

JUN 21, 2022 06:24 PM


Jody M. Higdon, Clerk
Morgan County, Georgia

IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

RICHARD M. HAYNES; JEFFREY V.)
MCKENZIE; NEAL S. FITZGERALD;)
VIRGINIA MCFADDIN; JENNIFER V.)
DEROCHE; VALLE S. ASHLEY;)
AND JOELLEN ARTZ)

Petitioners,)

v.)

BOARD OF TAX ASSESSORS OF)
MORGAN COUNTY; KEVIN BERRY;)
SAMUEL LEE NUNN; CHRIS SIDES;)
JOHN ARTZ; And MARY ELLEN ANTON;)

Respondents,)

and)

JOINT DEVELOPMENT AUTHORITY)
OF JASPER COUNTY, MORGAN)
COUNTY, NEWTON COUNTY AND)
WALTON COUNTY; BOARD OF TAX)
ASSESSORS OF WALTON COUNTY; and)
RIVIAN HORIZON, LLC)

Defendants in Certiorari.)

CIVIL ACTION FILE

No. _____

PETITION FOR WRIT OF CERTIORARI

COME NOW Richard M. Haynes, Jeffrey V. McKenzie, Neal S. Fitzgerald, Virginia McFaddin, Jennifer V. DeRoche, Valle S. Ashley, and JoEllen Artz, (collectively “Petitioners”) and for their Petition for Writ of Certiorari (the “Petition”) state and show this Court as follows:

PARTIES AND JURISDICTION

1.

Petitioners are residents, real property owners, and taxpayers in Morgan County, Georgia.

2.

The Board of Tax Assessors of Morgan County (“MCBTA”) is a Board established pursuant to O.C.G.A. § 48-5-290, *et. seq.*, which is comprised of the individually named Respondents. The MCBTA is subject to the jurisdiction of this Court, and venue is proper.

3.

Samuel Lee Nunn is a resident of Morgan County, Georgia and is a member of the MCBTA. Mr. Nunn is subject to the jurisdiction of this Court and venue is proper.

4.

Chris Sides is a resident of Morgan County, Georgia and is a member of the MCBTA. Mr. Sides is subject to the jurisdiction of this Court and venue is proper.

5.

John Artz is a resident of Morgan County, Georgia and is a member of the MCBTA. Mr. Artz is subject to the jurisdiction of this Court and venue is proper.

6.

Mary Ellen Anton is a resident of Morgan County, Georgia and is the chairperson of the MCBTA. Ms. Anton is subject to the jurisdiction of this Court and venue is proper.

7.

Kevin Berry is a resident of Morgan County, Georgia and is a member of the MCBTA. Mr. Berry is subject to the jurisdiction of this Court and venue is proper. (Mr. Nunn, Mr. Sides, Mr. Artz, Mr. Berry, and Ms. Anton are collectively referred to hereinafter as the “Individual Respondents”).

8.

The Joint Development Authority of Jasper County, Morgan County, Newton County and Walton County (“JDA”) is a public body corporate and politic existing under the laws of the State of Georgia created pursuant to the authority and agreement of Jasper County, Morgan County, Newton County and Walton County and was an applicant seeking approval of the Pilot Agreement which is at issue in this action. The JDA, by applying to the MCBTA for approval of the Pilot Agreement has consented to jurisdiction in Morgan County, Georgia and venue is proper.

9.

The Board of Tax Assessors of Walton County (“WCBTA”) is a Board established pursuant to O.C.G.A. § 48-5-290, *et. seq.*, and was an applicant seeking approval of the Pilot Agreement which is at issue in this action. The WCBTA, by applying to the MCBTA for approval of the Pilot Agreement has consented to jurisdiction in Morgan County, Georgia and venue is proper.

10.

Rivian Horizon, LLC, (“Rivian”) is a Delaware limited liability company which is qualified to do business within the State of Georgia. Rivian was an applicant seeking

approval of the Pilot Agreement which is at issue in this action. Rivian, by applying to the MCBTA for approval of the Pilot Agreement has consented to jurisdiction in Morgan County, Georgia and venue is proper.

11.

This Court has subject matter jurisdiction of this action pursuant to Art. VI, Sec. 4, Para. 1 of the Georgia Constitution and O.C.G.A. § 15-6-8.

FACTUAL BACKGROUND

12.

On or about December 16, 2021, the Governor of the State of Georgia—Brian Kemp—announced that Rivian would be developing a \$5 billion electric vehicle manufacturing plant in the area known as Stanton Springs North. The land on which Rivian intends to develop its electric vehicle plant sits on approximately 2,000 acres of mostly agricultural land, spanning Morgan County, Walton County, and the City of Social Circle more than half of which is located in Morgan County.

13.

On May 2, 2022, the JDA, the State of Georgia, and Rivian entered into an Economic Development Agreement (“EDA”) which outlined various terms concerning the development of Rivian’s electric vehicle plant. A copy of the EDA is attached hereto as **Exhibit “ A “** and incorporated by reference herein as if set forth in full

14.

Pursuant to Section 2.3(g) of the EDA, the State of Georgia agreed to lease to JDA the entirety of the project site where Rivian intends to develop its electric vehicle plant

pursuant to an Intergovernmental Lease Agreement a copy of the form of which is attached hereto as Exhibit “T” to the EDA and incorporated by reference herein as if set forth in full. The EDA defines the term “Project” as Rivian’s “commit[ment] to locate an electric vehicle manufacturing plant on land located in Morgan County, Newton County, and the City of Social Circle, Georgia.”

15.

In turn, pursuant to Section 3.6(g) of the EDA, the JDA agreed to “rent the Project” to Rivian under a “Rental Agreement”, a copy of which is attached hereto as Exhibit “B” and incorporated by reference herein as if set forth in full.

16.

According to Section 3.6(l) of the EDA, Rivian is not required to pay *ad valorem* tax on its interest in the property where it intends to develop its electric vehicle plant.

17.

Section 3.6(l) continues, providing that “[i]t is anticipated that the” MCBTA “will execute a PILOT Agreement . . . pursuant to which the Board of Assessors *will determine* and agree that” Rivian’s “interest in the Project under the Rental Agreement will constitute a usufruct . . . and such interest[] will not constitute a taxable estate for years (emphasis added).”

18.

Section 3.6(l) also provides that “while the Rental Agreement is in effect, it is anticipated that the” MCBTA “will determine the exempt status of” Rivian’s “interest in

the Project and will agree that the Company shall not pay *ad valorem* taxes on its interest in the Project”

19.

On April 27, 2022, the MCBTA held an open meeting to decide two issues: (1) whether Rivian’s interest under the Rental Agreement was exempt from *ad valorem* taxes pursuant to Georgia law; and (2) whether the MCBTA should enter into the proposed PILOT Agreement.

20.

During the April 27, 2022, meeting, the attorney for the JDA—Andrea Gray—presented the JDA’s summary of the proposed PILOT Agreement to the MCBTA and the MCBTA allowed members of the public in attendance to ask questions and comment about the JDA’s proposal.

21.

After the JDA’s presentation and public comment, the MCBTA elected to table the vote on entering the PILOT Agreement and whether Rivian’s interest under the Rental Agreement was exempt from *ad valorem* taxes pursuant to Georgia law. The MCBTA continued the meeting for its regularly scheduled May 25, 2022, meeting.¹

22.

Pursuant to a letter dated April 29, 2022, Andrea P. Gray, Esq., counsel for the JDA, sent a letter to Respondent Anton, asserting that the meeting held on April 27, 2022, did

¹ The continued meeting was actually specially set for May 12, 2022 but continued due to illness.

not comply with the Open Meetings Act (O.C.G.A. § 50-14-1 et. seq.), and that as a result all actions taken by MCBTA at the April 27, 2022, meeting were invalid. A copy of the April 29, 2022 letter is attached hereto as Exhibit "C" and incorporated by reference herein as if set forth in full.

23.

Based upon information and belief, MCBTA and the individual Respondents agreed that the April 27, 2022, meeting was held in violation of the Open Meetings Act and therefore constituted a nullity.

24.

On May 12, 2022, counsel for the Petitioners sent Respondent Anton, chairperson of the MCBTA, a letter requesting that the Board place him on the agenda for the May 25 meeting so that he could present the Petitioners' position regarding the PILOT Agreement and whether Rivian's interest under the Rental Agreement was actually tax exempt under the laws of the State of Georgia. A copy of the May 12, 2022, letter is attached hereto as Exhibit "D" and incorporated by reference herein as if set forth in full

25.

On May 18, 2022, counsel for MCBTA responded to the letter, denying Petitioners' counsel request to be placed on the May 25, 2022, meeting agenda. While the MCBTA's counsel acknowledged that members of the public were allowed to comment during the April 27, 2022, meeting (a meeting which violated the Open Meetings Act), he stated, in violation of the MCBTA's established procedures, that Petitioner's counsel had "no right to be heard" at the meeting scheduled for May 25, 2022. A copy of the May 18, 2022,

letter is attached hereto as Exhibit “E” and incorporated by reference herein as if set forth in full.

26.

On May 24, 2022, counsel for Petitioners’ sent Respondent Anton another letter (which letter was also copied via electronic mail to the other Individual Respondents) outlining the Petitioners’ opposition to the MCBTA’s approving the PILOT Agreement and identifying the myriad of reasons why Rivian’s interest under the Rental Agreement constituted an estate for years—not a usufruct—thus subjecting it to *ad valorem* tax pursuant to Georgia law. A copy of the May 24, 2022, letter is attached hereto as Exhibit “F” and incorporated by reference herein as if set forth in full.

27.

The MBCTA held a meeting as scheduled on May 25, 2022. During this meeting, MBCTA refused to accept any public comment on the matters before it, including the consideration of the Pilot Agreement, although MBCTA did allow Andrea Grey, an attorney for the JDA, to make a presentation in support of the Pilot Agreement. Several procedural errors occurred during the May 25, 2022, MBCTA meeting, including, but not limited to, no motion having been properly made prior to the vote of the MBCTA, Respondent Anton improperly and unilaterally denying a motion to amend the alleged motion to be voted upon in contravention of the rules governing the meeting, and the improper calling of the vote by stating “All in favor of Rivian – I mean of the PILOT Agreement.” A copy of the transcript of the MBCTA May 25, 2022, meeting in regard to

the PILOT Agreement is attached hereto as Exhibit “G” and incorporated by reference as if set forth in full.

28.

During the May 25 meeting, the MCBTA and the Individual Respondents voted four (4) to one (1), apparently to approve the PILOT Agreement (although no valid motion had been presented for vote). As part of such vote, MCBTA and the Individual Respondents were required to make a legal determination that Rivian’s interest under the Rental Agreement was exempt from *ad valorem* tax because such interest qualified as a usufruct, not an estate for years. During the meeting, the MCBTA and the Individual Respondents did not permit Petitioners’ counsel nor Petitioners to be heard concerning their position to the contrary, and there was no discussion by the MCBTA and the Individual Respondents regarding the validity of the PILOT Agreement, usufructs, or the legal status of the Rental Agreement.

THE PILOT AGREEMENT AND RENTAL AGREEMENT

29.

Despite the MCBTA’s and Individual Respondents decision to the contrary, Rivian’s interest in the property clearly constitutes an estate for years—not a usufruct—thus subjecting it to the payment of *ad valorem* tax. An analysis of the terms of the Rental Agreement between the JDA and Rivian confirms this fact.

30.

The terms of the Rental Agreement which are inconsistent with the finding it is a usufruct are numerous. For example, the length of the Rental Agreement between the JDA

and Rivian is greater than five years, thus creating a rebuttable presumption “that the parties intended to create an estate for years rather than a usufruct.” *E. Air Lines, Inc. v. Joint City-County Bd. of Tax Assessors*, 253 Ga. 18, 19 (1984) (citations omitted). Specifically, the term of the Rental Agreement is effectively twenty-five (25) years, with only an option for Rivian to terminate the agreement earlier if it desires to do so. Section 5.1 of the Rental Agreement provides that the initial term will continue through December 1, 2027, and then provides for four (4) additional “options” whereby Rivian may unilaterally extend the agreement for an additional twenty (20) years. These “options” are automatically exercised unless Rivian takes affirmative action to provide written notice of its intent not to extend the agreement at least sixty (60) days prior to the end of the then existing term. These are therefore not true options to extend, but rather constitute options to terminate running in favor of Rivian. In other words, the true term of the Rental Agreement is twenty-five (25) years. Thus, a rebuttable presumption is created that the Rental Agreement constitutes an estate for years subject to taxation, and the burden is on the JDA and Rivian to prove otherwise.

31.

Section 4.2 of the Rental Agreement is inconsistent with the finding of a usufruct because it provides that Rivian is responsible for all construction on the property, and that the JDA is only obligated to provide the bond proceeds to Rivian. Rivian retains full right to make changes to the property.

32.

Section 6.1 of the Rental Agreement is inconsistent with the finding of a usufruct because it grants Rivian the right to “make additions, modifications, or improvements to the Project, including without limiting the generality of the foregoing the installation of machinery, Equipment and related property or the construction of additional Buildings and structures on the Land, desirable for its business purposes” Neither the JDA nor the State of Georgia retain any right to review or approve the additions or modifications of Rivian, with merely a notification being required to be delivered to the JDA.

33.

Section 6.2 of the Rental Agreement is inconsistent with the finding of a usufruct because it requires that the JDA provide a quitclaim bill of sale to Rivian at any time in the event that Rivian desires to remove any of its equipment from the property for any reason.

34.

Section 6.4 of the Rental Agreement is inconsistent with the finding of a usufruct because it requires that Rivian—not the State of Georgia nor the JDA—maintain insurance for the property and the project. Not only is Rivian obligated to maintain the numerous lines of insurance as outlined in this provision but is also obligated to have the JDA named as an additional insured.

35.

Section 6.5 of the Rental Agreement is inconsistent with the finding of a usufruct because it requires that Rivian—not the State of Georgia nor the JDA—to “maintain the

Project in all material respects in compliance with all applicable life and safety codes and all legally enforceable health, environmental, and safety ordinances and laws”

36.

Section 6.7 of the Rental Agreement is inconsistent with the finding of a usufruct because it obligates Rivian, at its own expense, to keep the property and its project in a safe condition and to repair and maintain the same.

37.

Section 7.2 of the Rental Agreement is inconsistent with the finding of a usufruct because it provides that in the event of a condemnation of all or any portion of the property, the JDA will only receive that portion of the award that is attributable to that “portion of the Land which has not been materially improved by [Rivian]” This language demonstrates that any compensation associated with the portion of the Land that has been improved by Rivian will be paid to Rivian and establishes that Rivian has an interest in the real property consistent with an estate for years and not simply a right to utilize the property as would exist for a usufruct.

38.

Section 9.2 of the Rental Agreement is inconsistent with the finding of a usufruct because it provides that Rivian shall have the right to sublet all or a portion of the property to any supplier of Rivian. While the agreement recites that such sublease is subject to the consent of the JDA, it also provides that in the event of Rivian’s subleasing to any such supplier, the JDA shall not unreasonably withhold consent.

39.

The pertinent language of Sections 4.2, 5.1, 6.1, 6.2, 6.4, 6.5, 6.7, 7.2, and 9.2 as referenced above are all inconsistent with the finding that the Rental Agreement is a usufruct because they establish that Rivian possesses primary control of the property, and the JDA is not merely permitting Rivian to occupy it. Consequently, Rivian's interest in the property constitutes an estate for years subject to taxation—not a tax-exempt usufruct.²

LEGAL STANDARDS

40.

Chapter 4 of Title 5 of the Georgia Code provides that “[w]hen either party in any case in any inferior judiciary or before any person exercising judicial powers is dissatisfied with the decision or judgment in the case, the party may apply for and obtain a writ of certiorari by petition to the superior court for the county in which the case was tried...” O.C.G.A. § 5-4-3.

41.

Pursuant to O.C.G.A. § 5-4-12(b), “[t]he scope of review shall be limited to all errors of law and determinations as to whether the judgment or ruling below was sustained by substantial evidence.”

² The forgoing is a non-exhaustive list of the provisions contained in the Rental Agreement that establish Rivian's interest in the property qualifies as an estate for years subject to taxation. Petitioners reserve the right to amend this list of provisions as the case progresses.

42.

Petitioners are entitled to the issuance of a writ of certiorari from this Court pursuant to O.C.G.A. § 5-4-1(a). The MCBTA was acting in a judicial (or quasi-judicial) capacity when it determined that Rivian’s interest under the Rental Agreement qualified as a usufruct rather than an estate for years, and as such certiorari is the appropriate remedy.

43.

Petitioners are entitled to the issuance of a writ of certiorari and to an order finding that Rivian’s interest under the Rental Agreement constitutes an estate for years—not a usufruct—thus requiring it pay *ad valorem* tax on said interest.

44.

Because the MCBTA’s interpretation of the Rental Agreement involved a question of law, this Court must apply a *de novo* standard of review to the MCBTA’s decision. *See Mariner Healthcare, Inc. v. Foster*, 280 Ga. App. 406, 409 (2006) (“The construction of a lease, which is a contract, is generally a question of law for the court.”); *SDS Real Prop. Holdings, LTD v. City of Brookhaven*, 341 Ga. App. 862 (2017) (explaining that a *de novo* standard of review applies to questions of law during certiorari proceedings before the superior court).

ENUMERATIONS OF ERROR

45.

MCBTA and the Individual Respondents erred in determining that Rivian’s interest under the Rental Agreement qualified as usufruct—thus exempting the company from *ad*

valorem tax—because the terms of the Rental Agreement establish that Rivian possesses an estate for years subject to taxation.

46.

MCBTA's and the Individual Respondents determination that Rivian's interest under the Rental Agreement qualified as a usufruct and is therefore exempt from taxation violates the legal obligations which are imposed upon MCBTA and the Individual Respondents "to investigate diligently and to inquire into the property owned in the county for the purpose of ascertaining what real and personal property is subject to taxation in the county and to require the proper return of the property for taxation." O.C.G.A. § 48-5-299(a). The MCBTA's and Individual Respondent's failure to fulfill its obligations under § 48-5-299(a) constituted a gross abuse of discretion.

47.

The decision of MCBTA and the Individual Defendants to determine that Rivian's interest in the property qualified as a tax-exempt usufruct based on an erroneous legal interpretation of the Rental Agreement violates Petitioners' rights under Ga. Const. Art. 7, § 1, ¶ III to have their property taxed equally and uniformly with other property located within Morgan County.

48.

The erroneous approval of the PILOT Agreement and the erroneous determination that interests of Rivian under the Rental Agreement constitutes an untaxable usufruct constitutes an unconstitutional gratuity in violation of Ga. Const. Art. 3, § 6, ¶ VI.

PETITIONERS' RIGHT TO RELIEF

49.

The MCBTA's and Individual Respondents' failure to properly fulfill their quasi-judicial obligations by erroneously approving the PILOT Agreement and finding that Rivian's interest under the Rental Agreement is exempt from Georgia *ad valorem* tax as a usufruct constitute erroneous determinations of law that should not be granted any deference by this Court.

50.

As a result of MCBTA's and Individual Respondents erroneous approval of the PILOT Agreement and erroneous determination that Rivian's interest under the Rental Agreement is a usufruct, the Petitioners will suffer damages as a result of the obligation to pay a greater share of the tax burden of Morgan County than would otherwise exist if Rivian's interest under the Rental Agreement were properly taxed as required by Georgia law.

51.

No costs have accrued in the proceedings below, and Petitioners have submitted a Certificate of Payment of Costs filed with this Petition.

52.

Petitioners have posted a certiorari bond, filed with this Petition, sufficient to pay all future costs incurred in connection with this appeal.

As a result of the foregoing, Petitioners are entitled to, and respectfully demand, issuance of a writ of certiorari directed to the Respondents and a final order reversing of the Respondents' decision to approve the PILOT Agreement as well as Respondents' finding that Rivian's interest under the Rental Agreement is exempt from Georgia *ad valorem* tax upon both real property and personal property.

WHEREFORE, Petitioners respectfully demand and pray for the following relief:

- a. For the Respondents to promptly prepare, certify and file with the Court the full record and transcript of the proceedings below;
- b. That the Clerk issue a writ of certiorari directed to the Respondents as provided by law;
- c. For a hearing on this Petition and a final order reversing Respondents' decision to approve the PILOT Agreement as well as Respondents' finding that Rivian's interest under the Rental Agreement is exempt from Georgia *ad valorem* real property and personal property tax as a usufruct; and
- d. Such other and further relief as the Court deems just and appropriate.

/s/ John A. Christy

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