

STATE OF WISCONSIN
TAX APPEALS COMMISSION

BAY HILL ASSOCIATES LIMITED PARTNERSHIP,

DOCKET NO. 06-T-180

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

This matter comes before the Commission on a Stipulation of Facts with exhibits filed by the parties on November 23, 2007 (the "Stipulation"). Attorney Alan Marcuvitz represents the Petitioner in this matter. The Respondent, the Wisconsin Department of Revenue (the "Department"), is represented by Attorney John R. Evans. Both parties have submitted briefs.

The Commission's findings of fact consist of the facts stipulated by the parties, with certain changes made for form and consistency. Having considered the entire record before it, the Commission finds, decides and orders as follows:

FINDINGS OF FACT

1. The Petitioner, Bay Hill Associates Limited Partnership, is located in the State of Wisconsin and owned real estate in the State of Wisconsin. The Petitioner was a grantor of real estate in the State of Wisconsin and is subject to the real estate

transfer fee laws (Ch. 77, subchapter II, Wis. Stats.) of the State of Wisconsin for all years that may be relevant.

2. The Department is an agency of the State of Wisconsin created pursuant to Chapter 13 of the Wisconsin Statutes and engaged in governmental duties including, but not limited to, the administration of the real estate transfer fees pursuant to Chapter 77, subchapter II of the Wisconsin Statutes.

3. On March 6, 2003, the Petitioner filed a real estate transfer return (the "original return") as the grantor of real estate on a Wisconsin conveyance (the "conveyance") with the Door County Register of Deeds Office declaring the consideration for the conveyance to be \$2,700,000 and submitted with that original return a real estate transfer fee of \$8,100. (Stip. Ex. 1.)

4. On or about October 12, 2004, the Petitioner filed an amended real estate transfer return (the "amended return") on the conveyance with the Department declaring the consideration for the conveyance to be \$1,285,233.84 with a corresponding real estate transfer fee of \$3,855.90 and requesting a refund of a portion of the real estate transfer fee set forth in paragraph 3, above, in the amount of \$4,244.10 with applicable interest (the "refund claim"). (Stip. Ex. 2.)

5. On October 3, 2005, the Department denied the refund claim in full. (Stip. Ex. 3.)

6. On December 1, 2005, the Petitioner filed a petition for redetermination (the "petition") with the Department objecting to the denial of the refund claim. (Stip. Ex. 4.)

7. On May 16, 2006, the Department issued an action letter (the “action”) to the Petitioner denying the petition. (Stip. Ex. 5.)

8. On July 17, 2006, the Petitioner filed a timely petition for review (the “appeal”) with the Commission. (Stip. Ex. 6.)

9. On or about February 23, 2003, the Petitioner entered into the conveyance described in paragraph 3 with the buyer, Bay Hill Apartments Associates Limited Partnership (the “buyer”), for the amount of \$2,700,000 (the “purchase price”). (Stip. Ex. 1.)

10. As part of the conveyance, the buyer assumed two loans evidenced by promissory notes (collectively, the “notes,” unless separately described) that were entered into between the seller and the United States of America Rural Development Housing Service (the “government”).

11. Pursuant to the recitations referenced in paragraph 10, above, the documents related to the first of the promissory notes (“Promissory Note 1”) are as follows:

A. “Inquire on Loan” setting forth the loan data as of July 28, 2003, reflecting, among other data, the remaining principal balance of \$986,855.11 (Stip. Ex. 7);

B. Multi Family Housing Agreement with attachment (undated) (Stip. Ex. 8); and

C. Multi Family Housing Interest Credit and Rental Assistance Agreement (undated) (Stip. Ex. 9).

12. Pursuant to the recitations referenced in paragraph 10, above, the documents related to the second of the promissory notes (“Promissory Note 2”) are as follows:

A. “Inquire on Loan” setting forth the loan data as of July 28, 2003, reflecting, among other data, the remaining principal balance of \$1,371,043.28 (Stip. Ex. 10);

B. Multi Family Housing Assumption Agreement with attachment (undated) (Stip. Ex. 11); and

C. Multi Family Housing Credit and Rental Assistance Agreement (undated) (Stip. Ex. 12).

13. Promissory Note 1 and Promissory Note 2 are the promissory notes originally entered into by the Petitioner and the government in 1983 and contain the same terms and conditions, including but not limited to, the same subsidy payments as set forth in Stipulation Exhibits 9 and 12, referenced above.

14. Stipulation Exhibit 13 is a promissory note in the amount of \$483,000 dated February 26, 2003, between the lender, U.S. National Bank Association, and the borrower, who is the buyer herein, whose proceeds were used in the conveyance.

15. Stipulation Exhibit 14 is the closing statement executed by the Petitioner and the buyer in the conveyance. The Department has agreed that Stipulation Exhibit 14 is the closing statement executed in the conveyance, but has not agreed that the amounts and calculations on Exhibit 14 represent the true and correct

amounts and calculations attributable to the conveyance for real estate transfer fee purposes or any other tax purposes as set forth more fully in the issue submitted for determination by the parties.

16. Pursuant to the recitations in paragraph 15, above, the Petitioner advocates a “cash equivalent purchase price” for purposes of reporting the conveyance on the amended return and filing the refund claim. The “cash equivalent purchase price” was calculated from the purchase price as follows:

A. The Petitioner calculated the amount to be paid by the buyer (the “remainder monthly payment”) on the notes after the payment of the interest rate subsidy by the government;

B. The Petitioner subtracted from the monthly payment on Promissory Note 1 of \$11,275.35, the monthly government interest subsidy payment of \$8,581.13 to arrive at the remainder monthly payment due on Promissory Note 1 of \$2,694.22;

C. The Petitioner calculated the present value of the remaining 370 payments of the remainder monthly payment of \$2,694.22 (\$11,275.35 less the government interest rate subsidy of \$8,581.13) at 6.4% to arrive at a present value of the 370 remainder monthly payments of \$436,670.72;

D. The Petitioner subtracted from the monthly payment on Promissory Note 2 of \$11,356.67, the monthly government interest subsidy payment of \$8,307.14 to arrive at the remainder monthly payment due on Promissory Note 2 of \$3,049.53;

E. The Petitioner calculated the present value of the remaining 401 payments of the remainder monthly payment of \$3,049.53 (\$11,356.67 less the government interest rate subsidy of \$8,307.14) at 6.4% to arrive at the present value of the 401 payments of \$506,461.51;

F. The Petitioner subtracted the \$436,670.72 from 16.C, above, from the remaining principal balance on Promissory Note 1 of \$986,855.11 to arrive at the sum of \$550,184.39;

G. The Petitioner subtracted the \$506,461.15 from 16.E., above, from the remaining principal balance on Promissory Note 2 of \$1,371,043.28 to arrive at the sum of \$864,581.77;

H. The Petitioner subtracted the \$550,184.39 and the \$864,581.77 from 16.F. and 16.G., above, respectively, from the selling price of the conveyance of \$2,700,000 to arrive at an "effective sales price" of \$1,285,233.84, rounded to \$1,285,300, also known as the Petitioner's "cash equivalent purchase price;" and

I. The Petitioner reported the "cash equivalent purchase price" as the selling price for purposes of the real estate transfer fee amended return and refund claim.

17. The Department has agreed that the mathematical operations in paragraph 16, above, are accurate as respects the calculation of present values and the execution of the mathematical operations, but objects to the methodology or calculation

as appropriate to calculate the real estate transfer fee due on the conveyance as set forth more fully in the issue submitted for determination.

STIPULATED ISSUE

The issue submitted by the parties for determination by the Commission is whether or not the face amount of the conveyance of \$2,700,000 may be disregarded and replaced with the Petitioner’s “cash equivalency sales price” for purposes of calculating the real estate transfer fee on the conveyance, the face conveyance value being represented in Stipulation Exhibit 1 and the “cash equivalency sales price” being represented in Stipulation Exhibit 2.

DECISION

A. APPLICABLE STATUTES

Wis. Stat. § 77.22(1)(a) imposes a fee on every conveyance of real estate as follows:

77.22 Imposition of real estate transfer fee.

(1) There is imposed on the grantor of real estate a real estate transfer fee at the rate of 30 cents for each \$100 of value or fraction thereof on every conveyance

* * *

Wis. Stat. § 77.21(3) defines “value” as follows:

77.21 Definitions. In this subchapter:

(3) “Value” means:

(a) In the case of any conveyance not a gift, the amount of the full actual consideration paid therefore or to be paid, including the amount of any lien or liens thereon; and

(b) In case of a gift, or any deed of nominal consideration or any exchange of properties, the estimated price the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer, both conversant with the property and at prevailing general price levels.

B. STANDARD OF REVIEW

The Petitioner has the burden of showing that the Department's determination is incorrect. *Laabs v. Tax Commission*, 218 Wis. 414, 424, 261 N.W. 404 (1935); *Dept. of Taxation v. O.H. Kindt Mfg. Co.*, 13 Wis.2d 258, 268, 108 N.W.2d 535 (1961); and *Woller v. Dept. of Taxation*, 35 Wis.2d 227, 232, 151 N.W.2d 170 (1967). However, a tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax. *Wis. Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis.2d 44, 257 N.W.2d 855 (1977). The real estate transfer fee is often referred to as a tax. *Gottfried, Inc. v. Wis. Dept. of Revenue*, 145 Wis.2d 715, 429 N.W.2d 508 (Ct. App. 1988)

When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*; see also, Wis. Stat. § 990.01(1). Context and structure are also important

factors, and construction should strive to avoid absurd or unreasonable results. “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.” *Id.*

C. ANALYSIS

In this matter, the Petitioner offers essentially one argument in opposition to the Department’s valuation of the conveyance at issue and in support of its own valuation. (Pet. Br. pp. 2-3.) The Petitioner argues that determining “full actual consideration” under Wis. Stat. § 77.21(3)(a) requires making the cash equivalency adjustments reflected by the Petitioner in its amended return. According to the Petitioner, these adjustments are required by the Department’s Wisconsin Property Assessment Manual (rev. 12/04) (the “Manual”), as follows: “The conditions of the sale that need adjustment are those non cash items that either have an affect [sic] on the sales price or are not expressed in cash.” Manual, p. A-37. Furthermore,

The process of cash equivalency is to analyze the transaction, to determine whether or not any of the financing conditions had an affect [sic] on the sales price, and to determine the amount that the sales price was affected. Cash equivalency assumes that through this process the transaction can be adjusted to a cash amount that is indicative of market value.

Manual, p. A-35.

In response, the Department argues that the Manual applies only to questions related to the assessment of property for purposes of the ad valorem property tax under Chapter 70, Stats., and is not relevant to questions of valuation for purposes

of the Chapter 77 real estate transfer fee. We agree with the Department's analysis of this matter.

Under Chapter 70, property is taxed according to its fair market value, as measured by an assessor's actual view of the property and the best information available, including recent arm's-length sales of the property or reasonably comparable property. Wis. Stat. § 70.32. In contrast, the Chapter 77 real estate transfer fee is measured by "the full actual consideration paid," in the case of any conveyance of property that is not a gift. Wis. Stat. § 77.21(3)(a). Chapter 70 taxes property on an annual basis according to its then-current value; the Chapter 77 real estate transfer fee taxes specific transactions according to the consideration paid.

As argued by the Department, questions of valuation of property conveyed for purposes of measuring the Chapter 77 real estate transfer fee only arise in cases involving conveyances by "gift, or any deed of nominal consideration or any exchange of properties." Wis. Stat. § 77.21(3)(b). In this matter, the Petitioner does not claim that the conveyance at issue was a gift, and does not dispute that this conveyance was made in exchange for the consideration paid. Thus, the definition of "value" under Section 77.21(3)(a) applies, and it is concerned only with "the amount of the full actual consideration paid."

Here, the value of the consideration paid is not in dispute; it is the purchase price of the property, as agreed by the parties in the purchase agreement. However, the Petitioner focuses on the value of the non-cash portion of the consideration paid, arguing that the liens included in the consideration must be valued

according to the factors outlined in the Manual. The Petitioner argues that Section 77.21(3)(a)

“expressly refers to ‘full actual consideration, including the amount of any lien or liens.’ It is noteworthy that it does not say ‘the amount of cash paid plus the face amount of any lien or liens.’” (Pet Brf. at 2.)

This point is the heart of the Petitioner’s claim in this matter, and it turns the statute on its head. While the statute does not specify the “face amount” of any liens, it does specify the “amount of any lien or liens.” The Petitioner essentially urges us to adopt a circular interpretation of the statute, requiring a valuation of any liens involved in a transfer according to a full analysis of all of their terms, as opposed to their face value, in order to determine the amount of consideration paid, and therefore its value. This interpretation undercuts the basic thrust of the statute, which requires valuation according to the “amount” of both the cash and liens. The Petitioner interprets the statute to define “amount” according to “value,” when in fact the statute defines “value” according to “amount.”

Thus, we find that the Petitioner’s construction of the statute violates its plain meaning. In addition, the Petitioner’s construction would create a completely unworkable rule. Rather than measuring liens according to their face amount, the Petitioner would require every real estate transfer fee assessed under Chapter 77 to involve an inquiry into the precise terms of every lien on the property being transferred and a separate valuation of each such lien. Such an interpretation would, in practice, be

unworkable and would create tremendous uncertainty for both taxpayers and the Department.

The Commission has followed this analysis of Section 77.21(3)(a) in prior cases. Most recently, in *Fourth Street Villas, LLC, et. al. v. Wis. Dept. of Revenue*, Docket Nos. 07-T-48 and 07-T-49 (WTAC Nov. 19, 2008), the Commission determined that the amount of “full actual consideration paid” under § 77.21(3)(a) includes all consideration paid, including both cash and non-cash consideration. *See also, Malan Realty Investors, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. [CCH] ¶400-425 (WTAC 1999) (Under Wis. Stat. § 77.21(3)(a), the relevant inquiry is not the value of the property conveyed, but the full actual consideration paid.)

As noted above, the Department’s assessment is presumed to be correct and any person challenging an assessment has the burden of showing that it is incorrect. Here, the Petitioner has offered only its analysis of the Manual, which it has misapplied to § 77.21(3)(a). We conclude that the Petitioner’s analysis is incorrect, and that it has therefore not met its burden of proof.

ORDER

The Department’s action on the Petitioner’s petition for redetermination in this matter is affirmed.

Dated at Madison, Wisconsin, this 24th day of November, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"