

STATE OF WISCONSIN
TAX APPEALS COMMISSION

FOURTH STREET VILLAS, LLC,
TREYTON OAKS, LLC,

DOCKET NO. 07-T-48 AND
DOCKET NO. 07-T-49

Petitioners,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This matter comes before the Commission on a Stipulation of Facts submitted by the parties. The Petitioners are represented in these cases by Attorney D. Winthrop Haas. The Respondent, The Wisconsin Department of Revenue (the "Department"), is represented by Attorney John R. Evans. Both parties have submitted briefs.

Having considered the entire record before it, the Commission finds, rules, and orders as follows:

FINDINGS OF FACT

1. Petitioners, Fourth Street Villas, LLC ("Fourth Street") and Treyton Oaks, LLC ("Treyton Oaks"), are located in the State of Wisconsin and owned real

estate in the State of Wisconsin and were grantors of real estate in the State of Wisconsin and are 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 16, 2006, Fourth Street filed a real estate transfer return (“original Fourth Street return” and collectively “returns”) as the grantor of real estate on a Wisconsin conveyance (“Fourth Street conveyance”) with the Outagamie County Register of Deeds Office declaring the consideration for the Fourth Street conveyance to be \$33,600 and submitted with that original Fourth Street return a real estate transfer fee of \$100.80 (Exh. 1), declaring there being no other consideration for the Fourth Street conveyance.

4. On March 16, 2006, Treyton Oaks filed a real estate transfer return (“original Treyton Oaks return”) as the grantor of real estate on a Wisconsin conveyance (“Treyton Oaks conveyance”) with the Outagamie County Register of Deeds Office declaring the consideration for the Treyton Oaks conveyance to be \$16,800 and submitted with that original Treyton Oaks return a fee of \$50.40 (Exh. 2) declaring there being no other consideration for the Treyton Oaks conveyance.

5. Fourth Street is a Wisconsin limited liability company and was so at all times relevant to this matter.

6. Treyton Oaks is a Wisconsin limited liability company and was so at all times relevant to this matter.

7. CSMWC, LLC ("CSMWC") is a Wisconsin limited liability company and was so at all times relevant to this matter.

8. The Fourth Street conveyance and the Treyton Oaks conveyance were both to CSMWC. (Dept. Exh. 3 and Exh. 4 respectively.)

9. Ms. Jadine Chou ("Ms. Chou") was the owner of a 100% interest in Fourth Street and Treyton Oaks at the time of the conveyances herein through her interest as sole member and manager of FL 26, LLC, the sole member and manager of Group 8888, and the sole member and manager of Fourth Street and Treyton Oaks.

10. Ms. Chou desired to transfer one-half interest in the real estate owned by Fourth Street and Treyton Oaks to CSMWC for a one-half interest in CSMWC, and a cash payment of \$70,000 made as a contribution to capital of CSMWC (\$19,600 of the \$70,000 to a limited liability company not concerned herein) and an assumption of an unspecified allocable portion of the debt secured by mortgages on the properties.

11. Pursuant to an agreement (Exh. 5), between Ms. Chou, Vista Trust and Mr. Albert Belmonte, the Fourth Street real estate and the Treyton Oaks real estate

were conveyed to CSMWC heretofore described as the Fourth Street conveyance and the Treyton Oaks conveyance as Ms. Chou's contribution to capital in CSMWC such that Ms. Chou became an owner of a 50% interest in CSMWC in conjunction with the recitations set forth in paragraph 10.

12. At the time of the Fourth Street conveyance and the Treyton Oaks conveyance, the real estate was encumbered collectively by a mortgage in favor of Mutual Bank, a banking association having its principal office in Harvey, Illinois, in the amount of \$9,100,000 ("Mutual mortgage") (Dept. Exh. 6).

13. At the time of the Fourth Street conveyance and the Treyton Oaks conveyance, the grantee, CSMWC, assumed the Mutual mortgage and became encumbered with the Mutual mortgage.

14. On or about September 19, 2006, the Department issued a Notice of Additional Assessment of Real Estate Transfer Fee to Fourth Street ("Fourth Street assessment") in the amount of \$16,308.34 as respects the Fourth Street conveyance. (Dept. Exh. 7).

15. On or about October 12, 2006, the Department issued a Notice of Additional Assessment of Real Estate Transfer fee to Treyton Oaks ("Treyton Oaks assessment") in the amount of \$6,455.40 as respects the Treyton Oaks conveyance. (Dept. Exh. 8).

16. On or about November 16, 2006, Fourth Street filed a petition for redetermination (“Fourth Street petition”) with the Department objecting to the Fourth Street assessment. (Dept. Exh. 9).

17. On or about November 16, 2006, Treyton Oaks filed a petition for redetermination (“Treyton Oaks petition”) with the Department objecting to the Treyton Oaks assessment. (Dept. Exh. 10).

18. On or about January 19, 2007, the Department issued an action letter (“Fourth Street action”) to Fourth Street denying the Fourth Street petition. (Dept. Exh. 11).

19. On or about January 19, 2007, the Department issued an action letter (“Treyton Oaks action”) to Treyton Oaks denying the Treyton Oaks petition. (Dept. Exh. 12).

20. On or about March 23, 2007, Fourth Street filed a timely Petition for Review (“Fourth Street appeal”) with the Commission. (Dept. Exh. 13).

21. On or about March 23, 2007, Treyton Oaks filed a timely Petition for Review (“Fourth Street appeal”) with the Commission. (Dept. Exh. 14).

OPINION

This is a real estate transfer fee case. In brief, the Petitioners are Wisconsin limited liability companies that were both owned by Ms. Jadine Chou. In 2006, Fourth Street and Treyton Oaks each conveyed real property they respectively owned to CSMWC, an LLC. The properties had been assessed for real estate tax purposes at \$4,117,200.00 and \$1,624,100.00, respectively. In return, CSMWC gave back \$70,000 in cash and a one-half interest in CSMWC. The Petitioners paid the transfer fee imposed by Chapter 77 on the portion of the \$70,000 they allocated to the two relevant properties, but not on the value of the interest received in CSMWC. Thus, Petitioner Fourth Street Villas paid \$100.80 of transfer fee and Petitioner Treyton Oaks paid \$50.40, respectively. The Department later issued assessments for an additional \$16,308.34 and \$6,455.40, respectively, maintaining that the actual full consideration was the \$70,000 in cash plus the value of the one-half interest in CSMWC, which the Department measured by reference to local property tax assessments. The Petitioners then filed this appeal, arguing that under Wis. Stat § 77.21(3)(a), the \$70,000 was the “full actual consideration paid.” Based on the language of the statute and the relevant cases, the Department of Revenue is correct.

A. STATUTES INVOLVED

We initially note that Wis. Stat. § 77.22(1)(a) imposes a fee on every conveyance of real estate:

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 . . .

* * *

“Value” is defined in Wis. Stat. § 77.21(3) 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.

The Petitioners argue that the conveyances in this case fit within Wis. Stat. § 77.22(3)(a), focusing particularly on the “paid” part of the definition. The Department, on the other hand, looks to the more expansive “full actual consideration paid.” The issue in this appeal is which construction is appropriate.

B. STANDARDS OF REVIEW

On appeal to the Commission, the Petitioners have the burden of showing that the Department of Revenue’s determination is incorrect. *Laabs v. Tax Commission*,

218 Wis. 414, 424, 261 N.W. 404 (1935); *Department of Taxation v. O.H. Kindt Mfg. Co.*, 13 Wis.2d 258, 268, 108 N.W.2d 535 (1961); and *Woller v. Department of Taxation*, 35 Wis.2d 227, 232, 151 N.W.2d 170 (1967). In construing a statute and determining its scope, the first recourse is to the language of the statute itself. *State v. Derenne*, 102 Wis.2d 38, 45, 306 N.W.2d 12, 15 (1981). Further, sections of the statutes relating to the same subject matter must be construed *in pari materia*. *State v. Clausen*, 105 Wis.2d 231, 244, 313 N.W.2d 819, 825 (1982). Finally, in determining the meaning of any single phrase or word in a statute, it is necessary to examine it in the light of the entire statute. *Alberti v. City of Whitewater*, 109 Wis.2d 592, 598, 327 N.W.2d 150, 153 (Ct.App. 1982). 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.¹ *Wisconsin Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis.2d 44, 257 N.W.2d 855 (1977). With these principles in mind, we turn to the question of the proper measure of the transfer fee.

C. THE PETITIONERS' ARGUMENTS

The Petitioners argue that the amounts they put on the real estate transfer returns represent the value of the interests transferred and that the amounts paid are the best evidence of the consideration that should be allocated for real estate transfer return purposes. The Petitioners state that as \$70,000 is not a nominal consideration, it

¹ A real estate transfer fee is often referred to as a tax. *Gottfried, Inc. v. Wisconsin Dept. of Revenue*, 145 Wis.2d 715, 429 N.W.2d 508 (Ct.App. 1988)

is the definition in Wis. Stat. § 77.21(3)(a) that should be applied, and not the definition of value used in Wis. Stat. § 77.21(3)(b). Further, the Petitioners object to the penalty imposed pursuant to Wis. Stat. § 77.26(8), arguing that the values reported on the returns were not understated, but reflected the actual consideration paid. The Petitioners cite both *F.M. Management Co. Ltd. Partnership v. Wisconsin Dept. of Revenue*, 2004 WI. App. 19, ¶5, 269 Wis.2d 526, 531, 674 N.W.2d 922 (Ct. App. 2003) and *Wisconsin Dept. of Revenue v. Mark*, 168 Wis.2d 288, 483 N.W.2d 302 (Ct. App. 1992) in support of their claim.

In *Mark*, the Department of Revenue appealed a decision of the Tax Appeals Commission that had held that the beneficiaries of a trust who transferred their interests in some real property to a partnership did not owe transfer tax because there was no change in the beneficial ownership. The Wisconsin Court of Appeals, however, held that the respective transfers were conveyances within the meaning of the fee statute, as there was both a conveyance and consideration with value. In *F.M. Management*, a limited partnership and a limited liability company engaged in a two step transaction. The Tax Appeals Commission had upheld a determination by the Wisconsin Department of Revenue that a transfer fee and penalties were due for the two transactions between F.M. Management and F.M. Real Estate. The Court of Appeals held that both conveyances were transfers within the meaning of the statute

and that neither fit within one of the exemptions to the fee for related parties. In sum, neither *Mark* nor *F.M. Management* determines the issue here.

D. THE RESPONDENT'S ARGUMENTS

The Department maintains that the full actual consideration paid in this case includes the \$70,000 cash plus the one-half interest in CSMWC. The Department has valued the one-half interest in CSMWC based upon the value of the two properties transferred and together with the cash, assessed the real estate transfer fee. In support of its argument that the relevant consideration includes both the \$70,000 and the one-half interest in CSMWC, the respondent relies on the plain meaning of the statute and *Wolter v. Wisconsin Department of Revenue*, 231 Wis.2d 651, 605 N.W.2d 283 (Ct. App. 1999). In *Wolter*, the court opined that when limited partners exchanged their interests in a limited partnership for those in a limited liability company, there was consideration. Thus, in the Department's view, the proper measure of the transfer fee is the \$70,000 plus the value of the one-half interest in CSMWC.

E. ANALYSIS

As stated above, the issue presented in this appeal is the proper measure of value for calculating the transfer fee owing on the conveyances at issue. There is no claim here that the Petitioners are entitled to an exemption. In fact, the Petitioners have already paid a transfer fee, but only as to a portion of the \$70,000 that the Petitioners allocated between the relevant properties. The question here thus becomes whether or

not by leaving out the value of the LLC interest they have underreported the full and actual consideration.

Wis. Stat. § 77.21 (3) sets forth two ways to determine the value of the real estate conveyed. First, Wis. Stat. § 77.21(3)(a) states when the conveyance is something other than a gift, the value equals the “full actual consideration paid.” On the other hand, Wis. Stat. § 77.21(3)(b) states that when the conveyance is a gift, a deed of nominal consideration or an exchange of property, the value equals the “estimated price the property would bring in an open market.” As the conveyances here were not gifts, deeds of nominal consideration or “an exchange of properties,” the question here becomes what is the “full actual consideration paid” with respect to each conveyance. For the reasons stated below, the Commission believes that the Department has the better construction of the “full actual consideration paid” requirement.

First, technical words and phrases and others that have a peculiar meaning in the law are to be construed according to such meaning. *Sec. 990.01(1), Stats.* However, as stated above, any construction which would produce a result inconsistent with the manifest intention of the legislature should be avoided. *Sec. 990.01 (intro), Stats.* Although “value” is defined in the statute, “consideration” is not. The word “consideration,” however, has a peculiar meaning in the law. *Webster’s New World Dictionary* (2d coll. ed.) at 303 defines “consideration” in sense 7 as:

“... something of value given or done by another, in order to make a binding contract; inducement for a contract...”

Similarly, *Black's Law Dictionary* (5th ed.) at 277 gives the following principal definition:

“...The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by another.”

Professor Williston defines consideration as “a detriment incurred by the promisee or a benefit received by the promisor.” 1 Williston on Contracts (3d ed.) pp. 375-380, secs. 102, 102a. This definition has been used by the Wisconsin Supreme Court. *First Wisconsin Nat'l Bank of Milwaukee v. Oby*, 52 Wis.2d 1, 188 N.W.2d 454 (1971). Applying any of these definitions to this case, it is clear that the LLC interest in CSMWC received by the petitioners was consideration. It is axiomatic that every word or phrase in a statute must be given effect, and the Petitioners' argument merely gives effect to the word “paid” and not the whole phrase “full actual consideration paid.”²

Second, the Commission has previously considered the proper construction of Wis. Stat. § 77.21(3)(a) in a fashion that supports the Department's assessment here. *Malan Realty Investors, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr [CCH] ¶400-425. In *Malan*, The Petitioner bought 55 properties located in various states including Wisconsin for a purchase price of \$112,275,000. The purchase

²The terms "full" and "actual" appear to have been added to "consideration" for emphasis.

price was allocated among the properties by agreement of the parties as set forth in an exhibit attached to and made part of the Purchase Agreement. The allocated prices for the 10 properties in Wisconsin were generally between 46% and 85% of the assessed value, with one exception. Approximately \$93,333 was paid in transfer fees based on the prices in the agreement. Had the transfer fee been based on the assessed value of each Wisconsin property, the total transfer fee due would have been \$158,563. After considering the language in Wis. Stat. § 77.21(3)(a), specifically the reference to “full actual consideration paid” and the lack of reference to the “value” of the property, the Commission decided that transfer fees should have been assessed based on the purchase prices allocated by the purchase agreement to the various parcels of real property. The majority opinion states that under Wis. Stat. § 77.21(3)(a), the relevant inquiry is not the value of the property conveyed, but the full actual consideration paid. The Commission specifically stated that the Department need not always accept at face value the amount of consideration recited in a deed. Where the consideration reported is not the full actual consideration paid, the relevant inquiry is to determine the amount of the full actual consideration. Based on the record before it, a majority of the Commission in *Malan* concluded that the amounts recited in the Purchase Agreement were reasonable and represented the full actual consideration paid.

For two reasons, the Commission believes that *Malan* is instructive here. First, *Malan* confirms that the relevant measure of the transfer fee is the full actual

consideration paid, which, based on the definitions above, includes the value of the interest received in CSMWC. The Petitioners' contention that the consideration equates merely to the cash that changed hands is not reasonable as it does not give effect to all of the words in the statute. Second, both the majority opinion and the dissent confirm that where the dollar amounts reported are not the correct "full actual consideration paid," a reasonable alternative for the Department may be to offer the assessments for each property as determined by local assessors. As noted above, respondent's assessments are presumed to be correct and any person challenging them has the burden of showing that the assessment is incorrect. Applying that principle here, the Petitioners offered only the amounts they allocated to each property out of the \$70,000, excluding the value of the interest in CSMWC. Thus, as the Petitioners misapply Wis. Stat. § 77.21(3)(a), the Petitioners in this case have not met their burden of proof.

F. PENALTY IMPOSED

Wis. Stat. § 77.26(8) provides that if the Department determines that the value reported on the transfer return is understated by 25% or more the Department shall assess and collect a penalty of \$25 or 25% of the additional fee due, whichever is greater. The Petitioners here argue again that the values reported reflected the actual consideration paid. First, as noted in the Department's brief, the Department has no discretion under Wis. Stat. § 77.26(8) whether to apply the penalty. The statute uses the term "shall" and the use of the term "shall" generally brings with it a duty that is

mandatory. *State v. Sprosty*, 227 Wis.2d 316, 595 N.W.2d 692 (1999). Second, for the reasons stated above, the transfer fee clearly applies to the “full actual consideration paid.”

ORDER

The Department’s actions on the petitioners’ petitions for redetermination in these matters are affirmed.

Dated at Madison, Wisconsin, this 19th 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"