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

Pinnacle Greenbriar LLC, *et al*,
Petitioner,

v

MTT Docket No. 15-006908

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioners, Pinnacle Greenbriar LLC, *et al*., filed this appeal disputing Final Assessment Nos. UH60413, UH60412, UH60518, UH60353, UH60383, UH60371, UH60400, UH60399, UH60398, UH60397, UH60520, UH60519, UH60389, UH60390, UH60391, UH60392, UH60386, UH60387, UH60393, and UH60394 ("Final Assessments") on December 11, 2015. The assessments, which reflect additional tax and interest due under the State Real Estate Transfer Tax Act (the "Act"), were issued by Respondent, Michigan Department of Treasury, on November 11, 2015. Pursuant to the Final Assessments, Petitioners owe State Real Estate Transfer Tax ("SRETT") in the amount of $343,219.75, and interest in the amount of $52,349.11.[1] Jonathon Myers represented Petitioner, and Michael S. Hill and Michael R. Bell, represented Respondent.

A hearing was held on June 21, 2017. Petitioner's sole witness was Howard Fingeroot, Managing Partner of Diversified Property Group, LLC and of all Petitioners. Respondent's sole witness was Steven Bielak, Auditing Specialist employed by Respondent at the time of the audit of Petitioners. All exhibits proffered by both parties were admitted into evidence. The Tribunal ordered the parties to submit post-hearing briefs and Respondent and Petitioner filed their briefs on August 3, 2017 and August 4, 2017, respectively. No response briefs were permitted.

Based on the evidence, testimony, and case file, the Tribunal finds that Petitioners are liable for SRETT and interest, as set forth in the Final Assessments. Pursuant to the plain language of the Act, transfer tax is imposed upon certain recorded instruments of conveyance,

[1] Interest continues to accrue per 1941 PA 122. Interest shown above is current as of the date of the assessment.

and the seller of the property is liable for the tax so imposed.[2] Land contracts are also specifically exempt from the tax.[3] The properties sold on land contract were improved with single-family residences when the deeds were tendered, and in exchange for those deeds, Petitioners received all sums due and owing under both the land contracts and the construction contracts. Petitioners' land contracts were not recorded—only the deeds tendered in accordance with said contracts were recorded. As such, and inasmuch as Petitioners paid transfer tax based solely on the value of the vacant, unimproved lot, as set forth in the land contracts, Respondent correctly determined a deficiency. Petitioners do not contest the transfer tax assessed by Respondent on those transactions identified as sales of "spec" or speculative homes.

FINDINGS OF FACT

The Tribunal's Findings of Fact concern only evidence and inferences found to be significantly relevant to the legal issues involved; the Tribunal has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to these findings.

1. Petitioners are all single-member limited liability companies formed to develop land.
2. The sole member of each of Petitioners is Diversified Property Group, LLC, of which Howard Fingeroot is the founder and managing partner.
3. Petitioners purchase and develop land into site condominium projects consisting of single family lots. Development includes installation of water mains, roads, storm sewers, and sanitary sewers.
4. After development, Petitioners sell the lots in four different types of transactions: (i) sales of vacant lots to individuals pursuant to warranty deed, (ii) sales of vacant lots to non-affiliated builders pursuant to warranty deed, (iii) sales of lots improved with "spec" homes constructed by an affiliated builder pursuant to warranty deed, and (iv) sales of vacant lots pursuant to land contract with contemporaneous entry into a construction contract with an affiliated builder for a single-family residence.
5. Petitioners' affiliated builders are separate and distinct entities that have no ownership interest in the properties owned and developed by Petitioners.

[2] MCL 207.523(1) and (2).
[3] MCL 207.526(o).

6. When selling on land contract, Petitioners utilize a form document, the terms of which are the same for each Petitioner and development. The purchase price identified in the land contracts reflects the value of the vacant lot.
7. Petitioners' land contracts are not recorded.
8. Petitioners' land contracts require a down payment upon the signing of the agreement, with the balance due and payable within five days of the completion date of the residence, as defined in the residential construction contract.
9. Petitioners' land contracts prohibit prepayment of the land contract in whole or in part.
10. Contemporaneous with the execution of the land contract, Petitioners' land contract purchasers enter into a residential construction contract with an affiliated builder for construction of a single-family residence.
11. The residential construction contract is a form document, the terms of which are the same for each Petitioner and development. The contract price identified in the construction contract reflects the cost of construction of the single-family residence.
12. Petitioners are not parties to the residential construction contracts, and the affiliated builders are not parties to the land contracts.
13. The land contracts and residential construction contracts contain cross-default provisions.
14. Petitioners' obligation to convey fee title under the land contract is conditioned upon the purchaser's payment in full of all sums due and owing under the land contract and the construction contract.
15. Upon completion of construction of the single-family residence, Petitioners' land contract purchasers pay in full all amounts owed under both the land contract and the construction contract simultaneously in a single transaction, with all proceeds going to Petitioners; Petitioners' affiliated builders are not paid any proceeds at closing.
16. After full payment of all amounts owed under both the land contract and the construction contract, a deed is tendered to Petitioners' land contract purchasers and recorded with the register of deeds.
17. Construction of the single-family residence is complete when the deed is tendered to Petitioners' land contract purchasers and recorded with the register of deeds.
18. Respondent conducted a transfer tax audit of Petitioners for the 2009-2012 tax years.

19. Respondent determined that Petitioners underpaid transfer tax on 144 land contract sales and 14 spec home sales during the audit period, and issued assessments for the concluded aggregate deficiency of $343,219.75, not inclusive of accrued interest.[4]
20. In all of the 158 transactions identified by Respondent, Petitioner paid transfer tax based on the value of the vacant, unimproved lot, as set forth in the land contracts.
21. Respondent determined Petitioners' transfer tax liability based on the value of the vacant, unimproved lot, as set forth in the land contracts and identified on the HUD-1 Settlement Statements, and the value of the improvements, as set forth in the residential construction contracts and identified on the HUD-1 Settlement Statements.
22. Petitioners do not contest the transfer tax assessed by Respondent on those transactions identified as spec home sales.

CONCLUSIONS OF LAW

The sole issue in this case is whether property sold pursuant to a land contract is subject to transfer tax based on (1) the value of the property at the time the land contract is entered into, or (2) the value of the property when the land contract is paid off and a deed is tendered and recorded. Though Petitioners initially disputed Respondent's assessments in their entirety, they no longer contest the transfer tax assessed on those transactions identified as sales of spec homes. Petitioners concede that the spec home sales are subject to transfer tax based on the value of the improved lot, and that certain spec home transactions were improperly reported as land contract sales, with transfer tax paid in accordance with the same, based upon the value of the vacant lot. With respect to the land contract sales, however, Petitioners contend that they properly paid transfer tax based upon the value of the property at the time the land contracts were entered into, and as such, Respondent's assessment on those transactions should be cancelled. As will be discussed below, the Tribunal finds no merit in this argument, and it concludes that transfer tax is based on the value of the property when the land contract is paid off and the deed is tendered.

Under the Act, a tax is imposed on certain written instruments of conveyance when the instrument is recorded.[5] This includes "contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of

[4] Though Respondent referenced 15 spec home sales, only 14 are identified in the admitted exhibits: 4970 Parkgate, 3746 Connors, 3691 Hogan, 3458 Connors, 52109 Carrington, 22461 Cyprus, 22462 Cyprus, 22674 Mondavi, 22715 Mondavi, 23902 Mondavi, 3642 Hogan, 3678 Hogan, 3819 Hogan, and 3663 Connors.
[5] MCL 207.523.

property or any interest in the property,"[6] as well as deeds and other instruments of conveyance.[7] The tax is imposed at a rate of $3.75 for each $500 of total value of the property being transferred,[8] and the seller or grantor of the property is liable for the tax so imposed.[9] "Value" is defined by MCL 207.522(g) as "the current or fair market worth in terms of legal monetary exchange at the time of the transfer."[10] MCL 207.522(g) further states that "the tax shall be based on the value of the real property transferred and shall be collected at the time the instrument of conveyance is submitted for recording."[11] "Transfer" is defined by MCL 207.522(e) as "the conveyance of title to or other transfer of a present interest or beneficial interest or any other interest in real property by any method, including the interest or beneficial interest in real property acquired through the acquisition of a controlling interest in any entity with an interest in the property."[12] Also relevant to this appeal, MCL 207.526(o) states that "a land contract in which the legal title does not pass to the grantee until the total consideration specified in the contract has been paid," is "exempt from the tax imposed by this act."[13] In that regard, "Michigan law is quite clear that, when property is sold on a land contract, legal title is retained by the vendor and an equitable title or interest is obtained by the vendee."[14]

Petitioners contend that under these provisions, property sold via land contract is subject to transfer tax based on the value of the property at the time the land contract is entered into, but the tax is not paid until the contract is paid off and the deed is recorded. Petitioners reason that a land contract, when signed, transfers an interest in property, and value is determined at the time of the transfer of an interest in property. Further, "transfer" for purposes of the Act is very broadly defined, so as to encompass such an interest. As noted above, however, the transfer tax is a tax upon recorded instruments.[15] The Supreme Court acknowledged as much in *Lake Forest Partners 2, Inc v Dep't of Treasury*,[16] and despite Petitioners' assertion to the contrary, careful review of that case does not suggest that the result would have been different if the sales had

[6] MCL 207.523(1)(a).
[7] MCL 207.523(1)(b).
[8] MCL 207.525(1).
[9] MCL 205.723(2).
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Tidwell v Dasher*, 152 Mich App 379, 384-85; 393 NW2d 644, 646-47 (1986) (citation omitted).
[15] See MCL 207.523(1).
[16] *Lake Forest Partners 2*, 480 Mich 1046.

been made pursuant to land contracts as opposed to purchase agreements. The Tribunal in that case did distinguish land contracts from purchase agreements (i.e., contracts for the sale of land), and it did conclude that purchase agreements did not result in a transfer of property.[17] And on appeal, the Court of Appeals did disagree, and it held that a purchase agreement does in fact transfer an interest in the property. The Michigan Supreme Court, however, did not overturn this finding as contended by Petitioners. The Court made no ruling or determination on the issue of whether a purchase agreement transfers an interest in property. The sole basis of the Court's opinion was that "the State Real Estate Transfer Tax Act . . . taxes recorded instruments."[18] It reasoned that "in this case, the only recorded instrument was the deed. The 'value' exchanged for that deed included both the cost of the lot and the home; thus, the tax tribunal correctly held that that value was the proper measure for taxation."[19] Consequently, the issue of whether the purchase agreements transferred an interest in the property was wholly irrelevant, and the same is true for the land contracts at issue in this case.

The Court of Appeals' dissent in *Lake Forest* provides further persuasive reasoning as to why Petitioners' argument in this case must fail. Petitioners, like the Court of Appeals' majority, erroneously conclude that because *a* transfer occurred, that must be *the* transfer for transfer tax purposes.[20] As explained by Judge Davis,

> The state real estate transfer tax is imposed only on the instrument that is actually recorded. The majority's construction of the statute would calculate the tax on the basis of a 'transfer' that took place in an entirely different instrument, even though the recorded instrument—upon which the tax is actually imposed—*also* contains a transfer. This creates a complication that the Legislature did not intend from a plain reading of the statute. Indeed, the Legislature specifically provided for certain exceptions, such as land contracts, MCL 207.526(*o*), or instruments 'to confirm title already vested in a grantee,' MCL 207.526(n). If the Legislature had intended to impose a tax based on the *first* transfer, or based on *any* transfer, it could easily have said so. Instead, it refers to *the* transfer, logically referring to the transfer embodied in the instrument being recorded and on which the tax is imposed.[21]

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[17] Though Petitioners assert that the Tribunal concluded that the purchase agreements did not result in a transfer of property within the plain meaning of MCL 207.22(e), this section of the Act was not in effect at the time of the Tribunal's determination. The Act was amended by Public Act 473 of 2008, Effective January 1, 2007, to include the definition of "transfer," among other things.
[18] *Lake Forest Partners 2*, 480 Mich at 1047 (citation omitted).
[19] *Id.*
[20] *Lake Forest Partners 2, Inc v Dep't of Treasury*, 271 Mich App 244, 251-252; 720 NW2d 770 (2006).
[21] *Lake Forest Partners 2*, 271 Mich App at 252 (footnote omitted).

There is no evidence establishing that Petitioners' land contracts were recorded, and Mr. Fingeroot testified that to his recollection, they were not. Even if the land contracts had been recorded, MCL 207.526(o) exempts such documents from tax under the Act. And despite Petitioners' suggestion to the contrary, land contracts are not exempt only until they are paid off—they are exempt in their entirety, making the deed tendered and recorded after payoff of the contract the taxable instrument in such a transaction. As such, and inasmuch as the warranty deeds at issue in this case transferred and conveyed title of improved lots, Respondent properly assessed the transfers based on the value of both the land and the newly constructed homes. This is true notwithstanding that the construction agreements were entered into with the builder entities and not Petitioners, as regardless of what obligations the purchasers had to the builder entities under the construction agreements, Petitioners were the sole sellers of the properties—the builder entities held no ownership interest in the same, and all proceeds from the sales, which included the value associated with both the land contracts and the construction agreements, i.e., "the current or fair market worth in terms of legal monetary exchange at the time of transfer"[22] went to Petitioners. Petitioners readily acknowledge this fact, and consequently, there is no need to integrate the construction contract into the land contract or to pierce the corporate veil to conclude that Petitioners were required to pay transfer tax on both, though it is noted that the parole evidence rule "cannot be invoked either by or against a stranger to the contract."[23] The construction agreements are relevant only to the extent that they (1) affect the value of the property, by way of the improvements completed in accordance with the same, and (2) serve as a condition precedent to Petitioners' obligation to convey title of the properties. In that regard, Paragraph 3 of the land contract form provides:

> Concurrently with the execution of this Land Contract, Purchaser is entering into a Residential Construction Contract (the "Construction Contract") with Pinnacle-Novi LLC (the "Builder"), for the construction of a residence on the Property (the "Residence"). Purchaser acknowledges that the execution of the Construction Contract by Purchaser and the performance of Purchaser's obligations under the Construction Contract are a material inducement to Seller entering into this Land Contract, and Purchaser agrees that Seller's obligation to convey fee title to the

[22] MCL 207.522(g).
[23] *Denha v Jacob*, 179 Mich App 545, 550, 446 NW2d 303, 306 (1989). See also *Beacon Enterprises, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2013 (Docket No. 308170) "It is true that in *Mid America*, 153 Mich App at 458–460, the Court analyzed the parol-evidence rule in relation to a contract in a tax case. However, and significantly, the *Mid America* decision preceded *Denha*." *Id.*

> Property under this Land Contract is conditioned upon Purchaser's payment in full of all sums due and owing under the Construction Contract.

Paragraph 4 of the land contract also states that "upon Purchaser's payment in full of all sums due and owing under this Land Contract and under the Construction Contract, Seller shall deliver to Purchaser a warranty deed conveying fee title to the property . . . ." In accordance with these provisions, Petitioners' purchasers paid all sums due and owing under both contracts, and in exchange for those sums, received the warranty deeds conveying title of the improved property, which deeds were subsequently recorded.

JUDGMENT

IT IS ORDERED that Final Assessment Nos. UH60413, UH60412, UH60518, UH60353, UH60383, UH60371, UH60400, UH60399, UH60398, UH60397, UH60520, UH60519, UH60389, UH60390, UH60391, UH60392, UH60386, UH60387, UH60393, and UH60394 are AFFIRMED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties within 20 days of the entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes, interest, and penalties shall collect the taxes, interest, and penalties or issue a refund as required by this Final Opinion and Judgment within 28 days of the entry of this Final Opinion and Judgment.

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

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[24] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[25] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof

[24] See TTR 261 and 257.
[25] See TTR 217 and 267.

demonstrating that service must be submitted with the motion.[26] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[27]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[28] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[29] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[30]

By Steven H. Lasher

Date Entered: September 29, 2017
ejg

[26] See TTR 261 and 225.
[27] See TTR 261 and 257.
[28] See MCL 205.753 and MCR 7.204.
[29] See TTR 213.
[30] See TTR 217 and 267.