

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

525 Redevco, Inc.,
Petitioner,

v

MTT Docket No. 332707

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

FINAL OPINION AND JUDGMENT

On November 3, 2008, Respondent filed its Motion for Summary Disposition pursuant to MCR 2.116(C)(10), contending that Petitioner was liable for real estate transfer tax on the transfer of title of "Constitution Hall" located at 525 West Allegan Street, Lansing, Michigan to the State of Michigan. Petitioner filed its Brief in Opposition to Respondent Michigan Department of Treasury's Motion for Summary Disposition and Counter-Request for Summary Disposition Pursuant to MCR 2.116(I)(2) on December 1, 2008, contending that because no consideration was paid by the State of Michigan for the subject property, no real estate transfer tax is due. Respondent filed a Response to Petitioner's Brief in Opposition on July 29, 2011 and Petitioner filed its Reply Brief on August 18, 2011. Oral argument was held on October 5, 2011. The Tribunal finds that Respondent's imposition of the real estate transfer tax on the delivery of a Warranty Deed by Petitioner to Respondent is not supported by statute.

RESPONDENT'S ARGUMENT

In support of its Motion, Respondent contends that because Petitioner owned the property it transferred to the State of Michigan by warranty deed, the warranty deed was recorded, and the value of the property at the time of transfer exceeded \$100, MCL 207.521 et. seq. requires the imposition of a real estate transfer tax on the transaction. Citing *Lake Forest Partners 2 v Department of Treasury*, 480 Mich 1046; 743 NW2d 881 (2008), Respondent contends that the issue before the Tribunal is a simple one; i.e., because the tax is imposed on recorded instruments based on the value exchanged for the deed, and because the deed was provided to Respondent in exchange for \$122 million, the transfer tax must be imposed on the subject transaction. Respondent further contends that it conservatively determined the “value” of the subject property at the time of its transfer to be two times its assessed value (\$54,337,400) rather than the amount actually paid by the State of Michigan (\$122,363,189.67). See Affidavit of James Bengel. In its Reply Brief, Respondent reiterates its contention that the statute clearly imposes a transfer tax on the grantor (Petitioner) of an executed and recorded warranty deed, and further disputes Petitioner’s contention that the transfer tax cannot be imposed by Respondent because of estoppel, acquiescence, and statute of limitations prohibitions.

At oral argument, Respondent reiterated its position that the intricacy of the financing mechanism used to fund the construction of the subject property is not the issue in this case. Instead, Respondent contends that the language in the statute and in the Lease of the subject between Petitioner and Respondent is clear that the subject real property was conveyed by warranty deed from Petitioner to Respondent for consideration in the form of prepaid rent in an amount in excess of \$100 and is therefore subject to the real estate transfer tax. Respondent

further contends that although the financing in this transaction may be complicated, in the end it is no different than a homeowner with a mortgage selling his home; i.e., the transfer tax is imposed on the sale price for the home, irrespective of whether or not the seller receives any of the sale proceeds at closing (all proceeds presumably going to the mortgagee). Finally, Respondent reiterates its contention that Petitioner's argument, including affidavits, are irrelevant to the sole issue before the Tribunal – the banks, the holders of the COPs and all other third parties involved in the financing mechanism for this transaction have nothing to do with the imposition of the real estate transfer tax, which is imposed on Petitioner as the seller/grantor of the subject property.

PETITIONER'S ARGUMENT

In support of its Motion, Petitioner contends that although a transfer of ownership between Petitioner and Respondent did occur, the consideration for such transfer was nominal. Although Respondent attempts to characterize the transaction as a sale of the subject property by Petitioner to Respondent for a sale price of in excess of \$122 million, Petitioner contends that the transaction was actually a bond type transaction known as a Certificate of Participation (“COPS”) transaction that ultimately results in the sale of the property for a nominal value at the termination of a Lease. Here, Petitioner leased the subject property to the State of Michigan which has tax exempt financing capabilities. Those government obligations are then sold to third party investors. At the end of the lease, the government has the right to purchase the leased premises for a nominal amount (\$1 per the subject Lease). Under a process known as “defeasance” of the bonds, the governmental unit may take title to the leased premises by “substituting cash and securities with the trustee in order to secure the timely satisfaction of the

government's obligations under the COPS. In that instance, no consideration is paid to the landlord, and the government takes title to the leased premises early." (Section 12.2(b) of the Lease) (Emphasis added). Thus, Petitioner contends that the \$122 million paid by the State of Michigan was paid to the COPS Trustee, which was escrowed and used for rent and to redeem the COPS over time as the COPS became due or subject to redemption. "The \$122 million was not a purchase price – no consideration was paid to Redevo in the defeasance of the COPS." Petitioner further contends that the Lease is clear that the "monies paid for defeasance of the COPS is **pre-paid rent, not purchase consideration . . .**"

Petitioner's contentions are further supported by:

1. Affidavit of Marc Oberdorff, an attorney specializing in tax exempt bond transactions. Mr. Oberdorff stated that (a) the transaction between Petitioner and Respondent involved the transfer of possession of the subject property to Respondent in exchange for Respondent's promise to pay rent over a specified lease term, (b) Petitioner transferred all of its rights and interests in the Lease to a Trustee "in exchange for the full purchase price of the Property as of the Execution Date," (c) the Trustee sold COPS, with the interest tax-exempt, to investors, (d) Petitioner was required by the Lease to transfer title to the subject property for nominal consideration upon final payment of the COPS, (e) the transfer of the subject property to Respondent occurred on the Execution Date, but for the recording of the Warranty Deed conveying title to Respondent, (f) although structured to be a "true lease" to Respondent, "the economic substance of the transaction is equivalent to the State's acquisition of the property at the outset, *subject* to the State's obligation to repay the

acquisition costs through the COPs payments,” (g) Petitioner never received any portion of the money used to repay Respondent’s obligation, (h) Respondent’s ability to obtain title at the end of the lease by paying only a nominal amount (rather than fair market value of the subject property) is critical to the tax-exempt treatment of the COPs, (i) Respondent’s defeasance of the bonds allowed Respondent to take title to the subject property prior to the end of the lease term with no consideration paid to Petitioner, (j) in economic substance, Respondent is repaying a debt obligation it owes to COPs holders rather than purchasing the leased premises with this pre-payment; (k) Respondent’s characterization of this transaction as the conveyance of the subject property for more than a “nominal” sum is “inconsistent with the position that was taken by the State in its representations to the IRS, including the 8038-G form filed by the State in connection with the COPs, in order to establish the tax-exempt status of the COPs.”

2. Affidavit of William Schroeger, Petitioner’s General Manager. Mr. Schroeger stated that (a) Petitioner constructed, owned and leased the subject property to Respondent, (b) Respondent issued tax exempt bonds to finance the transaction, (c) rent payments under the lease were paid to a trustee, who then uses the rent payments to repay the government’s obligation, (d) Respondent has the right to purchase the subject property for a nominal amount at the end of the lease term, (e) the transaction was structured to be a “true lease” under Michigan law, but was a financing transaction under federal law, (f) the pre-payment of rent by Respondent was paid to the trustee

to “defease” the bonds¹, (g) provisions in the Lease prohibit Respondent from taking any action that would jeopardize the tax-exempt nature of the bonds, (h) Respondent executed a Closing Statement when Petitioner conveyed the subject property to Respondent by Warranty Deed that stated that no consideration was paid to Petitioner in exchange for the Warranty Deed, and (i) Respondent’s successful treatment of this transaction as a taxable purchase could jeopardize the tax-exempt nature of the bonds.

In its Reply Brief, Petitioner contends that Respondent “fails to rebut any of Redevo’s factual assertions or evidence in this matter and is insufficient to establish any genuine issues of material fact that would prevent this Tribunal from granting summary disposition in favor of Redevo.” Specifically, Petitioner contends that Respondent fundamentally misunderstands the nature of the transaction, whereby the Lease, the Closing Statement and related documents all state that the subject property was acquired by Petitioner for no consideration, with prepaid rent being paid to defease the COPs. In support, Petitioner again relies on the Schroeger and Oberdorff affidavits which conclude that “the State did not exchange any consideration for the transfer of title to the Leased Premises when it made the defeasance payment, but rather merely prepaid the rent to establish a cache of SLUGs for future COPs payments that would come due” (Petitioner’s Reply Brief, pp. 5, 6). Petitioner further contends that it detrimentally relied on various provisions of the transaction documents whereby Respondent warranted that it would take no actions in contravention of the tax-exempt nature of the transaction. Finally, Petitioner contends that pursuant to MCL 207.525(2), because the Warranty Deed specifically states that it is exempt from the transfer

¹ The substitution of collateral; in this case, Respondent purchased SLUGs from the Federal Government which were pledged to the trustee in exchange for a release of lien on the subject property.

tax because the consideration for the transaction is less than \$100, the remainder of the purchase price must be for personal property, which is not subject to taxation.

At oral argument, Petitioner reiterated its contentions that (1) Respondent has failed to provide affidavits or documentation in support of its motion under MCR 2.116(C)(10), (2) that the Warranty Deed conveying title in the subject property to Respondent clearly provides that the value of the consideration paid by Respondent is less than \$100, (3) that no money ever went to Petitioner upon conveyance of the Warranty Deed, (4) MCL 207.522(g) defines “Value” to mean the current or fair market worth in terms of legal monetary exchange at the time of the transfer, and there was no exchange of money between Respondent and Petitioner, (5) although structured as a financing arrangement for federal income tax purposes, the transaction was also structured to be a “true lease” for state purposes (Section 5.19 of the State Lease) and not a financing transaction, (6) the approximately \$122 million paid by Respondent as “prepaid rent” to an escrow account was “to essentially pay off the COPs,” (7) Respondent’s position regarding the imposition of transfer tax is “in direct contravention to the COPs documents and the State’s warranties as to the tax exempt nature and structure of the COPs transaction” (Transcript, p. 24), (8) if the subject transaction is deemed to constitute a transfer of the subject property for an amount in excess of \$100, thereby subjecting the transfer of title to the transfer tax, then Respondent has provided or executed “leases, agreements, statements, opinion letters, tax filings, closing documents, correspondence and other documents in which the State admitted that any defeasance payment was prepaid rent and not purchase consideration” upon which Petitioner has detrimentally relied (Transcript, p. 38), and (9) Respondent has provided no legal basis for the imposition of a penalty on Petitioner.

FINDINGS OF FACT

Although the parties did not submit a Joint Stipulation of Facts, the Tribunal has reviewed the respective briefs filed by the parties, and finds the following facts:

1. Petitioner is a Michigan corporation with a legal address of 2800 Byron Circle, Lansing, Michigan 48912, formed for the purpose of acquiring, constructing, owning and leasing the subject property to Respondent.
2. Respondent issued Final Assessment O094100 to Petitioner on April 4, 2007 in the amount of \$407,530.50, penalty of \$101,882.63 and statutory interest for unpaid real estate transfer taxes.
3. Petitioner acquired the subject property, commonly known as 525 West Allegan Street, Lansing, Michigan by Quit Claim Deed from SXJE, LLC on August 14, 2000. (Respondent Exhibit A)
4. Also on August 14, 2000, Petitioner and the State of Michigan entered into State Lease #10533. (Respondent Exhibit B, Petitioner Exhibit 5) (“Lease”).
5. Section 3.10 of the Lease provides, in part, that “the Lessor shall obtain and keep in force . . . rental interruption insurance and business interruption insurance for the Leased premises which the Lessee shall have no obligation to reimburse.”
6. Section 5.19 of the Lease provides, in part, that “for all purposes this Lease, and the rights created thereby, shall be construed under Michigan law as a true lease which does not pledge the ‘full faith and credit’, the ‘credit’ or the taxing power of the State, and does not create ‘state indebtedness’ or ‘borrowing’”

7. Petitioner financed the acquisition, construction and improvements to 525 West Allegan through the sale of \$127,600,000 of certificates of participation (“COPs”) to investors. (Petitioner Exhibit 17)
8. The COPs were issued pursuant to a Trust Agreement dated July 1, 2000 between Petitioner and Old Kent Bank of Grand Rapids, Michigan (“Trustee”).² (Petitioner Exhibit 4)
9. The COPs are secured by the rents to be paid by Respondent under the Lease.
10. The COPS document states that “the Lessor is not granted any specific rights under the Lease for the failure of the Lessee to timely pay the Rentals” (Petitioner Exhibit 17).
11. *Respondent covenants in the Lease and* Petitioner covenants in the Trust Agreement that it will not take any action that would render the interest portion of the rents taxable for federal income tax purposes. (Petitioner Exhibit 3)
12. Under the Trust Agreement, Petitioner assigned all of its rights to receive rent payments from Respondent as well as all of its rights to enforce the provisions of the Lease against Respondent to a Trustee for the holders of the COPs. (Lease, Sections 703, 711).
13. Article XII, Section 12.2(a) of the Lease allowed the State of Michigan to exercise an option to purchase the subject property from Petitioner at the termination of the 25 year lease for \$1.

² Old Kent Bank of Grand Rapids was replaced as Trustee by Fifth Third Bank when Fifth Third acquired Old Kent Bank. Sometime during the term of the Lease, Fifth Third was replaced as Trustee by The Bank of New York Trust Company, N.A.

14. Article XII, Section 12.2(b) of the Lease provides that Respondent has the option to “prepay rent from any legally available source of monies for the purposes of acquiring fee title to the Premises.” The amount of prepaid rent necessary to acquire fee title is equal to the “Pay Off Balance” as provided in the Lease. This section of the Lease further provides that the Lessor (Petitioner) shall use the prepaid rent to redeem or defease the COPs.
15. Article XII, Section 12.3(e) of the State Lease provides that Petitioner shall provide a warranty deed to Respondent “upon payment of either one dollar (\$1.00) and other valuable consideration which is acknowledged and agreed in paragraph 12.2(a) or upon prepayment of rent by the State and redemption of the Certificates by the Lessor as provided in paragraph 12.2(b) or (c).”
16. Section 709 of the Trust Agreement provides that:
 - a. Petitioner shall deliver a warranty deed from Petitioner to Respondent in connection with the issuance of the COPs.
 - b. The Trustee shall deliver the warranty deed to Respondent upon Respondent’s election to prepay rent pursuant to Section 12.2(b) of the Lease.
17. Section 1301 of the Trust Agreement provides that upon defeasance of the COPs, the Trustee relinquishes all right, title and interest in the COPs, and “shall turn over to the Lessee title to the Facilities and any surplus in any account in the Certificate Payment Fund” as well as balances remaining in all other funds and accounts relating to the COPs, other than money held for the redemption or payment of the COPs, money held in the Rebate Fund (defined in Section 101 of the Trust Agreement), money held

in the Additional Payments Fund (defined in Section 101 of the Trust Agreement), or money held for paying other obligations payable under the Trust Agreement. Section 1301 also provides that the Trustee “shall turn over to the Lessor all of the balance remaining in the Additional Payments Fund.”³

18. In 2004, the State of Michigan gave notice to Petitioner of its intent to exercise the option in the Lease to prepay rent for the purpose of purchasing the subject property. (Respondent Exhibit D, Petitioner Exhibit 7)
19. Petitioner filed a complaint in the Court of Claims and Respondent filed a counter complaint with respect to a variety of issues, including the issue of whether the transaction was exempt from the Real Estate Transfer Tax. (Respondent Exhibits E and F)
20. The Court of Claims ordered the transfer of the subject property from Petitioner to Respondent by warranty deed, but did not resolve the real estate transfer tax issue. (Respondent Exhibit G)
21. Petitioner provided a Warranty Deed dated April 26, 2005 that transferred ownership of the subject property to Respondent.
22. A settlement agreement between the parties determined that:
 - a. Petitioner owned the subject property.
 - b. Petitioner constructed a building on the subject property that was financed through the sale of COPs, and was leased to the State of Michigan.

³ Defined in the Trust Agreement as “the Additional Payments Fund authorized by Section 506 of this Trust Agreement.” Section 506 of the Trust Agreement provides that the fund is created for the deposit of “Additional Payments” assigned by the Lessor to the Trustee. “Additional Payments” is defined to mean “payments required to be paid to the Lessor by the Lessee pursuant to Section 5.6 of the Lease for insurance, real property taxes or fees, maintenance and property management.

- c. The State of Michigan properly delivered notice to Petitioner pursuant to section 12.2(b) of the State Lease of its exercise of the option to purchase requiring prepayment of rent.
 - d. Litigation would cease and the State of Michigan would accept the warranty deed **“without prejudice to the State’s right to subsequently assess or attempt to collect transfer tax on the Property”** (Emphasis added).
23. The State of Michigan made the requisite prepayment of rent to an escrow account in the amount of \$122,363,189.67 to pay off the COPs.
24. The State of Michigan imposed a real estate transfer tax on the transaction based on the tax rate of \$3.75 per each \$500 of value, with the value of the transaction determined to be 2 x the property’s state equalized value of \$27,168,700. (Affidavit of James Bengel)
25. The closing statement reflects the sale of the subject property to the State of Michigan, with no funds paid to Petitioner. (Respondent Exhibit K, Petitioner Exhibit 1).

STANDARD OF REVIEW

Respondent moves for summary disposition pursuant to MCR 2.116(C)(10). In *Occidental Dev LLC v Van Buren Twp*, MTT Docket No. 292745 (March 4, 2004), the Tribunal stated “[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact.” Under subsection (C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that there is no genuine issue of material fact, and the

moving party is entitled to judgment as a matter of law. *Smith v Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In the event, however, it is determined that an asserted claim can be supported by evidence at trial, a motion under subsection (C)(10) will be denied. *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-63; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)). The moving party bears the initial burden of supporting his position by presenting his documentary evidence for the court to consider. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1992).

CONCLUSIONS OF LAW

The applicable statute in this case is straightforward. A transfer tax is imposed on the seller of real estate when the deed or other instrument of conveyance is recorded (MCL 207.523). The transfer tax is imposed at a rate of \$3.75 for each \$500 of total **value** of the

property being transferred (MCL 207.525(1)). “Value” is defined by MCL 207.522(g) to mean “the current or fair market worth in terms of legal monetary exchange at the time of the transfer.” Finally, MCL 207.526(a) exempts from the transfer tax a transaction where the “value of the consideration for the property is less than \$100.”

The parties agree that Petitioner conveyed the subject property by warranty deed to Respondent on April 26, 2005. The issue for the Tribunal to determine is whether Petitioner received consideration, or value in exchange, for the delivery of the warranty deed to Respondent when Respondent prepaid rent under the Lease Agreement and Petitioner’s COPs were defeased, and, if so, what was the amount of that “value.” Respondent argues that Petitioner’s conveyance of the subject property to Respondent by warranty deed provides a sufficient basis for it to impose a transfer tax on Petitioner pursuant to statute because the “value” exchanged exceeded \$100. At oral argument Respondent summarized its contentions that (1) section 12.3(e) of the Lease clearly provides that a warranty deed will be delivered to Respondent upon (a) prepayment of rent by Respondent and (b) the “redemption of the COPs” by Petitioner pursuant to section 12.2(b) or (c) of the Lease, (2) a warranty deed was delivered by Petitioner to Respondent upon the prepayment of rent and the defeasance of the COPs, (3) the prepayment of rent constitutes the “monetary value at the time of exchange” contemplated by statute for Respondent’s purchase of the property, (4) the amount of rent prepayment exceeded \$100, (5) the complexity of the financing of this transaction is irrelevant when determining whether a transfer tax should be imposed, (6) section 12.3(g) of the Lease contemplates Petitioner’s payment of transfer tax, and (7) it was Petitioner’s obligation to defease the COPs. (Transcript, pp. 46 – 78).

The only authority identified by Respondent in support of its contention that the prepayment of rent by Petitioner in exchange for a warranty deed for the subject property constitutes the consideration for the property of \$100 or more, as required by MCL 207.526(a) is the decision by the Michigan Supreme Court in *Lake Forest Partners 2, Inc v Department of Treasury*, 480 Mich 1046; 743 NW2d 881 (2008), where, according to Respondent, the Court affirmed that the transfer tax is “imposed on recorded instruments based on the value exchanged for the deed.” (Respondent’s Brief, p. 12). The Tribunal has carefully reviewed *Lake Forest* and concludes that the issue considered by the Court differs from the issue currently before the Tribunal. In *Lake Forest*, the issue was whether the transfer tax would be imposed on the sale of an unimproved lot (evidenced by an unrecorded purchase agreement) or on the sale of an improved lot (evidenced by the recording of a warranty deed). The Court held that the transfer tax “taxes recorded instruments,” the only recorded instrument was the deed, and the “value exchanged for that deed included both the cost of the lot and the home” The Supreme Court in *Lake Forest* did not, nor was it asked to, provide a substantive discussion of the term “value.” Instead, it simply concluded that in this specific fact situation, “value” for purposes of the real estate transfer tax included both the lot and the improvements to the lot. The Tribunal finds that Respondent’s reliance on *Lake Forest* to support its argument is without merit.

The Tribunal further finds that Respondent relies almost exclusively on the plain language of the statute, cites no case law in support of its conclusions (other than *Lake Forest*) and relegates the complex financing transaction discussed in detail by Petitioner to one approaching irrelevancy. In fact, Respondent contends that the subject transaction is no different in substance from a more common transaction where an individual purchases real property,

secures a mortgage to finance the acquisition, then sells the property with all proceeds paid to the mortgagee to pay the outstanding mortgage. In this example, as Respondent contends is true in the subject case, the property owner conveys the property to the buyer, receives consideration for the property, but personally receives no money in the exchange. Here, Respondent relies on the Lease entered into by the parties which provides that Petitioner will lease the subject property to Respondent for a specific term, that at the end of the lease term Petitioner has the right to purchase the subject property for \$1, or, in the alternative, Petitioner can prepay rent at some point prior to the end of the lease term and, in exchange, receive a Warranty Deed to the property. Thus, under Respondent's theory of this case, Respondent's prepayment of rent under Section 12.2(b) of the Lease in the amount of approximately \$122 million constitutes the "consideration" necessary for the imposition of transfer tax.⁴ Respondent further contends that all of Petitioner's argument regarding the financing of this transaction by Respondent is incidental to the essential facts of this case; i.e., Respondent paid value in exchange of \$100 or more for a warranty deed conveying the subject property from Petitioner to Respondent.

In their briefs, the parties seem to agree that if the Lease had continued through its intended 25 year life, Respondent had the right to purchase the subject property for \$1 and receive a warranty deed in exchange, and no transfer tax would be due. Petitioner purchased the subject land and constructed the subject building with proceeds of the COPs issued by the

⁴ Respondent has not clearly settled on a single conclusion regarding the "value" exchanged. As previously discussed, "value" is defined by MCL 207.522(g) to mean "the current or fair market worth in terms of legal monetary exchange at the time of the transfer." Respondent calculated the transfer tax based on a "value" equal to two times the assessed value of the subject property at the time of the transfer of title. At other times, Respondent has argued that the "value" exchanged is equal to approximately \$122 million, or the amount of the prepaid rent. Further, at oral argument, Respondent's counsel presented an argument that the statute could be read to include as the "value" of consideration paid in a lease transaction with a de minimis buy-out at the end of the lease term, the cumulative amount of rent payments made during the term of the lease. However, Respondent's counsel presented no authority for that conclusion.

Trustee under the Trust Agreement. Respondent then paid rent equivalent to the principal and interest associated with the COPs issued by the Trustee. The Closing Statement shows that Petitioner never received any funds at the closing of this transaction. There was, however, a defeasance of the COPs. Respondent would like the Tribunal to believe that this defeasance relieved Petitioner of any liability associated with the COPs; thus, Petitioner received consideration.

As discussed above, the Tribunal finds the transfer tax statute to be clear. The Tribunal has carefully reviewed the briefs, reply briefs and oral argument presented by the parties, and finds that Petitioner's characterization of the subject transaction as a complicated financing transaction, with no consideration paid by Respondent to Petitioner as a result of Respondent's defeasance of the COPs in exchange for the warranty deed, is valid and, therefore, no consideration was provided by Respondent to Petitioner for the warranty deed.

Respondent presents several arguments in support of its contention that it did not receive any consideration when it provided the warranty deed to Respondent upon its prepayment of rent under the Lease. Petitioner first relies on statutory language defining "value" as legal monetary exchange. Petitioner contends that, as evidenced by the Closing Statement, it received no money in exchange for the warranty deed delivered to Respondent. Petitioner further contends that the transaction documents all characterize the payment by Respondent of approximately \$122 million as the prepayment of rent, rather than as purchase consideration. Specifically, Petitioner contends that ". . . Petitioner and the State executed the aforementioned Closing Statement which confirmed that (1) the State did in fact prepay all rent it owed to the third party investors under the Lease/COPs; and (2) paid 525 Redeveco \$0.00 of consideration for the conveyance of the

Property's fee title.” (Petitioner's Motion for Summary Disposition, p 9, Exhibit 1) Petitioner further relies on the Affidavits of Mr. Oberdorff and Mr. Shroeger, which Petitioner provide testimony that the prepayment of rent by Respondent was for the defeasance of the COPs, and were not paid in exchange for title to the subject property.

“Consideration” is a bargained-for exchange; there must be a benefit to, detriment suffered by, or service done by one party. *General Motors Corp v Department of Treasury*, 466 Mich 231; 644 NW2d 734 (2002). Further, consideration for a promise may inure to one other than the promisor. *Schofield v Spilker*, 37 Mich App 33; 194 NW2d 549 (1972). The Tribunal finds that Petitioner's argument that no consideration was paid at the time it issued the warranty deed to Respondent is supported by the facts in this case and supported by the evidence submitted. When the COPs were sold in 2000, Petitioner was provided funds to finance the acquisition, construction and improvements of the subject property. After Petitioner received these funds, it no longer possessed an interest in the rent payments made by Respondent to the Trustee as a result of the COP. Consequently, Respondent did not alleviate Petitioner's debt and Petitioner did not receive consideration as a result of Respondent's prepaid rent.

The certificates issued under the COP represented “. . . individual undivided proportionate interests in rental payments . . . under [the] lease agreement.” Petitioner's Exhibit 17. Pursuant to the Trust Agreement, the “. . . [r]entals and all funds . . . are pledged by the Lessor to the Trustee, and a lien is created thereon, for the payment of the principal and interest and redemption premiums, if any, with interest with respect to the Certificate.” Petitioner's Exhibit 4, Respondent Exhibit B. Although Petitioner did benefit from the monies received as a

result of the initial issuance of the COP, it did not receive any subsequent benefit from Respondent's monthly rental payments or the prepaid rent payment.

The Tribunal finds that neither Petitioner nor Respondent was personally liable under the COPs. The COP states that the “. . . lease is not a general obligation of the State of Michigan and does not constitute a ‘debt.’” Petitioner's Exhibit 17. The lease indicates that it may be cancelled by Respondent during any period of possession if either (1) an appropriation is made with the specific prohibition against use of funds for the lease or (2) the Legislature fails to appropriate funds for the purpose of making lease payments under the lease. As such, Respondent could cancel the lease and would not be responsible for the remainder of the rental payments. The lease, the COPs, and the trust agreement all indicate that insurance was required to be obtained that would cover any “rental interruption.”⁵ As such, if Respondent cancelled the contract, Petitioner was not required to personally make rental payments to the Trustee as they would be paid from the insurance proceeds. Therefore, the Tribunal finds that *neither* Petitioner nor Respondent was personally liable under the COP and no consideration was exchanged when Respondent prepaid the rent and gained possession of the warranty deed for the subject property.

Supported by the Affidavits of Mr. Oberdorff and Mr. Shroeger, Petitioner contends that the Tribunal must recognize the federal income tax implications of a decision supporting Respondent's position. Specifically, Petitioner contends that the subject transaction was structured so that interest paid to COPs holders was tax-exempt for federal income tax purposes.

⁵ “The Lessor shall obtain and keep in force . . . [r]ental interruption insurance and business interruption insurance for the Leased premises which the Lessee shall have no obligation to reimburse.” Petitioner's Exhibit 5, Lease, Section 3.10, p 10.

“The Lessor shall insure or maintain in effect insurance . . . required by Section 3.10 . . . of the Lease. . . .” Petitioner's Exhibit 4, Trust Agreement, p 32.

“Payment of the principal of and interest on the Certificates when due will be insured by a municipal bond insurance policy to be issued by Ambac Assurance Corporation.” Petitioner's Exhibit 17, Certificates of Participation, p 1.

To insure the tax exempt nature of the COPs, Petitioner contends that the debt obligation associated with the COPs must be Respondent's, that the defeasance of the COPs results in no consideration paid to Petitioner, that Respondent agreed to this structure for the transaction as evidenced by its execution of IRS Form 8038-G and its current position regarding transfer tax is inconsistent with those representations and may transform "the COPs Lease from a tax-exempt debt instrument to a taxable purchase and conveyance instrument, and that the Lease requires Respondent to take no actions that would jeopardize the exclusion of the interest portion of the rental payments from gross income for federal income tax purposes." The Tribunal rejects Petitioner's reliance on federal tax law as inapplicable to the sole issue facing the Tribunal, i.e., whether a transfer tax should be imposed upon the conveyance of a warranty deed by Petitioner to Respondent.

The Tribunal rejects Petitioner's estoppel, acquiescence and statute of limitations arguments. Although Petitioner seems to argue that Respondent acquiesced to Petitioner's transfer tax argument by entering into the transaction documents, or is estopped from making its transfer tax argument by virtue of the representations it made in the transaction documents regarding the tax-exempt nature of the COPs, Respondent correctly argues that the issue is not how Petitioner financed its obligation to improve the subject property. Instead, Respondent specifically identifies Section 12.3(g) of the Lease, which clearly provides that "the Lessor acknowledges responsibility for payment of any state or local real estate transfer taxes." Given its acceptance of that provision in the Lease, Petitioner can not now claim that Respondent, through its execution of the transaction documents somehow is estopped from relying on that provision of the Lease. The Tribunal does not accept Petitioner's contention at oral argument

that this provision was included in the Lease solely in anticipation of a change in the law at some point during the term of the lease. Petitioner's statute of limitations argument is also unsupported, given the statutory language (MCL 207.523) that specifically provides for the imposition of a transfer tax when the deed is recorded.

Ultimately, the Tribunal agrees with Respondent in that “. . . the actual pertinent facts in light of the express language of the [State Real Estate Transfer Tax Act] disclose that this is a very simple matter.” Respondent's Motion for Summary Disposition, p 11. Pursuant to MCL 207.526(a), a seller is exempt from state real estate transfer tax in a transaction where the “value of the *consideration* for the property is less than \$100.” As explained herein, the Tribunal has determined that there was no consideration exchanged when Respondent prepaid rent and obtained the warranty deed for the subject property. Therefore, the value of the consideration is zero and the subject transaction is exempt from State Real Estate Transfer Tax Act.

Therefore,

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

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Disposition is GRANTED.

IT IS FURTHER ORDERED that Respondent's Final Assessment No. 0094100 is
CANCELLED.

This Order resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: December 22, 2011

By: Steven H. Lasher