

STATE OF WISCONSIN
TAX APPEALS COMMISSION



MEQUON RESERVE, LLC,

DOCKET NO. 21-T-004

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

ELIZABETH KESSLER, CHAIR:

This case comes before the Commission for decision on Respondent's Motion to Dismiss and, in the alternative, Respondent's Motion for Summary Judgment. The Petitioner, Mequon Reserve, LLC, a Wisconsin limited liability partnership, appears by Attorney Anthony G. Henika. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney James W. McNeilly, Jr. Both parties have filed briefs in support of their respective positions.

The Commission finds the real estate transfer in question was not exempt from the Real Estate Transfer Fee, and, therefore, upholds the Department's assessment.

FACTS

Jurisdictional Facts

1. On or about December 26, 2019, an eRETR (electronic real estate transfer return) was filed with the Department and the Ozaukee County Register of Deeds reporting the December 23, 2019 conveyance of real estate ("Property") from Grantors Mequon Reserve Kennedy LLC, Mequon Reserve L&P2 LLC, Mequon Reserve County Seat LLC, Mequon Reserve WAH LLC, and Mequon Reserve Dakota LLC to Grantee, Mequon Reserve LLC, via Quit Claim Deed. The conveyed Property consisted of the land and improvements valued at \$16,077,100. The eRETR indicated a transfer fee due of \$0.00 and claimed a transfer fee exemption of "6m." The transfer type was listed as "Other (Converting Entity)." (Affidavit of Leo Kiedrowski ("Kiedrowski Aff."), ¶ 6, Ex. A.)

2. On May 14, 2020, Respondent issued a Notice of Additional Assessment of Real Estate Transfer Fee ("Notice") to Mequon Reserve Kennedy, LLC, one of the five Grantors, in the total amount of \$63,460.50, including interest and penalty. The Notice referenced all five Grantors. (Kiedrowski Aff., ¶ 9, Ex. D.)

3. By letter dated June 16, 2020, Attorney Henika timely appealed the Notice to the Department on behalf of the five Grantor LLCs, claiming that the conveyance was exempt from the transfer fee under exemption Wis. Stat. § 77.25(6m). (Kiedrowski Aff., ¶ 10, Ex. E.)

4. On November 13, 2020, the Department issued to Mequon Reserve Kennedy, LLC, a Notice of Action denying the Petition for Redetermination, again referencing the five Grantor LLCs. (Kiedrowski Aff., ¶ 11, Ex. F.)

5. On January 8, 2021, the Petitioner, the Grantee in the transaction at issue, filed a timely Petition for Review with the Commission appealing the Department's Notice of Action denying the Grantors' Petition for Redetermination. (Commission file.)

Material Facts

6. On or about April 4, 2016, a Tenants-In-Common Agreement was created by a group of individuals and business entities to which Petitioner refers as the "Grantor business entities," "albeit under different names." Petitioner also collectively refers to them as "Mequon Reserve TIC." (Petitioner's Br., ¶ 1, Ex. A.)

7. The Tenants-In-Common Agreement explicitly states, on the first page, in the first numbered paragraph, that they are not a business entity. Indeed, they specifically agreed:

1. NO PARTNERSHIP. The parties hereby confirm their intention not to hold the Property as a partnership property or in a partnership []. No Tenant in Common shall execute any agreement identifying any or all of the Tenants in Common as partners, shareholders or members of a business entity, nor participate in holding the Tenants in Common out as a partnership or any other form of business entity. No Tenant in Common shall participate in the holding of the property out as partnership property or as being held by any other form of business entity. (Emphasis added.)
(Petitioner 's Br., Ex. A.)

8. A document identified as “Consent Resolution for Mequon Reserve, LLC,” dated December 23, 2019, lists the following owners of Mequon Reserve, LLC, along with the following listed percentages of ownership interest:

Owner	Percentage Ownership Interest
Mequon Reserve Kennedy, LLC	21.07%
Mequon Reserve L & P 2 LLC	16.23%
Mequon Reserve County Seat, LLC	30.33%
Mequon Reserve WAH, LLC	13.16%
Mequon Reserve Dakota, LLC	19.21%

(Petitioner’s Br., Ex. C.)

9. The assessed party, Mequon Reserve Kennedy, LLC, is one of the five Grantor entities. The assessment references all five Grantor LLCs and the Petition for Redetermination appears to have been brought on behalf of all Grantors. (Kiedrowski Aff., ¶ 8, Ex. D.)

10. The Petitioner is the Grantee in the disputed transaction. Mequon Reserve, LLC, is a Wisconsin Limited Liability Company with its principal office located at 524 Technology Way, Saukville, WI, 53080. The Petitioner was organized as a domestic limited liability company on August 15, 2017. (Kiedrowski Aff., ¶ 8, Ex. C.)

11. There are no records in the Wisconsin Department of Financial Institutions indicating that the Grantor companies filed a statutory conversion of business entity certificate, nor a statutory merger. (Kiedrowski Aff., ¶ 8, Ex. C.)

Applicable Statutes

Wis. Stat. § 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 not exempted or excluded under this subchapter. . . .

Wis. Stat. § 77.25. Exemptions from fee. The fees imposed by this subchapter do not apply to a conveyance:

(6m) Pursuant to the conversion of a business entity to another form of business entity under state law (sec. 178.1141, 179.76, 180.1161, 181.1161, or 183.1207, Wis. Stats.) if after the conversion, the ownership interests in the new entity are identical with the ownership interests in the original entity immediately preceding the conversion.

Wis. Stat. § 183.0701. Ownership of limited liability company property.

(1) All property originally transferred to or subsequently acquired by or on account of a limited liability company is property of the limited liability company and not of the members individually.

(3) ... Any interest in real property may be acquired in the name of a limited liability company and title to any interest so acquired shall vest in the limited liability company rather than in the members individually.

Wis. Stat. § 802.06 (2)(b). Defenses and objection; How presented.

(2)(b)...If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted ... matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08.

ANALYSIS

The underlying facts are not in dispute. The Department filed both a Motion to Dismiss and a Motion for Summary Judgment, arguing first that the Petitioner lacks standing in this matter because it is the grantee, not a grantor in this title transfer.

Under Wis. Stat. § 77.22, the real estate transfer fee is imposed upon the grantor, not the grantee. The Petitioner is not the grantor in the transaction at issue. We

further note that our relevant appeal statute requires a petitioner to be aggrieved by a determination of the Department. Wis. Stat, § 73.01(5)(a). In this case, the aggrieved party, if any, is Mequon Reserve Kennedy, LLC, and its fellow Grantors; it is not Mequon Reserve, LLC.

We find the Petitioner/Grantee lacks standing to challenge this matter and is not aggrieved by a determination of the Department; therefore, we grant the Department's Motion to Dismiss. However, in the interest of efficiency, we will also address the substance of the Motion 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).

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 (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.” *Lindner*, quoting *Selle v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-410 (WTAC 1999).

Under the Wisconsin real estate transfer fee statutes, a transfer is exempt from the fee “[p]ursuant to the conversion of a business entity to another form of business entity under state law (sec. 178.1141, 179.76, 180.1161, 181.1161, or 183.1207, Wis. Stats.) if after the conversion, the ownership interests in the new entity are identical with the ownership interests in the original entity immediately preceding the conversion.” Wis. Stat. § 77.25(6m).

The petitioner contends that the Tenants-In-Common Agreement signed on April 4, 2016 created a business entity, and that that entity converted to another form of business entity with, arguably, the same ownership interests, on December 23, 2019, and, therefore, the transfer of title is exempt as a conversion under Wis. Stat. 77.25(6m).

This argument fails for several reasons. First, there is no recognized “Tenants-In-Common” business entity under Wisconsin statutes. Tenants-In-Common is a form of property ownership, the rights and interests associated therewith being outlined in Wis. Stat. Chapter 700. While it appears that a group of individuals and LLCs acquired this commercial real estate collectively with the intent to run a business, they did not create a singular “original entity” capable of conversion.

Second, the language of the Tenants-in-Common Agreement, which the Petitioner contends created a business entity, expressly declares that it is not creating a partnership nor any other form of business entity. It is absurd to claim that a document that expressly does not create a business entity is, in fact, creating a business entity.

Third, in order for a business entity conversion to qualify for exemption under Wis. Stat. § 77.25(6m), the conversion must be of a type specifically referenced in Wis. Stats. §§178.1141, 179.76, 180.1161, 181.1161, or 183.1207 and must follow the procedures outlined in the appropriate statute.

The statutory language says, "Pursuant to the conversion of a business entity to another form of business entity under s. 178.1141 [Domestic Partnership to another entity], 179.76 [LLP to another entity], 180.1161 [Domestic Business Corporation to another entity], 181.1161 [Domestic Non-Stock Corporation to another entity], or 183.1207 [Domestic LLC to another entity]..." (Emphasis added.) The exemption does not apply to every business entity converting to some other business entity, but only to specific types of business entities converting. Those types of converting entities for which conversions are exempt do not include tenancies-in-common.

We note specifically that this transaction does not fall under Wis. Stat. § 183.1207 [Domestic LLC to another entity], because it is not a conversion from a single LLC into another entity. As noted below, Petitioner expressly explains that the Grantor LLCs could have merged but did not. Therefore, even if Petitioner were to argue that the tenants-in common, i.e., the five Grantor LLCs, were "converting" into one LLC, the transaction still fails to meet the one-for-one requirement for the exemption.

Finally, these statutes uniformly include the requirement that the business entity to be converted deliver to the Wisconsin Department of Financial Institutions a certificate of conversion, along with a variety of additional documentation of the plan for conversion. Wis. Stat. §§ 178.1144 [Domestic Partnership to another entity], 179.76(5) [LLP

to another entity], 181.1161(5) [Domestic Non-Stock Corporation to another entity], or 183.1207(5) [Domestic LLC to another entity]. Nothing in the record indicates that such a certificate was filed by the Petitioner nor by any of the Grantor entities listed on the Quit Claim Deed.

Petitioner asks us to consider, “Does the entity form constitute the business or is it really what the entity does?” This argument is one of equity. While the owners of the various LLCs involved in the ownership and operation of the real estate in question may have intended to function as a singular business and intended to convert from one type of ownership entity to another, the Commission is bound by the language of the statutes, not by the implied desires or intentions of a handful of individuals.

The Petitioner alternatively argues that the five Grantor LLCs “could have merged” into the Grantee LLC. There are no Wisconsin statutes offering exemptions to the title transfer fee for entities that could have converted to a new business form but made the choice not to merge or otherwise follow the statutory requirements for conversion from one form of business entity to another. While the documents filed by the Petitioner suggest that the original 2016 owners were committed to not being a business entity, which would also preclude converting into “another” business entity, the record suggests that they may have changed their minds. However, simply abandoning one’s commitment not to be legally recognized as a business entity does not create a business entity that is exempt from title transfer fees. As we recently ruled in *Edgewood Cmty. Church v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH 402-388) ¶ 21 (WTAC 2020):

Even if the Petitioner is correct, that the 'essence' of the conversion exemption is the continuity of ownership interests between the original and subsequent business entity after conversion, that does not absolve the Petitioner from following the statutory requirements. The language of Wis. Stat. § 181.1161 includes multiple repetitions of the phrase 'shall comply with the procedures,' making it clear that the legislature intended to require specific actions on the part of entities engaging in the conversion process.

The Wis. Stat. § 77.25(6m) exemption does not apply to the transaction at issue because there was no statutory business conversion. We cannot extend exemptions to situations or taxpayers not covered by the plain language of the statute.

CONCLUSIONS OF LAW

1. Petitioner is not the entity which was aggrieved by the redetermination of the Department; as such, Petitioner is not a proper party in interest to bring this Petition for Review.

2. Transfer taxes are assessed against the grantor to a transaction. Because Petitioner is not a grantor on which this title transfer fee was imposed, it lacks standing to appeal the imposition of the title transfer fee on this conveyance.

3. Because there was no statutory business conversion, the transfer at issue was not exempt from the transfer fee under Wis. Stat. § 77.25(6m).

ORDER

Based on the foregoing, it is ordered that the Department's Motion to Dismiss is granted and the Petitioner's Petition for Review is dismissed.

Dated at Madison, Wisconsin, this 21st day of October, 2021.

WISCONSIN TAX APPEALS COMMISSION

Elizabeth Kessler, Chair

Lorna Hemp Boll, Commissioner

Jessica Roulette, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

Dated at Madison, Wisconsin, this 21st day of October, 2021.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll, Commissioner



Jessica Roulette, 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.