

STATE OF MICHIGAN
IN THE SUPREME COURT

LAKE FOREST PARTNERS 2, INC.,
a Michigan corporation,

Appellee-Petitioner,

v

MICHIGAN DEPARTMENT OF TREASURY,

Appellant-Respondent.

Supreme Court No. 132013

Court of Appeals No. 257417

Michigan Tax Tribunal No. 0292089

**MICHIGAN DEPARTMENT OF TREASURY'S SUPPLEMENTAL
BRIEF TO THE MICHIGAN SUPREME COURT**

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ARGUMENT

Respondent-Appellant, Department of Treasury, through its counsel Michael A. Cox, Attorney General, and Michael R. Bell, Assistant Attorney General, submits this supplemental brief as authorized by the Michigan Supreme Court in its Order dated February 9, 2007.

I. Neither a tax on written instruments for the sale, conveyance, assignment, and other transfers of an interest in property nor the kind of transactions created by Petitioner-Appellee, Lake Forest Partners 2, Inc., in this case, are new.

A. Short history of a tax on written instruments transferring interests in property.

The nature of the State Real Estate Transfer Tax Act (SRETTA)¹ is traceable back to the county Real Estate Transfer Tax Act (RETTA)² and the RETTA evolved from the federal documentary stamp tax.³

The federal documentary stamp tax, in effect from 1958 to 1967, had imposed a tax on all written instruments that transferred, conveyed or assigned interests in property when the "consideration or value of the interest or property conveyed...exceeds \$100..."⁴ Liability for the tax was imposed on the person who made, signed, issued, or sold any written instrument subject to the tax or for whose benefit such instrument was made, signed, issued, or sold.⁵

In response to the advance knowledge that the federal documentary stamp tax would expire in 1967, our Michigan Legislature drafted the RETTA and made it immediately effective upon the repeal of the documentary stamp tax.⁶

The SRETTA, in turn, was enacted as a part of Proposal A, a package of bills that sought to promote school finance and tax reform.⁷ In keeping with the purpose in enacting the

¹ MCL 207.521 *et seq.*

² MCL 207.501 *et seq.*

³ Attachment 1, 26 USC §4361 *et seq.*, of the Internal Revenue Code of 1954, expired December 31, 1967.

⁴ 26 USC §4361.

⁵ 26 USC §4384.

⁶ MCL 207.513.

SRETTA, it even contains a specific section, § 11,⁸ directing the State Treasurer to credit the SRETT proceeds to the state school aid fund.

Finally, comparing the various sections in both the RETTA and SRETTA reveals that the Legislature used the RETTA as the base language for the SRETTA.

B. A federal court has already ruled that similar transactions in this case were subject to the federal documentary stamp tax.

The Michigan Tax Tribunal succinctly summarized the parties' stipulation of facts regarding the transactions at issue in this case⁹:

The parties have stipulated that the 45 transactions involved in this case and the Washtenaw County case are the same in that Lake Forest concurrently entered into an agreement with a customer to sell a vacant lot and to construct a home. This agreement or agreements were embodied in a single document entitled "purchase agreement" and separately set forth the consideration for the lot sale and the consideration for the construction of the house. (Stipulation of Facts #5). The purchase agreement was not recorded and the closing transferring title and possession to the purchaser did not occur until after the home was constructed and a certificate of occupancy issued. After the closing and at the time the deed was recorded, Petitioner paid the real estate transfer tax to the County and the State based on the value of the vacant lot at the time the purchase agreement was entered into rather than the value of the real property (lot and home) at the time of actual conveyance.

A slightly more complicated version of Lake Forest's transactions occurred in the case of *Raccoon Development, Inc. v United States*,¹⁰ where "the question [was] whether the documentary stamp tax properly attache[d] to the total price that the home buyer paid for the house and lot or only to the portion of that price attributable to the lot."¹¹

In the case, Raccoon Development in conjunction with three affiliated corporations sold lots for residential construction along with selling and building prefabricated homes on those

⁷ Attachment 2, House Legislative Analysis discussing the various bills including House Bill 5110.

⁸ MCL 207.531.

⁹ Application for Leave to Appeal, Attachment C, pp 9-10.

¹⁰ Attachment 3, *Raccoon Development, Inc., v United States*, 391 F2d 610 (1968).

¹¹ *Raccoon Development*, 391 F2d at 611.

sold lots.¹² No vacant lot could be sold except in conjunction with the sale of a prefabricated house.¹³ A typical transaction occurred as follows: A purchaser signed an agreement with a Raccoon Development affiliate, Builders, for the purchase of a prefabricated home and a lot for a specific price.¹⁴ After the purchaser's credit was deemed satisfactory a construction agreement was executed with Builders.¹⁵ This agreement separated the total consideration to be paid between the price of the home and the lot.¹⁶ Subsequently, another Raccoon Development affiliate, also a co-plaintiff, Brookside Sales, executed a warranty deed conveying a vacant lot to the purchaser and the deed was subsequently recorded and tax paid on the consideration for the lot.¹⁷ Construction began shortly thereafter and upon completion and acceptance by the purchaser the deed was delivered to the purchaser.¹⁸

Raccoon Development and Brookside Sales argued that there should not be any liability for the documentary stamp tax attributable to the transaction for the house because they were not a party to that transaction and the "only thing deeded to the home purchaser by plaintiffs was an improved lot with no house on it at the time of recordation..."¹⁹

The Court rejected their argument. First, the Court held that recordation of a deed was not the touchstone of taxability for the documentary stamp tax but rather delivery of the deed was controlling.²⁰ Further, the Court stated that under Ohio law recordation was presumptive of delivery of a deed at best, but that the critical inquiry was whether the parties intended delivery of the deed and transfer of the property to occur at the time of execution and recordation of the

¹² *Raccoon Development*, 391 F2d at 611.

¹³ *Raccoon Development*, 391 F2d at 612.

¹⁴ *Raccoon Development*, 391 F2d at 612.

¹⁵ *Raccoon Development*, 391 F2d at 612.

¹⁶ *Raccoon Development*, 391 F2d at 612.

¹⁷ *Raccoon Development*, 391 F2d at 612.

¹⁸ *Raccoon Development*, 391 F2d at 612.

¹⁹ *Raccoon Development*, 391 F2d at 613.

²⁰ *Raccoon Development*, 391 F2d at 613.

deed or at another point in time.²¹ Second, the Court held that factually there was no doubt that the parties did not intend to transfer property at the time of recordation of the deed for the land because the facts established that the purchaser intended to buy a home on a lot for a specified total sum.²²

The *Raccoon Development* decision brings into clearer view the subtle point made by the dissenting opinion in the decision of the Court of Appeals where it was stated that "the SRETTA imposes a tax on the value of the transfer effectuated by the instrument that is being recorded."²³ That subtle point was that the agreements for the sale of vacant lots and for residential construction entered into between Lake Forest and its customers establish that the parties' intended to transfer improved land, and that the warranty deed represents the culmination of their intent by actually transferring title to improved property. It is upon this latter written instrument that the value of the transfer of improved property is then fixed.

Fixing the value of the transaction based on the warranty deed only makes sense. The deed transfers all vestiges of title in the real estate held by Lake Forest to its purchasers. Along with representing the total property to be transferred, the deed also represents the total value of the property transferred, and satisfies the Legislature's express statement that the SRETT is imposed on the total value of the property transferred.²⁴

²¹ *Raccoon Development*, 391 F2d at 613.

²² *Raccoon Development*, 391 F2d at 613.

²³ *Lake Forest Partners 2, Inc., v Department of Treasury*, 271 Mich App 244, 253; 720 NW2d 770 (2006).

²⁴ MCL 207.525.

CONCLUSION

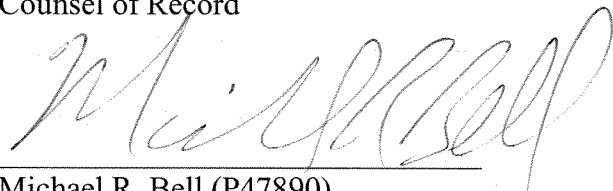
As discussed in the Department's application for leave to appeal, the express statutory language of the SRETTA imposes a tax on Lake Forest's transactions. The Court of Appeals incorrectly concluded that the execution of Lake Forest's purchase agreements, in which consideration for a vacant lot and for residential construction is separately stated, evidences a present transfer of the vacant lot to a purchaser and that the value of the transfer is established at that point in time.

Instead, the dissenting opinion in the Court of Appeals correctly read the SRETTA to impose a tax on the warranty deed that conveys title to the improved land and that the transfer of the deed was the point in time to establish the value of property transferred.

Respectfully submitted,

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