

**STATE OF WISCONSIN  
TAX APPEALS COMMISSION**

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**ROBERT J. LAWRENCE  
AND CHARLES M. KEMPLER (DEC'D),**

**DOCKET NO. 05-T-83**

Petitioners,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

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**JENNIFER E. NASHOLD, CHAIRPERSON:**

This matter comes before the Commission on a Stipulation of Facts, exhibits incorporated therein, and briefs filed by the parties. Petitioner Robert J. Lawrence represents petitioners. The Department appears by Attorney John R. Evans.

Having considered the entire record herein, the Commission finds, concludes, and orders as follows:

**MATERIAL FACTS**

The following facts are taken from the parties' Stipulation of Facts and exhibits incorporated therein.

## **Jurisdictional Facts**

1. Petitioners were adult residents of the State of Illinois for all times relevant to the matter herein.

2. The Department is an agency of the State of Wisconsin created pursuant to Chapter 13 of the Wisconsin Statutes and is engaged in governmental duties including, but not limited to, the administration of the real estate transfer fee pursuant to Chapters 73 and 77 of the Wisconsin Statutes.

3. On September 23, 2004, petitioners were issued a Notice of Additional Assessment of Real Estate Transfer Fee ("assessment"), in the amount of \$16,203.29 for the transfer of certain property located at 16705 W. Lincoln Avenue and 2345-85 S. Commerce Drive, New Berlin, Wisconsin, 53151 ("property"), said property being in the State of Wisconsin and subject to Chapters 73 and 77 of the Wisconsin Statutes.

4. By letter dated November 5, 2004, and received by the Department on November 8, 2004, petitioners timely filed a petition for redetermination objecting to the assessment.

5. On March 23, 2005, the Department timely issued a Notice of Action denying the petition in its entirety.

6. Charles M. Kempler died on November 12, 2004, subsequent to the filing of the petition for redetermination with the Department.

7. On May 19, 2005, petitioners timely filed a petition for review with the Commission.

**Additional Facts**

8. The value of the property for purposes of this appeal is \$4,000,000.

9. On January 3, 1972, Charles M. Kempler, James J. Lawrence and other parties entered into an agreement entitled "Joint Venture Agreement" in connection with the acquisition and ownership of the property and other property.

10. Paragraph 1 of the Joint Venture Agreement states the name of the joint venture as "Lincoln-New Berlin Property" ("Joint Venture"). Paragraph 8 of the Joint Venture Agreement states that "title to the real property shall be taken in the names of Charles M. Kempler and James J. Lawrence in joint tenancy for the benefit of the parties hereto, and Charles M. Kempler and James J. Lawrence do hereby declare that upon their receipt of said title they will be holding it in trust for the parties hereto." (Exh. D, attached to Petition for Review, pp. 3-4).

11. The title insurance policy states the "Name of Insured" as "Charles M. Kempler and James J. Lawrence, not as tenants in common, but in joint tenancy with right of survivorship." (Exh. E, attached to Petition for Review).

12. On or about January 31, 1972, Charles M. Kempler and James J. Lawrence acquired title to the property.

13. After the death of James J. Lawrence, on or about January 1, 1994, petitioner Robert J. Lawrence, son of James J. Lawrence, was appointed as a successor

trustee and/or agent under the Joint Venture Agreement and, on or about April 11, 1994, title to the property was transferred by deed to petitioners, as joint tenants.

14. On or about October 15, 2003, Robert J. Lawrence organized a Wisconsin limited liability company designated Lincoln-New Berlin Property, LLC ("LLC").

15. On or about October 21, 2003, the parties to the Joint Venture Agreement entered into an Exchange and Conversion Agreement, whereby the parties exchanged their interests in the Joint Venture for equal interests in the LLC. There was no actual consideration given or received by any party in this exchange, unless the above recited exchange and conversion of interests by the parties is deemed consideration. The members of the LLC were the same parties with the same ownership interests as under the Joint Venture Agreement.

16. On or about December 29, 2003, petitioners conveyed the property to the LLC by quit claim deed, which was recorded on January 22, 2004, with petitioners' original Wisconsin Real Estate Transfer Return. There was no actual consideration of any kind given or received for this transfer. The quit claim deed states that "Robert J. Lawrence and Charles M. Kempler, as joint tenants [address] quit-claims (sic) to Lincoln-New Berlin Property, LLC [address] the following described real estate in Waukesha County, State of Wisconsin: Legal Description attached hereto . . . ." (Exh. B, attached to Petition for Review).

17. On or about November 5, 2004, as part of the petition for review filed with the Commission, petitioners submitted an amended Wisconsin Real Estate

Transfer Return. The quit claim deed, Wisconsin Real Estate Transfer Return and amended Wisconsin Real Estate Transfer Return all claim that the transfer is exempt under Wis. Stat. § 77.25(9).

18. The Joint Venture, through 2003, and the LLC, beginning in 2004, filed federal and Wisconsin partnership income tax returns using the same federal employer identification number provided by the Internal Revenue Service in 1972.

### **CONCLUSION OF LAW**

Petitioners have not met their burden of establishing that the transfer of the property to the LLC from petitioners as trustees of the Joint Venture was exempt from the real estate transfer fee under Wis. Stat. § 77.25(9) as a conveyance from trustees to a beneficiary or from agents to a principal.

### **OPINION**

Wisconsin Stat. § 77.22(1) provides: "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 not exempted or excluded under this subchapter." A number of types of property transfers are exempted from the real estate property transfer fee, including conveyances "[b]etween agent and principal or from a trustee to a beneficiary without actual consideration." Wis. Stat. § 77.25(9).

Under Wisconsin law, tax exemptions are a matter of legislative grace and not of right. *Janesville Community Day Care v. Spoden*, 126 Wis. 2d 231, 233, 376 N.W.2d 78 (Ct. App. 1985). Exemption statutes are construed against the taxpayer, who must bring himself or herself clearly within the terms of the exemption. *Gottfried, Inc. v. Dep't*

*of Revenue*, 145 Wis. 2d 715, 719-20, 429 N.W.2d 508 (Ct. App. 1988). Assessments made by the Department are presumed to be correct, and the burden is upon the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-401 (WTAC 1984); Wis. Stat. § 77.59(1).

Petitioners claim an exemption under Wis. Stat. § 77.25(9), which the Department has denied. Petitioners have the burden of establishing that the conveyance clearly falls within that exemption and must show by clear and satisfactory evidence that the Department's assessment was in error.

Petitioners assert that they held the property as trustees for the Joint Venture. They further contend that the members of the Joint Venture were the beneficiaries, and that by virtue of the Exchange and Conversion Agreement, the LLC (which was comprised of the same members as those in the Joint Venture) replaced the members of the Joint Venture as beneficiary. Thus, petitioners assert that the transfer was one between trustees and beneficiary.<sup>2</sup>

As a preliminary matter, we note that the deed does not indicate that petitioners held or transferred the property as trustees for the Joint Venture or its members; the deed states only that they, "as joint tenants," quit claimed the property to the LLC. (Exh. B, attached to Petition for Review). The same is true of the title

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<sup>2</sup>Although petitioners' argument centers around a claimed conveyance between trustees and beneficiary, they also mention, at various points in their briefs, an agency/principal relationship and rely primarily on case law involving agent/principal conveyances. The agent/principal relationship is not developed and we therefore do not consider it, except to distinguish precedent cited by petitioners.

insurance policy, which names the owners of the property as “Charles M. Kempler and James J. Lawrence, not as tenants in common, but in joint tenancy with right of survivorship” but says nothing about owning the property as trustees for the Joint Venture or its members. (Exh. E, attached to Petition for Review). However, the Department joins petitioners in arguing that petitioners held and transferred the property as trustees for the benefit of the Joint Venture or its members. Accordingly, in light of the Department's agreement on this point, we assume for purposes of this decision that the language of the Joint Venture Agreement is sufficient to establish that petitioners held the property in trust for the members of the Joint Venture and transferred the property as trustees for the benefit of the members of the Joint Venture. The Department also does not deny that the Exchange and Conversion Agreement was sufficient to convert the Joint Venture into an LLC. The Department's primary argument appears to be that there was no method available to petitioners to carry out their business conversion that would not give rise to liability for the real estate transfer fee.<sup>3</sup>

Petitioners' argument is that a change in the form of that business entity should not strip the business entity of its exemption under Wis. Stat. § 77.25(9). Simplified, they argue that if a business entity that is the beneficiary of a trustee relationship swaps one "hat" (joint venture) for another (LLC), that business, now in the form of an LLC, remains the beneficiary of the trust relationship.

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<sup>3</sup> In support of this argument, the Department relies, in part, on *Turner v. Wis. Dep't of Revenue*, 2004 WI App 82, 271 Wis.2d 760, 679 N.W.2d 880. However, that case is distinguishable as it addressed the applicability of Wis. Stat. §77.25(15m), transfers between spouses, and did not involve a trustee/beneficiary relationship or conversion from one business form to another.

It is clear that had petitioners, the undisputed trustees of the Joint Venture, conveyed the property to the members of the Joint Venture, the undisputed beneficiaries here, the conveyance would have been exempt under § 77.25(9). It is also clear that, had the LLC been formed in 1972 (assuming such an option were available) and had Charles Kempler and James Lawrence taken title to the property as trustees for the LLC, the conveyance to the LLC in December of 2003 would have been exempt under § 77.25(9), as a conveyance from trustees to a beneficiary.

The issue here is whether, when a business changes its form (here, from a joint venture to an LLC), without other major changes to the business or its ownership, the business remains the same beneficiary under a trust arrangement, or whether, as part of the business transformation, the business becomes a new and different beneficiary.

We conclude that petitioners have not met their burden of establishing by clear and satisfactory evidence that the Department's assessment was in error nor have they shown that the conveyance clearly falls within the claimed exemption of § 77.25(9) as a conveyance from trustees to beneficiary. The trustees did not transfer the property to the members of the Joint Venture, the beneficiaries of the trust, or to the members of the LLC, who were the same individuals. Instead, the property was transferred to the LLC, a new business entity which was not a named beneficiary of the trust under the Joint Venture Agreement.

Petitioners have not shown how the Exchange and Conversion Agreement transforms the plain language of the deed, which conveys property from petitioners to



the LLC, into what they argue is a mere replacement of beneficiaries. Petitioners have the burden of squarely establishing that the conveyance falls within the exemption asserted. Simply referring to the Exchange and Conversion Agreement, without any concrete explanation as to how that document brings the conveyance into the ambit of Wis. Stat. § 77.25(9), is insufficient to satisfy that burden. None of the documents submitted by petitioners, including the Exchange and Conversion Agreement, refers to the LLC as a beneficiary of the trust created under the Joint Venture Agreement.

Nor does the authority cited by petitioners assist them in establishing that the conveyance was an exempt transfer between trustees and beneficiary or between agents and principal. Petitioners first cite *Sunburst v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-550 (WTAC 2001), *rev'd on other grounds*, Wis. Tax Rptr. (CCH) ¶ 400-623 (Waukesha County Cir. Ct. 2002), *aff'd*, 2003 WI App. 162, 266 Wis. 2d 693, 667 N.W.2d 377 (unpublished decision). That case is readily distinguishable. In *Sunburst*, the Commission held that an unrecorded nominee agreement established an agency relationship between Sunburst, a real estate developer, and Westgrove, a limited liability partnership that was formed to hold record title to Sunburst's property. Therefore, the transfer from Sunburst to Westgrove qualified for the transfer fee exemption. The nominee agreement in *Sunburst* stated, in relevant part, that Sunburst would "transfer record title to the property to Westgrove LLP to act as its nominee and agent" and that "Westgrove LLP acknowledges that its duties or responsibilities with respect to the Property arise solely in its capacity as agent of and nominee for Sunburst IV, [and] that it has no real interest in the Property. . . ."

The Commission agreed that Sunburst, as principal, transferred the subject property to its agent, Westgrove, and the conveyance was therefore exempt under Wis. Stat. § 77.25(9). The Commission stated that the nominee agreement "make[s] it clear that Westgrove is Sunburst's agent." In the instant case, petitioner has not shown that there was either a trustee/beneficiary or an agent/principal relationship between the transferor, petitioners as trustees of the Joint Venture, and the transferee, the LLC.

Likewise, petitioners' reliance on *Washington National Development Co. v. Dep't of Revenue*, 194 Wis. 2d 566, 535 N.W.2d 71 (1995) is misplaced because that case also involved an agency agreement that clearly established an agency relationship between the transferor, Washington National (the agent), and the transferee partnerships (the principals). See also *Kasprzak v. Dep't of Revenue*, Tax Rptr. (CCH) ¶400-494 (WTAC 2000) (Commission rejects claim that conveyance exempt under Wis. Stat. § 77.25(9) because no evidence of agency agreement). Moreover, unlike in this case, the transfer at issue in *Washington National* involved a transfer to interim holders which was temporary until the intended grantee could be finalized. *Washington National*, 194 Wis.2d at 572.

Petitioners also rely for their position on various issues of the Real Estate Transfer News, a publication issued by the Department. They first cite question 2Q of the October 1998 Real Estate Transfer News, which states:

2Q. A and C intend to purchase 2 adjacent lots from B. Because A and C do not want B to know that C is buying lot 2, A enters into a purchase agreement to buy the two

adjacent lots from B and immediately transfer lot 2 to C. Can a transfer fee be avoided on the conveyance from A to C?

A. This transaction appears to be "agent to principal" and could be exempt from fee per s. 77.25(9), Stats. A and C should have an "agency agreement" between them indicating their intentions. The use of exemption 9 also requires the conveyance to be for "no consideration." If A transfers lot 2 immediately after taking title from B and does not benefit from having held title, exemption 9 would apply.

(Department's Brief, Attachment 1, p.1).

Petitioners state that the scenario described above is similar to that here because "Petitioners acquired title from a third party and then conveyed the property, pursuant to a written trust (or agency) agreement to the beneficiary of the trust (or principal of the agent)." (Petitioner's Brief at 3) We disagree. Again, petitioners have not established a trustee/beneficiary or agent/principal relationship between themselves as trustees and the LLC. Moreover, unlike in the situation described in Question 2Q, here it cannot be seriously argued that in acquiring the Joint Venture property from the "third party" in 1972, James Lawrence and Charles Kempler did so only to act as agents to transfer the property to the LLC, which, from the record, was not formed until 2003, over 30 years later.

Also advanced in support of petitioners' argument is the answer to Question 3Q in the Department's October 1999 Real Estate Transfer News, which states:

A has contracted with B, Construction Contractor, to build an apartment on A's property. A conveys his land to B for financing reasons. At the completion of the contract B conveys to A the land and building. Should a fee be paid on the conveyance from A to B; from B to A?

A. No, each conveyance is exempt under s. 77.25(9), Stats.

(Department's Brief, Attachment 2, p. 3) The scenario described above is distinguishable because it is clear that there is no intent for the contractor to acquire the property for anything other than for construction purposes and the property was immediately conveyed back to A upon completion of construction. In the case at bar, the property was not transferred to the LLC as a temporary measure for a given purpose, but was indefinitely transferred.

Petitioners' reliance on the Department's responses in three other issues of the Real Estate Transfer News is also unavailing, as all of the scenarios to which petitioner refers involved the transfer of personal property, not real estate. *See* Question 1Q in the March 2003 Real Estate Transfer News, <http://www.revenue.wi.gov/ust/news/0303.pdf>, p.1 (involved sale of "membership interest in our LLC where the LLC name will remain the same and the only change will be the members who own the LLC"); Question 2Q of the April 1999 Real Estate Transfer News, <http://www.revenue.wi.gov/ust/news/9904.pdf>, p. 1. (involved LLC with two members which wished to continue, but with one member); Question 7Q in the February 1998 Real Estate Transfer News,<sup>4</sup> <http://www.revenue.wi.gov/ust/news/9904.pdf>, p.2 ("selling of membership in a LLC is personal property and nothing needs to be recorded since there is not a real property conveyance.")

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<sup>4</sup> Petitioners cite a "February 1999" Newsletter. However, because there exists no such February 1999 Newsletter, the Commission assumes that petitioners actually meant to refer to the February 1998 Newsletter.

In all three situations described in the preceding paragraph, the LLC held the real estate before, during and after the transfer of the membership interests and the conveyances involved transfers of personal property, not real estate. To the extent petitioners argue that this case involves the transfer of personal property rather than real estate, this assertion is not only underdeveloped but also undermined by their filing of a quit claim deed and amended Real Estate Transfer Return and their position that the conveyance was an exempt transfer of real estate from trustees to beneficiary under Wis. Stat. § 77.25(9). Petitioners conveyed real estate to the LLC. Because petitioners have failed to demonstrate that a trustee/beneficiary relationship existed between the transferors and transferee, they have not shown that the conveyance falls within the exemption established in Wis. Stat. § 77.25(9).

**IT IS ORDERED**

The Department's action on petitioners' petition for redetermination is affirmed and the Department's assessment is upheld.

Dated at Madison, Wisconsin, this 4th day of January, 2007.

**WISCONSIN TAX APPEALS COMMISSION**

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Jennifer E. Nashold, Chairperson

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Diane E. Norman, Commissioner

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David C. Swanson, Commissioner