

STATE OF WISCONSIN  
TAX APPEALS COMMISSION



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RICHARD H. LINDNER 1991 CONVERTIBLE TRUST,      DOCKET NO. 18-T-159

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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**LORNA HEMP BOLL, COMMISSIONER:**

This case comes before the Commission for decision on a Joint Stipulation of Facts and Cross Motions for Summary Judgment. The Petitioner, the Richard H. Lindner 1991 Convertible Trust ("the Trust"), is represented by Andrew Robinson of Mallery & Zimmerman, S.C., Milwaukee, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jenine E. Graves. Both parties have submitted briefs in support of their respective positions. For the reasons set forth below, we hold in favor of the Department.

**FACTS**

1. On February 22, 2018, the Department issued a Notice of Additional Assessment of Real Estate Transfer Tax to the Trust. (Stip. Ex. A.)

2. The Trust filed a timely Petition for Redetermination which the Department denied in a Notice of Action dated May 16, 2018. (Stip. Exs. B & C.)

3. On July 13, 2018, Petitioner filed a timely appeal with the Commission. (Stip. Ex. D.)

4. On July 18, 1991, Richard H. Lindner created the Trust. (Stip. 5.)

5. Upon Richard H. Lindner's death in 2012, the Trust became irrevocable. (Stip. 5-6.)

6. At all relevant times, the Trust was irrevocable and the trustees of the Trust were Gregg R. Lindner, the grantor's son, and Cathryn J. Lindner, the grantor's surviving spouse. (Stip. 7-8.)

7. By deed recorded in Milwaukee County on or about February 25, 2016, the Trust transferred its fractional ownership interest in a property located at 6055 S. 6<sup>th</sup> Street, Milwaukee, Wisconsin ("Property") to RLT 6, LLC ("the LLC"), a Wisconsin limited liability company. (Stip. 9-10.)

8. At all relevant times, the Trust was the sole member of the LLC. (Stip. 11.)

9. The Wisconsin Electronic Real Estate Transfer Return ("eRETR") filed pursuant to the transfer claimed an exemption from the imposition of the real estate transfer fee under Wis. Stat. § 77.25(15s). The eRETR describes the relationship between Grantor (the Trust) and Grantee (the LLC) as "Family (Grantor to a single member LLC of which the Grantor is the sole member)." (Stip. Ex. E.)

### *Applicable Statutes*

The Wisconsin Statutes impose a transfer fee on conveyances of real property. Wis. Stat. § 77.22(1). However, some conveyances are exempt from the transfer fee. Pertinent to this case, the transfer fee does not apply to conveyances:

[b]etween a limited liability company and one or more of its members if all of the members are related to each other as spouses, as lineal ascendants, lineal descendants or siblings, whether by blood or by adoption, or as spouses of siblings and if the transfer is for no consideration other than the assumption of debt or an interest in the limited liability company.

Wis. Stat. § 77.25(15s).

### DECISION

The underlying facts here are not in dispute. The parties have submitted a Stipulation of Facts, and both parties have filed Motions for Summary Judgment. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of simultaneous motions for summary judgment is an assertion that the material facts are not in dispute and only questions of law remain for determination. *Healthcare Services, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-086 (WTAC 2016).

As a general matter, assessments made by the Department are presumed to be correct, and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determinations. *Calaway v. Dep't. of Revenue*,

Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). Tax exemptions, deductions, and privileges are matters of legislative grace and are strictly construed against the taxpayer. *Ramrod, Inc. v. Dep't. of Revenue*, 64 Wis. 2d 499, 504, 219 N.W.2d 604 (1974).

“While the ‘fee’ is not a ‘tax’, it has similar characteristics, such as having a value or ‘measure’, a statutorily imposed rate, and the moneys being used to fund state (and county) operations or programs. Exemptions from this fee are, similarly, narrowly construed against the claimant.” *Selle v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-410 (WTAC 1999) and *Blado v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-411 (WTAC 1999) (addressing the Wis. Stat. § 77.25(15s) transfer fee exemption); *Huntington Revocable Trust v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-557 (WTAC 1999) (addressing a similar exemption under Wis. Stat. § 77.25(15s)).

The pertinent facts are as follows: The Trust conveyed its ownership interest in a parcel of real property to the LLC. The Trust was the sole member of the LLC. The Trust then claimed the transaction was exempt as “between a limited liability company and one or more of its members.”

The Department has denied the exemption on two theories. First, the transaction is between a limited liability company and its sole member, which is an irrevocable trust, an entity which is not human and therefore does not qualify for this exemption. Petitioner counters that the transaction is really between the LLC and the trustees of the Trust, who are related, which leads to the Department’s second argument

that the surviving spouse and her stepson are not related in any of the ways outlined by the language of the exemption.

Applying the language of the statute, we find that the conveyance is between the LLC and its sole member, the Trust. The parties stipulate that the Trust was an irrevocable trust at the time of the transfer, Mr. Lindner having passed away prior to the transaction. At the time of the transfer, the trustees were Mr. Lindner's surviving spouse and his son (who is not the biological or adopted son of the surviving spouse).

Petitioner argues that we should look through the Trust and view the transaction as being between the LLC and the individual trustees of the Trust, and then we should evaluate their relationship. For the first proposition, Petitioner cites several cases involving fee exemptions claimed by trustees of revocable trusts. *Selle v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-410 (WTAC 1999); *Blado v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-411 (WTAC 1999); *Huntington Revocable Trust v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-557 (WTAC 1999). Those cases each involved transfers between the trustees of a revocable trust and an LLC<sup>1</sup> where the revocable trust was the sole member. In each, the exemption was upheld. However, in all three cases, the Commission pointed out,

Claimed exemptions from the fee for entity-to-entity transfers—between partnerships, corporations and LLC's, all of which are comprised solely of family members—have usually not succeeded, in the absence of specific exemption language. . . .

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<sup>1</sup> The transaction in the *Huntington* case was actually between a revocable trust and an LLP, where the trust was the sole partner of the LLP, so the exemption was claimed under Wis. Stat. § 77.25(15m), which is substantially similar to Wis. Stat. 77.25(15s).

The rationale has generally been that exemptions from tax statutes are narrowly construed against the person claiming the exemption. *Ramrod, Inc. v. Wisconsin Department of Revenue*, 64 Wis. 2d 499 (1974).

*Selle* (March 15, 1999), *Blado* (March 19, 1999), *Huntington* (April 8, 1999), all using identical language.

We find all three cases distinguishable for the reason that the trusts in those cases were revocable. The *Selle* case involved the transfer between a joint revocable trust and an LLC. Mr. and Mrs. Selle were the trustees of their own restated revocable joint trust. The Selles created an LLC, whose sole member was the Selle's revocable trust. As trustees of their revocable trust, the Selles purchased property which they later conveyed to the LLC. They claimed an exemption from the transfer tax under Wis. Stat. § 77.25(15s). The Commission allowed the exemption because it viewed the transaction as "a transfer from the two trustees of a revocable living trust to an LLC in which they are spouses and the equal sole members in their trustee capacities."

The *Blado* case also involved a transfer from a joint revocable trust to an LLC. Mr. and Mrs. Blado were the settlors, trustees, and beneficiaries of their own revocable trust; as settlors, they retained powers to amend or revoke the trust. As in *Selle*, the Commission viewed the transaction as "a transfer from spouses who are the two trustees of a revocable living trust to an LLC in which they are the sole members."

The *Huntington* case involved a transfer between a revocable trust and a partnership. Mr. Huntington was the sole donor and sole trustee of his own revocable trust, and Mr. Huntington and his sister were the sole partners of the partnership. The deed's grantor was listed as "Lyle G. Huntington, Trustee." The claimed exemption, Wis.

Stat. § 77.25(15m), exempts transfers between a partnership and its partners if they are related to each other in the same manner as is required by Wis. Stat. § 77.25(15s). The Commission viewed the transaction as “a transfer by the trustee of a revocable living trust to a partnership in which the trustee and his sister are partners and sole members.”

The following language is used in all three decisions:

Under Wis. Stat. § 701.05(1), “the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee's fiduciary duties as trustee.” Therefore, the trustee – who was an individual and not an entity as respondent claims – owned the property.

*Selle, Blado, Huntington.*

The distinguishing factor here is that the Lindner Trust was irrevocable at the time of the transfer. The trustee of an irrevocable trust does not take “all title” to the trust assets; the trustee takes legal title while the equitable or beneficial ownership is with the beneficiaries. The I.R.S. explains: “The trustee obtains legal title to the trust assets and is required to administer the trust on behalf of the beneficiaries according to the express terms and provisions of the trust agreement. A fiduciary is an individual or organization charged with the duty to act for the benefit of another. A trustee is a fiduciary. . . . The beneficiaries are those entitled to receive benefits from the trust.” <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers> (last visited 9/26/2019).

As trustees, the individuals in *Selle*, *Blado*, and *Huntington* were both the legal and beneficial owners of their own revocable trust assets, meaning, as their own beneficiaries, the trustees had full and unfettered use of the assets of the trusts.<sup>2</sup>

In contrast, in this case, Mr. Richard H. Lindner was the initial grantor of the Lindner Trust. While he was alive, his trust was revocable, and Mr. Lindner was the grantor, trustee, and beneficiary. Just like the *Selle* trustees and the *Blado* trustees, Mr. Lindner was the full owner of all his revocable Trust's assets. He could amend or revoke the trust (Wis. Stat. § 701.0602) and was subject to taxation on those assets as though he owned them outright.

The parties have stipulated that, upon Mr. Lindner's death, the Trust became irrevocable. At that point, the roles of grantor, trustee, and beneficiary separated. The grantor was deceased, Mrs. Lindner and Mr. Gregg Lindner became the trustees of the now-irrevocable trust. We have little to no information as to the beneficiaries.<sup>3</sup>

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<sup>2</sup> "The grantor (also known as trustor, settlor, or creator) is the creator of the trust relationship and is generally the owner of the assets initially contributed to the trust. The grantor generally establishes in the trust instrument the terms and provisions of the trust relationship between the grantor, the trustee, and the beneficiary. These will usually include the following:

- The rights, duties, and powers of the trustee;
- Distribution provisions;
- Ability of the grantor to amend, modify, revoke, or terminate the trust agreement;
- The designation and selection of a trustee or successor trustees; and
- The designation of the state under which the terms and provisions of the trust agreement are to be governed. . . .

If a trust is a grantor trust, then the grantor is treated as the owner of the assets, the trust is disregarded as a separate tax entity, and all income is taxed to the grantor."

See I.R.S. website, <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers> (last visited 9/26/2019).

<sup>3</sup> The stipulation does not include any information concerning the terms or beneficiaries of the Trust other than to indicate that Mrs. Lindner and Mr. Gregg Lindner were the only Trustees at all times material to this case.



While the 1999 cases allow for the law to look through a revocable trust to its trustees, we do not similarly disregard an irrevocable trust. The trustees of an irrevocable trust hold legal title but are not in full control of an irrevocable trust in the same way a grantor/trustee is in the case of a revocable trust. The trustees of an irrevocable trust (with some exceptions) cannot change the terms of the trust, cannot revoke the trust, cannot do as they wish with trust assets, and are not by virtue of their roles as trustee taxed personally on trust income.

An irrevocable trust is an entity unto itself, separate from the individuals involved. Thus, this Trust is a non-human entity. Therefore, the transaction in this case is between an LLC and a non-human entity which is the sole member of the LLC. The Commission and circuit court looked at transfers between entities when a legal entity was the sole member of an LLC in *F.M. Management Co., Ltd. Partnership v. Dep't of Revenue*, 2004 WI App 19, 269 Wis. 2d 526, 674 N.W.2d 922 (2003). In that case, the petitioner claimed an exemption under Wis. Stat. § 77.25(15s) for the transactions between a limited liability partnership (LLP) and an LLC, where the LLP was the sole member of the LLC.<sup>4</sup> The taxpayer urged that the family relationship requirement should not apply to sole member LLCs. The taxpayer reasoned that, where there is only one member, that member need not be human because neither humans nor entities may be “related” to themselves. In a decision which post-dates *Selle, Blado*, and *Huntington*, the circuit court upheld the Commission’s ruling that “the plain meaning of Wis. Stat. § 77.25(15s) is that natural

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<sup>4</sup> The case does not describe the makeup of the LLP. The parties apparently agreed, at least for the purpose of the ruling, that the partnership was an entity without the required familial relationships.

persons who are family members are exempt from transfer fees and that a legal entity is not a family member within the meaning of the statute.” In finding the family relationship requirement “clear and unambiguous,” the *F.M. Management* court explained:

[T]o be exempt from the transfer fee under this provision, the parties must be natural persons and familial relations. If the legislature had intended legal entities to be exempt under this provision, there would be clear language to that effect. To interpret this section to include nonhuman legal entities is contrary to the plain language and intent of the statute, not to mention create text that would be predominantly surplusage. Additionally, such interpretation would achieve an absurd result: entities could be created simply for the purpose of avoiding this fee thereby negating the entire purpose of the fee provision to begin with.

*F.M. Management.*

For the purposes of the transfer fee, the Lindner Trust is an irrevocable trust which is a non-human entity. Because the transfer in this case was between two entities, an LLC and an irrevocable trust, *F.M. Management* dictates that the transaction in this case is not exempt under Wis. Stat. § 77.25(15s).

We further note that, even if the transfer had been between the LLC and the Trustees themselves, the two Lindners are not related in any of the manners for which the Wis. Stat. § 77.25(15s) exemption is allowed. The exemption, broken down, applies to one person or more if the people are all related to each other as

- spouses (the Lindners are not spouses),
- lineal ascendants by blood or adoption (they are not mother/child by blood or adoption),
- lineal descendants by blood or adoption (they are not mother/child by blood or adoption)
- siblings by blood or adoption (they are not brother/sister by blood or adoption), or

- spouses of siblings (they are not sibling in-laws).

Mr. Gregg Lindner is simply the son of Mrs. Lindner's deceased spouse.

Petitioner suggests we look to Wis. Stat. § 77.25(8), which does allow an exemption for step relatives. The existence of that statutory language, however, simply illustrates that the legislature could have provided similar language in Wis. Stat. § 77.25(15s) but did not. Perhaps it is an error that it was not included here, but it is not our job to guess why the "step" relationship is not included in the exemption language of Wis. Stat. § 77.25(15s) - we simply note that it is not there. We do not have the power to write language into a statute that the legislature has not included. *Hastings v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-644 (WTAC 2002).<sup>5</sup>

Petitioner points to the Department's guidance, which refers to "any combination of the above" relationships, as sufficiently broad to encompass the "step" relationship. Exemptions are to be strictly construed. The guidance language is vague at best and cannot be read to hold the Department to language clearly not included in this exemption.

#### CONCLUSIONS OF LAW

1. An irrevocable trust is a legal entity which may not claim the Wis. Stat. § 77.25(15s) exemption.
2. Petitioner's Motion for Summary Judgment is denied.

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<sup>5</sup> "The Commission cannot rewrite the subject statute. Even if we believed the statute to be unfair, we cannot go beyond legitimate construction when, as here, the meaning is plain and not ambiguous. *See In Interest of G. & L.P.*, 119 Wis. 2d 349, 354 (Ct. App. 1984), and *State v. Hall*, 207 Wis. 2d 54, 82 (1997)." *Hastings v. Dep't of Revenue*.


3. The Department's Motion for Summary Judgment is granted.

Dated in Madison, Wisconsin, this 10th day of October, 2019.

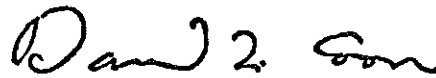
WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll, Commissioner



David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin 53705

**NOTICE OF APPEAL INFORMATION**

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.