

Report on Public Policy Position

Name of section:

Taxation Section

Contact person:

Jess A. Bahs

E-mail:

jbahs@howardandhoward.com

Bill Number:

[HB 6122](#) (Bieda) Taxation; state real estate transfer; definitions, transfers, and payment of tax procedure; modify. Amends secs. 2, 3, 6 & 12 of [1993 PA 330](#) (MCL [207.522](#) et seq.).

Date position was adopted:

December 8, 2008

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

14

Number who voted in favor and opposed to the position:

11 Voted for position

0 Voted against position

3 Abstained

Position:

Oppose and Amend

Explanation of the position, including any recommended amendments:Current Law:

Under current law, a state transfer tax of \$3.75 per \$500 (or fraction thereof) of value transferred is imposed on transfers of real estate in Michigan when there is a deed recorded. There also is a parallel county transfer tax of \$.55 per \$500 (or fraction thereof) that is similarly structured as a deed recordation tax.

History:

The State Real Estate Transfer Tax (the "SRETT") was passed in 1993 to ensure that Proposal A was revenue neutral. It was intended as a recordation tax and not as a transfer tax. For this reason, it rejected the transfer methodology used in MCL 211.27a, General Property Tax Act Proposal A ("GPTA"), which operates to uncap taxable value a year following a "transfer of ownership." The GPTA language, particularly defining a "transfer of

ownership," was rejected. The exceptions from the "transfer of ownership" definition were not used. The SRETT, as inferred from its exemptions, was imposed on written instruments that would be required to be filed. The SRETT was designed for clerical administration by a county treasurer, not analysis by the township/city assessors who are evaluating pursuant to State Tax Commission ("STC") guidelines that a "transfer" under MCL 211.27a has occurred.

Attempts to "close the SRETT loophole" by expanding the definition of "value" in Gov. Granholm's first year of office failed to make it out of House Tax Policy. The argument against the proposal was that expanding "value" to cover other contracts (to build) was contrary to the legislative intent when the SRETT was passed and that it would transform the tax from a recordation tax.

Constitutional Background:

The Michigan Constitution requires that "every law that imposes, continues or revives a tax shall distinctly state the tax." Const. 1963, Art IV, Section 32. Any Michigan tax law should be clear and distinctly stated.

HB 6122 Legislative Background:

House Bill 6122 is written as an amendment to the current tax and has been described as a "loophole" closing amendment, intended to close a perceived "loophole" that involves a transfer of ownership in certain Limited Liability Companies ("LLC"s) that own real estate.

Comments:

- (1) Under HB 6122, the prior perceived loophole would be more than closed and the transfer tax, as changed, will raise more revenue than ever before since it will cover transactions that were not intended to be covered by the original transfer tax.
- (2) If the bill is being characterized as a loophole closer, it is misleading. The bill goes much further than closing a loophole, since the perceived loophole could be addressed by taxing equity shifts only after real estate has been placed within an entity within a certain period of time prior to the equity shift. By covering all equity shifts, the tax will cover many Mergers and Acquisitions ("M&A") transactions that never would have been subject to transfer tax in the past. The tax may be incurred for changes within a controlled group, since the control group exemptions for transfer tax are not completely clear about transfers between individual owners and entities.
- (3) The amendment to HB 6122 would not impact the parallel county transfer tax.
- (4) The proposal provides a definition of "transfer" that is contrary to the GPTA in a number of respects and contrary to the State Tax Commission's interpretation of a "transfer of ownership" under the GPTA. The STC has adopted an expansive "mirror image" policy position, i.e. transfers to an LLC by individuals who are the sole members of the LLC does not constitute a "transfer of ownership". This position would be rejected under the amendment to the SRETT.
- (5) The proposal introduces the concept of "controlling interest," however, this will require treasurers to analyze the corporate/transactional documents. Again, the test is different than that used under the GPTA, including the use of an 80% test, not the 50% test used under the GPTA. That is, it potentially creates other "loopholes."

- (6) As a number of large purchasers (particularly of businesses) will conduct a business valuation and allocate a value to the real property, it is unclear whether this value will be accepted under the SRETT or whether valuation disputes will occur.
- (7) The proposal dramatically expands the definition of "value" beyond the value stated on written documents -- an expansion far greater than what was previously rejected by the House Tax Policy. The proposed definition includes anything required to be paid "by money, property, or any other thing of value." Does this mean that sales of ongoing businesses would also include the business value? The statute seems to suggest it is not tied to the value of real estate alone and requires tax on any contract that includes real estate.
- (8) Compliance is different under the GPTA. Transfer affidavits are filed 45 days after the transfer with the assessor. Under the proposal, corporate documents would be filed with the County Treasurer within 15 days. What is to be filed is exceedingly broad and unclear.
- (9) With respect to appeals of the revised SRETT, the allocation of legal burdens to the taxpayer does not appear to be consistent with good tax policy or with other laws.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2008-HB-6122>