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**STATE OF WISCONSIN
TAX APPEALS COMMISSION**

FILED Wisconsin Tax Appeals Commission	
MAR 3 1998	
Darlene Skolaski Deputy Clerk	

VACATION OWNER'S ASSOCIATION, INC.
985 Regent Road
Oconomowoc, WI 53066,

Docket No. 95-S-1513

Petitioner,

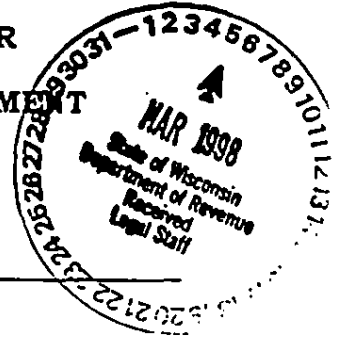
RULING AND ORDER

vs.

**ON MOTIONS FOR
SUMMARY JUDGMENT**

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,

Respondent.



DON M. MILLIS, COMMISSIONER:

The above-entitled matter comes before the Commission on cross-motions for partial summary judgment. Both parties have submitted briefs and supporting papers concerning the cross-motions. Petitioner is represented by O'Neil, Cannon & Hollman, S.C., by Attorney Gregory W. Lyons. Respondent is represented by Attorney Linda M. Mintener.

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

SUMMARY OF UNDISPUTED FACTS

1. As a result of a field audit for the years January 1, 1988, through December 31, 1993 ("period under review"), respondent issued a sales and use tax assessment against petitioner on February 2, 1995, in the amount of \$87,706.15. The assessment primarily concerned sales tax for the period of January 1, 1990, through December 31, 1993 ("period at issue"), on petitioner's

sale of time-share property and on conveyance and maintenance fees collected by petitioner from purchasers of time-share property.

2. Petitioner filed a timely petition for redetermination. Respondent denied the petition for redetermination. Petitioner then filed a timely petition for review with the Commission.

3. Petitioner is a Wisconsin non-stock corporation formed in 1981, with its principal place of business in Oconomowoc, Wisconsin.

4. During the period under review, petitioner was in the business of managing certain time-share property within a complex commonly known as "Olympia Village" or "Olympia Spa & Resort" in Oconomowoc, Wisconsin. Petitioner also sold a small number of time-share units during the period under review.

5. Petitioner has held Wisconsin sales tax permit no. 504302 since March 6, 1991.

6. During the period at issue, petitioner did not collect or pay to respondent any sales or use tax on its (1) sale of time-share property, (2) collection of conveyance fees, or (3) collection of maintenance fees.

7. Petitioner does not contest the calculation of amounts owing if respondent's action on the petition for redetermination is affirmed.

8. Persons who purchased time-share units managed by petitioner automatically became members of petitioner.

9. The time-share property managed and sold during the period at issue consisted of time-share units that are commonly referred to as flexible use time-share units. The time-share property at issue consisted of flexible use time-share units because: (1) at the time of petitioner's sales of time-share

property at issue here, the use of rooms or lodging was not fixed as to either starting day or unit; and (2) members did not know which time-share unit or week the member would occupy until the member confirmed a reservation for each year.

10. Use of a member's time-share property was contingent on that member's making a timely reservation. Reservations were granted on a first-come, first-served basis based on availability.

11. The WB-27 time-share contract form was used for purchases of the time-share property during the period at issue. On each of the forms, the unit purchased was not designated by a number but by the term "FLOATING." Each of these forms further stated that "occupancy will commence AT TIME OF CONFIRMED RESERVATION." In this phrase "occupancy" meant the member's annual occupancy of time-share property.

12. Documents petitioner used to transfer time-share property during the period at issue did not designate a specific unit number purchased, but rather referred to a "unit type."

13. Documents petitioner used to transfer time-share property to members during the period at issue did not refer to a specific week or any date relating to the member's right to use the time-share property. Rather, these documents referred to a "season."

14. Along with their purchase of time-share property, members received:

Free use of indoor and outdoor pools;

Free use of Silver Lake Beach House and Silver Lake Beach [for 1988-1991];

50 percent discount on: (1) golf course green fees [during 1988-90 and January to September 1991-92], (2) tennis courts [during 1988-90 and January to September 1991-92], (3) racquetball courts [during 1989-90 and January to September 1991-93], and (4) ski lift tickets [during 1989-90 and January to September 1991-92];

20 percent discount on hotel room accommodations [for 1988-93].

15. Members paid a conveyance fee, sometimes referred to as "assessments" or "charges," at the time they purchased the time-share property. Conveyance fees collected by petitioner were placed in a fund that was to be used to pay expenses associated with time-share property managed by petitioner.

16. Members paid maintenance fees, sometimes referred to as "assessments," "basic assessments" or "charges," on an annual basis. Maintenance fees were used for: (1) operation, repair, maintenance, and improvement of time-share property; (2) administration of petitioner's vacation plan; and (3) reimbursing petitioner's expenses to manage the time-share property.

17. A member could not reserve or occupy a time-share unit if the member was not current on the member's maintenance fee obligation.

18. Petitioner is exempt from state income taxation under § 71.26(1)(a), *Stats.*, and is a tax-exempt homeowners association for federal tax purposes under § 528(c) of the Internal Revenue Code.

19. The time-share property at issue was created as time-share units in 1981. Of the 1,530 time-share unit weeks created, 1,396 (or 91.2 per cent) of these unit weeks were sold prior to August 9, 1989.

APPLICABLE WISCONSIN

[1989-90 to 1993-94]

77.51 Definitions. Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

* * *

(4) (a) "Gross receipts" means the total amount of the sale, lease or rental price, as the case may be, from sales at retail of tangible personal property, or taxable services, valued in money, whether received in money or otherwise, without any deduction on account of the following:

* * *

(c) "Gross receipts" includes:

* * *

6. Charges associated with time-share property that is taxable under s. 77.52(2)(a)1. or 2.

77.52 Imposition of retail sales tax.

(1) For the privilege of selling, leasing or renting tangible personal property, including accessories, components, attachments, parts, supplies and materials, at retail a tax is imposed upon all retailers at the rate of 5% of the gross receipts from the sale, lease or rental of tangible personal property, including accessories, components, attachments, parts, supplies and materials, sold, leased or rented at retail in this state.

* * *

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

1. The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations, *including the furnishing of rooms or lodging through the sale of time-share property, as defined in s. 707.02(32), if the use of the rooms or lodging is not fixed at the time of sale as to the starting day or the lodging unit.* In this subdivision, "transient" means any person residing for a continuous period of less than one month in a hotel, motel or other furnished accommodations available to the public.... [Emphasis supplied.]

* * *

707.02 Definitions. In this chapter:

* * *

(32) "Time-share property" means one or more time-share units subject to the same time-share instrument, together with any real estate or rights to real estate appurtenant to those units.

* * *

[1987-88]

77.52 Imposition of retail sales tax.

* * *

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

1. The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations. As used in this paragraph, "transient" means any person residing for a continuous period of less than one month in a hotel,

motel or other furnished accommodations available to the public....

2. . . . the furnishing, for dues, fees or other considerations, . . . the privilege of having access to or use of amusement, entertainment, athletic or recreational devices or facilities, including, in connection with the sale or use of time-share property, as defined in s. 707.02(32), the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, including but not limited to membership rights, vacation services and club memberships.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact, and this matter is appropriate for summary judgment as a matter of law.

2. Petitioner is liable for sales tax on the proceeds from the sale of time-share property sold during the period at issue. § 77.52(2)(a)1, *Stats.*

3. Petitioner is liable for sales tax on the amounts it received from members in the form of conveyance fees and maintenance fees associated with time-share units that were sold by petitioner on or after August 9, 1989. §§ 77.51(4)(c)6 and 77.52(1) (1988-89 to 1993-94), *Stats.*

4. Petitioner is not liable for sales tax on the amounts it received from members in the form of maintenance fees associated with time-share units that were sold by petitioner before August 9, 1989. § 77.52(2)(a)1 (1987-88), *Stats.*; 1989 Wis. Act. 31.

RULING

This case concerns petitioner's sales tax liability for three types of transactions: (1) petitioner's sale of time-share property; (2) petitioner's collection of conveyance fees at the time the time-share property was sold; and (3) petitioner's annual collection of maintenance fees from its members. These

issues involve the imposition of sales tax. Thus, liability will be found only by the clear and express language of the statute, with any doubt resolved in favor of the taxpayer. *Kearney & Trecker Corp. v. Dept. of Revenue*, 91 Wis. 2d 746, 753 (1979).

Neither party will prevail on its motion for summary judgment unless it shows that it is entitled to summary judgment as a matter of law. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980). Here there is no genuine issue of material fact, and respondent has demonstrated that it is entitled to summary judgment as a matter of law with regard to all portions of the assessment except that portion concerning petitioner's liability for sales and use tax on amounts received from its members in the form of maintenance fees associated with time-share units that were sold by petitioner before August 9, 1989. With regard to this last portion of the assessment, petitioner has demonstrated it is entitled to summary judgment as a matter of law.

Sale of Time-Share Property

Section 77.52(2)(a)1, *Stats.*, imposes the sales tax on the sale of time-share property if, at the time of the sale, the use of the lodging or rooms is not fixed as to starting day or lodging unit. Such time-share property is sometimes described as "flexible use." Petitioner does not argue that the time-share property at issue consists of something other than flexible use time-share units. In fact, when the time-share property at issue was sold, neither the starting day nor the unit to be used was fixed. Only when a member made a reservation could the member be sure of the unit and week the member would use that year.

Petitioner argues instead that because the time-share units at issue were created pursuant to Chapter 703 of the statutes and *before* the effective date of Chapter 707, petitioner's time-share units do not come within the definition of time-share property incorporated in § 77.52(2)(a), *Stats.* Section 77.52(2)(a) applies to "time-share property as defined in s. 707.02(32)." Petitioner argues that because Chapter 707 generally applies to time-share property created *after* June 1, 1988, the definition incorporated in § 77.52(2)(a) must include only time-share property created *after* June 1, 1988. Since the time-share property at issue was created before June 1, 1988, petitioner concludes that the sale of this property is not subject to taxation under § 77.52(2)(a).

It may be that the time-share property at issue was created under Chapter 703 and not under Chapter 707. This fact will not help petitioner because § 77.52(2)(a) does not refer to time-share property *created pursuant to* Chapter 707, but simply incorporates the definition of time-share property¹ found in § 707.02(32). The plain language of the two statutes makes it clear that § 77.52(2)(a) applies to any time-share property described in § 707.02(32). If, within § 707.02(32), there was language limiting the applicability of the definition, this too would be incorporated in § 77.52(2)(a).² However, there are

¹ Petitioner does not dispute that but for the initial applicability of Chapter 707, its time-share units would fall within the definition of time-share property found in § 707.02(32).

² For example, as we discuss below, § 77.51(4)(c)6, *Stats.*, uses the term "time-share property" in defining "gross receipts." But this definition does not simply incorporate the definition found in § 707.02(32). Rather, this definition is limited to time-share property *taxable* under § 77.52(2)(a). Because we conclude below that the sale of time-share property was not subject to the sales tax prior to August 9, 1989, this definition of gross receipts does not include charges associated with such time-share property.

no words of limitation in § 77.52(2)(a).

Petitioner's argument also ignores the fact that several provisions of Chapter 707 apply to time-share property created prior to June 1, 1988, and, to this extent, the definition of time-share property in § 707.02(32) also applies to time-share units created *before* June 1, 1988. *See*, § 707.58(2)-(11), *Stats.* Thus, petitioner's premise that Chapter 707 does not apply to time-share units created prior to June 1, 1988, is not entirely correct.

Petitioner argues that § 707.02(32) must be construed in the context of the chapter in which it is located. Petitioner further argues that the legislature could not have intended § 77.52(2)(a) to apply to time-share units created under Chapter 703. Because the interplay of §§ 77.52(2)(a) and 707.02(32) is clear and unambiguous, there is no need to resort to rules of statutory construction or to ascertain the legislature's intent. *Harris v. Kelley*, 70 Wis. 2d 242, 250 (1975). Petitioner also argues that § 707.02(32) must be construed so as not to create any surplusage. Not only is it not necessary to resort to statutory construction, but petitioner fails to show that any part of the statute would be rendered surplusage under the Commission's view of the statute.

Petitioner argues that no portion of respondent's assessment should apply because it is a tax-exempt, non-stock corporation and is not involved in a retail activity. Petitioner relies on *Kollasch v. Adamany*, 104 Wis. 2d 552 (1981), a case in which the Supreme Court held that furnishing meals to guests by the Sisters of St. Benedict was not subject to the sales tax because the sales were fundamentally non-mercantile, and, thus, the religious order was not a retailer under the sales tax. *Id.* at 568. In this case, petitioner manages and sells time-

share property. Petitioner's activities are clearly mercantile in nature. Moreover, its status as a tax exempt corporation does not, in and of itself, exclude petitioner from liability under the sales tax. *Id.* at 567.

Therefore, we conclude that the sales price paid by members for the purchase of time-share property was subject to the sales tax pursuant to § 77.52(2)(a)1.

Conveyance Fees

The payment of a one-time conveyance fee is part and parcel of the sales price of the time-share property. Therefore, this fee is taxable under § 77.52(2)(a)1. In addition, all conveyance fees at issue fall within the definition of "gross receipts" found in § 77.51(4)(c)6: charges associated with the time-share property that is taxable under § 77.52(2)(a)1. Because the conveyance fees at issue here were all collected for time-share property that is taxable under § 77.52(2)(a)1, these conveyance fees are taxable gross receipts.

Maintenance Fees

There can be little doubt that maintenance fees are "gross receipts" because they are "[c]harges associated with time-share property" as provided in § 77.51(4)(c)6. However, in order to be included within this definition of "gross receipts" the maintenance fees must be associated with time-share property that is *taxable* under § 77.52(2)(a)1 or 2. Thus, if the time-share property is not taxable under either of these subdivisions, then maintenance fees associated with this property cannot fall within the definition of gross receipts found in § 77.51(4)(c)6.

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Section 77.52(2)(a)1

Section 77.52(2)(a)1 was amended effective August 9, 1989, to apply to the sale of flexible use time-share property. Respondent argues that even before the amendment, flexible use time-share property was taxable lodging under this statute. Respondent explains its failure to actually enforce any sales tax liability against sellers of flexible use time-share units prior to August 9, 1989, as an accommodation to the industry. It is hard to take respondent's argument seriously.

No matter how charitably we read § 77.52(2)(a)1 (1987-88), nothing in that statute convinces us that the sale of flexible use time-share units falls squarely within this statute. Moreover, if respondent is correct, nothing in the statute prior to August 9, 1989 — or since — would limit its application to only flexible use time-share units. Why not tax time-share property that fixes the unit and starting date at the time of sale? Respondent does not attempt to tax fixed use time-share property because, we assume, it realizes there is no merit to such an argument.

We conclude, therefore, that time-share property sold by petitioner before August 9, 1989, is not time-share property that is taxable under § 77.52(2)(a)1.

Section 77.52(2)(a)2

Effective May 17, 1988, § 77.52(2)(a)2 was amended to apply to certain transactions relative to time-share property. Specifically, as amended, the statute imposes the sales tax on

the furnishing, for dues, fees or other considerations, ...
the privilege of having access to or use of amusement,
entertainment, athletic or recreational devices or

facilities, including, in connection with the sale or use of time-share property, as defined in s. 707.02(32), the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, including but not limited to membership rights, vacation services and club memberships.

The reference to § 77.52(2)(a)2 in § 77.51(4)(c)6 is curious. The latter subdivision includes within the definition of gross receipts “[c]harges associated with time-share property that is taxable under s. 77.52(2)(a)1 or 2.” In other words, in order for a charge to come within this definition, it must be associated with *time-share property that is taxable* under § 77.52(2)(a)1 or 2. With regard to § 77.52(2)(a)1, this reference is clear. That subdivision, as amended in 1989, imposes the sales tax on the *sale* of certain time-share property. Thus, a reference to time-share property taxable under § 77.52(2)(a)1, clearly refers to time-share property, the sale of which was subject to the sales tax.

The same clarity is not found in the reference to § 77.52(2)(a)2. This subdivision imposes the sales tax on “dues, fees or other considerations” for certain recreational facilities that are provided in connection with the “sale or use” of time-share property. For example, this subdivision imposes the sales tax on fees charged to owners of time-share property specifically for the use of recreational facilities, such as a golf course. In this example, the tax would not be imposed on the *time-share property or its sale*, but rather on the *fee charged*. Thus, if an owner of time-share property had to pay separate fees for the use of recreational facilities, that alone would not make that time-share property taxable under § 77.52(2)(a)2. Therefore, charges associated with the time-share property would not necessarily be included in the definition of gross receipts under § 77.51(4)(c)6 simply because the owner of the time-share property had to

pay fees for the use of recreational facilities.

In order for time-share property to be taxable under § 77.52(2)(a)2, the tax imposed by this subdivision must be imposed on *the sale of the time-share property*. For example, perhaps the purchase price of the time-share property had a component that was attributed to the member's perpetual use of recreational facilities.³ In such a case, a portion of the sales price of the time-share property would be taxable under § 77.52(2)(a)2. (Presumably, the remainder of the sales price would be taxable under § 77.52(2)(a)1.)

In the present case, respondent has not asserted that there was an identifiable component of the sales price of any time-share property that would be taxable under § 77.52(2)(a)2. (Even if there were such a component, it would only have an impact on maintenance fees charged for those time-share units sold on or after May 17, 1988 and before August 9, 1989.) We conclude that none of the time-share units for which maintenance fees are charged is taxable under § 77.52(2)(a)2.

We conclude that maintenance fees charged for time-share property that was sold prior to August 9, 1989, do not fall within the definition of gross receipts in § 77.51(4)(c)6 and, therefore, are not subject to the sales tax.

Respondent argues that the maintenance fees are actually part of the sales price that is paid in installments. There may be a case where the facts would demonstrate that a maintenance fee is in reality part of an installment sales plan. There are no facts in this case that give rise to such an inference.

³ This separate component might be identified in the sales document. Alternatively, respondent might identify and quantify this separate component on audit.

Therefore,

IT IS ORDERED

1. Respondent's motion for summary judgment is granted to the extent that petitioner is liable for sales tax on the proceeds, including conveyance fees, from the sale of time-share property sold during the period at issue and maintenance fees associated with time-share units that were sold by petitioner on or after August 9, 1989.

2. Petitioner's motion for summary judgment is granted to the extent that petitioner is not liable for sales tax on the amounts it received from members in the form of maintenance fees associated with time-share units that were sold by petitioner before August 9, 1989. § 77.52(2)(a)1 (1987-88), Stats.; 1989 Wis. Act. 31.

3. Respondent's action on the petition for redetermination is so modified and, as modified, affirmed.

Dated at Madison, Wisconsin, this 3rd day of March, 1998.

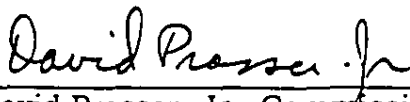
WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



David Prosser, Jr., Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN
Department of Revenue

DATE: March 13, 1998
TO: John Evans
FROM: Clay Seth
SUBJECT: Vacation Owners Association, Inc.
Docket No. 95-S-1513
Issue: Taxability of maintenance fee on time shares sold prior to
August 9, 1989

In response in your March 11, 1998 memo to Diane Hardt and myself, we concur with the recommendation to petition for rehearing on the above mentioned issue and if unsuccessful, appeal to Circuit Court. We also agree that DOR should drop the argument that sales of time shares were taxable prior to the change in sec. 77.52(2)(a)1.

CS:sdd7900

cc: D. Hardt
J. DeYoung
M. Wipperfurth
D. Davis
Conferees

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