The Moorings of Leelanau LLC,
Petitioner,

v

City of Traverse City,
Respondent.

MICHIGAN TAX TRIBUNAL

MOAHR Docket No. 19-001535

Presiding Judge
Marcus L. Abood

ORDER GRANTING PETITIONER'S MOTION TO AMEND

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING RESPONDENT'S REQUEST FOR COSTS

FINAL OPINION AND JUDGMENT

INTRODUCTION

On December 13, 2019, Respondent filed a motion requesting that the Tribunal enter summary judgment in its favor in the above-captioned case. More specifically, Respondent contends that it properly uncapped the property's taxable value and that no exclusion to a transfer of ownership applies.

On January 17, 2020, Petitioner filed a response to the Motion and a motion to amend the Petition. In its response, Petitioner contends that there was no transfer of ownership because the members of the LLC merely withdrew. Thus, there was no conveyance from one to another. In the Motion, Petitioner contends that, when it filed the Petition, it was not represented by counsel but has now engaged counsel. It wishes to set forth additional grounds for relief, which are not futile and do not prejudice Respondent.

Respondent has not filed a response to Petitioner's Motion.

The Tribunal has reviewed Respondent's Motion, Petitioner's response, Petitioner's Motion, and the evidence submitted and finds that granting Petitioner's Motion to Amend and granting Respondent's Motion for Summary Disposition is warranted at this time.

RESPONDENT'S CONTENTIONS

In support of its Motion, Respondent contends that uncapping the taxable value of the subject properties was proper under MCL 211.27a(6)(h). A transfer of ownership under MCL 211.27a(6)(h) occurred because two individuals conveyed an interest in Petitioner greater than 50%. The exception to transfer of ownership under MCL 211.27a(7)(m) does not apply because Petitioner is comprised of another LLC and two individuals. Petitioner and the other LLC are unrelated, which negates the exception. The exclusion under MCL 211.27a(7)(h) also does not apply because specific monetary consideration was specified by the court for the transfer.

PETITIONER'S CONTENTIONS

In support of its response, Petitioner contends that Petitioner's members did not own the property, they only owned membership interests. Thus, there was no conveyance of title or present interest in the property. Uncapping under the facts of this case would be inconsistent with MCL 211.27a(6)(h). The purpose of this section is to prevent end-running the uncapping rules by selling stock in real estate holding companies. That concern does not exist here because the subject properties never changed hands. The two members that left the LLC did not "convey" their ownership interests; they merely withdrew from the LLC. The Operating Agreement requires a

two-step process before a transfer of membership rights could occur. Membership interests are not transferred unless an agreement is executed elevating the assignee to a substitute member. MCL 211.27a(6)(h) cannot be constitutionally applied to this case because there was no transfer of property rights. Summary disposition should be granted to Petitioner under MCR 2.116(I)(1).

STANDARD OF REVIEW

There is no specific Tribunal rule governing motions for summary disposition. Therefore, the Tribunal is bound to follow the Michigan Rules of Court in rendering a decision on such motions.[1] In this case, Respondent moves for summary disposition under MCR 2.116(C)(10). Summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and must identify those issues regarding which the moving party asserts there is no genuine issue of material fact. Under subsection (C)(10), a motion for summary disposition will be granted "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law."[2]

The Michigan Supreme Court has established that a court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed by the parties in the light most favorable to the non-moving party.[3] The moving party bears the initial burden of supporting its position by presenting its documentary evidence for the court to consider.[4] The burden then shifts to the opposing party to establish that a

[1] See TTR 215.
[2] *Lowrey v LMPS & LMPJ, Inc,* 500 Mich. 1, 5; 890 NW2d 344 (2016) (citation omitted).
[3] See *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citing MCR 2.116(G)(5)).
[4] See *Neubacher v Globe Furniture Rentals, Inc*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

genuine issue of disputed fact exists.[5] Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[6] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[7]

MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

CONCLUSIONS OF LAW

The Tribunal has carefully considered the Motions and finds that granting Petitioner's Motion to Amend and granting Respondent's Motion for Summary Disposition under MCR 2.116(C)(10) is warranted.

With respect to Petitioner's Motion, the Tribunal finds that a petition "may be amended or supplemented by leave of the tribunal only."[8] Nevertheless, "leave to amend or supplement shall be freely given when justice so requires."[9] The Michigan Supreme Court has held that "a motion to amend should be granted unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory tactics, (3) repeated failure to cure deficiencies by amendment previously allowed, (4) undue prejudice to the opposing party, or (5) futility."[10] No such reasons exist in this case, and

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[5] *Id.*
[6] See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[7] See *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).
[8] TTR 221(1).
[9] *Id*.
[10] *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 447 (2006) (citation omitted).

the Tribunal is satisfied that granting Petitioner's Motion will facilitate the efficient administration of justice.

As to Respondent's Motion, both parties assert that there are no material facts in dispute.[11] Michigan's Constitution provides that "[w]hen 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."[12] The Legislature implemented this provision in MCL 211.27a, which states that "[u]pon a transfer of ownership of property after 1994, the property's 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."[13] This is commonly referred to as "uncapping" a property's taxable value. Section 6 of MCL 211.27a defines transfer of ownership as "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."[14] That section also provides that certain transactions are included, without limitation, in the definition of transfer of ownership. Pertinent to this case, transfer of ownership includes certain transactions concerning legal entities:

> Except as otherwise provided in this subdivision, a conveyance of an ownership interest in a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity if the ownership interest conveyed is more than 50% of the corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity.[15]

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[11] See Respondent's Motion for Summary Disposition, December 13, 2019, p 2.; Petitioner's Response to Motion, January 17, 2020, p 5.
[12] Const 1963, art 9, § 3.
[13] MCL 211.27a(3).
[14] MCL 211.27a(6).
[15] MCL 211.27a(6)(h).

Based on this statutory section, the Tribunal concludes that the Legislature specifically intended that if more than 50% of the ownership interests in an LLC are conveyed, the transaction qualifies as "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."[16] Thus, although Brick and Lockwood did not have an ownership interest in the subject properties, if they conveyed more than 50% of their membership interests in Petitioner, the transaction was a transfer of ownership.[17]

The Tribunal further concludes that a conveyance under MCL 211.27a(6)(h) occurred despite Petitioner's characterization that Brick and Lockwood merely "withdrew" from the LLC. As explained by the Michigan Court of Appeals in *Zenti v City of Marquette,*[18] a conveyance is a "voluntary transfer of a right or of property," and transfer means to "convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of."[19] Here, Brick and Lockwood each had a 29% "Company Percentage" in Petitioner, and MI Moorings, LLC (MIM) had 42%.[20] Brick and Lockwood had a dispute with MIM, resulting in a lawsuit.[21] The parties to that case thereafter entered into a settlement agreement (Settlement).[22] That agreement provided, in part, that "[i]mmediately, Brick and Lockwood's Membership Interest in TML shall be relinquished, their roles as TML

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[16] MCL 211.27a(6).
[17] See also *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694; 714 NW2d 392 (2006) (concluding there was a transfer of ownership because there was a transfer of the membership interests in the LLC).
[18] *Zenti v City of Marquette*, ___ Mich App ___; ___ NW2d ___ (2019) (Docket No. 344615).
[19] *Id*. at ___; slip op at 5 (citation omitted).
[20] Exhibit A to Operating Agreement, October 20, 2014, attached as exhibit 1 to Petitioner's Response, pdf p 48.
[21] See Settlement, Wavier, and Release (Settlement), December 29, 2017, attached as exhibit 3 to Petitioner's Response, ¶ 4, p 2.
[22] See Settlement.

Managers resigned, and they shall have no further rights or duties in relationship to TML or to its remaining Member MIM except as provided in this Agreement."[23] Another portion of the Settlement stated that Brick and Lockwood relinquished their membership interests in Petitioner and would "receive payments totaling $2,575,000 ('Settlement Amount'), plus accrued interest. "[24] Of that amount, "[t]he first $1,875,000 paid to Brick and Lockwood shall be deemed consideration for the purchase of their Membership Interest."[25] Further, the parties to the Settlement entered into a Consent of Members pursuant to Article 11.1(m) of the Operating Agreement.[26] The Consent of Members provided, in pertinent part, that "[p]ursuant to Article 7 of the Operating Agreement, Brick and Lockwood hereby assign the entirety of their Membership interest, including both any Class A Membership Interest and any Class B Membership Interest, to TML."[27] According to Petitioner's Operating Agreement, "the term 'assign' means to sell, transfer, assign, gift, pledge or otherwise dispose of or encumber all or any portion of a Membership Interest. All derivations of the term 'assign' shall have similar meanings, as is appropriate."[28] Thus, even looking at the documentary evidence in the light most favorable to Petitioner, and although some of the language used in the Settlement and Consent of Members describes Brick and Lockwood "withdrawing" from the LLC, the result of the Settlement was that they voluntarily transferred their membership interests

[23] Settlement ¶ 3(A)(ii), p 5.
[24] Settlement, ¶ 1(b), p 2.
[25] Settlement, ¶ 2(I)(i)(A), p 5.
[26] Consent of Members, April 3, 2018, attached as exhibit 4 to Petitioner's Response.
[27] Consent of Members, ¶ 4(a), p 2.
[28] Operating Agreement, art 7.6, p 20. Brick and Lockwood also represented that "they have full authority to *transfer their membership interest* without any attachment, restriction, encumbrance, lien or claim of any third party whatsoever." Settlement, ¶ 6(A)(i), p 10 (emphasis added).

from themselves to MIM, i.e. "from one to another."[29] Brick and Lockwood's combined interest was 58%,[30] and thus the conveyance uncapped the subject properties' taxable values under MCL 211.27a(6)(h). And given that the result of the settlement agreement resulted in MIM becoming the only remaining member of Petitioner, the Tribunal is unpersuaded that any failure to adhere to the Operating Agreement changes the result of the transaction for purposes of uncapping.[31]

The Tribunal is also unpersuaded that uncapping would be inconsistent with the purpose of MCL 211.27a(6)(h). Petitioner cites the Tribunal's opinion in *Burlington Prop, LLC v City of Ann Arbor*[32] to argue that the statute's purpose was to prevent taxpayers from "end-running" uncapping rules. There, the Tribunal considered whether the transfer of a legal entity that did not own the property outright, but instead owned the company that owned the property, constituted a transfer under MCL 211.27a(6)(h).[33] In

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[29] See *Zenti* at ___; slip op at 5.
[30] Exhibit A to Operating Agreement, Petitioner's Response, pdf p 48.
[31] With respect to assignments, the Operating Agreement provided:

> Subject to the remaining provisions of this Section 7.2, a Member may assign all or any portion of his, her or its Membership Interest at any time. Notwithstanding the immediately preceding sentence, an assignment of a Membership Interest does not entitle the assignee to participate in the management and affairs of the Company or to become, or exercise any rights of, a Member. An assignment of a Membership Interest merely entitles the assignee to receive, to the extent assigned, distributions to which the assigning Member would be entitled pursuant to this Agreement. In no event shall the Company, any Manager or any other Member have any obligation whatsoever to recognize an assignment of a Membership Interest unless the assignee has been admitted, in accordance with Section 7.2(b) below, as a substitute Member in place of the assigning Member to the extent of the Membership Interest assigned. Until such time as the assignee has been so admitted, the Company, the Manager and the other Members may consider the assigning Member to be the owner of his, her or its Membership Interest for all purposes relevant to the Articles of Organization, this Agreement and the Michigan Act, and all distributions relating to the assigned Membership Interest may be made to the assigning Member, it being his, her or its responsibility to forward the appropriate portion of such distributions to the assignee. [Operating Agreement, ¶ 72(a), p 18.]

[32] *Burlington Prop, LLC v City of Ann Arbor*, Docket No. 299442 (November 16, 2004).
[33] *Id*.

deciding this issue, the Tribunal explained that Michigan's statute was patterned after California's:

> It appears as though the first case to interpret California's statute was *Sav-On Drugs, Inc v County of Orange*, 190 Cal App 3d 1611; 236 Cal Rptr 100 (1987). In that case, the California Court of Appeals held [a]s a practical matter, corporate realty can be acquired in various ways. The land may be obtained directly from the corporation by deed, or the corporation itself may be acquired by a stranger who purchases its stock for cash ... [The Legislature] rather obviously determined reassessments may not be avoided under article XIII A via the simple expedient of disguising transfers of realty by means of selling all or a majority of the stock in real estate holding companies. In other words, the Legislature has determined article XIII A was meant to apply in the case of "true" changes in ownership but not "paper" ones. *Id*. at 1617-1618.[34]

This reasoning merely acknowledges that the transfer of the ownership interest in a legal entity, results in an uncapping. This case does not stand for the proposition that a transaction that otherwise falls within MCL 211.27a(6)(h) is somehow exempted because the parties had no intention to circumvent uncapping rules when there is a "true" change in ownership.

Petitioner also argued in the Petition that the transaction falls into an exclusion from transfers of ownership. Section 7 provides that certain transactions are not transfers of ownership.[35] A transfer of ownership also 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."[36] In *TRJ & E Properties, LLC v City of Lansing*,[37] the Court of Appeals examined the meaning of "commonly controlled." It adopted the

[34] *Id*. (alteration in original).
[35] See MCL 211.27a(7).
[36] MCL 211.27a(7)(m).
[37] *TRJ & E Props, LLC v City of Lansing*, 323 Mich App 664; 919 NW2d 795 (2018).

definition of "under common control" contained in MCL 211.9o(7), which relates to personal property:

> "Control", "controlled by", and "under common control with" mean the possession of the power to direct or cause the direction of the management and policies of a related entity, directly or indirectly, whether derived from a management position, official office, or corporate office held by an individual; by an ownership interest, beneficial interest, or equitable interest; or by contractual agreement or other similar arrangement.[38]

Here, prior to the Settlement, Brick and Lockwood owned 58% of the membership interests in Petitioner and were its managers.[39] Brick and Lockwood thus control Petitioner prior to the Settlement. It is undisputed that afterward, MIM owned 100% of the membership interests and Brick and Lockwood were no longer managers.[40] Thus, Brick and Lockwood had the power to direct the management of Petitioner prior to the Settlement Agreement, but did not afterward, and Petitioner was not under common control. Accordingly, MCL 211.27a(7) does not apply.

Respondent also argues that the transaction is not excluded under MCL 211.27a(7)(h). That section states that a transfer of ownership does not include "[a] transfer pursuant to a judgment or order of a court of record making or ordering a transfer, unless a specific monetary consideration is specified or ordered by the court for the transfer."[41] The Tribunal agrees because, as explained above, Brick and Lockwood were given "specific monetary consideration" in exchange for their membership interests in Petitioner.

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[38] *Id*. at 672-673.
[39] Operating Agreement, art 5.1, p 10; Exhibit A to Operating Agreement, pdf p 48.
[40] See Consent of Members, ¶ 4(a), p 2 (assigning Brick and Lockwood's membership interests to MIM).
[41] MCL 211.27a(7)(h).

Although the Tribunal concludes that a transfer of ownership occurred, it concludes that a partial uncapping is appropriate. Specifically, only 58% of the ownership interests in Petitioner "transferred," and thus the remaining 42% shall remain capped. Respondent shall recalculate the taxable values according to the following formula: (2018 taxable value X .42 X 1.021)[42] + (2019 assessed value x .58). With respect to Respondent's request for costs and attorney fees, "[t]he granting of costs and attorney fees are within the discretion of the Tribunal" and the Tribunal, in exercising such discretion, generally looks to whether a claim or defense was frivolous or imposed for any improper purpose.[43] The Tribunal finds no such concerns here. As such, it concludes that Respondent has not shown good cause to award it costs and attorney fees.

JUDGMENT

IT IS ORDERED that Petitioner's Motion to Amend is GRANTED.

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

IT IS FURTHER ORDERED that Respondent's request for costs is DENIED.

IT IS FURTHER ORDERED that Respondent shall recalculate the subject properties' taxable values according to the formula above.

This Final Opinion and Judgment resolves the last pending claim and closes the case.

[42] 1.021 is the 2018 inflation rate multiplier set by the State Tax Commission.
[43] See TTR 209(1), MCL 24.323, TTR 215, and MCR 1.109(E)(5) and (6).

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.[44] 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.[45] 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 demonstrating that service must be submitted with the motion.[46] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[47]

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."[48]

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[44] See TTR 261 and 257.
[45] See TTR 217 and 267.
[46] See TTR 261 and 225.
[47] See TTR 261 and 257.
[48] See MCL 205.753 and MCR 7.204.

A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[49] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[50]

By 

Entered: April 20, 2020
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[49] See TTR 213.
[50] See TTR 217 and 267.