STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Fitzgerald, P.J., Meter and Boonstra, JJ.

NACG LEASING f/k/a
CELTIC LEASING, LLC,

Petitioner-Appellee,

v

DEPARTMENT OF TREASURY,

Respondent-Appellant.
/

Supreme Court No. 146234

Court of Appeals No. 306773

Tax Tribunal No. 338928

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

REPLY BRIEF OF APPELLANT DEPARTMENT OF TREASURY

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Rules

INTRODUCTION

Under Celtic Leasing's view of property and tax law, an owner's exercise of a property right that generates $50,000 per month for the owner does not qualify as a "use" of that property. This position is inconsistent with both basic principles of property law and the plain language of the Use Tax Act.

Celtic Leasing purchased a DC-8 cargo aircraft, and as the owner of the aircraft, it acquired all the incidents of ownership for the aircraft. It exercised one of the "bundle of sticks" of its ownership rights to the aircraft when it leased the aircraft to Murray Air. This act of leasing the aircraft falls squarely within the definition of "use" in the Use Tax Act: Celtic Leasing "exercise[d] . . . a right or power . . . incident to the ownership of that" aircraft when it relinquished certain of its rights, including the right to possession of the aircraft, in exchange for payments.

Celtic Leasing argues that it did not "use" the aircraft sufficient to trigger Use Tax liability because it never physically possessed the aircraft and because it retained "no dominion or control" over the aircraft. But this argument suffers from two flaws. First, it is inconsistent with the statutory definition of "use," which does not impose either of these requirements. And second, it is factually wrong, given that Celtic Leasing still retains significant control over the aircraft.

Celtic Leasing relies on several Court of Appeals decisions that insist "upon some element of physical domination and control in order to find a 'use.'" (Celtic Leasing Br, p 8.) But those cases address a different issue, and in any event cannot

be followed to the extent they use a different definition of "use" than the definition supplied by the Use Tax Act. This Court should reverse the Court of Appeals.

ARGUMENT

I. The Use Tax Act does not require actual possession over tangible personal property.

A. The Act's definition of "use" covers leasing.

Conceding that the plain statutory language controls, Celtic Leasing argues that MCL 205.92(b) *does* expressly require actual possession. Celtic Leasing starts its statutory interpretation of the word "use" by examining MCL 205.93(1), which levies a use tax on "the privilege of using, storing, or consuming tangible property in this state." Noting that two of those words—"consuming" and "storing"—each "entail[] some exercise of physical dominion over [the] property," Celtic Leasing argues that therefore, "[l]ogically, the same must be true of 'using' tangible personal property." (Celtic Leasing Br, p 6.)

There are two problems with this analysis. First, it is not logical. It is like looking at the phrase "plains, trains, and automobiles" and then arguing that because trains and automobiles travel only on the ground, airplanes must too. Indeed, a basic principle of statutory interpretation recognizes that logic leads to the opposite conclusion: "When the Legislature uses different words, the words are generally intended to connote different meanings." *US Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009). And second, there is no need to look to the words "consuming" and "storing" to divine the

definition of "use" because the Legislature expressly defined "use" in MCL 205.92(b).

Celtic Leasing also contends that Treasury's interpretation "would obliterate any distinction between 'ownership' and 'use.'" (Celtic Leasing Br, p 7.) But that criticism is a criticism of the statute itself, since the statute defines "use" in terms of "ownership"—a use is an "exercise of a right or power over tangible personal property incident to the ownership of that property." MCL 205.92(b). And that definition is consistent with the common property-law analogy that an owner holds a bundle of rights that he can exercise separately or together, as he wishes.

Rights flowing from property ownership include the right to personal use and enjoyment, the right to manage its use by others, and the right to income derived from that property. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57–58; 602 NW2d 215 (1999). As the Tax Tribunal has recognized, there is no meaningful difference between the leasing of real property and the leasing of personal property for tax purposes; the ownership rights being exercised in both instances are the same. *Ponderosa Farms LLC v Dep't of Treasury*, MTT Docket No. 358038 (April 11, 2011) (leasing personal property within Michigan is a taxable "use" under MCL 205.92); *Longranger II Corp v Dep't of Treasury*, MMT Docket No. 304076 (June 21, 2005) (executing a lease and delivering possession to the lessee within Michigan is a taxable use).

Celtic Leasing also asserts that the "mere signing of lease documents" and the "mere vesting of incidents of ownership" is not exercising a right or power over the property. (Celtic Leasing Br, p 7.) But no authority supports that assertion.

The signing of a lease document *is* exercising a right or power over the property; before the lease is signed, the lessor has possession but no right to receive payments, but after exercising his right to lease the property by signing the lease, the lessor has exchanged his right to possession for a stream of payments—here, $50,000 per month.

"Entering into a contract to give up some of one's rights to possession or control is, itself, an exercise of those rights." *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App 207, 212–13; 769 NW2d 740 (2009). This principle is true whether the lessor owns an apartment, a car, a billboard, or a plane. See *Attorney General v Pere Marquette Ry Co*, 263 Mich 431, 433; 248 NW 860 (1933) ("An incident of ownership is the right to sell or lease or use the property in any lawful way."); *Wolverine Sign Works v City of Bloomfield Hills*, 279 Mich 205, 207; 271 NW 823 (1937) (describing "the lease use" as "a property right"); *Winter v Mackie*, 376 Mich 11, 19; 135 NW2d 364 (1965) ("fee simple title includes . . . as an incident of ownership, the right to . . . lease . . . the property"). Celtic Leasing attempts to minimize the clear language of *Pere Marquette* by saying that case is just about mineral rights. But the principle that *Pere Marquette* is stating about ownership does not turn on some special rules about minerals; to the contrary, this Court's statement in that case was unqualified and applies to all types of property. Further, Celtic Leasing cannot point to any decision of this Court stating the contrary principle—that leasing a property is *not* exercising a right incident to ownership.

Celtic Leasing also asserts that "the Legislature's use of the phrase 'over tangible personal property' suggests the exercise must involve the property itself in a physical sense, and not merely the intangible, incorporeal aspects of ownership." (Celtic Leasing Br, p 7.) But "tangible personal property" is defined to include at least one item that a person can perceive but not physically possess: electricity. MCL 205.92(k). And more fundamentally, if ownership itself can occur without possession—and it can, by a transfer of title, see, e.g., MCL 205.92(e) (defining "purchase")—then so too can an incident of ownership be exercised without possession.

Celtic Leasing concedes that the word "including" is a term of enlargement (Celtic Leasing Br, p 10), not a limitation, and that possession is therefore "not necessarily determinative" of whether a particular action constitutes a use (*id.* at 3). In light of these concessions, it is hard to understand Celtic Leasing's insistence that "physical dominion" (e.g., *id.* at 6) is a prerequisite for finding a "use." Indeed, this position is internally inconsistent, as reading the statute to require possession in a physical sense changes the definition's "including" clause—"including transfer of the property in a transaction where possession is given"—into a requirement, not an example. Further, if "use" requires actual possession, then the phrase "*a* right or power" over tangible personal property would be rendered meaningless because *the only* right that would qualify would be physical possession. If the Legislature wanted to use the definite article "the" instead of the indefinite article "a," it could have simply changed the construction of the sentence. It did not.

To interpret the word "use" to require actual possession over the tangible personal property would require this Court to rewrite the statute. Instead, this Court must give effect to every word, every phrase, and clause in a statute and must avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012).

B. The Court of Appeals decisions that conclude that leasing is not a property use conflict with the statute's plain language.

As addressed in Treasury's principal brief (Treasury Br, pp 10–12), much of the case law addressing use tax liability involves the presumption of use tax liability under MCL 205.93(1) where an aircraft is purchased out of state and then brought into Michigan. Under MCL 205.93(1), tangible personal property that is brought into the state within 90 days of the purchase date is considered acquired for storage, use, or consumption in this State. The cases that the Court of Appeals cited and that Celtic Leasing relied on involve this presumption of use tax liability. In many instances, the owner's physical control and possession of the aircraft in Michigan were used to evaluate the presumption of liability for use and storage. Because the instant case does not involve MCL 205.93(1), the Court of Appeals' focus on possession and control below is simply misplaced. But to the extent that these opinions fail to follow the statutory definitions provided by the Legislature or add additional requirements, such opinions should be disavowed. See *Whitman v City of Burton*, 493 Mich 303, 306; 831 NW2d 223 (2013).

The Court of Appeals case that is on point—that focuses on the statutory language of MCL 205.92(b)—is *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App

207; 769 NW2d 740 (2009). And that case properly gave the statutory language its plain meaning:

> More importantly, "use" is defined very broadly by MCL 205.92(b) as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." Thus, "use" in the context of the UTA is not limited to physical actions performed directly on the property. It includes any exercise of a right that one has to that property by virtue of having an ownership interest in it. Something need not necessarily be physically present in Michigan for it to be used in Michigan." [*Id.* at 212.]

One last point bears mentioning about Celtic Leasing's reliance on the Court of Appeals cases. Treasury explained in its initial brief that Celtic Leasing would lose even under a test that focused on the lessor's control over the property. (Treasury Br, pp 11–12.) This is true because Celtic Leasing controlled the ability to lend or rent the aircraft and the amount of time the aircraft could spend away from its home airfield in Michigan; it also retained, among other things, the right to inspect the aircraft and the responsibility for scheduled maintenance. (*Id.*) Celtic Leasing does not even attempt to answer this point.

II. It was proper for the Tax Tribunal to enter judgment in favor of Treasury in the amount of tax and penalty set forth in Final Assessment N971045, plus statutory interest.

Celtic Leasing asserts, as an alternative position, that Final Assessment N971045 is facially invalid. It claims that the Tax Tribunal lacked sufficient factual basis for entering judgment against Celtic Leasing in the amount of the assessment, plus statutory interest, and asks that this Court order the Tax Tribunal to conduct an evidentiary hearing to determine the correct amount of tax it owes. This request is improper for several reasons.

First, Celtic Leasing did not challenge the *amount* of the assessment in the Tax Tribunal. It moved for summary disposition under MCR 2.116(C)(10) on the legal issue of whether it had "use" of the aircraft under the Use Tax Act. Its motion for reconsideration likewise did not address the *amount* of the assessment. Having failed to raise and question the *amount* of the assessment at any time during the proceedings in the Tax Tribunal, Celtic Leasing waived it. *County of Wayne v Michigan State Tax Comm'n*, 261 Mich App 174, 198; 682 NW2d 100 (2004).

Second, the contract price of the aircraft is not the only permissible evidence of the aircraft's value. A buyer and seller can work together to manipulate a contract price, which is why Treasury will look to other evidence to determine market value of aircraft and calculate tax liability. Here, Treasury assessed use tax based on the aircraft having a market value of $6.9 million—not the contract price of $2.7 million. Celtic Leasing had the burden to refute the assessment. MCL 205.104a (authorizing Treasury to assess the amount of tax due from the taxpayer based on information that is available or that may become available, and stating that an assessment is considered prima facie correct, with the taxpayer bearing the burden of proof to refute the assessment). But Celtic Leasing chose not to address the issue.

Third, this issue is beyond the scope of this Court's grant of leave.

CONCLUSION AND RELIEF REQUESTED

Celtic Leasing exercised a right over the aircraft incident to its ownership when it leased the aircraft to Murray Air. This action is a "use" subject to the use tax as the term is defined by the Legislature in the Use Tax Act. The Court of Appeals' restrictive construction of the definition of the term "use" was an error of law, as was its failure to recognize that granting a lease is an exercise of a right incident to ownership. Application of the correct standard of law requires reversal of the Court of Appeals' decision and entry of an order affirming Treasury's assessment.

Respectfully submitted,

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