STATE OF MICHIGAN

COURT OF APPEALS

525 REDEVCO, INC., Petitioner-Appellee,	UNPUBLISHED May 28, 2013
v DEPARTMENT OF TREASURY, Respondent-Appellant.	No. 308077 Michigan Tax Tribunal LC No. 00-332707

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

In this dispute over tax liability under the State Real Estate Transfer Tax Act ("SRETTA" or "the Act"), MCL 207.521 *et seq.*, respondent, Department of Treasury, appeals as of right the Michigan Tax Tribunal's order granting summary disposition to petitioner, 525 Redevco, Inc., and denying respondent's motion for summary disposition associated with a 2005 warranty deed transferring property from petitioner to the state of Michigan. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioner acquired real property located at 525 West Allegan Street in Lansing, Michigan, on August 14, 2000. On the same day, petitioner and the state of Michigan ("the State") entered into a lease for the property. Shortly thereafter, petitioner obtained financing through what is known as certificates of participation ("COPs") to construct and improve the premises at 525 West Allegan. The State's rent payments for the leased property acted as security for the COPs, which were officially issued based on a trust agreement. This trust agreement specifically assigned all of petitioner's rights to the State's rent payments to the trustee for the benefit of the COPs investors.

The lease between petitioner and the State provided the State with two exercisable options. First, the State had the option to purchase the leased property from petitioner at the end of the twenty-five-year lease for nominal consideration of $1. The lease specifically reads:

> (a) In consideration for the State remaining in possession of the Leased premises for the full twenty-five (25) year term of the Lease, the State may acquire fee title to the Premises and all rights, title and interest presently held and subsequently acquired therein by the Lessor for one dollar ($1.00) at the end of the Lease term. The State may exercise the option to acquire by giving the Lessor

> written notice at least one hundred eighty (180) days before the Lease expires of the State's intent to exercise the option to acquire provided in this Article.

Second, the State had the option to prepay rent to acquire title:

> (b) *The State shall also have the option anytime after Substantial Completion and possession by the State to prepay rent from any legally available source of monies for the purpose of acquiring fee title to the Premises.* The amount of prepaid rent necessary to acquire fee title is equal to the "Pay Off Balance" set forth in Enclosure H. If the rent is prepaid before the tenth (10th) year of possession, the Lessor must satisfy the conditions for a defeasance under the Trust Indenture. The State shall exercise this option to acquire by giving the Lessor sixty (60) days written notice of its intent to exercise its option to acquire the property by prepaying rent. Within thirty (30) days after the State provides written notice of its intent to exercise its option to acquire the property by prepaying rent, the Lessor is obligated to give notice of its intention to redeem or defease the Certificates. *The Lessor shall use the prepaid rent to redeem or defease the Certificates.* Any such rent repayment by the State and redemption or defeasance of the Certificates by the Lessor shall be accomplished in the manner and at such times as provided under the terms of the Certificates. *Upon prepayment of rent by the State and redemption or defeasance of the Certificates by the Lessor, the Lessor shall immediately transfer title to the State pursuant to this Article.* [Emphasis added.]

If the State chose to exercise the second option, petitioner was required to use all of the prepaid rent to defease the COPs. In the event that the State exercised either of these options, the lease provided that petitioner must convey a warranty deed to the State for the leased property.

On October 1, 2004, the State notified petitioner of its intent to exercise its option to prepay rent. Petitioner initiated litigation to determine, among other things, whether the transaction would require petitioner to pay a tax under SRETTA. The parties agreed to a settlement, which included language that the State took the deed "without prejudice to the State's right to subsequently assess or attempt to collect transfer tax on the Property. . . ." On April 26, 2005, petitioner conveyed a warranty deed to the State for the 525 West Allegan property. The State paid $122,363,189.67 in escrow for the payment of the COPs. At this time, a closing statement was given to the parties that explicitly stated that no funds were paid to petitioner for the sale of the property.

Respondent then began the process of determining whether petitioner owed a transfer tax under SRETTA. Respondent determined that petitioner did owe a tax and issued Final Assessment O094100. The assessment indicated that petitioner owed $407,530.50 in tax, $101,882.63 in penalties, and $53,902.32 in interest.

After receiving the assessment, petitioner sought relief from the Michigan Tax Tribunal, claiming that the transaction was exempt from taxation under the Act. Both parties moved the tribunal for summary disposition under MCR 2.116(C)(10). The tribunal issued a final opinion

and judgment granting petitioner's motion for summary disposition, denying respondent's motion for summary disposition, and cancelling the assessment.

II. STANDARD OF REVIEW

We review de novo the tax tribunal's decision on a motion for summary disposition. *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 236; 818 NW2d 489 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

The sole issue on appeal is whether petitioner's transfer of the warranty deed to the State in 2005 triggered the application of SRETTA, subjecting petitioner to pay tax on the transfer. SRETTA states in pertinent part:

> (1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:
>
> > (a) 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 property or any interest in the property.
> >
> > (b) Deeds or instruments of conveyance of property or any interest in property, for consideration.
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> * * *
>
> (2) The person who is the seller or grantor of the property is liable for the tax imposed under this act. [MCL 207.523.]

However, SRETTA exempts certain written instruments and transfers from the tax, including "a written instrument in which the value of the consideration for the property is less than $100.00." MCL 207.526(a). According to SRETTA, "value" means "the current or fair market worth in terms of legal monetary exchange at the time of the transfer. 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. . . ." [MCL 207.522(g).]

The crux of this case is whether a COPs arrangement is a permissible form of tax-exempt financing under SRETTA. Petitioner alleges that it is tax exempt under SRETTA because petitioner received no consideration at the time of the warranty-deed transfer. Respondent argues that petitioner received a benefit when the State extinguished petitioner's liability under the COPs agreement, which is sufficient consideration to make the transfer taxable. The tribunal sided with petitioner, deciding that there was no consideration given because petitioner never received any monetary benefit at the time of the transfer.

Necessary to a review of the parties' arguments is an understanding of the COPs arrangement. The tribunal described COPs as follows:

> COPs are . . . financial instruments used by governmental entities that allow an individual to buy a share of lease revenues rather than a bond that is served by those lease revenues, which is not subject to state restrictions on the amount of debt the state can incur, and where the lessor's ownership interest in the property is purchased by investors who then share income from the leased asset.

In the COPs transaction here, the State leased the premises for a 25-year term with an option to purchase the property. Then, through the assistance of a broker, the government's obligation under the lease was sold to third-party investors through certificates of participation. Petitioner and the State entered into a trust agreement, where the State paid all of the lease payments to the trustee for the benefit of the investors. The lease and trust agreement also provided the option for the State to defease the bonds or prepay its lease obligation to the trustee through cash or securities.[1] If this occurred, petitioner was to transfer a warranty deed to the property over to respondent upon final defeasance of the bonds.[2] The tribunal specifically found in its final opinion and judgment that the COPs arrangement resulted in neither petitioner nor respondent being personally liable.[3]

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[1] If paid off before June 1, 2010, the lease specifically provided that prepayment "shall be the amount necessary to purchase non-callable no-prepayable direct United States Government obligations…."

[2] In describing the purpose of the COPs arrangement, petitioner asserts in its brief on appeal:

> This structure is desirable to investors because the interest on the COPs is largely exempt from federal and state income tax liability. This structure is also desirable to the State because it does not have to be included against its bonding cap, as it does not pledge the "full faith and credit" of the State.

[3] The trust agreement itself stated:

> No provision in this Trust Agreement shall be construed as creating any obligation on the part of the Lessor [525 Redevco] to pay the principal of or interest on the Certificates except from payments of the Rental which have been pledged and assigned to the Trustee pursuant to the terms of this Trust Agreement.

Respondent first contends that the tribunal erred by adding a requirement that SRETTA requires the seller to directly receive consideration.

We review de novo matters of statutory interpretation. *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). The primary goal of statutory interpretation is to discern the Legislature's intent by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011); see also *Wexford Med Group v City of Cadillac*, 474 Mich 192, 204; 713 NW2d 734 (2006). If the Court determines that the language is clear and its meaning is plain, then no judicial construction is necessary. *Alliance Obstetrics & Gynecology v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). Ambiguities in tax statutes should be construed in favor of the taxpayer. *Id*. However, tax exemptions must be narrowly construed because they "upset the desirable balance achieved by equal taxation." *Wexford*, 474 Mich at 204.

The language at issue in MCL 207.526(a), "a written instrument in which the value of the consideration for the property is less than $100.00," exempts any transfers where the value of the consideration given for a written instrument is less than $100.00. The wording is clear and unambiguous and, thus, does not require statutory construction.

Respondent inaccurately interprets the tribunal's decision by asserting that the tribunal erred by adding a requirement to the statute that the consideration be directly received. The tribunal did not determine that petitioner must directly receive consideration for it to be taxable. Instead, the tribunal determined that petitioner received no consideration at all. The tribunal determined that neither party was personally liable based on the COPs agreement. The State was able to cancel the lease at any time and incur no liability, while petitioner was not liable if the State stopped paying because there was insurance coverage in the event of such occurrence. Therefore, the tribunal determined that there was no consideration because no party had a debt or liability paid. Furthermore, the tribunal noted that the closing statement showed that the State paid zero funds to petitioner at the time of closing.

There is no indication in the tribunal's final opinion and judgment that it read the exemption statute to require direct consideration or relied on anything other than the plain language of the statute. Instead, the tribunal merely did not find respondent's arguments convincing, and it determined that petitioner received no consideration at the time of closing. Therefore, the tribunal correctly read the exemption portion of the Act, and respondent has failed to show that it was incorrectly interpreted or applied.

Next, respondent argues that petitioner received well in excess of the $100 limit for a tax exemption. Respondent asserts that petitioner received about $122,000,000 in consideration, which is the amount the State paid for the property. Respondent contends that although this money did not go directly to petitioner, it went to pay petitioner's obligations, which is sufficient consideration.

Consideration is present where there is a bargained-for exchange. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). To have consideration, there must be a benefit or detriment to one side or a service to another. *Id*. at 238-239. Courts have concluded that anything may be considered valuable consideration. *Id*. at 239.

First, it is not disputed that petitioner did not receive any actual funds at the time of closing. Petitioner submitted a closing statement that indicated that the State paid petitioner zero funds for the warranty deed. Therefore, the issue becomes whether the prepayment of rent by the State to the COPs investors constituted consideration for petitioner. The tribunal determined that it did not. The tribunal concluded that the COPs arrangement was a complicated financing transaction, in which ultimately petitioner received no benefit at the time the warranty deed was transferred. Instead of consideration to petitioner, the State paid off the COPs in exchange for petitioner's warranty deed. In considering whether the State alleviated petitioner's debt, which respondent claims is consideration for the warranty deed, the tribunal stated:

> The Tribunal finds that Petitioner's argument that no consideration was paid at the time it issued the warranty deed to Respondent is supported by the facts in this case and supported by the evidence submitted. When the COPs were sold in 2000, Petitioner was provided funds to finance the acquisition, construction, and improvements of the subject property. After Petitioner received these funds, it no longer possessed an interest in the rent payments made by Respondent to the Trustee as a result of the COPs. . . . Consequently, Respondent did not alleviate Petitioner's debt and Petitioner did not receive consideration as a result of Respondent's prepaid rent.

Finally, the tribunal determined that the petitioner received its benefit up front at the issuance of the COPs but that it did not receive a monthly benefit from the rents paid or the final rent prepayment.

Having reviewed the evidence available at the time of the motion, we conclude that respondent has not established that genuine issues of material fact remain as to whether there was consideration received. Petitioner introduced evidence of a closing statement that indicated that the State paid zero funds to petitioner in exchange for the warranty deed. Furthermore, petitioner introduced evidence that it received absolutely no benefit from the monthly rent or the prepaid-rent sum, as the rights were assigned pursuant to a trust agreement. Once the arrangement was set up, petitioner had no obligation except for the transfer of the warranty deed to the State upon the defeasance of the bonds or the payment of $1 after twenty-five years.

Respondent has presented no documentary evidence to support its assertion that there was consideration at the time of the transfer of the warranty deed. On the other hand, petitioner has pointed to specific areas of the lease, trust agreement, and other affidavits to support its claim that this arrangement was created for the purpose of tax exemption under federal income tax law. In that effect, petitioner submitted an affidavit with its motion for summary disposition from a bond and tax-law specialist. In his affidavit, the specialist indicated that petitioner did assign all of its right to rent payments and that the only obligation remaining for petitioner was to deliver legal title, explaining the transaction as follows:

> Although styled as a lease to the State, the economic substance of the transaction (and its characterization for federal income tax purposes) is equivalent to the State's acquisition of the property at the outset, *subject* to the State's obligation to repay the acquisition costs through the COPs payment. The substance, then, is the

same as if the State had purchased the property "up front," subject to a mortgage obligation payable over time to the third party investors.

The specialist indicated that the importance of the arrangement was that petitioner received no part of the government's repayment. Therefore, this financing arrangement allowed the investors to achieve tax exemption because the lease was treated solely as an obligation of the State.

Respondent correctly asserts in its brief that consideration can be anything, even a cent or a peppercorn. See *id.* However, it has failed to support its assertion that the transaction resulted in consideration for petitioner. Consideration requires some benefit, detriment, or service to another. *Id.* at 238-239. In this situation, any consideration must be valued at $100 or more; otherwise, the transaction will be tax exempt under SRETTA. See MCL 207.526(a). All of the documentary evidence at the time of the parties' motions for summary disposition indicated that the COPs arrangement was a tax-exempt financing transaction created for the sole purpose of avoiding federal income taxation. Petitioner introduced affidavits and pointed to specific provisions in the lease and trust agreement that demonstrated that it received no consideration at the time of the transfer of the warranty deed. Because all of the documentary evidence supported petitioner's arguments, respondent has failed to show that genuine issues of material fact remain, and petitioner is entitled to judgment as a matter of law.

Accordingly, the tribunal did not err by granting summary disposition in favor of petitioner.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering