requirement, ruling that the “open to the public” requirement would create safety concerns. While it would obviously be unsafe to have the hangar open to the general public, the fact that it is not open to the general public means that it does not meet the statutory requirements for tax exemption. MCL 211.181 (2)(b). The statute does not say it must be open to the public only when safe.”
3. Petitioner filed a response to Respondent’s objections on May 13, 2008. In response, Petitioner states:
- a. “Petitioner’s use of the hangar satisfies the meaning of “concession” because the FBO Agreement, which is incorporated into the lease between Petitioner and Respondent, satisfies the concerns found in *City of Detroit v Tygard*, 381 Mich 271 (1968).”
 - b. “Here, Petitioner agreed to act as Respondent’s fixed base operator and provide aircraft services to the public, . . . Respondent reviews and approves Petitioner’s pricing every year, . . . Petitioner is required to provide certain aircraft services under the FBO Agreement, . . . the term of the FBO Agreement between the parties is 20 years, . . . the term of the Lease Agreement is for 28 years with a 30 year renewal; Petitioner adheres to operating standards required by Respondent, . . . and Respondent conducts performance reviews under the FBO Agreement. . . . Clearly, there are specific obligations imposed on the Petitioner by Respondent that satisfy the concerns of *Tygard*.”
 - c. “As for Respondent’s contention that the hangar is not open to the general public, that too has been fully briefed and the Tribunal has correctly found that the hangar is open to the general public. Petitioner stores itinerant aircraft in the hangar for the public on a first-come-first-serve basis. The hangar is open to the public, subject only to reasonable limitations because of public safety concerns.”
4. The Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. The Tribunal finds that Respondent’s first argument, that “the Proposed Judgment improperly adds Tulip City Air Service, Inc. as a party to the proceedings after the trial was concluded,” is unpersuasive. The Tribunal possesses discretion in adding a party to a proceeding on its own initiative at any stage of the proceedings. TTR 220. As such, the Proposed Opinion

and Judgment properly added Tulip City Air Service, Inc. as a second Petitioner to the above-captioned case.

5. The Tribunal further finds that Respondent's contention that the Proposed Opinion and Judgment incorrectly determines that the hangar is exempt from taxation as a concession is also unpersuasive. MCL 211.181(b)(2) provides in pertinent part that "[p]roperty that is used as a concession at a public airport, park, market, or similar property and that is available for use by the general public," even if used by a for-profit taxpayer, will be exempt from taxation. The Administrative Law Judge properly determined that Petitioners established their entitlement to exemption by a preponderance of the evidence. Specifically, Petitioners proved that their site is used as a concession at a public airport and is available for use by the general public. MCL 211.181(2)(b). Respondent specifically argues that the hangar must be "open" in terms of the general public freely being able to enter and leave, with minimal barriers, whether they have an airplane in the hangar or not. The Tribunal finds that MCL 211.181(2)(b) does not contain the requirement that the facility be "open" as Respondent states but that the issue relates to the ability of the public to have the opportunity to "use" the facility for what Petitioners' purpose is, namely as an airplane storage area. Petitioners here have demonstrated to the Tribunal, and Respondent has failed to rebut the fact, that Petitioners are not using the property for its personal planes. Here, Petitioners testified to the fact that the general public has the opportunity to store an airplane in the hangar on request.
6. Respondent's last exception that Petitioners do not qualify for exemption as a concession because the concession agreement must impose specific obligations to be performed at specific times, is equally inapposite. Petitioners' response to Respondent's exceptions shows that Petitioners have a specific obligation to act as Respondent's fixed base operator and provide aircraft services to the public.
7. Given the above, the Tribunal finds that Respondent has failed to show good cause to justify the requested modification of the Proposed Opinion and Judgment or the granting of a rehearing. See MCL 205.762. 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.

IT IS SO ORDERED.

MICHIGAN TAX TRIBUNAL

Entered: October 9, 2008
tab/sms

By: Kimbal R. Smith III

STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MICHIGAN TAX TRIBUNAL

Entity Partners, LLC, and
Tulip City Air Services, Inc.,
Petitioners,

MTT Docket No. 317277

v

City of Holland,
Respondent.

Administrative Law Judge Presiding
John S. Gilbreath, Jr.

PROPOSED OPINION AND JUDGMENT

Introduction

This case is an *ad valorem* property tax exemption appeal. The subject property is located at 1581 South Washington Avenue, Holland, Michigan at Tulip City Airport. The property is identified as parcel number 03-02-08-300-906. The tax years at issue are 2005, 2006, and 2007.

It is conceded by all parties that MCL 211.181, otherwise commonly referred to as the Lessee Use Tax, applies in this case. This statute provides that otherwise exempt property is not exempt from taxation when the property is leased to a for-profit entity except when that entity is a “concession.” How this term, “concession,” is applied to the facts and circumstances of this case, and which of a number of appellate decisions apply, is the seminal substantive legal issue before the court.

Each party offered testimony and documentary evidence. The parties stipulated that Respondent's Exhibits R-1 through R-15 be admitted into evidence.¹ Each party filed post hearing briefs.

Before this issue can be resolved, the Tribunal must resolve a procedural issue based on the doctrine of real property in interest. This procedural issue was raised by Respondent in its Pre-Hearing Brief. At the close of proofs, Petitioner Entity Partners, LLC, orally moved to amend its petition to conform to the proofs by adding a Co-Petitioner, Tulip City Air Services, Inc., which would ameliorate the issue of real party in interest.

¹ Respondent's exhibits consisted of the following:

- | | |
|------|--|
| R-1 | Land Lease between City of Holland and Entity Partners, LLC dated November 15, 1994. |
| R-2 | Fixed Base Operator Agreement of Tulip City Airport, Holland, Michigan Dated October 23, 1986. |
| R-3 | Lease by and between Entity Partners, LLC and Tulip City Air Services, Inc., dated June 1, 1995. |
| R-4 | Hangar Lease Tulip City Air Services, Inc., and E. C. Aviation, Inc., dated November 1, 2004. |
| R-5 | Hangar Lease Tulip City Air Services, Inc., and E. C. Aviation, Inc., dated May 1, 2003. |
| R-6 | Hangar Lease Tulip City Air Services, Inc., and Lakeshore Air, Inc., dated January 1, 2005. |
| R-7 | Hangar Lease Tulip City Air Services, Inc., and Dirkse Aero, LLC., dated January 1, 2005. |
| R-8 | Hangar Lease Tulip City Air Services, Inc., and Smith & Associates, dated January 1, 2005. |
| R-9 | Letter from Interim Assessing Administrator to Entity Partners, LLC dated February 7, 2005. |
| R-10 | Photographs of Aircraft under Hangar Leases (R-4 through R-8) |
| R-11 | Property Assessment Card for Parcel No. 03-02-08-300-906 |
| R-12 | Photograph of subject Property-aerial |
| R-13 | Photograph of Tulip City Airport-aerial |
| R-14 | Photograph of subject Property-ground shot |
| R-15 | Board of Review Appeal Action. |

Real Party in Interest

Respondent argues that Tulip City Air Services, Inc. (“Tulip City” or “TCAS”) is the real party in interest, since Tulip City, not Entity Partners, is the potential concessionaire. MCR 2.201(B) provides that “an action must be prosecuted in the name of the real party in interest.” A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Stephenson v Golden*, 279 Mich 710, 766; 276 NW2d 849 (1937). Furthermore, the Michigan Court of Appeals in *Rite-Way Refuse Disposal, Inc v Vanderploeg*, 161 Mich App 274, 277-278; 409 NW2d 804, 805 (1987), stated relative to MCR 2.201(B) that:

1 Martin, Dean & Webster, Michigan Court Rules Practice, p. 6, explains:

“The purpose of the rule is to protect the defendant by requiring that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted against the defendant.”

The commentators then go on to discuss the relationship of the real party in interest rule to MCR 2.205 concerning necessary joinder of parties.

“The real party in interest rule is concerned only with the power of the plaintiff before the court to bring suit upon the claim stated. Whether additional parties also have an interest, such that their joinder is required or the plaintiff is prohibited from proceeding without them, is not a question of real party in interest, but of necessary joinder of parties under MCR 2.205.”

In this case, Tulip City entered into the original “concessionaire” agreement with Respondent. (Exhibit R-2) Subsequently, Tulip City entered into an agreement with Entity Partners whereby Entity Partners assumed the responsibilities of the concessionaire agreement. Respondent entered into a lease agreement with Entity Partners relative to the land. Pursuant to all of these transactions, Respondent arguably has benefited because the original services were

never interrupted, and for all intents and purposes these transfers were seamless given the principals in all of the transactions are the same.

Petitioner, in adding or amending the petition, is in effect making a motion to join an additional entity pursuant to MCR 2.205. The motion is necessary to conform the facts to the pleadings and also to provide for an economical adjudication of the claims. **As such, the motion is granted.**

Summary of Judgment

The Tribunal, having considered the evidence properly submitted and the file in the above-captioned case, finds that the subject property, parcel number 03-02-08-300-906, is exempt from ad valorem property tax pursuant to MCL 211.181(2)(b) for the 2005, 2006 and 2007 tax years.

Background and Procedural History

Background

The property in question is located at what is commonly referred to as Tulip City Airport (hereafter referred to as the Airport). The day-to-day operations of the Airport are governed by the City of Holland (herein after referred to as the City). Respondent, City of Holland, is responsible for assessing the property located at the Airport.

On November 15, 1994, the City entered into a land lease with Petitioner. (Exhibit R-1) The term of the lease was from November 17, 1994 until February 17, 2002. The lease allows for an extension of thirty years. Paragraph 7 of the lease requires that the land be used by Petitioner as a site for the maintaining, servicing and storing of aircraft in connection with the duties and obligations pursuant to a Fixed Base Operator Agreement dated October 23, 1986.

(Hereafter referred to as “FBO Agreement”) (Exhibit R-2) The site includes two hangars to fulfill this obligation.

At issue is the extent to which the property should be exempt from property tax liability because the property is used as a concession.

While the City is exempt from *ad valorem* property taxes pursuant to MCL 211.7m as a public entity, Petitioner can be assessed as a lessee of otherwise exempt property. The tax is imposed pursuant to MCL 211.181, commonly known as the Lessee-User Tax. The effect of this tax is to treat the property leased from an otherwise exempt entity to a for-profit entity, such as Petitioner, as though the lessee owned the property. The only exception to this treatment is when the property is used as a “concession.”

Petitioner has been assessed as a lessee-user for approximately seventy-five percent of the subject property. Petitioner has challenged this assessment to Respondent’s 2005 board of review claiming that the property is part of a concession. The Board of Review denied the requested relief and appeal was made to the Michigan Tax Tribunal. The 2006 and 2007 tax years were added through amendments to the original petition.

A hearing was held in Lansing, Michigan on March 20, 2007.

Petitioner’s Contentions

Petitioner contends that all of the property leased from the City is used as a “concession” and, as such, should be exempt from property tax. The fact that the Fixed Base Operator has leased hangar space for the storage of based aircraft does not defeat the fact that this space is likewise used for the operations associated with the FBO Agreement. Petitioner further states that *Kent County v Grand Rapids*, 381 Mich 640; 167 NW2d 287 (1969), is on point.

Petitioner's lone witness was Ronald Ludema, the majority owner of Entity Partners, LLC and sole owner of Tulip City Air Services. (Trial Transcript pg 27) TCAS is the Fixed Based Operator for Tulip City Airport pursuant to the Fixed Based Operator agreement dated 1986. (Trial Transcript pgs 27, 29) Mr. Ludema testified that Entity Partners, LLC was created at the request of the City of Holland for purposes of insulating the city from liability arising from the long-term lease agreement with TCAS. (Trial Transcript pgs 45-6) As such, Entity Partners entered into a land lease in 1994 with the City of Holland for the subject property. (Trial Transcript pg 46) Mr. Ludema, as an individual, has managed operations at the Tulip City Airport since 1976. (Trial Transcript pg 107).

Petitioner argues that the lease between the City of Holland and Entity Partners, LLC states that the subject property can only be used in connection with the Fixed Based Operator Agreement between the City and TCAS. (R-1, pg 5; Trial Transcript pgs 47-52) Petitioner therefore states that the terms and conditions of the FBO Agreement are incorporated by reference into the land lease between the City and Entity Partners, LLC. (Trial Transcript pgs 50-52) Petitioner also demonstrates that the land lease between Entity Partners and the City recognizes the identity of shareholders in Tulip City Airport and Entity Partners. (Trial Transcript pgs 50-1)

According to the FBO Agreement, TCAS is required to provide "apron servicing of, and assistance to, aircraft, including itinerant parking, storage and tie-down service, for both based and itinerant aircraft upon or within facilities leased to Operator of aircraft parking areas designated by the City." (R-2, pg. 8; Trial Transcript pg 32) Petitioner highlights the condition that services are to be provided to "both based and itinerant aircraft." (Trial Transcript pg 34)

Petitioner contends that authority to sublease is stated in the land lease agreement between Entity Partners, LLC and the City of Holland, but any sub-lease may not violate provisions of either the land lease or the FBO agreement. (Trial Transcript pg 48) Petitioner states that TCAS, as the FBO, provides services as required by the agreement and have also entered into hangar space agreements with various entities for the storage of their airplanes. Petitioner argues that as the FBO, TCAS has an obligation to provide storage to “based” aircraft, as well as itinerant aircraft. (Trial Transcript pgs 33-34)

Petitioner continues that in conjunction to its obligations under FBO agreement, the hangar space agreements provide based aircraft with a guaranteed space at the airport when that aircraft is located in Holland. Petitioner states that the sub-leases do not promise an exclusive use of any particular space in the hangar, but only provide that a space will be available. (Trial Transcript pg 58) Petitioner claims that planes are arranged in the hangar in a manner called “stacking,” so that one plane’s wings will overlap another plane’s wings to use the maximum space in the hangar. The planes are stacked so that planes that are scheduled to leave first are placed in the front. Petitioner states that the hangar space agreements do not interfere with this storage arrangement because the space in the hangar is not exclusive and planes are arranged and rearranged according to their flight schedule, not according to preferences established by a lease. (Trial Transcript pg 115)

Petitioner, therefore, claims that the sub-leases are not in violation of the FBO agreement and, in fact, are made pursuant to its obligation to store based aircraft. (Trial Transcript pgs 52-53) Petitioner claims that the entire hangar is used to provide services that are required under the FBO agreement. Petitioner states that maintenance and repair services for airplanes are conducted in both hangars and, with regard to the hangar in question, about 25% of the space is

used to service airplanes and the remaining 75% that Respondent deems non-exempt is used to store planes. (Trial Transcript pgs 68-69)

Petitioner states that the public is allowed into the airport; however, for safety reasons the public is not free to walk in as they please, but must comply with the proper procedures to gain entry. Petitioner claims that restrictions apply due to safety and health concerns and these restrictions do not cut-off access to the airport by the general public but do restrict access to a method and manner that is safe. (Trial Transcript pgs 104-105)

Respondent's Contentions

Respondent argues that the Lease does not create a concession. Respondent further contends that neither the Lease nor the FBO provide the degree of oversight by the City that would constitute a concession as defined by the Michigan Supreme Court in *Kent County, supra*. Further, the subject hangar is not available to the general public and, therefore, would not be eligible for exemption. The language of the "concession" exemption provides that the property must be available to the general public.

Respondent called the City assessor, David VanderHeide, as their only witness. Mr. VanderHeide has been employed by the City of Holland in the assessor's office since 1978 and has been employed as the interim assessing administrator for the past three years. (Trial Transcript pg 122) Mr. VanderHeide visited the Tulip City Airport sometime around late 2004 or early 2005 to assess another company's new hangar that was built at the airport. While at the airport on this visit, the assessor was informed that Tulip City Air Services had entered into long-term leases with private companies for the use of its hangar space. (Trial Transcript pg 123) Mr. VanderHeide subsequently visited the hangars owned by Tulip City Air Service to determine how the hangar was being used. The City assessor, after discussion with Mr. Ludema and

inspection of the subject hangar, determined that the hangar should be added to the assessment roll as omitted property. (Trial Transcript pgs 125-127) Mr. VanderHeide's assessment was that seventy-five percent of the hangar was not used for any activity related to the concession and therefore only twenty-five percent of the hangar should be exempt from taxation. (Trial Transcript pg 128)

The assessment is based on information reported to the assessor that approximately twenty-five percent of the hangar space is used to maintain and service aircraft. (Trial Transcript pg 133) The assessor also noted that seventy-five percent of the hangar space was used to satisfy long-term lease obligations, a use outside the scope of the concession. (Trial Transcript pgs 134-136) The City acknowledges that TCAS is obligated under the FBO agreement to provide storage for based aircraft; however, the City claims that the responsibility that TCAS has to the lessees of the hangar space defeats the "available to the general public" clause of the statute because the leased space reduces available space for other aircraft. (Trial Transcript pgs 139-141)

Findings of Facts

Stipulated Facts

Pursuant to the parties' Stipulation of Agreed-Upon Facts and Facts in Dispute, the Tribunal finds the following facts. Petitioner is a Michigan Limited Liability Company whose principal office is located in the City of Holland. Respondent, City of Holland, is a Michigan Municipal corporation organized pursuant to the laws of the State of Michigan. Respondent owns the property and surrounding areas commonly known as the Tulip City Airport. Petitioner, Entity Partners, LLC, leases a portion of the airport property, which is located at 1581 S.

Washington in Holland, Michigan, identified on the tax rolls of the City of Holland as Parcel No. 03-02-08-300-960.

On November 15, 1994, Respondent, City of Holland, entered into a Land Lease (“Lease”) with Petitioner, Entity Partners, LLC, relating to 51,759.03 square feet of property owned by the City. The duration of the Lease was from November 17, 1994 until February 17, 2002 with a permitted extension for an additional thirty (30) years.

The Lease requires that Petitioner use the property for the maintaining, servicing, and storing of aircraft in connection with the duties and obligations under an FBO Agreement dated October 23, 1986. The Lease grants Petitioner the right to sub-lease the property as long as none of the uses violates the Lease or the FBO Agreement and the sub-lessee is approved by the City.

In 1995, Petitioner leased the entire property to Tulip City Air Service, the Fixed Based Operator, for a term of 21 years. Subsequently, in 2004 and 2005, Tulip City Air Service entered into five specific hangar leases.

After Tulip City entered into these five sub-leases, Dave VanderHeide, the Acting Assessing Administrator, inquired as to the use of the subject property. On February 7, 2005 a letter was sent to Petitioner, Entity Partners, LLC, to inform it that 75% of the land and buildings would be assessed for 2005.

Additional Findings of Facts

Ronald Ludema is the majority owner of Entity Partners, LLC and sole owner of Tulip City Air Services. Mr. Ludema has managed operations at the Tulip City Airport since 1976. TCAS is the Fixed Based Operator for Tulip City Airport pursuant to the Fixed Based Operator agreement dated 1986. Entity Partners, LLC was created at the request of the City of Holland for purposes of insulating the city from liability arising from the long-term lease agreement with

TCAS. As such, Entity Partners entered into a land lease in 1994 with the City of Holland for the subject property. The property is improved with two hangars. (Exhibits R-10, R-11, R-12, R-13 and R-14)

The Lease between the City of Holland and Entity Partners, LLC states that the subject property can only be used in connection with the Fixed Based Operator Agreement between the City and TCAS. The terms and conditions of the FBO Agreement are incorporated by reference into the land lease between the City and Entity Partners, LLC.

According to the FBO Agreement, TCAS is required to provide “apron servicing of, and assistance to, aircraft, including itinerant parking, storage and tie-down service, for both based and itinerant aircraft upon or within facilities leased to Operator of aircraft parking areas designated by the City.”

The authority to sublease is stated in the land lease agreement between Entity Partners, LLC and the City of Holland but any sub-lease may not violate provisions of either the land lease or the FBO agreement. TCAS, as the FBO, provides services as required by the agreement and has also entered into hangar space agreements with various entities for the storage of their airplanes. As the FBO, TCAS has an obligation to provide storage to “based” aircraft as well as itinerant aircraft.

In conjunction to TCAS’s obligations under the FBO agreement, the hangar space agreements provide based aircraft with a guaranteed space at the airport when that aircraft is located in Holland. The sub-leases do not promise an exclusive use of any particular space in the hangar, but only provide that a space will be available. Mr. Ludema, as manager, states that planes are arranged in the hangar in a manner called “stacking,” so that one plane’s wings will overlap another plane’s to use the maximum space in the hangar. The planes are stacked so that

planes that are scheduled to leave first are placed in the front. The hangar space agreements do not interfere with this storage arrangement because the space in the hangar is not exclusive and planes are arranged and rearranged according to their flight schedule, not according to preferences established by a lease.

The sub-leases are not in violation of the FBO agreement and are made pursuant to their obligation to store based aircraft. The entire hangar is used to provide services that are required under the FBO agreement. Maintenance and repair services for airplanes are conducted in both hangars and, with regard to the hangar in question, about 25% of the space is used to service airplanes and the remaining 75% is used to store planes.

The public is allowed into the airport; however, for safety reasons the public may not freely walk in, but must comply with the proper procedures to gain entry. Petitioner claims that restrictions apply due to safety and health concerns and these restrictions do not cut off access to the airport by the general public, but do restrict access to a method and manner that is safe.

Conclusions of Law

Law of Exemption

The seminal issue in this case is whether the property is a “concession” and is therefore exempt from *ad valorem* property taxation pursuant to MCL 211.181(2)(b). In an exemption appeal, a petitioner must establish its entitlement to exemption by a preponderance of the evidence. *Pro Med Healthcare v Kalamazoo*, 249 Mich App 490, 495; 644 NW2d 47 (2002), quoting *Rose Hill, Inc v Holly Twp*, 224 Mich App 28; 568 NW2d 332 (1997). Because “[e]xemption from taxation effects the unequal removal of the burden generally placed on all landowners to share in the support of local government. Since exemption is the antithesis of tax equality, exemption statutes are to be strictly construed in favor of the taxing unit.” *Michigan*

Baptist Homes & Development Co v City of Ann Arbor, 396 Mich. 660, 670; 242 NW2d 749, 753 (1976).

MCL 211.7m

Governmental Exemption

MCL 211.7m provides generally that property owned by a political subdivision is exempt from taxation. Further, as to airport authorities such as those permitted by the Aeronautics Code, MCL 259.1 et seq, MCL 211.7m states:

Property owned by ... **an authority** ... of a political subdivision ... and is used to carry out a public purpose itself or on behalf of a political subdivision ... is exempt from taxation under this act.

MCL 211.181

Lessees or Users of Tax-Exempt Property

MCL 211.181 provides as a general rule that property leased from an otherwise exempt governmental entity is not exempt from ad valorem taxation. MCL 211.181(1) states:

Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased ... to and used by a private ... 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.

There is an exception to this rule, found in subsection (2)(b):

Subsection (1) does not apply to all of the following:

Property that is used as a concession at a public airport ... and that is available for use by the general public.

Case Law

Concession

In *Detroit v Tygard*, 381 Mich 271, 275; 161 NW2d 1 (1968) and *Kent County v Grand Rapids*, 381 Mich 640; 167 NW2d 87 (1969), the Michigan Supreme Court dealt with airport concession cases for the first time. In *Tygard*, the Court provided the following facts:

The facts have been stipulated. Appellants Tygards are copartners doing business as Trim-A-Plane Service. They have possession of certain designated T-hangars under written agreements with the Detroit Aviation Commission, an agency of the city of Detroit. The business consists of giving flying lessons, ground school courses, instrument flying, and renting, leasing, storing and servicing small aircraft for the public generally. The realty upon which they conduct these operations is owned by the city of Detroit. So owned, it is not taxable. The agreement under which they hold and use the property is on a month-to-month basis terminable with or without cause by the city. *Tygard, supra*, pg 274

In *Tygard*, the Court began its analysis by defining a concession as “[a] privilege or space granted or leased for a particular use within specified premises.”² *Tygard, supra*, pg 275 The Court suggested that more than just a lease is required to constitute a concession, that there has to be a concept of exclusivity in the agreement reached between the tax-exempt entity and the concessionaire. Second, the Court states that specific obligations imposed upon the concessionaire by the tax-exempt entity to ensure that services are adequately offered are an indication of a concession. In addition, the services offered must “bear a reasonable relationship to the purposes of a public airport.” *Tygard, supra*, pg 277. Finally, the Court noted “the privilege granted the concessionaire is exchanged for assurance to the tax-exempt entity that services customarily and needfully required at airports are performed.”

² In *Tygard* the Court analyzed the then existing MCL 211.181 prior to an amendment to that statute that created the specific concession that pertains to airports, found in sub-section (2)(b) of the current statute.

In *Kent County, supra*, the issue was associated with two types of concessions. The first pertained to a hotel located at the Kent County Airport Authority, while the second was associated with a fixed based operator at the same facility. In both instances, the Supreme Court concluded that a concession existed and in so doing relied upon language found in *Tygard, supra*. In *Kent County*, the Court concluded that:

The factual situation created by the City of Detroit-Tygard agreement is not similar to the situation in the present appeal, and our decision in that case does not control our decision in this appeal.

Both the 20-year Harvey lease and the 30-year Northern lease contain provisions that fully met the requirements of the Aeronautics Code of the State of Michigan, which provided that:

'Such terms, charges, rentals and fees shall be equal and uniform for the same type of facilities provided, services rendered or privileges granted with no discrimination between users of the same class for like facilities provided, services rendered or privileges granted.'

The City of Detroit-Tygard decision established that the agreement there considered failed to meet those requirements.

The privileges granted under the leases to Fred Harvey and Northern Air Service are concessions and "are entirely consistent with the intention of the legislature as evidenced in an earlier statute, the 1945 Aeronautics Act wherein the legislature authorized a political subdivision establishing an airport 'to confer the privilege of concessions."

We agree with the trial court and affirm its opinion holding that the uses of the property leased by Fred Harvey and Northern Air Service are concessions and that by P.A.1953, No. 189 as amended, the property here involved is exempt from taxation. *Supra*, pg 652-653

The case at hand is indistinguishable from *Kent County* in one important fact; both cases involve a "fixed base operator" associated with a long-term lease. In *Kent County*, the lease was a 30-year lease with Northern Air Services "to perform the functions of the 'fixed base operator.'" In this case, the Lease between the City of Holland and Entity Partners, LLC states that the subject property can only be used in connection with the Fixed Based Operator

Agreement between the City and TCAS. The terms and conditions of the FBO Agreement are incorporated by reference into the land lease between the City and Entity Partners, LLC. These facts satisfy the initial concern found in *Tygard* that more than just a lease is required to constitute a concession, that there has to be a concept of exclusivity in the agreement reached between the tax-exempt entity and the concessionaire.

Also, according to the FBO Agreement, TCAS is required to provide “apron servicing of, and assistance to, aircraft, including itinerant parking, storage and tie-down service, for both based and itinerant aircraft upon or within facilities leased to Operator of aircraft parking areas designated by the City.” Again, these facts satisfy another concern found in *Tygard*, and that is that the tax-exempt entity ensures that services are adequately offered and that the services offered must “bear a reasonable relationship to the purposes of a public airport.”

Availability to the General Public Clause

The City argues that the sub-leases to base aircraft owners defeat a purpose of the fixed base operating agreement. The City acknowledges that TCAS is obligated under the FBO agreement to provide storage for based aircraft; however, the City claims that the responsibility that TCAS has to the lessees of the hangar space defeats the “available to the general public” clause found in MCL 211.181(2)(b) because the leased space reduces available space for other aircraft.

In response, Petitioner argues and agrees that TCAS, as the FBO, provides services as required by the agreement and has also entered into hangar space agreements with various entities for the storage of their airplanes. As the FBO, TCAS has an obligation to provide storage to “based” aircraft as well as itinerant aircraft.

Also, in conjunction to TCAS's obligations under the FBO agreement, the hangar space agreements provide based aircraft with a guaranteed space at the airport when that aircraft is located in Holland. The subleases do not promise an exclusive use of any particular space in the hangar, but only provide that a space will be available. Mr. Ludema testified that planes are arranged in the hangar in a manner called "stacking," so that one plane's wings will overlap another plane's to use the maximum space in the hangar. The planes are stacked so that planes that are scheduled to leave first are placed in the front. The hangar space agreements do not interfere with this storage arrangement because the space in the hangar is not exclusive and planes are arranged and rearranged according to their flight schedule, not according to preferences established by a lease.

The sub-leases are not in violation of the FBO agreement and are made pursuant to their obligation to store based aircraft. The entire hangar is used to provide services required under the FBO agreement for both based and itinerant aircraft. Maintenance and repair services for airplanes are conducted in all of TCAS facilities for both based and itinerant aircraft.

Based upon these facts, the Tribunal does not agree that the sub-leases are inconsistent with the "available to the general public" clause found in MCL 211.181(2)(b). As stated in *Tygard*, the tax-exempt entity must ensure that services offered "bear a reasonable relationship to the purposes of a public airport." A public airport exists for the flying public. Both based and itinerant aircraft are part of the flying public.

Further guidance is found in *Emery Worldwide v Township of Cascade*, unpublished per curiam opinion of Court of Appeals, issued March 10, 2005 (Docket No. 251416). In *Emery*, the Court of Appeals upheld the Tribunal's denial of a concession. The Court provided the following background:

The property that is the subject of this dispute is a freight hangar and associated improvements located at the Kent County International Airport in Cascade Township ("the township"). In June 1998, petitioner entered into a written lease agreement with the owner of the airport, the Kent County Board of Aeronautics (KCBA), for approximately 250,000 square feet of ground area and 57,000 square feet of apron improvements. Under the terms of this lease agreement petitioner was granted the right to construct, at its sole expense, certain improvements including office, parking, and hangar space **for use in its air cargo and general freight transportation business.** (Emphasis added)

In finding that no concession existed, the Court of Appeals reviewed the *Tygard* and *Kent County* cases and concluded that:

[U]nlike the fixed base operators in the *Tygard* and *Kent Co* cases, petitioner offers no service directly associated with use of the airport by the general public. Rather, petitioner's use of airport property merely facilitates its more general, private business purpose, i.e., the transportation of cargo. Although locating a portion of its operations on airport property certainly enhances its financial and logistical ability to conduct its operations, such use is no more customary or needful to the airport and its public users than use by any other private corporation seeking to enhance its business operations through the expediency of air travel. This is not to say that petitioner's use of the property does not, as argued by petitioner, benefit the public in general. **However, general public benefit is not the test. Rather, the test is whether the use to which the property is put reasonably relates to the purposes of a public airport, which is to provide a public hub for activities ordinarily associated with airplanes.** (Emphasis added)

TCAS provides "a public hub for activities ordinarily associated with airplanes." All of TCAS facilities are used to provide services which are required under the FBO agreement for both based and itinerant aircraft. Those services include apron servicing of, and assistance to, aircraft, including itinerant parking, storage and tie-down service, for both based and itinerant aircraft. The subleases are co-incidental to the more general purpose of the FBO agreement that is to provide services associated with aircraft. It would be inconsistent with this purpose to precluded based aircraft from using other services offered by the FBO agreement solely for the reason that they have a lease for hangar space. The subleases do not promise an exclusive use of

any particular space in the hangar, but only provide that a space will be available. In conclusion, the subleases to base aircraft owners do not defeat the “available to the general public” clause found in MCL 211.181(2)(b) because the leases provide that space will be available for based aircraft but not to the exclusion of itinerant aircraft.

The City’s last argument focuses on the lack of accessibility to the hangar facilities to the non-flying public. The argument goes that the subject property is not available to the general public and therefore the exemption should fail. However, in the case of an airport, availability to the general public is obviously limited due to public safety concerns. The fact that access to and from the hangar is obstructed by fences, gates or other forms of security does not negate the “availability” element of the concession exemption when those limitations to access do not limit the ultimate enjoyment or use of the airport by the general flying public but merely limit the methods of access to the airport to the general public.

Conclusion

Based upon the above findings of fact and the applicable statutory and case law, the Tribunal concludes that Petitioner has met its burden of proving that the subject property is a concession. The test as found in *Emery* after the Court of Appeals analyzed and considered the Supreme Court cases of *Tygard* and *Kent County*, is whether the use to which the property is put reasonably relates to the purposes of a public airport, which is to provide a public hub for activities ordinarily associated with airplanes. In this case the subject property is such a public hub and therefore, the property being parcel number 03-02-08-300-906 is exempt from *ad valorem* property tax pursuant to MCL 211.181(2)(b) for the 2005, 2006 and 2007 tax years.

Judgment

IT IS ORDERED that the property's assessed and taxable values for the tax year(s) at issue are as set forth in the *Summary of Judgment* and *Conclusions of Law* sections of this Proposed Opinion and Judgment unless modified by the Tribunal in the Final Opinion and Judgment.

Entered by Chief Clerk: April 16, 2008 By: John S. Gilbreath, Jr., Administrative Law Judge

This Proposed Opinion and Judgment ("Proposed Opinion") was prepared by the State Office of Administrative Hearings and Rules. The parties have 20 days from date of entry of this Proposed Opinion to notify the Tribunal in writing if they do not agree with the Proposed Opinion and why they do not agree (i.e., exceptions). After the expiration of the 20-day time period, the Tribunal will review the Proposed Opinion and consider the exceptions, if any, and:

- a. Adopt the Proposed Opinion as a Final Decision.
- b. Modify the Proposed Opinion and adopt it as a Final Decision.
- c. Order a rehearing or take such other action as is necessary and appropriate.

The exceptions are limited to the evidence submitted prior to or at the hearing and any matter addressed in the Proposed Opinion. There is no fee for the filing of exceptions. A copy of a party's written exceptions must be sent to the opposing party.