

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

Baruch SLS, Inc.,  
Petitioner,

v.

MTT Docket Nos. 395010 & 415093

Township of Tittabawassee,  
Respondent.

Tribunal Judge Presiding  
Paul V. McCord

FINAL OPINION AND JUDGMENT

Terry L. Zabel (P53798), for Petitioner.  
Gary R. Campbell (P36596), for Respondent.

I. INTRODUCTION

This charitable exemption case came before a hearing on January 29, 2013, in Dimondale, Michigan. Petitioner contends that its adult foster care home known as Stone Crest Senior Living Adult Foster Care (“Stone Crest”) should be exempt under MCL 211.7o for the 2010, 2011, and 2012 tax years. We are asked to decide the following two issues: (1) whether Petitioner’s real property is entitled to a charitable exemption under MCL 211.7o, and (2) whether the personal property located thereon is exempt under MCL 211.9 for the 2010, 2011, and 2012 tax years; we hold that it is not exempt.

II. JUDGMENT

For the tax years at issue, we hold that the true cash value of Petitioner’s property, state equalized (SEV) and taxable (TV) values, are as follows:

| Parcel Number       | Year | TCV         | SEV       | TV        |
|---------------------|------|-------------|-----------|-----------|
| 29-13-3-16-3007-000 | 2010 | \$1,846,000 | \$923,000 | \$923,000 |
| 29-13-3-16-3007-000 | 2011 | \$1,826,000 | \$913,000 | \$913,000 |
| 29-13-3-16-3007-000 | 2012 | \$1,759,200 | \$879,600 | \$879,600 |

| Parcel Number       | Year | TCV      | SEV      | TV       |
|---------------------|------|----------|----------|----------|
| 29-99-9-99-0211-006 | 2010 | \$20,000 | \$10,000 | \$10,000 |
| 29-99-9-99-0211-006 | 2011 | \$25,000 | \$12,500 | \$12,500 |
| 29-99-9-99-0211-006 | 2012 | \$30,000 | \$15,000 | \$15,000 |

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing and observing the witness who testified at the evidentiary hearing, allowing for the Tribunal to assess credibility, and having further considered the exhibits submitted by the parties, the arguments presented by counsel, and applying the governing legal principles, the Tribunal makes the following independent findings of fact and conclusions of law<sup>1</sup> set forth below in memorandum form. See MCL 205.751(1) (“A decision and opinion of the tribunal . . . shall be in writing or stated in the record, and shall include a concise statement of facts and conclusions of law, stated separately . . .”); see also MCL 24.285.

### IV. FINDINGS OF FACT

This section presents a “concise, separate, statement of facts” within the meaning of MCL 205.751(1), and, unless stated otherwise, the matters stated or summarized are “findings of fact” within the meaning of MCL 24.285. The findings of fact are set forth in narrative form based on the Tribunal’s conclusion that it is the most expeditious manner of proceeding where there are few disputes about facts and the main focus of the controversy are the legal issues.

#### A. Petitioner

The parties filed with the Tribunal a stipulation of facts. The stipulated facts are incorporated herein by this reference. We find the facts accordingly. Petitioner is a Michigan non-profit, non-stock corporation with its principal place of business in Grand Rapids, Michigan and is also a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. Petitioner was incorporated on or about September 25, 1997. Petitioner subscribes to a “faith based” philosophy in its operations and management, however, Petitioner is not affiliated with any specific denomination or church. At all relevant times, Petitioner operated the Subject as an adult foster care facility, serving typically elderly individuals with developmental disabilities or those without a physical disability and residents with dementia.

Petitioner’s Articles of Organization in effect for the tax years at issue provide:

The purposes for which the corporation is organized are to provide charitable services as described under the Internal Revenue Service Home for the Aged guidelines, provide home health services, and to provide other senior lifestyle services to the general public.

Petitioner’s Bylaws (P-2) further provide its purpose as:

1. To provide home health care services;
2. To provide other senior lifestyle services to the general public;

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<sup>1</sup> To the extent that a finding of fact is more properly a conclusion of law, and to the extent that a conclusion of law is more properly a finding of fact, it should be so construed.

3. To provide charitable services as described under the Internal Revenue Service Home for the Aged guidelines; and,
4. Said organization is organized exclusively for charitable, educational and religious purposes . . . .

Petitioner owns and operates six adult foster care homes in Michigan in addition to the Subject. Petitioner also manages two other adult foster care homes. As of January 10, 2007, Petitioner owned four of these six homes. (TR at 87-88). Save for the Subject, it is accepted as true that all of the six adult foster care homes owned by Petitioner have been granted property tax exemptions. The evidence does not reveal, however, when these facilities received their property tax exemptions or whether all of Petitioner's real and personal property was being treated as exempt as of January 10, 2007.

#### B. The Subject Property

The subject property, commonly known as Stone Crest Assisted Living ("Stone Crest" or sometimes referred to as the "facility"), is located at 255 N. Main, Freeland, Michigan. Stone Crest is a licensed 40 bed adult foster care facility spread among two wings (Wing A and Wing B) each wing having 20 beds apiece. The facility carries two separate licenses as an "Adult Foster Care," facility issued by the Michigan Department of Human Services under 1979 PA 218. Each of these licenses are held by Stone Crest Management, LLC ("licensee"), a wholly owned affiliate of Petitioner. (TR at 92-93; P12).

The assisted living provided at Stone Crest is divided among two care centers with care focused between residents who require a higher level of assistance from those who do not. Wing-A is the facility's so-called "specialized care center," providing care for residents with higher acuity. Residents in this wing of the facility may have more advanced dementia or have higher physical needs requiring more staffing for assistance and monitoring of residents, for example. Wing A is licensed as a specialized care unit with the licensing document describing the licensed programs as: aged, developmentally disabled, Alzheimer's, physically handicapped, and mentally ill. (Exhibit P 12). In addition to the common rooms, Wing A has 16 private bedrooms with half baths and two semi-private bedrooms without half baths.

Wing B is the facility's supportive care unit, designed to provide those residents with a more independent living environment (TR at 91), although the separate licensing document for Wing B lists the same purposes as those of Wing A. (Exhibit P 12). Wing B contains 14 private bedrooms with half-bathrooms and three semi-private bedrooms without half-bathrooms. The licensed capacity of each wing of not more than 20 residents each. (Exhibit P 12). Petitioner maintains a resident to staff ratio of one direct staff per every 15 residents during the day and 1 direct staff per every 20 residents during sleeping hours.

#### C. Petitioner's Acquisition of the Subject

Petitioner purchased substantially all of the business assets and real estate of Stone Crest from Ironwood Estates Development Co, on December 30, 2009, for \$2,500,000 on a land

contract. At the time of Petitioner's purchase, permanent bank financing was not available for various reasons, including the population count at the facility and the Subject's income history under its former owner. Petitioner eventually financed out of its land contract in November 2012, when it received permanent bank financing from Chemical Bank. The HUD-1 Settlement Statement associated with this refinancing reflects \$2,075,186.45 of the refinancing proceeds being allocated to the real estate assets (after state and county transfer taxes) and \$124,507.01 allocated to equipment.

In Michigan, the Department of Human Services (DHS), Bureau of Child and Adult Licensing (BCAL) is charged with the responsibility for licensing and monitoring assisted living facilities. See Adult Foster Care Facility Licensing Act, Public Act 218 of 1979. At the time of purchase, Petitioner was permitted to operate the facility under the former owner's license held by Stone Crest Management, LLC. Petitioner applied for new licensure under its own name in June or July of 2010, but ran into administrative difficulties with the Office of Fire Safety. As a work-around, BCAL advised Petitioner that the required licensure could be accomplished if Petitioner were to acquire all of the ownership interests in the legal entity holding the licenses. Petitioner then purchased Stone Crest Management, LLC as its sole member.

As part of Petitioner's acquisition of the Subject, Petitioner entered into a service agreement with Leisure Living Management, Inc. ("Leisure Living"). Leisure Living is a for profit enterprise that provides management consulting, accounting, finance and employee benefit services to adult foster care facilities. Leisure Living is related to Petitioner, located at the same business address as Petitioner and sharing the same chief executive officer. Leisure Living provides its various services to all of the adult foster care facilities owned by Petitioner, as well as to outside clients. Under the services agreement with Leisure Living, Petitioner received accounting, finance and employee benefit services for Stone Crest. In exchange for the contracted services, Petitioner agree to pay a monthly fee equal to 3 ¼ percent of the facility's gross revenues (with certain exclusions).

#### D. Admissions

Petitioner's facility is open to individuals ranging in age from 18 years old and older, serving developmentally disabled individuals or those without a physical disability and residents with dementia. Admission to Petitioner's facility is conditioned on the following documentation: (1) a written assessment plan, (2) a written resident care agreement (on a State prescribed form), and (3) a written health care appraisal that is not more than 90 days old will not accept individuals whose behavior requires isolation or restraint, nor will Petitioner accommodate persons requiring constant professional nursing care, unless the applicant is being admitted to hospice. It is accepted as true that Petitioner does not consider race, religion (*i.e.*, does not discriminate based on creed or religion), color or national origin in the admissions process.

Prior to being admitted as a resident of Stone Crest, each Applicant must enter into Resident Care Agreement. This agreement includes a description of the services to be provided and the fee for the services, as well as a description of additional costs in addition to the basic fee charged. In addition, for the tax years at issue, Petitioner's general fee policy required a \$500

non-refundable entrance fee. Petitioner has waived this fee on occasion.

Petitioner's Admission Policy does not reference the requirement that the applicant is required to furnish any financial information. Petitioner's Program Statement makes reference to "[a]dvance financial agreements will be made with the administrator." Petitioner's vice-president of operations testified that admissions decisions are not based on an applicant's ability to pay, although the population of elderly or disabled individuals Petitioner seeks to serve all qualify for Social Security so they all have some ability to pay. (TR at 153). Applicants seeking admission to the facility on Petitioner's Income-Based Program, or at a reduced rate, must qualify for Medicaid. As explained by Connie Clauson, Vice President of Operations for Baruch SLS, Inc., this was done as a matter of administrative convenience, as the Medicaid program has made a determination as to whether the applicant/resident is "indigent" under that program. In this regard, applicants are required to show that they have the ability to pay some amount towards their living arrangement and care and Stone Crest has not admitted any resident who did not have some ability to pay. (TR at 74). Every resident at Stone Crest is charged a fee and the facility does not provide free housing or care. (TR at 74-75).

A resident may be discharged if the individual poses a threat to either themselves or others, or if a resident is no longer able to live at the level of care that the facility can provide. Petitioner will not terminate a Residency Agreement without a thirty (30) day discharge letter. Petitioner has, in its collection process, used such 30-day letters in order to get Adult Protective Services involved in order to assist the resident or the financially responsible party with bill payment. (TR at 99). That stated, no resident has been discharged from the facility for non-payment.

#### E. Monthly Charges

Monthly charges vary based on room type, level of care and add-on services. The average monthly rate at Stone Crest is \$3,200, although the amount actually charged to any particular resident may be less than this stated rate due to the income-based program Petitioner has in place. (TR at 101, 137; Pet Brief, p 3). Included in this rate are three meals per day, with snacks, dispensing medication and shots on doctor's orders, staff availability for assisting with personal hygiene, linens, furnished private and shared rooms, handicapped accommodations, and housekeeping, among other things. Additional fees apply for supplemental nutrition, personal hygiene supplies, incontinent products, and transportation and escort services. Resident has to separately arrange for telephone and cable TV services.

Under the general fee policy, the monthly charge is due and owing in full for any calendar month the resident is in possession of a room at Stone Crest. Monthly charges are due by the first of each month. A \$50.00 late fee is added to the monthly statement of charges for each month there is an unpaid balance as of the tenth day of the month, however, Petitioner has waived this fee from time-to-time. Petitioner's program documents contain Petitioner's legal rights to collection. Petitioner's fee policy further specifies that if a resident vacates or is discharge from the facility on or after the first day of the month for any reason, including death, the full monthly charged for that month is due.

As of November 30, 2012, Stone Crest ran accounts receivable of \$120,072, representing monies owed by residents to the facility. (Ex P-24) Some of this amount represented delinquent amounts from residents not paying the amounts due and accrued late fees on nonpayments. Some of this amount also represents discounted monthly rent. (TR at 107). Petitioner's accounting system treats amounts collected from residents that are less than the stated base monthly rate in its accounts receivable pool. For the tax years at issue Petitioner ran deficits in the amount of base rent vs. rent paid as follows:

| Tax Year | Difference –<br>Base Rent vs.<br>Paid Rent |
|----------|--|
| 2010     | (\$55,739.74)                              |
| 2011     | (\$104,037.07)                             |
| 2012     | (\$233,407.52)                             |

#### F. Petitioner's Income Based Program

Petitioner maintains an "Income Based Program" whereby a resident's monthly charge is reduced to a level based on the amount of their income. Exhibit P-13 outlines the eligibility criteria for the Income Based Program as follows:

- A resident will have lived at Stone Crest Assisted Living and made a minimum of twenty-four (24) full monthly payments.
- A resident will be required to apply for and be determined, eligible for Medicaid. Michigan Department of Human Services (DHS) currently provides this benefit.
- A resident will provide copies and information about all available income.
- A resident will qualify for the Income Based Program beginning the calendar month for the date of notification of eligibility for Medicaid to Stone Crest Assisted Living.
- A maximum of twenty-five percent (25%) of the available rooms at Stone Crest Assisted Living may be used for the Income Based Program at a given time.

Petitioner's vice-president of operations testified that although the stated policy requires 24 months of full payment before eligibility for the Income Based Program, management has waived this requirement on an ad-hoc basis and has admitted residents directly on the Income Based Program without a full 24 month payment history. Although by stated policy the Income Based Program is available to only a maximum of 25 percent of the available beds at Stone Crest, as of the time of hearing 40 percent of the residents received financial assistance from this program.

G. The MI Choice program

The MI Choice Waiver Program is part of the Medicaid Home and Community-Based Services (HCBS) waiver program, authorized in §1915(c) of the Social Security Act [42 USC 1396n(c)], and furnishes an array of home and community-based services to assist aged and disabled Medicaid beneficiaries who would otherwise be institutionalized to continue to live in their communities. The state has broad discretion to design a waiver program to address the needs of the waiver's target population. Waiver services compliment and/or supplement the services that are available to participants through the Medicaid State plan and other federal, state and local public programs. Through this program, eligible adults who meet income and asset criteria can receive Medicaid-covered services like those provided by nursing homes, but can stay in their own home or another residential setting, such as an assisted living facility like the Subject.

Ms. Clauson, testified that through participation in this program, Michigan Medicaid is able to move covered eligible individuals out of the nursing home environment where the state was paying as much as \$6,000, \$8,000, or \$10,000, and into a less restrictive setting, such as Stone Crest resulting in considerable cost savings of state Medicaid dollars.

According to Petitioner's census dated December 1, 2011, the resident in room 2A, for example, was eligible for this program. Petitioner was permitted to set that resident's room rate at an amount equal to their social security income, less an allowance for personal cash, or \$1,018.26. Petitioner then charged the resident this amount as his/her monthly rental. The eligible resident was also assessed by the local Area Agency on Aging. This agency determined the amount of personal care that that individual required and calculates an amount for the determined level of care which is then converted to a daily rate. Petitioner receives this daily rate from Michigan Medicaid for housing and caring for this resident, but only for the periods, days during the month, which the resident is physically present at Petitioner's facility. If, for example, that resident requires a hospital stay, Petitioner does not receive this daily rate while the resident is off premises. Petitioner nevertheless holds the room open for the resident during the hospital stay or is away for rehabilitative care. With respect to the resident in room 2A, Petitioner received \$1,860 from Michigan Medicaid during the December 2011. When combined, the amount Petitioner received as monthly rent from the resident's social security income and the amount received from Michigan Medicaid was less than the standard customary charge for this room.

For the tax years at issue Petitioner received subsidies from the MI Choice Waiver Program for qualified residents as follows:

| Tax Year | Subsidies received from MI Choice Waiver Program |
|----------|--|
| 2010     | \$4,260.00                                       |
| 2011     | \$144,818.00                                     |
| 2012     | \$139,616.00                                     |

#### H. Respondent's Assessment

The Subject is identified on Respondent's assessment roll by parcel identification number 29-13-3-16-3007-000 and is classified as commercial real property and parcel identification number 29-99-9-99-0211-006 which is classified as commercial personal property. The indicated true cash value of the Subject by method of mass appraisal together with the state equalized value (SEV), assessed value (AV), and taxable value (TV), as confirmed by the Board of Review for Tittabawassee Township, as of each tax year at issue are as follows:

| Parcel Number       | Year | TCV         | SEV       | TV        |
|---------------------|------|-------------|-----------|-----------|
| 29-13-3-16-3007-000 | 2010 | \$1,846,000 | \$923,000 | \$923,000 |
| 29-13-3-16-3007-000 | 2011 | \$1,826,000 | \$913,000 | \$913,000 |
| 29-13-3-16-3007-000 | 2012 | \$1,759,200 | \$879,600 | \$879,600 |

| Parcel Number       | Year | TCV      | SEV      | TV       |
|---------------------|------|----------|----------|----------|
| 29-99-9-99-0211-006 | 2010 | \$20,000 | \$10,000 | \$10,000 |
| 29-99-9-99-0211-006 | 2011 | \$25,000 | \$12,500 | \$12,500 |
| 29-99-9-99-0211-006 | 2012 | \$30,000 | \$15,000 | \$15,000 |

During each of the tax years at issue, the level of assessment for commercial real property and personal property within Respondent's jurisdiction equaled 50% of true cash value determined by method of mass appraisal.

#### V. CONCLUSIONS OF LAW

The general property tax act provides that "all property, real and personal, within the jurisdiction of this state, **not expressly exempted**, shall be subject to taxation." MCL 211.1. (Emphasis added.) Exemption statutes are subject to a rule of strict construction in favor of the taxing authority." *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Township, Washtenaw County*, 416 Mich 340, 348-349; 330 NW2d 682 (1982), *APCOA, Inc v Dep't of Treasury*, 212 Mich App 114, 119; 536 NW2d 785 (1995).

It is also well settled that a petitioner seeking a tax exemption bears the burden of proving that it is entitled to the exemption. The Michigan Court of Appeals, in *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490; 644 NW2d 47 (2002), discussed Justice Cooley's treatise on taxation and held that:

[T]he **beyond a reasonable doubt** standard applies when the petitioner attempts to establish that an entire class of exemptions was intended by Legislature. However, the **preponderance of the evidence** standard applies when a petitioner attempts to establish membership in an already exempt class. (Emphasis added.) *Id.*, pp494-495.

Petitioner asserts that the subject properties are exempt from taxation because Petitioner



is a charitable organization under MCL 211.7o, which provides:

Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

The Michigan standard for exemption is more rigorous than the federal standard: “the fact that a petitioner may qualify for tax exempt status under Federal law, i.e., Section 501(c)(3) of the Internal Revenue Code, creates no presumption in favor of an exemption from property taxes.’ *Ladies Literary Club v City of Grand Rapids*, 409 Mich 748), 752 (n 1) (1940).” See also *American Concrete Institute v State Tax Comm*, 12 Mich App 595, 606; 163 NW2d 508 (1968), which states: “The institute’s exemption from Michigan ad valorem tax is not determinable by its qualification as an organization exempt from income tax under section 501(c)(3) of the internal revenue code of 1954, but by the much more strict provisions of the Michigan general property tax act.”

In *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), the Supreme Court presented the test for determining if an organization is a charitable one under MCL 211.7o (such is the same test for an educational exemption) and required that:

- (1) the real estate must be owned and occupied by the exemption claimant;
- (2) the exemption claimant must be a nonprofit charitable institution;
- (3) the exemption exists only when the building and other property thereon are occupied by the claimant solely for the purpose for which it was incorporated.

Here, there is no dispute that Petitioner owns the Subject and that it is a non-profit corporation organized under Michigan law and recognized as such for federal income tax purposes. This leaves for us the determination of two questions, namely: (1) whether Petitioner “occupies” the Subject solely in furtherance of its exempt purpose, and (2) whether Petitioner a “charitable institution” within the meaning of that term in MCL 211.7o(1). Petitioner argues that it qualifies as a nonprofit charitable institution under MCL 211.7o(1) operating as an adult foster care facility. Respondent asserts that, notwithstanding the fact that Petitioner is incorporated as a nonprofit corporation, is federally tax exempt, and owns and occupies the Subject, no other aspect of Petitioner’s operations distinguishes it from a for-profit enterprise engaged in the same trade or business of providing assisted living services and amenities.

#### A. Occupancy

With respect to factors (1) and (3), Respondent raises a number of concerns regarding the relationship of Leisure Living and the services it provides to Petitioner. In the main, Respondent appears to question whether it is in fact Leisure Living, a for-profit enterprise, as opposed to Petitioner, as the real entity operating the Subject Property and providing the underlying assisted living services. Respondent also raises a question regarding Stone Crest Management LLC, the legal entity that holds the licensure of the facility. Respondent states that “[i]t is clear from the

literature provided by Stone Crest Assisted Living that Leisure Living provides more than accounting services to the facility.” (Res Brief, p 14). The brochure referenced by Respondent states that Stone Crest is “a Leisure Living Managed Community.” (R5). However, it was explained in testimony that this brochure was prepared when Leisure Living was still working for the prior owner and there were bad feelings in the community towards the former tenant. Leisure Living wanted to show that they were at the property and there was a different operator. Petitioner may have continued to use the brochure after they acquired Stone Crest, but only because the brochure was expensive and was used until they ran out. (TR at 89-90).

The address of Baruch, SLS, Inc. and Leisure Living (in Grand Rapids) is not the address of the subject property. Further, there is no indication that Leisure Living conducts business or operates out of the Subject. Mr. Murphy, Leisure Living’s chief financial officer, testified that Petitioner has operated Stone Crest since it was purchased and has a service agreement with Leisure Living “for the accounting and the accounts receivable and the accounts payable and the benefits and those types [of] things . . . but aside from that Baruch has its own operations people . . . and the employees became Baruch employees and the operations took over.” (TR at 33). Further, the Services Agreement specifically disclaims the creation of any sort of partnership or joint venture arrangement between the parties. (R27 p 7). The fact that an organization contracts with third-party, for-profit providers for ancillary services does not, in itself, preclude the organization from being characterized as a charitable institution within the meaning of MCL 211.7o(1). Virtually all charities must contract with for-profit vendors to one degree or another in order to carry on their operations and perform their charitable functions. See J. Colombo, *Hospital Property Tax Exemption in Illinois: Exploring the Policy Gaps*, 37 Loy U Chi LJ 493, 521-22 (2006). Hiring qualified officers and employees and/or engaging qualified service providers is necessary for Petitioner to accomplish its purposes. In this respect, Mr. Murphy indicated that this arrangement reduces Petitioner’s costs, personnel and the need for equipment and software. (TR at 48). He stated that Leisure Living does not do anything other than financial and services work for Petitioner. (TR at 49).<sup>2</sup>

In regard to Stone Crest Management, LLC, the Tribunal finds persuasive Petitioner’s explanation that Petitioner acquired Stone Crest Management, LLC solely to maintain the licensing for the facility, and Petitioner is the sole member of the LLC. (TR at 93-96). Pursuant to this licensing, Petitioner, through its affiliate, is licensed as an adult foster care facility under the Adult Foster Care Facility Licensing Act, 1979 PA 218. There is no indication that Petitioner occupies the assisted living facility known as Stone Crest for anything other than the purposes for which it was incorporated and there is also no indication that either Leisure Living, Stone Crest Management LLC, or any other for-profit entity is operating out of the subject property. Accordingly, we find that Petitioner meets factors (1) and (3).

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<sup>2</sup> We may be more apt to question the arrangement if Leisure Living Management only provided its services to Petitioner – essentially acting as captive service provider. But this is not the case, based on the evidence presented to this Tribunal, as Leisure Living Management provides similar services to 20 other senior living facilities in addition to the nine facilities own by Petitioner and the two that Petitioner manages. (TR p 49).

## B. Charitable Institution

Next, we must decide whether Petitioner is a nonprofit *charitable* institution under factor (2). Petitioner must prove by a preponderance of the evidence that it is a “charitable institution.” In this regard, the Michigan Supreme Court concluded that the “institution’s activities as a whole must be examined.” See *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661; 378 NW2d 737 (1985). Simply serving a “valuable social purpose” does not necessarily qualify a property for an exemption under MCL 211.7o. *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 672; 242 NW2d 749 (1976). Here, we do not question whether Petitioner, through its services and acts, provides a valuable social purpose; it does. Whether such activities are charitable, warranting an exemption from taxation, we discuss below.

Whether an institution is a charitable institution is a fact-specific question that requires examining the claimant’s overall purpose and the way in which it fulfills that purpose. In this regard, the Michigan Supreme Court held in *Wexford, supra*, that several factors must be considered in determining whether an entity is a charitable institution for purposes of MCL 211.7o:

- (1) A “charitable institution” must be a nonprofit institution.
- (2) A “charitable institution” is one that is organized chiefly, if not solely, for charity.
- (3) A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.
- (4) A “charitable institution” brings people’s minds or hearts under the influence of education or religion; relieves people’s bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
- (5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
- (6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year.

Each of these 6 factors is analyzed in detail below in determining whether Petitioner is entitled to an exemption under MCL 211.7o.

### 1. Nonprofit Institution

The parties have stipulated and the evidence demonstrates that Petitioner is a nonprofit organization under both Michigan and Federal law.

## 2. *Organized Chiefly for Charity*

The Michigan Supreme Court established the following definition of “charity”:

[C]harity \* \* \* [is] a *gift*, to be applied consistently with existing laws, *for the benefit of an indefinite number of persons*, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or *otherwise lessening the burdens of government*.

*Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348-349; 330 NW2d 682 (1982). [Emphasis in original.]

As cited above, Petitioner’s Articles of Organization and Bylaws reflect that Petitioner is organized to provide charitable services, home health care services, and senior lifestyle services. Respondent does not dispute that Petitioner is organized for charitable, educational, and religious purposes under its by-laws, but contends that the issue is whether Petitioner provides charity at the Stone Crest facility. (Res Brief, p 8). Respondent argues that Petitioner’s actual policy and practices impose a financial restriction that is not consistent with the requirement that Petitioner’s activities must constitute a “gift.” (Res Brief, p 9).

It is a fundamental principle of law that a “gift” is a voluntary, gratuitous transfer of property by one to another, and that it is essential to a gift that it should be without consideration. See *Cranson v Cranson*, 4 Mich 230 (1856); *Holland Homes v Grand Rapids*, 219 Mich App 384; 557 NW2d 118 (1996); *Commissioner v Duberstein*, 363 US 278 (1960).

Petitioner furnishes its services to its residents pursuant to a Resident Care Agreement. The Resident Care Agreement is a contract as Petitioner offers the resident a home and care under certain terms and conditions, the resident accepts the offer as extended, the resident pays the entrance fees, and promises to pay the monthly fees. See Restatement of Contracts, 2d § 1. The Resident Care Agreement is a legally enforceable, binding promise, imposing a duty on Petitioner to provide its residents with care. All of Petitioner’s residents pay some amount for their care. When a resident receives assisted living services for a fee, consideration is passed. The services Petitioner provides in this regard therefore do not qualify as a “gift” in the traditional sense as the benefit received by the residents is in return for consideration. As the benefit is not a gift, it cannot be charitable. See *Holland Homes, supra* at 400.

Petitioner contends that it offers a charitable benefit through its reduced rate and income-based fee program. Petitioner asserts that it charges less than market rates for the assisted living services it provides, and that this differential should be considered a “gift.” However, Petitioner offered no documentary evidence regarding the actual rates charged at comparable assisted living facilities in the area. Whether a differential is present as between comparable facilities and the \$3,200 per month Petitioner charges, to the extent it exists, represents a “gift” or is more the product of competitive market pricing, is supposition on the record before this Tribunal. We also note that the record shows Petitioner ran accounts receivable of \$120,072, representing monies

owed by residents, both on delinquent accounts and on accounts receiving discounted monthly rent. While Petitioner has apparently never exercised its legal rights to seek collection of these amounts, Petitioner has also never waived its legal rights either. Nor do we view Petitioner's "income based program," standing alone, as a "gift." Instead, it is more in the nature of a contractual allowance, i.e., the difference between what Petitioner charges and what payments it accepted. Further, Petitioner conditions eligibility into its income-based program on the resident living at the facility and having made a minimum of twenty-four (24) full monthly rent payments, applying for and being determined eligible for Medicaid, and furnishing copies and information about all available income. Although Petitioner's written policy sets the maximum number of rooms for the income-based program at 25 percent, Petitioner in practice, however, has extended this program to as much as 40 percent of its residents who cannot pay the regular room rate. (TR at 101). Petitioner is under no contractual obligation to offer participation in this program and is certainly under no compulsion to offer it to more than the maximum set in its policy, and yet it has. Petitioner claims this is part of its charitable purpose because if the income-based program was not in place, those residents "would end up going to a much more restrictive setting, they would most likely end up in a nursing home . . ." (TR at 101). To the extent that Petitioner has exceeded participation in this program, beyond its own policy limits, the excess may be fairly characterized as gratuitous. Petitioner has likewise adopted this view.

Petitioner argues that the amount of discounted care it provides to its residents at the facility is not an accurate reflection of the scope of its charitable use of the property. In its view, its accommodation of Medicare and Medicaid residents should also be taken into account because the payments it receives for assisting such residents do not cover the full costs of its care. Petitioner also points to its participation in the MI Choice Program. Here we note that participation in Medicare and Medicaid and/or the MI Choice Program is not mandatory. Accepting Medicare and Medicaid residents or participating in the MI Choice Program is optional. While it is consistent with Petitioner's mission, it also serves Petitioner's financial interests. In exchange for agreeing to accept less than its "established" rate, Petitioner receives a reliable stream of revenue. Participation in such programs may also enable Petitioner to qualify for favorable treatment under federal tax law, which is governed by different standards.

Mindful of such considerations, however, our appellate courts have held that discounted care provided to Medicare and Medicaid patients is considered charity for purposes of assessing eligibility for a property tax exemption. See *Redford Opportunity House v Redford Twp*, unpublished opinion per curiam of the Court of appeals, issued January 27, 2004 (Docket No. 241718). The *Redford Opportunity House* Court affirmed the Tribunal in holding that a licensed facility for the developmentally disabled was exempt. Redford Township argued that the claimant did not provide "a gift" to its residents because the residents paid for their services through government benefits received by the claimant on its residents' behalf. Citing *Huron Residential Service Youth, Inc v Pittsfield Charter Twp*, 152 Mich App 54; 393 NW2d 568 (1986), the Court of Appeals found that "there was a gift for the benefit of the residents because the state, not the residents, paid for the services rendered." As a result, we are constrained to conclude that shortfalls from Medicaid and Medicare payments are a form of "gift" and may constitute a form of "charity" as applied to Petitioner's operations of the facility. See also

*Wexford, supra*, at 216-217; *McLaren Regional Medical Center v Owosso (On remand)*, 275 Mich App 401, 417; 738 NW2d 777 (2007).

To the extent that this “gift” element of Petitioner’s “charity” extends from “detached and disinterested generosity” and is given out of “affection, respect, admiration, charity or like impulses” [*Commissioner v Duberstein*, 363 US 278, 285 (1960)], Petitioner’s Articles of Incorporation contain the following provisions in furtherance of its charitable purposes. Article VI provides that “[n]o part of the net earnings of the organization shall inure to the benefit of, or be distributable to its member’s, trustees, officers, or other private persons . . . .” except that Petitioner may “pay reasonable compensation for services rendered and . . . make payments and distributions in furtherance of the purposes of set forth in the purposes clause hereof. Additionally, Section 1.01 of Petitioner’s corporate bylaws reinforce that Petitioner has been organized for the following purpose:

1. To provide home health care services;
2. To provide other senior lifestyle services to the general public;
3. To provide charitable services as described under the Internal Revenue Service Home for the Aged guidelines; and,
4. Said organization is organized exclusively for charitable, educational and religious purposes . . . .

An organization is not organized chiefly, if not solely, for charity unless its assets are dedicated to a charitable purpose. An organization’s assets are dedicated to a charitable purpose if, for example, upon dissolution, the assets would, by reason of a provision in the organization’s articles be distributed for one or more charitable purposes, or to the federal government, or a state or local government for a public purpose. Similarly, if the assets would be distributed by a court to another organization to be used in a manner as in the judgment of the court that will best accomplish the general purposes for which the dissolved organization was organized, the assets are properly dedicated. Article VII of Petitioner’s Articles of Organization meet this requirement.

In light of the consistent statements of organizational purpose to provide home health care services and senior lifestyle services for which it was organized, and to “operate exclusively for charitable, scientific, and educational purposes,” coupled with the fact that Petitioner makes “gifts” of its “charity,” this Tribunal concludes that Petitioner satisfies the requirement that it be organized chiefly, if not solely, for charity. *Wexford, supra* at 215 (observing that Wexford Medical Group was “organized as a charitable institution as reflected in its statement of purpose and bylaws”); *Pheasant Ring v Waterford Twp*, 272 Mich App 436, 440; 726 NW2d 741 (2006) (considering articles of incorporation in determining whether the petitioner had organized for charity), reversed on other grounds; *McLaren Regional Medical Center, supra* at 413.

### 3. *Discriminatory Basis*

In *Wexford*, at 213, our Supreme Court explained that:

In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. *Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group.* [Emphasis added.]

In this case, the Tribunal finds that Petitioner offers its charity on a discriminatory basis. Petitioner purports to serve the general public and aged populations by providing home health services and other senior lifestyle services. Petitioner asserts that its services are available to all “regardless of their ability to pay” and that “a large percentage of the rent payments made in any given year are discounted charitable rents.” (TR at 74). Petitioner does not discriminate on the basis of any protected class (race, color, creed, religion, national or ethnic origin, sex, sexual orientation, gender identity, or physical ability). That, however, does not make its policies any less discriminatory.

Petitioner appears to have placed obstacles in the way of those who needed and may have availed themselves of charity. Petitioner first conditions eligibility to existing residents having made a minimum of twenty-four full monthly rent payments, and being determined eligible for Medicaid. As a result, Petitioner’s charity is not freely available to the general public and aged population, but to a smaller subset, its existing residents who have first met certain conditions. We cannot tell from the record whether the general public knows of the program’s existence.

Petitioner stated that the admission process does not ask for any financial information. While this may be true, it is also true that Petitioner’s stated monthly rate was quoted at \$3,200 per month, and Petitioner does not offer free services and has not admitted any resident for no fee; as a result some measure of discrimination or self-selection occurs *ab initio*. It is understood that Petitioner is not able to provide reduced rent to every resident who applies for it and it is not offered on a first-come, first-serve basis. Petitioner requires that a resident seeking participation in its income based program be approved for Medicaid. (TR at 113). This is because, according to Petitioner, Medicaid eligible residents have already been determined by a separate agency not to have funds available to pay the full rate. Further, by written policy, Petitioner does extend its income based programs to residents who have not first made full payment for the 24 consecutive months and not admit new residents directly on its income based program, although there have been accommodations made to policy on an ad-hoc basis. (TR at 100). That said, the actual decision making process for making such departures from its stated policy was not explained at the hearing. We recognize that Petitioner has extended participation in this program beyond the policy’s state maximum to as much as 40 percent of its resident population who cannot pay the regular room rate. Yet, there is no guarantee of its availability to all who seek it, and particularly, in the case of an individual seeking such “charity” when the 25 percent threshold has been exceeded, too speculative.

The mere process of selecting residents who will receive reduced rent requires some level of discrimination in that a choice must be made from the group Petitioner purports to serve. *Wexford* clearly holds that charities can exist to serve a particular group or type of person.

However, within these groups, charities cannot discriminate by “choosing who, among the group it purports to serve, deserves the services.” *Id* at 215. Charging fees and rendering benefits to persons not poverty-stricken does not destroy the charitable nature of an organization, but this is true only to the extent that the organization admits persons who need and seek the benefits offered but are unable to pay. See *Wexford, supra* at 213. Accordingly, we find that Petitioner does not meet factor (3), as the “charity” is being offered on a discriminatory basis.

#### 4. Charitable Acts

Respondent argues that “merely serving a ‘valuable social purpose’ does not necessarily qualify a property for an exemption under MCL 211.7o.” *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 672; 242 NW2d 749 (1976). (Res Brief, p 11). We find that Petitioner does more than merely serve a valuable social purpose. Petitioner offers religious and spiritual support services to the residents at Stone Crest, as well as worship services and Bible studies, which would bring their minds or hearts under the influence of religion. (R5, R8). Petitioner also relieves people’s bodies from disease, suffering, or constraint, by providing meals, housekeeping, and social activities to the residents at Stone Crest, as well as medication assistance and monitoring of medical conditions and assistance with activities of daily living that residents are unable to perform on their own. (Pet Brief, p 11-12; R5, R8). It can be concluded on this record that providing adult foster care services to individuals who suffer with dementia and/or Alzheimer's related conditions, developmental disabilities, psychiatric disabilities, physical disabilities, and/or suffer from traumatic brain injuries relieve persons from “disease, suffering or constraint” and also assists persons to “establish themselves for life,” which are two charitable purposes set forth in case law. *Wexford*, 211.

#### 5. Charge for Services

The fact that Petitioner charged its residents rent does not disqualify it from the exemption. See *Wexford, supra* at 215, (“A ‘charitable institution’ can charge for its services as long as the charges are not more than what is needed for its successful maintenance.”). Here, one of Petitioner’s stated purposes is “[t]o provide charitable services as described under the Internal Revenue Service Home for the Aged guidelines.” To this end, the Internal Revenue Service recognized in Rev Rul 72-124 that an organization that devotes its resources to the operation of a home for the aged will qualify for charitable status if it operates in a manner designed to satisfy three primary needs of aged persons for (1) housing, (2) health care, and (3) financial security.

“Financial security” refers to an elderly person’s need for protection against financial risks associated with advanced years. Where an organization commits to a written or “in-practice” policy of not evicting persons who become unable to pay regular charges after being granted admission, the need of financial security is partially met. “Financial security” is also met through an organizations fee structure, where the organization operates so as to provide its services to the elderly at the lowest cost possible, taking into account the organization's debt payments, financial reserves to insure the future life care of residents and appropriate community expansion needs, and the existing resources of the organization. Here we should considered the



amount of any fee—whether entree fee, founder's fee, or monthly fee—must be considered in relation to all items of expense (including indebtedness and reserves) in order to determine if the organization is operating at the lowest possible cost. Where fees are set actuarially at a level to make little to no profit beyond the reasonably anticipated needs for the institutions successful maintenance, and whether any profits that are made are used to reduce the costs of operating the facility, evidence would help to establish that the fee/cost structure are within the bounds suggested in *Wexford, supra*. Such evidence would also enable this Tribunal to ensure that the commercial aspects of Petitioner's operation do not become more important than its charitable mission.

Here, fees charged vary with the residence, room size, and the types of services needed by the residents. Respondent contends that Petitioner has offered no support for its claim that comparable assisted living facilities in the area charge \$3,700 or more per month, while Stone Crest rates are \$3,200 or less. The Tribunal agrees. Petitioner has submitted no documentary evidence regarding the actual rates charged at comparable assisted living facilities in the area. Petitioner has offered some evidence suggesting that Stone Crest was not bringing in sufficient revenue to cover its expenses for the tax years under appeal. Excluding the funds expended by Petitioner for the initial purchase and subsequent payoff of the land contract, in 2010 Petitioner paid \$80,000 to Stone Crest, in 2011 the amount was \$120,000, and in 2012 the amount was \$45,000. (P23; TR at 26-28). Such losses can be discounted, however, as they occur in the early stages of Petitioner's operation of the facility. Petitioner presented no detail evidence as to its cost structure or how developed and set its fee structure. This while we have no quarrel with the fact that Petitioner charges fees for its services, we cannot say whether the fees charged are not more than what is needed for its successful maintenance. We find that Petitioner has not met its burden of proof on this factor.

#### 6. Overall Nature of the Organization

Finally the Court in *Wexford* stated that “[a] ‘charitable institution’ need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a ‘charitable institution’ regardless of how much money it devotes to charitable activities in a particular year.”<sup>3</sup> *Wexford*, at 215. This factor, implies that a charitable institution may conduct what looks like a commercial activity but still be entitled to charitable exemption so long as its activities as a whole are conducted in a manner that does not significantly advance noncharitable purposes. Were we to conclude that although Petitioner is generous and performs good work, this Tribunal is simply not convinced within the requisite standard of proof, that Petitioner's overall nature is charitable. Instead, Petitioner conducts its activities in a commercial manner. The primary indicator of the commercial nature

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<sup>3</sup> This factor has a colloquial “I know it when I see it” quality made famous by Justice Potter Stewart in *Jacobellis v Ohio*, 378 US 184 (1964), as the *Wexford* Court attempts to categorize an observable fact, an institution's overall nature being “charitable,” although the category is subjective and lacks clearly defined parameters.

of Petitioners activities is its direct competition with other assisted living facilities both within the market area of the Subject and its other locations. Competition with commercial firms is strong evidence of the predominance of non-exempt commercial purposes. This competition, is reflected in Petitioners market level pricing structure, and distribution of promotional material that contained commercial marketing messages. Other indicators of Petitioner's commercial hue were its lack of charitable solicitation plans, lack of charitable donations, stated internal policies, and that its charity is not available to all persons who need and seek the benefits offered but are unable to pay and, finally, the discriminatory nature by which its charity is distributed. Though the Tribunal agrees that an internal operating loss like that suffered by Petitioner with respect to the Subject is an indicator of lack of a commercial nature, such losses can be discounted when they occur in the early stages of operations. The bottom line here is that an exempt claimant must operate a manner as to primarily advance its charitable purpose, in this case, of providing for the unique needs of the elderly. Here, Petitioner's overall manner of operations suggests that its primary objective was commercial in nature.

We have carefully considered all remaining arguments made by the parties for a result contrary to that expressed herein, and, to the extent not discussed above, we consider them to be irrelevant or without merit.

## VI. JUDGMENT

IT IS ORDERED that Parcel Nos. 29-13-3-16-3007-000 and 29-99-9-99-0211-006 **shall not** be granted a charitable exemption under MCL 211.7o for the 2010, 2011, and 2012 tax years.

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 properties' charitable exemption for the tax years at issue as provided in this Final Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

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, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09% for calendar year 2012, (iv) after June 30, 2012, through December 31, 2013, at the rate of 4.25%, and (v) after December 31, 2013, and through June 30, 2014, at the rate of 4.25%.

This Opinion resolves the last pending claim and closes this case.

By: Paul V. McCord

Entered: Dec. 20, 2013