

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

1310 – 1314 Broadway, LLC,
Petitioner,

v

MTT Docket No. 347864

City of Detroit,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER GRANTING PETITIONER’S MOTION FOR SUMMARY DISPOSITION

A prehearing conference was held in the above-captioned matter on October 26, 2010. Petitioner was represented by attorney Andrew J. Goldberg of the firm of Kemp Klein. Respondent was represented by attorney Kevin C. Richard of the City of Detroit Law Department. At the prehearing conference, the parties agreed to file a Joint Stipulation of Facts and then subsequently file respective Motions for Summary Disposition and Reply Briefs. Petitioner filed its Motion for Summary Disposition on December 1, 2010, with an accompanying Brief in support of its contention that the taxable value of the subject property should not have been “uncapped” for the 2008 tax year. On December 1, 2010, Respondent also filed a Brief in support of its contention that the taxable value of the subject property should have been “uncapped” for the 2008 tax year. On December 15, 2010, Petitioner filed a Reply Brief Supporting Petitioner’s Motion for Summary Disposition. Respondent did not file a Reply Brief.

This matter involves one parcel of real property located in the City of Detroit, Wayne County, state of Michigan, identified by tax parcel number 01004004. Petitioner timely invoked the jurisdiction of the Tribunal for the 2008 tax year. Only the taxable value of the subject parcel for the 2008 tax year is at issue.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, that the transaction in question does not constitute a transfer of ownership. As a result, Respondent incorrectly “uncapped” the taxable value of the subject property for the 2008 tax year pursuant to MCL 211.27a(3). The 2008 taxable value of the subject property should be \$67,752, which is calculated as the 2007 taxable value of the subject property increased by the applicable 2.3% inflation rate.

For the reasons set forth herein, the Tribunal grants Petitioner’s Motion and grants summary disposition in favor of Petitioner pursuant to MCR 2.116(I)(1).

STIPULATION OF FACTS

The parties filed the following joint Stipulation of Facts with the Tribunal on November 16, 2010, and the Tribunal adopts the joint Stipulation of Facts as part of its Findings of Facts:

“1. The at issue property commonly known as 1310-1314 Broadway and identified with Parcel Id. No. 01004004 (‘Property’) was originally owned by David Silbert . . . , as to a one-half (1/2) interest, and by the Jerry Silbert Revocable Living Trust . . . , as to a one-half (1/2) interest.

2. On September 24, 2007, Articles of Organization for Petitioner 1310-1314 Broadway, LLC (‘LLC’) were filed with the Michigan Department of Labor & Economic Growth and such Articles were endorsed the same day, effectuating the formation of the LLC.

3. Pursuant to the Articles of Organization and an Operating Agreement executed on September 25, 2007, David and the Trust are, and have been at all times, the only members of the LLC, each owning a 50% membership interest.

4. On October 25, 2007, David and his wife, Renee Silbert, conveyed David’s one-half (1/2) interest in the Property to the LLC. A copy of the Warranty Deed recorded in Liber 46852, pages 1027-1029, Wayne County Records, on December 10, 2007 evidences this conveyance

(Renee joined in the execution of this Warranty Deed for the sole purpose of barring her dower interest in the Property).

5. The Trust also conveyed its one-half (1/2) interest in the Property to the LLC on October 25, 2007. A copy of the Warranty Deed recorded in Liber 46852, Pages 1016-1018, Wayne County Records, on December 10, 2007 evidences this conveyance.

6. A Property Transfer Affidavit dated October 25, 2007 reflecting both conveyances enumerated in Paragraphs 4 and 5, was filed with the City of Detroit Assessments Division.

7. The City of Detroit Assessments Division determined the conveyances enumerated in paragraphs 4 and 5 resulted in a transfer of ownership of the Property in 2007 pursuant to MCL 211.27a(6). Based on this determination, and in accordance with MCL 211.27a(3), the Assessments Division increased the taxable value of the Property from \$66,229 in 2007 to \$196,323 in 2008, and issued a Notice of Assessment reflecting this increase.

8. Petitioner timely appealed (the 'Appeal') the City of Detroit's 2008 Notice of Assessment requesting the City of Detroit Assessor reverse its determination that the Conveyance resulted in an uncapping for real property tax purposes. Such appeal was denied.

9. Petitioner timely appealed to the Michigan Tax Tribunal, the denial of the Appeal by the City of Detroit Assessor. Petitioner contends the Conveyance was not a transfer of ownership under MCL 211.27a(6)."

ADDITIONAL FINDINGS OF FACT

1. David Silbert ("Silbert") and the Jerry Silbert Revocable Living Trust ("Trust") were engaged in the business of leasing of the subject property, including collecting rents and paying expenses associated with the subject property.

2. Petitioner is engaged in the business of leasing of the subject property, including collecting rents and paying expenses associated with the subject property.
3. The 2007 taxable value of the subject property was \$66,229.
4. The applicable inflation rate to be used in calculating the 2008 taxable value of a property is 2.3%.

PETITIONER'S CONTENTIONS

Petitioner contends that the transfer of the subject property from Silbert and the Trust to Petitioner was “a conveyance from two co-owners who were the sole owners of the subject property to a limited liability company in which the two were the sole members.” (Petitioner’s Brief Supporting Petitioner’s Motion for Summary Disposition, p.4) Therefore, it is Petitioner’s contention that the transaction did not constitute a “transfer of ownership” because it was a transfer of property among commonly controlled entities pursuant to MCL 211.27a(7)(l).

Petitioner relies upon MCL 211.27a(7)(l), which provides that a transfer of ownership does not include “[A] transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities if the entities involved are commonly controlled.” Specifically, Petitioner contends that this statutory language can be viewed from two perspectives, both of which lead to a conclusion that the transfer of the subject property in 2007 was a transfer between commonly controlled entities. “First, the individual and the Trust who originally were co-owners are themselves ‘legal entities.’” (Petitioner’s Brief Supporting Petitioner’s Motion for Summary Disposition, p. 5) “Second, as co-owners of this property, Silbert and the Trust continuously leased the property to various tenants, collected rents from tenants, and paid expenses related to leasing, owning and operating the property. Silbert and the Trust constituted a partnership under Michigan law” (see

MCL 449.6(1), which provides that “A partnership is an association of 2 or more persons . . . to carry on as co-owners a business for profit.” (Petitioner’s Brief Supporting Petitioner’s Motion for Summary Disposition, p. 5) See also *Byker v Mannes*, 465 Mich 637, 646; 641 NW2d 210 (2002), which Petitioner contends stands for the proposition that “if the parties associate themselves to ‘carry on’ as co-owners a business for profit, they will be deemed to have formed a partnership relationship regardless of their subjective intent to form such a legal relationship.” (Petitioner’s Brief Supporting Petitioner’s Motion for Summary Disposition, p. 6) Petitioner further contends that the Michigan State Tax Commission in its Bulletin 1995-16 concludes that the issue of “common control” for purposes of taxable value uncapping must be viewed pursuant to Michigan Revenue Administrative Bulletin (RAB) 1989-48. In this regard, the RAB states that there is common control among a “brother-sister” group if the same five or fewer persons who are individuals, estates or trusts own directly or indirectly a controlling interest in each entity. Here, Petitioner contends that because Silbert and the Trust each owned 50% of the “partnership” and each own 50% of the LLC, these entities are “commonly controlled” for purposes of MCL 211.27a(7)(l). Thus, Petitioner concludes that the conveyance at issue in this appeal did not change the actual control of the subject property or the effective ownership interests and, therefore, the conveyance was not a transfer of ownership that triggered the uncapping provisions of MCL 211.27a(3).

Finally, in its Reply Brief Supporting Petitioner’s Motion for Summary Disposition, Petitioner takes exception to Respondent’s reliance on *C & J Investment of Grayling LLC v City of Grayling*, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2007, Docket No. 270989. In *C & J Investments*, a Trust conveyed property to an LLC, owned 50% by the Trust and 50% by an unrelated individual, and the Michigan Court of Appeals held

that the entities were not under common control because their ownership interests were not identical before and after the transfer. Petitioner distinguished the facts in *C & J Investments* from this fact situation because the ownership interests in the subject property before the transfer and after the transfer were identical. Further, Petitioner contends that Respondent cannot rely on RAB 89-48 without also relying on the State Tax Commission guidelines contained in Bulletin No. 16, which adopt RAB 89-48 to define “commonly controlled” entities for purposes of MCL 211.27a(7)(1).

RESPONDENT’S CONTENTIONS

It is Respondent’s contention that the transfer of ownership of Silbert’s 50% interest in the subject property and the Trust’s 50% interest in the subject property to Petitioner constitutes a “transfer of ownership” pursuant to MCL 211.27a(6). While recognizing the exceptions enumerated in MCL 211.27a(7), specifically the “entities under common control” exception pursuant to MCL 211.27a(7)(1), Respondent contends that a definition of “commonly controlled” is not included in the statute, and that Petitioner’s reliance on the STC Bulletin is misplaced, as such bulletins are “merely explanatory and do not have the force of law as they are not properly promulgated administrative rules” (see *Danse Corp v City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002)). Respondent further contends that the Tribunal must look to RAB 1989-48, which defines “three (3) categories of groups that qualify as entities under common control: (1) parent-subsidary entities under common control; (2) brother-sister entities under common control; and (3) a combination of entities under common control.” Respondent further relies on *C & J Investments, supra*, which Respondent contends supports its position that under fact situation at issue, “as no party owned a controlling interest in each entity a brother-sister relationship could not exist.” (Respondent’s Brief, p. 5) (Note that although Respondent also

provides argument regarding the “affiliated group” exception pursuant to MCL 211.27a(7)(j), this exception was not argued by Petitioner, and is not deemed applicable to the instant fact situation by the Tribunal.) Respondent concludes that Petitioner does not “fit within any of the categories,” concluding that “in order to qualify as ‘brother-sister entities under common control’ the same person(s) must own a controlling interest in each entity. As no party owned a controlling interest in each entity a brother-sister relationship could not exist.” (Respondent’s Brief, p. 5).

CONCLUSIONS OF LAW

As discussed above, the issue to be resolved by the Tribunal in this matter is whether, under the general property tax act, being MCL 211.1 *et seq*, a “transfer of ownership” occurred when 50% co-owners of the subject property (an individual and a trust) created a limited liability company (owned 50% by the individual and 50% by the trust) and then transferred the property to that limited liability company.

The phrase “transfer of ownership” as it relates to the general property tax act, originated in 1994 as a result of voter approval of several amendments to Michigan’s constitution. These amendments are commonly referred to as “Proposal A.” The amendment relevant to the issue at hand was made to Article 9, §3, whereby, beginning in 1995, the taxable value is limited by statutorily determined general price increases, adjusted for additions and losses.

The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law...The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not...exceed 50%...; and for a system of equalization of assessments. For taxes

levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. Const 1963, Art IX, Sec 3.

The Legislature, responding to the Article 9, §3 requirement to define when ownership of a parcel of property is transferred, amended MCL 211.27a to provide the following definition of “taxable value”:

- (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
- (a) The property’s taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. For taxes levied in 1995, the property’s taxable value in the immediately preceding year is the property’s state equalized valuation in 1994.
 - (b) The property’s current state equalized valuation. MCL 211.27a(2).

Subsection (3) codifies the constitutional requirement that the parcel shall be assessed at the applicable proportion of the current true cash value when ownership of the parcel of property is transferred. “Upon a transfer of ownership of property after 1994, the property taxable value for the calendar year following the year of the transfer is the property’s state equalized valuation for the calendar year following the transfer.” MCL 211.27a(3).

MCL 211.27a(6) provides that a “transfer of ownership” means “the conveyance of title to or a present interest in property, including the beneficial use of the property, the value of which is substantially equal to the value of the fee interest. Transfer of ownership of property includes, but is not limited to, the following:

- (a) a conveyance by deed.”

Finally, MCL 211.27a(7)(l) provides that a transfer of ownership does not include:

(l) “A transfer of real property or other ownership interests among corporations, partnerships, limited liability companies, limited liability partnerships, or other legal entities if the entities involved are commonly controlled”

Thus, the central issue in this dispute is simply whether the “commonly controlled” entity exception to the transfer of ownership taxable value uncapping provisions of MCL 211.27a(6) found in MCL 211.27a(7)(l) applies to the facts at hand. In essence, Petitioner contends that prior to the transfer of the subject property to Petitioner, Silbert and the Trust each owned a 50% interest in the subject property, which they leased “to various tenants,” (Petitioner’s Motion for Summary Disposition, p. 5), collected rents and paid expenses relating to their ownership and operation of the subject property. As a result, Petitioner contends that the relationship between Silbert and the Trust constituted a partnership under Michigan law pursuant to MCL 449.6(1). The Joint Stipulation of Facts filed by the parties confirms that Silbert and the Trust formed Petitioner, a limited liability company, in September, 2007, with each of the parties owning a 50% membership interest in the LLC. Shortly thereafter, in October, 2007, Silbert and the Trust conveyed the subject property to the LLC by Warranty Deed. Because Silbert and the Trust were each 50% owners of the “partnership” that owned and operated the subject property before its transfer, and were each 50% owners of the limited liability company (Petitioner) to which the property was conveyed, Petitioner contends that the “commonly controlled” test is clearly satisfied.

In addition to unnecessarily focusing on an argument that the transfer of property from Silbert and the Trust to Petitioner is not a transfer between “affiliated groups,” which was not argued by Petitioner, Respondent contends that the Tribunal must 1) ignore transfer of ownership

guidelines issued by the State Tax Commission which seemingly indicate that the subject conveyance is exempt (see “Transfer of Ownership and Taxable Value Uncapping Guidelines” issued by the Michigan Department of Treasury State Tax Commission/Property Tax Division on March 31, 2001), and 2) must follow the Michigan Court of Appeals unpublished decision (see *C & J Investments, supra*), which determined that it was proper for the Tribunal to rely on the definition of “commonly controlled” found in Michigan Revenue Administrative Bulletin 1989-48. In this regard, Respondent states that “in order to qualify as ‘brother-sister entities under common control’ the same person(s) must own a controlling interest in each entity. As no party owned a controlling interest in each entity a brother-sister relationship could not exist.” (Respondent’s Brief, p. 4, 5)

The Tribunal finds that Respondent has misinterpreted both Michigan statute and case law applicable to this matter. As noted above, the sole issue here is whether Petitioner qualifies for the “commonly controlled” exception to taxable value uncapping found in MCL 211.27a(7)(l). In this regard, State Tax Commission Bulletin No. 16 (1995) provides that “an entity under common control is as defined in the Michigan Revenue Administrative Bulletin 1989-48.” Both parties rely on the RAB in support of their respective arguments. Further, Respondent cites to, and Petitioner discusses, *C & J Investments, supra* at 699, which concludes that:

RAB 1989-48 represents an authoritative interpretation of the phrase ‘commonly controlled’ by the agency responsible for administering and enforcing the statute. A court will defer to the interpretation of statutes administered and enforced by the Tax Tribunal.” *Signature Villas, LLC v City of Ann Arbor*, 269 MichApp 694, 696-697; 714 NW2d 392 (2006). Although tax statutes may not be extended by forced construction or implication, *id.* At 702, we conclude that RAB 1989-48 is not inconsistent with the plain meaning of ‘commonly controlled’ in MCL 211.27a(7)(l).

In this regard, RAB 1989-48 provides that the term “brother-sister group of entities under common control” means two or more entities engaged in a business activity, providing the following exist:

1. The same five or fewer persons who are individuals, estates or trusts own (directly or indirectly) a controlling interest in each entity . . . , and
2. Taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such entity, such persons are in effective control of each entity. The five or fewer persons, whose ownership is considered for purposes of the controlling interest requirement for each organization, must be the same persons whose ownership is considered for purposes of the effective control requirement.

The RAB further states that persons are in “effective control” of a partnership if the “persons own an aggregate of more than 50 percent of the profits or capital of such partnership.”

The Tribunal has found that both Silbert and the Trust (prior to the transfer of ownership of the subject property) and Petitioner (after the transfer of ownership of the subject property) were engaged in a business activity, i.e., the leasing of the subject property for profit. Further, the Tribunal has previously found that Silbert and the Trust each owned a 50% interest in the subject property prior to its transfer to Petitioner, and each owned a 50% interest in the LLC that owned the subject property after the transfer of ownership. Thus, to satisfy the “commonly controlled” requirements of the statute and the RAB, the Tribunal must find that Silbert and the Trust constituted an “entity” for purposes of the statute and the RAB. The RAB defines “entities under common control” to include “an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, receiver, estate, trust, or any other group or combination acting as a unit.” The Tribunal finds that Silbert and the Trust constituted a partnership prior to the conveyance of the subject property to Petitioner. See *Byker v Mannes, supra*, which states that: “a partnership is an association of 2 or more persons, which

may consist of husband and wife, to carry on as co-owners a business for profit’ MCL 449.6(1). The individuals involved need not have the subjective intent to form a partnership.” “[I]n determining the existence of a partnership, the focus of inquire is on the parties’ actual conduct in their business arrangements, as opposed to whether the parties subjectively intend that such arrangements give rise to a partnership. Thus, one analyzes whether the parties acted as partners, not whether they subjectively intended to create, or not to create, a partnership.” *Id.* at 649. Here, Petitioner has stated that prior to the transfer of the subject property to Petitioner, Silbert and the Trust “continuously leased the property to various tenants, collected rents from tenants, and paid expenses related to leasing, owning and operating the property.” Clearly, this activity constitutes a “partnership” under *Byker*.

Thus, the Tribunal finds that Petitioner has satisfied the provisions of MCL 211.27a(7)(l) allowing an exception from the transfer of ownership taxable value uncapping provisions because the transfer of the subject property from Silbert and the Trust, a partnership with each constituting a 50% owner of the subject property to Petitioner, a limited liability company also owned 50% by Silbert and 50% by the Trust, is a transfer among “commonly controlled” entities.

JUDGMENT

IT IS ORDERED that the property’s taxable value for the 2008 tax year shall be reduced to \$67,752.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property’s true cash and taxable values as finally shown in this Final Opinion and Judgment

within 20 days of the entry of the Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund as required by the Final Opinion and Judgment within 90 days of the entry of the Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and of penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 1995, at a rate of 6.55% for calendar year 1996, (ii) after December 31, 1996, at a rate of 6.11% for calendar year 1997, (iii) after December 31, 1997, at a rate of 6.04% for calendar year 1998, (iv) after December 31, 1998, at the rate of 6.01% for calendar year 1999, (v) after December 31, 1999, at the rate of 5.49% for calendar year 2000, (vi) after December 31, 2000, at the rate of 6.56% for calendar year 2001, (vii) after December 31, 2001, at the rate of 5.56% for calendar year 2002, (viii) after December 31, 2002 at the rate of 2.78% for calendar year 2003, (ix) after December 31, 2003, at the rate of 2.16% for calendar year 2004, (x) after December 31, 2004, at the rate of 2.07% for calendar year 2005, (xi) after December 31, 2005, at the rate of 3.66% for calendar year 2006, (xii) after

December 31, 2006, at the rate of 5.42% for calendar year 2007, (xiii) after December 31, 2007, at the rate of 5.81% for calendar year 2008, after December 31, 2008 at the rate of 3.315% for calendar year 2009, after December 31, 2009 at the rate of 1.23% for calendar year 2010, and after December 31, 2010 at the rate of 1.12% for calendar year 2011.

This Opinion and Judgment resolves all pending claims and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: February 4, 2011

By: Steven H. Lasher