STATE OF MICHIGAN

COURT OF CLAIMS

WINGS UP IV, L.L.C.,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendant.
_____/

OPINION AND ORDER

Case No. 17-000326-MT; 18-000062-MT

Hon. Colleen A. O'Brien

Pending before the Court in these consolidated cases is defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). That motion is DENIED. Furthermore, because it is apparent to the Court that plaintiff, as the nonmoving party, is entitled to judgment, summary disposition is GRANTED in plaintiff's favor pursuant to MCR 2.116(I)(2).

I. BACKGROUND

The Use Tax Act (UTA), MCL 205.91 *et seq.*, permits a lessor to "elect to pay tax on receipts from the rental or lease of" tangible personal property in lieu of paying use tax on the purchase price of the property. See MCL 205.95(4). The issue in this case concerns whether plaintiff is a "lessor" who was entitled to pay use tax on rental receipts with respect to three helicopters.

Plaintiff is an entity wholly owned by its sole member, Robert F. Barnes. Barnes formed plaintiff in 2013 as an entity that was intended to own aircraft to be used by a different entity,

Traverse City Helicopters, LLC (TC Helicopters). Barnes is also the majority owner of TC Helicopters. According to deposition testimony from Michael Terfehr, a licensed pilot and manager of plaintiff and TC Helicopters, plaintiff was formed for the purpose of owning aircraft (helicopters) and leasing the same to TC Helicopters, as well as to Barnes. In turn, TC Helicopters was to make the helicopters available for rent, primarily for helicopter tours in the Traverse City area.

In furtherance of these purported goals, plaintiff purchased three helicopters from outside of the state in 2013 and brought them to this state for use; those three helicopters are at the center of the instant case. Two of the helicopters at issue in this case are the subject of the complaint filed in Docket No. 17-000326-MT. Those helicopters are: (1) a Robinson R44 Helicopter (FAA Number N144AH) purchased for $85,000 on or about September 19, 2013; and (2) a Bell 206B helicopter (FAA Number N75Y) purchased for $565,000 on or about September 20, 2013. The third helicopter at issue is the subject of the complaint in Docket No. 18-000062-MT. That helicopter is a Robinson R44 (FAA Number N425RW) purchased for $383,533 on or about March 4, 2013. As noted above, in lieu of paying use tax on these helicopters at the time of purchase, plaintiff elected to pay use tax on rental receipts.

The record contains several lease agreements between plaintiff and TC Helicopters and between plaintiff and Barnes for the helicopters at issue in this case. The leases all provided for an open-ended lease term. The first leases were signed on or about April 20, 2013. On this date, plaintiff and TC Helicopters entered into an agreement for the use of the Robinson R44 Helicopter identified by FAA Number N425RW. The agreement called for an hourly rental

charge of $325 per Hobbs hour[1] of use of the helicopter. The charge was to "be calculated on a quarterly basis." Barnes signed the agreement on behalf of plaintiff; Terfehr signed on behalf of TC Helicopters. Barnes signed a nearly identical lease with plaintiff on his own behalf as well. According to plaintiff, it paid $1,610 in use tax based on TC Helicopter's rental receipts under this agreement. In addition, plaintiff paid $1,610 in use tax based on Barnes's rental of the same helicopter, purportedly at the same hourly rate. In total, plaintiff contends it paid $3,220 in use tax related to leasing this helicopter. This amount of use tax remitted would correspond with $53,667 received in combined rental income from TC Helicopter's and Barnes's use of the helicopter.

Additionally, plaintiff executed two identical leases on or about September 20, 2013 with Barnes and with TC Helicopters with respect to the Bell 206B Helicopter (FAA Number N75Y). Barnes signed his agreement both on behalf of himself and on behalf of plaintiff. The agreements specified that the leases were to be on a "co-exclusive basis" with TC Helicopters and Barnes serving as co-lessee of the same helicopter, at the same rate. Plaintiff remitted to defendant $2,020 in use tax related to the Bell 206B ($1,010 for rental receipts paid by TC Helicopters; and $1,010 for rental receipts paid by Barnes). In total, this amount of use tax remitted would correspond to approximately $33,667 in rental income received by plaintiff for this particular helicopter.

The final lease agreement plaintiff produced in this case was a January 20, 2014 agreement between plaintiff and TC Helicopters. The subject of this agreement was the

[1] According to deposition testimony in this case, a "Hobbs hour" refers to the amount of time a helicopter's rotors are spinning.

Robinson R44 (FAA Number 144AH). This lease, based on the notion that the particular helicopter was less expensive than the other Robinson R44, called for a lease rate of $100 per hour "based on readings from the Hobbs meter[.]" According to plaintiff, it remitted $3,061.50 in use tax based on rental receipts from this lease agreement. This amount corresponds to $51,025 in rental receipts generated from this lease agreement.

Although plaintiff produced the lease agreements at issue in this case and the amounts of use tax are generally not contested, plaintiff has never produced any invoices issued to TC Helicopters or to Barnes. Plaintiff did, however, produce banking records that appear to correspond with payments from TC Helicopters to plaintiff during timeframes and in amounts that could correspond to the lease terms.

Shortly after purchasing the same, plaintiff sold each of the helicopters at issue in this case. Two helicopters—the Bell 206B and the Robinson R44 assigned FAA Number N425RW—were sold less than a year after plaintiff purchased them. According to deposition testimony, plaintiff purchased the Bell 206B (FAA Number N75Y) with the intention of leasing the helicopter for powerline inspections. Terfehr testified at deposition that Consumers Energy ceased operating its own "flight department" with the intention of contracting out flyover powerline inspections to a third party. Plaintiff purchased the helicopter in hopes of securing a contract, through TC Helicopters, to be that third party. TC Helicopters hired Carly Boylan, who was formerly employed by Consumers Energy as a pilot, in part of its effort to secure a contract from Consumers Energy. However, those efforts did not bear fruit. As a result, plaintiff sold the helicopter in Florida.

Following review by an auditor, defendant determined that plaintiff was not a "lessor" and was not entitled to have elected to pay use tax on the rental receipts derived from the three helicopters at issue in this case. Defendant issued notices of intent to assess for tax periods covering 2013 and 2014. In a September 2017 letter, defendant indicated that plaintiff did not meet the qualifications required of a lessor of tangible personal property, so the election was disallowed. The letter cited Revenue Administrative Bulletin (RAB) 2015-15[2] and stated that the existence of lease agreements alone was not enough to establish that plaintiff was a lessor. Instead, stated the letter "[a] lessor must also be in the business of leasing with a profit motive and be available to the public as a lessor," and plaintiff did not provide sufficient documentation to satisfy those requirements. Defendant issued three final assessments in this case, and plaintiff has challenged the validity of all three in these consolidated cases.

II. ANALYSIS

This matter is before the Court on defendant's motion filed pursuant to MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The UTA imposes on every person within the state a tax "for the privilege of using, storing, or consuming tangible personal property in this state at a total combined rate equal to 6% of the price of the property or services . . . ." MCL 205.93(1). Here, plaintiff was liable for use tax because it purchased the three helicopters outside of this state and brought them into the

[2] It appears the reference to RAB 2015-*15* was likely a typographical error, as this RAB pertains to "the income tax treatment of income attributable to estates, trusts and beneficiaries." It appears that defendant intended to cite RAB 2015-*25*.

state. In lieu of remitting use tax on the purchase price, plaintiff elected to pay use tax on rental receipts derived from leasing the helicopters. In this respect, MCL 205.95(4) provides that "A lessor may elect to pay use tax on receipts from the rental or lease of the tangible personal property in lieu of payment of sales or use tax on the full cost of the property at the time it is acquired."

A. WHETHER PLAINTIFF WAS A "LESSOR" UNDER THE UTA

The primary issue in this case is whether plaintiff qualifies as a "lessor" who was entitled to make the election under the UTA. The term "lessor" is not defined in the UTA. However, defendant has, pursuant to its rulemaking authority, provided some guidance. Notably, Mich Admin Code, R 132 (also referred to as "Rule 82") provides that "[a] person engaged in the business of renting or leasing tangible personal property to others shall pay the Michigan sales or use tax at the time he purchases tangible personal property, or he may report and pay use tax on the rental receipts from the rental thereof." Pursuant to this rule, a lessor must be one who is "engaged in the business of renting or leasing" property.

In *Devonair Enterprises, LLC v Dep't of Treasury*, 297 Mich App 90, 98; 823 NW2d 328 (2012)—a case which also involved aircraft—the Court of Appeals held that the requirements of Rule 82 should be considered in determining whether a plaintiff is a "lessor" of property. In doing so, the panel did not expressly adopt a list of factors considered by the Michigan Tax Tribunal in that case. Instead, the panel drew on Rule 82 to determine that a "lessor" under the UTA had to be one who was engaged in the business of leasing or renting tangible personal property to others. *Id*. "Business" under the UTA " 'means all activities engaged in by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect.' " *Id*. quoting MCL 205.92(h). Hence, reasoned the panel, in order for the petitioner

in that case to be a "lessor," the petitioner must have been "engaged in the business of leasing the [aircraft] to others for petitioner's gain, benefit, or advantage." *Id*. at 100.

In light of *Devonair*, the inquiry in this case is whether plaintiff was engaged in the business of leasing the helicopters to others for the purpose of plaintiff's gain, benefit, or advantage. As summarized in this paragraph and articulated in more detail below, the Court concludes that plaintiff meets this definition of "lessor." First, even though plaintiff leased the helicopters to related entities, the leases were nevertheless arm's-length transactions, and they are distinguishable from the grossly below-market, unfavorable leases at issue in *Devonair*. Second, given the rates charged in the leases and plaintiff's activities—which included leasing multiple helicopters—the leases were intended to generate a profit or gain for plaintiff.

As an initial matter, plaintiff entered into multiple leases with "others," despite defendant's contentions. In this regard, the record reveals the existence of several lease agreements entered into between plaintiff as lessor and TC Helicopters and Barnes as lessees. Defendant contends that these leases do not represent leasing to "others," because the entities were related and because Barnes was on both sides of the transactions. Defendant's analysis oversimplifies the inquiry. Indeed, this state's law "respects the corporate form, and our courts will usually recognize and enforce separate corporate entities." *Gallagher v Persha*, 315 Mich App 647, 653; 891 NW2d 505 (2016). Stated otherwise, the fact that the entities were related does not necessarily preclude the conclusion that plaintiff leased to "others." Contrary to defendant's position, *Devonair*, 297 Mich App at 102, does not focus narrowly on whether the entities are related, but rather, is concerned with the terms of the lease and whether a lease represents an "arm's-length transaction." And in this case, the terms of the leases are not as one-

sided as were the terms of the leases in *Devonair*, where one of the lessees was forced to bear all maintenance costs, regardless of who used the aircraft.

In concluding that the lease agreements were not the product of an arm's-length transaction, the auditor in this case expressed concerns about one of the lease rates being too high. To this end, the auditor testified that the $325 per hour rate for one of the Robinson R44 helicopters[3] was excessive, based on her internet research. Initially, it should be noted that this is the opposite of the concern present in *Devonair*, where the lease rates were so far below market average that the MTT concluded—and the Court of Appeals affirmed—that the agreements were not the product of arm's-length transactions. In addition, the record evidence belies the conclusion that the rate in this case was excessive. First, the auditor's opinion was formed based on internet research that does not appear to have taken account of the age, condition, or fixed costs pertinent to the Robinson 44s at issue in this case. The single webpage showing rental rates is entirely devoid of this information. Nor does the auditor's opinion consider that her own research regarding the operating costs, per hour, of a Robinson R44 exceeded her purported rental rate. In addition, the conclusion that plaintiff's rates were excessive fails to account for the notion that TC Helicopters itself entered into a leasing agreement with Northern Michigan College to make the helicopters available at a rate of $430 per hour. That TC Helicopters entered into a lease with an unrelated party—Northern Michigan College—for an amount in excess of the rate plaintiff charged TC Helicopters significantly undercuts the notion that plaintiff charged TC Helicopters an excessive rate or that the rate charged was indicative of an

[3] There was no testimony regarding the rate charged for the other Robinson R44, which was older and which was purchased for considerably less than the newer Robinson R44.

agreement that was not the product of an arm's-length transaction. Furthermore, the notion that the leases were for excessive rates fails to take into account the $5,000 monthly term for the Bell 206B helicopter or the rate charged for the other Robinson R44 helicopter. There is no evidence in the record, nor any suggestion, that these lease rates were excessive or that they were not otherwise the product of arm's-length transactions. In sum, the evidence does not support defendant's contentions that the leases in this case were not the product of an arm's-length transaction.

Aside from the related nature of the entities, defendant argues that plaintiff cannot qualify as a "lessor" because it did not advertise the helicopters as being available for lease. The Court disagrees. Although defendant cites *Devonair* for the contention that advertising was necessary, such a proposition is not supported by a careful examination of the *Devonair* decision. The *Devonair* panel looked at the petitioner's lack of advertising, as well as the petitioner's general inactivity—and stated desire *not* to lease the airplane on a regular basis—to conclude that the petitioner was not in the business of leasing to others. See *Devonair*, 297 Mich App at 102. Hence, advertising is not dispositive as to whether an entity holds itself out to others or whether it is in the business of leasing to others.

Returning to the instant case, there is no indication in the record that plaintiff, while only leasing to two customers, avoided leasing the aircraft as occurred in *Devonair*. Rather, the evidence shows that plaintiff, despite only leasing the helicopters for a short time period, leased the helicopters enough times to generate tens of thousands of dollars in revenue. Furthermore, there is evidence in the record that plaintiff intended the Bell 206B Helicopter to be leased on a regular basis, as evidenced by the attempts to secure a contract with utility companies for powerline inspections. This is a far cry from the intentionally limited leasing and lack of

revenue at issue in *Devonair*. And, contrary to defendant's suggestions, the Court declines to read *Devonair* to preclude an entity from being a "lessor" under the UTA simply because it leases only to a single, related entity and does not advertise its leasing activities on a broader basis. Defendant has not presented a meaningful argument as to why such an entity could not be a "lessor" when the entity was expressly structured as a holding company that is in the business of leasing property to another entity. Instead, defendant asks the Court to engage in a superficial analysis and to conclude that, simply because an entity does not advertise to the general public, it cannot be in the business of leasing to others. Again, the Court disagrees. So long as the taxpayer leases its property with the (reasonable) expectation of making a profit, it can be "engaged in the business of renting or leasing" the property at issue. Such a conclusion is consistent with the UTA's definition of business, which refers to "*all activities engaged in* by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect." MCL 205.92(h). This definition, by referring to "all activities," anticipates a vast array of activities, without restriction that meet the statutory definition. See *Ionia Ed Ass'n v Ionia Pub Schs*, 311 Mich App 479, 486; 875 NW2d 756 (2015) (discussing the use of "all-encompassing" statutory terms such as "any," "all," or "every"). The limitation defendant seeks to read into this definition, i.e., that a taxpayer is only engaged in the business of leasing property if it advertises to the public at large, is not within the plain language of the pertinent authorities.

In support of its position, defendant contends that RAB 2015-25 imposes on taxpayers the requirement of advertising to the public. An RAB does not have the force or effect of law, but it may be considered persuasive. *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 100; 815 NW2d 811 (2012). In this respect, § III of RAB 2015-25 states that, in order

to be a lessor, a taxpayer must "hold itself out to the public as a lessor[.]" The RAB cites *Devonair* for this conclusion. However, as noted above, the *Devonair* panel never expressly adopted or imposed on taxpayers the requirement that the taxpayer advertise its services. Moreover, the RAB purports to be interpreting a decision from the Court of Appeals, rather than a statute, such that it is not apparent the "respectful consideration" afforded to agency interpretations of statutes is even owed to RAB 2015-25. Cf. *Andersons Albion Ethanol, LLC v Dep't of Treasury*, 317 Mich App 208, 213; 893 NW2d 642 (2016) ("An agency's interpretation of *a statute* is not binding and may not conflict with the plain meaning of the statute, but it is entitled to respectful consideration") (citation and quotation marks omitted; emphasis added).

The final requirement discussed in the *Devonair* decision was whether the leasing entity undertook its efforts " 'with the object of gain, benefit, or advantage, either direct or indirect.' " *Devonair*, 297 Mich App at 100, quoting MCL 205.92(h) (defining "business" under the UTA). In this case, defendant has not presented a meaningful challenge to whether plaintiff's activities had as their goal to obtain a gain, benefit, or advantage. Defendant generally decries the amount of use tax paid on the aircraft, but defendant does not dispute that plaintiff was engaged in its efforts in order to generate a profit. Because defendant has not articulated a meaningful argument in this regard, the Court could decide not to address it in any additional detail. Nevertheless, the case is readily distinguishable from *Devonair*, where the petitioner leased the aircraft at rates that were considerably under the prevailing market rate, and where the petitioner generated only minimal returns. Here, by contrast, plaintiff leased multiple aircraft at or above market rate, and generated, in a short period of time, tens of thousands of dollars in revenue. The lease terms were not of such a short duration as to produce limited revenue, either.

As a final note on the issue of whether plaintiff had as its goal the production of a gain or profit, a comparison of the returns realized by plaintiff in this case and those realized by the petitioner in *Devonair* are useful. In *Devonair*, the petitioner purchased an aircraft for approximately $3.6 million, and over the course of three years it generated only $109,584 in revenue on its leasing efforts. This is a return of roughly 3%, or approximately 1% on an annualized basis. Based on the amount of use tax remitted in this case, plaintiff generated significantly better returns. For instance, on the Bell 206B Helicopter (FAA Number N75Y), plaintiff generated approximately $33,667 in lease revenue over the course of approximately 3 months. Plaintiff paid $565,000 for this helicopter. Those figures amount to a nearly 6% return over only three months, or roughly 23% on an annualized basis. With respect to the Robinson R44s, the aircraft with FAA Number N425RW generated $53,667 in lease revenues over approximately a six-month period. On a purchase price of $383,533, this amounts to approximately a 13.9% return, or approximately a 27% return on an annualized basis. With respect to the other Robinson R44, plaintiff generated $51,025 in lease revenues over the course of 3 years and 3 months on a purchase price of $85,000. This amounts to approximately a 60% return, or approximately an 18.47% return on an annualized basis. In short, plaintiff in the instant case derived significantly greater returns on its lease revenues than did the petitioner in *Devonair*. Moreover, there is no evidence of an ulterior-type motive in this case as in *Devonair*, i.e., the petitioner in that case purchased the helicopter with the stated goal of holding an appreciating asset and with the goal of *minimalizing* leasing hours. In short, the evidence in this case supports the notion that plaintiff was leasing these helicopters with the goal of producing a benefit or profit.

B. RECORDKEEPING

The next issue in this case concerns whether plaintiff's recordkeeping was sufficient enough to support its lessor election. MCL 205.28(3) provides that "[a] person liable for any tax administered under [the Revenue Act—which includes the UTA] shall keep accurate and complete records necessary for the proper determination of tax liability as required by law or rule of the department." Furthermore, pursuant to its rulemaking authority, defendant has promulgated recordkeeping requirements for all taxpayers in this state. In particular, Mich Admin Code, R 205.4103(1) provides that "[p]ursuant to section 28(3) of the revenue act, MCL 205.28(3), a taxpayer shall maintain all records that are necessary for the proper determination of the taxpayer's tax liability."

Defendant asserts plaintiff has not produced any invoices that were issued to TC Helicopters or to Barnes and, as a result, defendant contends plaintiff has not maintained sufficient records. Defendant asks the Court to uphold the assessments because of the lack of invoices or similar records. The Court disagrees. At issue in this case is whether plaintiff was a "lessor" under the UTA, i.e., whether it was in the business of leasing property to others with the expectation of a profit. Plaintiff has produced lease agreements and the evidence noted above in support of its position that it was engaged in the business of leasing to others with the expectation of a profit. Defendant's challenge in this case sounds more in the nature of a challenge with respect to whether plaintiff has sufficient documentation to show whether the amounts remitted are valid, and not whether plaintiff was a lessor in the first instance. Stated otherwise, any dispute about documentation in this case does not, as defendant contends, bear on the threshold question of whether plaintiff was a "lessor" under the UTA; instead, the dispute about invoices concerns whether plaintiff, as a "lessor," has sufficient documentation to establish

the amount of use tax paid in this case. And whether plaintiff paid those amounts has never been in dispute and is not at issue in this case. Because defendant's recordkeeping argument does not bear on the only issue before the Court, i.e., whether plaintiff satisfies the threshold requirement of being a lessee, defendant has not identified a reason to uphold the assessments issued in this case.

III. CONCLUSION

In conclusion, the record supports that plaintiff was engaged in the business of leasing helicopters to others for the purpose of obtaining a benefit or generating a profit. As a result, the assessments issued in this case are invalid and are hereby cancelled. In light of this conclusion, any discussion over whether defendant erred in adjusting the purchase price of one of the helicopters or by imposing penalties is moot.

IT IS HEREBY ORDERED that defendant's motion for summary disposition is DENIED.

IT IS HEREBY FURTHER ORDERED that summary disposition is GRANTED to plaintiff as the nonmoving party, pursuant to MCR 2.116(I)(2). As a result, the final assessments issued in this case are hereby invalid and without effect.

This order resolves the last pending claim and closes the case.

Dated: August 27, 2019

Colleen A. O'Brien, Judge
Court of Claims