maddin hauser
Maddin Hauser Wartell Roth & Heller PC
attorneys and counselors

Real e-State

January 2009
Vol. 6 Issue 1

An electronic newsletter for real estate professionals

From the desk of:
The Real e-ditor

MBT Amendment Will Help Brokers

By: Steven D. Sallen

Normally in this space, I venture my own opinions and observations on current events, the state of the economy, and the like. Amidst the gloom and doom, however, I must confess that my crystal ball has gone cloudy. While we all hope and pray that this week's historic inauguration of President Obama will mark the start of our economic recovery, frankly, our country has lapsed into such a state of economic turmoil that one wonders whether any mere mortal can have the profound impact we so desperately need. So instead of trying to guess what the Treasury intends to do with the next $350 Billion in TARP money, or what industry will be next in line for a taxpayer bailout, or what other Wall Street Worms are yet to be smoked out of the woodwork, today I bring to your attention a bit of simple, run-of-the-mill, good news.

Real Estate Brokers received some welcome tax relief for 2008 in the form of House Bill 5924. H.B. 5924 amends the Michigan Business Tax (MBT) to prevent double taxation of commission payments. The MBT levies a modified gross receipts tax on every taxpayer with nexus in Michigan. The MBT tax is imposed on the modified gross receipts tax base, after certain adjustments. The modified gross receipts tax base is a taxpayer's gross receipts, less purchases from other firms. Under H.B. 5924, for a taxpayer licensed under Article 25 of the Occupational Code (dealing with real estate brokers, associate brokers and salespersons), "purchases from other firms" would include payments to an independent contractor licensed under Article 25. Therefore, commission-share payments to individual sales associates are not first taxed at the company or "broker" level. H.B. 5924 will apply retroactively to January 1, 2008, so be sure and make your certified public accountant aware of this helpful development.

State Real Estate Transfer Tax Expanded

By: Danielle M. Spehar and Steven D. Sallen

Despite the lobbying efforts of the State Bar of Michigan, Governor Granholm signed House Bill 6122 into law on January 9, 2009. The Bill, which amends 1993 PA 330, expands the reach of the state real estate transfer tax (the "State Transfer Tax") to apply to the transfer of a controlling interest in an entity that owns real property comprising 90% or more of the fair market value of the assets of the entity. No longer will sellers be able to sell their interest in an entity and take the position that the sale avoided the State Transfer Tax.

… a "transfer" is now defined to include an interest in real property acquired through the acquisition of a controlling interest in an entity with an interest in property.

Perhaps you are familiar with the two real estate transfer taxes assessed in Michigan. The State Transfer Tax is levied by the state on sales of real property and assessed at the rate of $3.75 per $500.00 of consideration paid. A second tax of $0.55 per $500.00 of consideration paid is levied by the counties and remains unchanged, for now. Prior to enactment of H.B. 6122, both transfer taxes were imposed only when ownership of real property was transferred by a written instrument, such as a deed. Each tax was calculated on the consideration or the fair market value of the property being transferred. The combined tax rate on the transfer of real estate is approximately .86% of the purchase price.

Prior to enactment of H.B. 6122, if real estate held by an entity such as a limited liability company or partnership was transferred by selling ownership interests in the entity, record title remained vested in the name of the entity and, no documents were recorded with the Register of Deeds. Arguably no transfer tax was due, and many transactions were structured to take advantage of this lack of specificity in the law. Now, State Transfer Tax will be due and the seller or grantor will be liable to pay the tax imposed. The Michigan Department of Treasury has deemed H.B. 6122 to be the closure of a "loophole".

See **TRANSFER TAX** on Page 3

MDEQ Resolves To Replace The BEA With Beefed Up Due Care Requirements

BY: KASTURI BAGCHI

Michigan's current statutory framework for environmental remediation and liability protections established through a baseline environmental assessment ("BEA") has just celebrated its fifteenth anniversary. See *Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 P.A. 451, as amended* ("Part 201"). Just when you think you may have gotten a handle on Part 201, you should know that the Michigan Department of Environmental Quality ("MDEQ") invited professionals outside of the agency to form discussion groups and review the program. These discussion groups concluded that Part 201 promotes liability protections at the expense of other goals, namely the protection of public health, safety and welfare. See *Michigan's Part 201 Environmental Remediation Program Review: Final Report and Recommendation, dated April 2, 2007 and prepared by Public Sector Consultants* (the "Report"). The Report also identified 101 recommendations to the MDEQ to improve Part 201, of which 30 were sponsored by the Liability and Compliance Group.

The MDEQ responded to the Report on November 1, 2007. See *Implementation Report and Action Plan for Michigan's Part 201 Environmental Remediation Program Review: Final Report and Recommendations* (the "MDEQ Response"). What is significant is that the MDEQ Response did not summarily dismiss any of the 30 recommendations proposed by the Liability and Compliance Group.

One of the recommendations under consideration by the MDEQ is the proposal to replace the BEA as a basis for liability relief with a "due care" plan. The BEA provides a method for differentiating new releases from pre-existing contamination so that new owners or operators are not responsible for contamination caused by others. The BEA itself does not impose on new owners or operators any obligation to address the source of contamination.

... the MDEQ believes that the public continues to be exposed to hazardous conditions.

When a contaminated property has been conveyed many times, gathering sufficient evidence to find one owner in the chain of title liable can be challenging. Once it is determined that you are the owner of a contaminated property, then Part 201 "due care" provisions require liable and nonliable parties to prevent unacceptable exposures and exacerbation of existing contamination. Even if a "due care" plan is adopted by a new owner, current Part 201 rules do not require new owners to remove the source of contamination nor are there any reporting requirements so that the MDEQ can monitor compliance with the "due care" requirements. Imposing clean up obligations on prior owners can also be complicated. Even if proofs are established, the Report found that actions were not being taken by liable parties in a timely manner, largely because the MDEQ has no real tools to monitor compliance.

Because of these deficiencies, the MDEQ believes that the public continues to be exposed to hazardous conditions. Consequently, the agency announced during a webinar hosted on December 18, 2008 that it seeks to modify Part 201 so that not only are BEAs replaced with "due care" plans, but "due care" plans should include a remediation component. By way of example, currently Part 201 does not require a new owner of contaminated property to remove hazardous substances from abandoned containers, pits or piles. The MDEQ is resolved to make this a new requirement under "due care" plans. In addition, to ensure greater compliance, the MDEQ proposes to require annual certifications from owners of facilities and implement deadlines for response activities.

The MDEQ appears to seek sweeping changes to Part 201 to protect the public from those landowners who do nothing with existing recognized environmental conditions once the BEA has been delivered to the MDEQ. While redesign of Part 201 is still in the proposal stage and no legislation has yet been submitted, momentum is building for change. If the legislation to amend Part 201 is in fact passed, prospective purchasers of contaminated properties may incur additional expenses of removing the source of contamination and complying with reporting requirements. These expenses could be substantial and persuade a purchaser to terminate the transaction during the due diligence period. Keep an eye on future issues of the *Real e-state* newsletter for updates on this topic.

"Now is no time to think of what you do not have. Think of what you can do with what there is."

~Ernest Hemingway, Author

Cont'd **TRANSFER TAX** on Page 1

The Bill also adds new *exemptions* from the State Transfer Tax for certain transfers including (i) transfers of real property to effectuate a dissolution of a corporation, limited liability company, partnership, or trust, and (ii) transfers in connection with the reorganization of an entity where the beneficial ownership is not changed.

This legislation's retroactive effect will impact not only all future transactions, but also the many transactions that have been structured as entity interest transfers since January 1, 2007. A ripe source for disputes will be the effect on buyers and sellers in those two years worth of entity transfer transactions retroactively impacted by H.B. 6122. Stay tuned to future issues of *Real* e-*State* for further developments in this area.

On January 16, 2009, Maddin Hauser presented
Business Survival Strategies for 2009.
This Symposium was designed to help business owners and key management personnel deal with a myriad of legal and business issues in our troubled and uncertain economic environment. Several parts of the program were videotaped, and will be available soon on our website at www.maddinhauser.com.
For more information, or for a copy of the Symposium booklet, please don't hesitate to contact us. This program was in addition to our annual Real Estate Symposium which will take place in April 2009.
Keep an eye out for additional information in your e-mail inbox.

www.maddinhauser.com
28400 Northwestern Highway
Third Floor, Essex Centre
Southfield, Michigan 48034

Phone: 248-827-1861
Fax: 248-359-6161

The Real e-State Staff:

On This Date In Michigan History
January 15, 1919

The first all women jury hears a trial

When all-male juries twice were unable to determine the guilt or innocence of a Flint man charged with being intoxicated, the judge, defense attorney and prosecutor agreed to pick Michigan's first all-woman jury. The six women quickly agreed on a guilty verdict and the man was ordered to pay a $50 fine and spend sixty days in jail.
Courtesy of Michigan History

"History doesn't repeat itself, but it does rhyme"

~Mark Twain