WASHINGTON NATIONAL DEV 93CV4101 080394 DANE CTY CIR CT

STATE OF WISCONSIN CIRCUIT COURT BRANCH 13 DANE COUNTY

WASHINGTON NATIONAL DEVELOPMENT CO.,
Petitioner,

vs.

MEMORANDUM DECISION AND ORDER
Case No. 93CV4101

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

Petitioner, Washington National Development Co. (Washington National), seeks review under ch. 227, Stats., of a decision of the Wisconsin Tax Appeals Commission (Commission) dated September 27, 1993. The decision affirmed, with some modification, the assessments of real estate transfer fees imposed by the respondent, Department of Revenue (Department), under sec. 77.22, Stats., on two conveyances made by Washington National in 1986. For the reasons set out below, I reverse the decision of the Commission.

BACKGROUND

The facts are undisputed and are set out in detail in the Commission's decision. On February 19, 1986, Van Buren Management, Inc., (Van Buren) submitted to Northwestern National Insurance Company of Milwaukee (Northwestern National) an offer to purchase three contiguous properties in the City of Milwaukee. The properties are referred to by the parties as the "Landmark Building," the "Office Building," and the "Parking Lot." The president and sole stockholder of Van Buren was Joel S. Lee (Lee). (Findings #1-2). Van Buren accepted the counteroffer of Northwestern National on February 24, 1986.

Van Buren then submitted an undated "Application for Tax Exempt Financing" to the

Redevelopment Authority of the City of Milwaukee (Redevelopment Authority) for industrial revenue bond financing to develop the Office Building, Parking Lot, and another property. (Finding #5). On June 12, 1986, the Redevelopment Authority adopted a preliminary resolution approving the issuance of up to $30,000,000 of industrial revenue bonds. (Finding #5).

On June 30, 1986, Lee and Washington National formed Jackson Development Limited Partnership (Jackson Development), for the purpose of acquiring and dealing with the subject properties. (Finding #7). Lee owned 55 units of Jackson Development as the managing general partner. Washington National owned 5 units of Jackson Development as a general partner and 40 units thereof as a limited partner.

Also on June 30, 1986, Washington National, Lee, Van Buren and Jackson Development entered into an Agency Agreement. Pursuant to the Agency Agreement, Washington National and Lee, on behalf of themselves and/or entities to be formed by one or more of them, as principals, appointed Washington National, Lee, Van Buren and/or Jackson Development, as agents, to deal with the properties until the closing of the industrial revenue bond or other permanent financing for the properties.[1] (Finding #8).

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[1]The Agency Agreement specifically provides:

"Lee and Washington National, on behalf of them (the "Principals"), do hereby make, constitute and appoint Van Buren, Lee, Washington National and/or Jackson Development, as their agents and attorneys-in-fact (the "Agents"), to on the Principals' behalf, purchase, own, transfer, sell, maintain, repair, manage, insure or otherwise deal with the Parcels until such time as Lee and Washington National have formed and designated the persons or entities to which ultimate ownership of the Parcels shall be granted. Such persons or entities shall be designated, and transfer of the Parcels to such persons shall take place, at or about the time of the closing of industrial revenue bonds or such other permanent financing as Lee and Washington National are able to obtain permanent financing as Lee and Washington National are able to obtain for Parcel 1 and Parcel 2." (Appendix of Petitioner,

The following day, July 1, 1986, Jackson development purchased the properties from Northwestern National for the total purchase price of $9,400,000. A real estate transfer fee of $27,294[2] imposed under sec. 77.22(1), Stats., was paid by Northwestern National. (Finding #9)

On November 3, 1986, Lee reserved the names "Washington Square I, a Limited Partnership," and "Washington Square II, a Limited Partnership," on behalf of the entities that were to be formed to own and develop the Office Building and Parking Lot, by filing "Applications for Reservation of Name" in the office of the Wisconsin Secretary of State. (Finding #12).

Lee and Van Buren had obtained authorization for $10,000,000 of industrial revenue bond financing for each of the Parking Lot and the Office Building on behalf of Washington Square I and Washington Square II, respectively on September 12, 1986. (Findings #10,#13).

Foley & Lardner, bond counsel for Washington Square I and Washington Square II, felt that for technical compliance with I.R.C. § 144, and its predecessor, I.R.C. § 103, Washington Square I and Washington Square II should not acquire title to the properties directly from Jackson Development because Jackson Development was a "related Party."[3] (Finding #13).

Exhibit #8 at 2).

[2]Of the $9,400,000 total purchase price, $9,098,000 was attributed to real estate and was thus subject to the transfer fee.

[3]I.R.C. § 144 deals with tax exempt bonds. "Under I.R.C. § 144, related parties included any entities which were more than 50% owned by the same persons." (Finding #13).

Bond counsel for Washington Square I and Washington Square II recommended that since Lee and Washington National owned 100% of Jackson Development and were to own more than 50% of one or both of Washington Square I and Washington Square II, Jackson Development should transfer title to the Parking Lot and Office Building to an intermediary, which would then transfer title to Washington Square I and Washington Square II, respectively. Bond counsel recommended that the transfers be made through Washington National, rather than Lee, because it was believed that Lee would own more than 50% of one or both of Washington Square I and Washington Square II. (Finding #13).

On November 30, 1986, Jackson Development transferred the Office Building and Parking Lot to Washington National. The parties claimed that both transfers were exempt from real estate transfer fees under sec. 77.25(9), Stats., as being transfers between an agent and principal without actual consideration. (Finding #14). The Department did not challenge this exemption claim.

On December 30, 1986, Washington Square I and Washington Square II were formed. The partners and percentages in Washington Square I were: General Partner--Van Buren-1%; Limited Partners--Washington National-37.5%, Washington National Insurance Company-12.5%, Lee-47%, Pauline Adams-1%; and Michael Comerford-1%. (Finding #16).

Also on December 30, 1986, Washington National transferred each of the subject properties to the respective Washington Square Limited Partnership. It claimed that the transfers were exempt from real estate transfer fees pursuant to sec. 77.25(9), Stats., as being between agent and principal without actual consideration. No monies were paid or

properties exchanged. (Finding #17).

Washington Square I and Washington Square II then each closed its respective $10,000,000 industrial revenue bond financing on December 30, 1986. (Finding #18).

On March 14, 1991, the Department issued its Notices of Additional Assessment of Real Estate Transfer Fees to Washington National as follows: (1) A $25,088.70 fee on a 1987 assessed fair market value of $8,362,900 for the Parking Lot, plus interest of $12,405.50 computed at the rate of 12% from March 31, 1987, to May 31, 1991, and a 25% penalty of $6,272.18 pursuant to sec. 77.26(8), Stats., for a total assessment of $43,766.38; and (2) a $15,600.00 fee on a 1987 assessed fair market value of $5,200,000 for the Office Building, plus interest of $7,713.67 computed at the rate of 12% from March 31, 1987, to May 13, 1991, and a 25% penalty of $3,900.00 pursuant to sec. 77.26(8), Stats., for a total assessment of $27,213.67. (Finding #22).

Washington National made a timely objection to the assessments on April 17, 1991. On September 13, 1991, the Department issued its Notices of Action on both assessments, denying Washington National's petition for redetermination. (Findings #23-24).

On October 21, 1991, Washington National filed its Petition for Review of both assessments with the Commission. Subsequent to filing, the Department amended the valuation of the Parking Lot to $1,880,200. (Finding #25-26), which reduced the assessment of transfer fee on this parcel from $25,088.70 to $5,640.60.

The Commission consolidated the review of the two assessments and the parties waived the right to a hearing. After a review of the stipulated facts and exhibits, the Commission issued its decision of September 27, 1993. In its decision, the Commission

reduced the parking lot transfer fee assessment from $5,640.60 to $3,525.37, but otherwise affirmed the Department's assessments.

This action followed.

STANDARD OF REVIEW

The facts are undisputed and the resolution of the case turns on an application of a statute to a known set of facts. This presents a question of law. Department of Revenue v. Mark, 168 Wis. 2d 288, 291 (Ct. App. 1992). Our Supreme Court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. Jicha v. DILHR, 169 Wis. 2d 284, 290 (1992). Although the blackletter rule is that a court is not bound by an agency's decision on a question of law, a court will give deference to the agency when the decision involves the application of a law which the legislature charges the agency to administer; where the agency's application is consistent with long-standing practice; where the application requires the use of the agency's expertise, technical competence and specialized knowledge; and when the agency's application furthers the provision of uniformity and consistency in the field. Lisney v. LIRC, 171 Wis. 2d 499, 505 (1992). When such circumstances are all present, great weight should be given to the agency's decision and it should be reversed only where it directly contravenes the statute or is otherwise unreasonable or without rational basis. Id at 506. If such circumstances are not present, the agency's decision is entitled only to due weight or to no weight. Sauk County v. WERC, 165 Wis. 2d 406, 413-14 (1991).

The threshold conclusion made by the Commission in its decision was that the subject

conveyances were not between agent and principal within the meaning of sec. 77.25(9), Stats. Although the commission has experience, technical competence and expertise in applying the real estate taxation provisions found in ch. 77., it failed to cite any precedent in the form of a prior Commission decision or Wisconsin court case for its interpretation of the agent-principal exception found in sec. 77.25(9), Stats. There is no evidence of a long-continued, substantially uniform and unchallenged practice or position and the question appears to be nearly one of first impression. School District of Drummond v. Wisconsin Employment Relations Commission, 121 Wis. 2d 126 (1984). Therefore, I conclude that this conclusion is entitled only to due weight.

The cardinal rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature. In Interest of J..W.T., 159 Wis. 2d 754, 761 (Ct. App. 1990). In determining the legislature's intent, courts should first consider the language of the statute itself. Abraham v. Milwaukee Mut. Ins. Co., 115 Wis. 2nd 678, 680 (Ct. App. 1993). Where the language is clear it will be given effect without resorting to other aids for construction. Id. If the language is ambiguous, the legislative intent must be ascertained by reference to the statute's scope, history, context, subject matter and object. Wis. Environmental Decade v. Public Service Comm., 81 Wis. 2d 344, 350 (1978).

"Exemption statutes, unlike taxing statues, are construed against the taxpayer, who must bring himself or herself clearly within the terms of the exemption." Gottfried, Inc. v. Department of Revenue, 145 Wis. 2d 715, 719-20 (Ct. App. 1988).

RELEVANT PROVISIONS

Section 77.22, Stats., governs the imposition of real estate transfer fees on

conveyances of real estate. At all times relevant to this case, it provided, in relevant part:

> **Imposition of real estate transfer fee.**
>
> (1) CONVEYANCE. (a) 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....If the transfer is not subject to a fee as provided in this subchapter, the reason for exemption shall be stated on the face of the conveyance to be recorded by reference to the proper subsection under s.77.25.

The term "conveyance" is defined in sec. 77.21(1) as, in relevant part:

> (1) "Conveyance" includes deeds and other instruments for the passage of ownership interests in real estate....

Section 77.21(3) defines "value" as follows:

> (3) "Value" means:
> (a) In the case of any conveyance not a gift, the amount of the full actual consideration paid therefor or to be paid, including the amount of any lien or liens thereon; and
> (b) In the 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 exemptions from the real estate transfer fee are listed in sec. 77.25, Stats. The exemption at issue in the present case is found in sec. 77.25(9), Stats. That provision provides:

> **Exemptions from fee.** The fees imposed by this subchapter do not apply to a conveyance:
> ...
> (9) Between agent and principal or from a trustee to a beneficiary without actual consideration.

SECTION 77.25(9), STATS.

The inquiry into whether a conveyance is exempt from a real estate transfer fee under sec.77.25(9) is two-pronged. First, the conveyance must be between an agent and principal or from a trustee to a beneficiary. Second, the conveyance must be without actual consideration. Gottfried, Inc., v. Department of Revenue, 145 Wis. 2d 715, 720 (Ct. App. 1988).

In its decision, the Commission concluded that, although the conveyances from Washington National to the Washington Square Partnerships were "without actual consideration" within the meaning of sec. 77.25(9), "a valid principal-agent relationship did not exist for purposes of the transfer tax exemption 'between principal and agent' under sec. 77.25(9), Stats." (Decision at 11).[4]

The Commission based its conclusion that the conveyances were not between an agent and principal on the fact that the purported principals, Washington Square I and Washington Square II, were not in existence at the time the Agency Agreement, dated June 30, 1986, was entered into. (Decision at 10). The Agency Agreement authorizes several agents, including Washington National, to act on behalf of principals Washington National, Lee, "and/or entities to be formed" by Washington National and Lee. According to the Commission, a bona fide agency relationship cannot exist without legal authority from the principal to the agent. (Decision at 10). Because the claimed principals were not even in existence when the June 30, 1986 Agency Agreement was entered into, the Commission

[4]The Department does not challenge the Commission's conclusion that the transfers were "without actual consideration."

reasoned Washington National did not have the requisite legal authority to act as an agent. (Decision at 10).

As support for its conclusion, the Commission cited 2A C.J.S. §27 which provides:

> "The word 'agency' imports the contemporaneous existence of a principal, and an agent cannot exist without a then existing principal; the term 'agent' necessarily contemplates or presupposes the existence of a principal. There is no agency unless one is acting for and in behalf of another, since a man cannot be the agent of himself."[5]

DISCUSSION

The Commission was correct in stating at the outset that an agency exists only if there has been a manifestation by the principal to the agent that the agent may act on the principal's account. Pavlic v. Woodrum, 169 Wis. 2d 585, 591 (Ct. App. 1992), Citing §15 of the Restatement (2d) of Agency. The Commission's ensuing analysis, however, was flawed. The Commission focused exclusively on the written Agency Agreement and the date of its execution and concluded that, because the claimed "principals" were not in existence when the Agreement was made, the agreement could not have granted Washington National the authority to act as agent.

The relation of agency, however, is created as a result of conduct by two parties and does not depend on the existence of a contract between the principal or agent. Comment on Subsection (1) of § 1 of the Restatement (2d) of Agency. Comment (a) to § 15 of the Restatement (2d) of Agency provides that one becomes an agent if another in some way

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[5]"The Commission also cited §15 of the Restatement (2d) of Agency (1957)("An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to so act") and 2A C.J.S. §4.a("In its broadest sense it includes every relation in which one person acts for or represents another by his authority").

indicates to him consent that he may act on the other's account. This consent can be communicated "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." § 26 Restatement (2d) of Agency. Generally, "[w]hether an actual principal-agent relationship exists usually turns on facts concerning the understanding between the alleged principal and agent." Johnson v. Minnesota Mut. Life Ins., 151 Wis. 2d 741, 748 (Ct. App. 1989). However, it is the manifestation and not the intention of the principal that is important. "[H]ence, whenever the principal manifests to the agent that the agent is to act on his account, authority exists although the principal is not in fact willing that he should do so." Comment (a) to § 26 of the Restatement (2d) of Agency.

In the present case, a review of the Commission's undisputed findings reveals that Washington National had authority to act as agent for the Washington Square Partnerships. First, the Commission concluded in its decision that "because the claimed 'principals' were not even in existence when the June 30, 1986 agency agreement was entered into, the agreement could not have granted legal authority to the petitioner as agent from the two Washington Square Associated Partnerships." (Decision at 10). The conveyances, however, were not made on June 30, 1986, but on December 30, 1986. The latter is the determination date for whether the conveyances were exempt. Under the agreement, dated June 30, 1986, Washington National and Lee, on behalf of themselves "and/or entities to be formed by one or more of them," as principals, appointed Washington National, among others, to act as agents to deal with the properties. It is undisputed that the Washington Square Partnerships were the "entities to be formed" pursuant to the agreement. These entities were formed and

were in existence on the day the conveyances from Washington National to the Washington Square Partnerships were made. Thus, at the time of the conveyances on December 30, 1986, both the principal and agent formally existed, such that a principal-agent relationship was capable of being formed.

Second, the undisputed facts concerning the transactions involved here reveal that such a relationship was in fact formed. The Limited Partnership Agreements for both of the Washington Square Partnerships named Van Buren, Lee's solely owned corporation, as general partner. (Exs #23 and #24, par. 5). Both agreements explicitly granted to the general partner the authority to retain "agents" as it "determine[d] to be reasonably necessary to conduct the business of the partnership." (Ex. #23, par. 14(c) and Ex. #24, par. 8(c)). As the preceding discussion of the principles of agency law reveals, it is unnecessary for the creation of an agency that a written contract reflect the granting of authority to act on behalf of the principal. Thus it was unnecessary that the June 30, 1986 agency agreement be reexecuted once the Washington Square Partnerships were formally created. All that was necessary is that the Partnerships manifest their desire that Washington National act on their behalf.

Third, while the Department is correct in its argument that there could be no manifestation on June 30, 1986 by the Washington Square Partnerships to Washington National for Washington National to act as agent because the Washington Square Partnerships were "separate legal entities entitled to enter into their own agency agreements if they chose," there is no question that they in fact made that choice once they were in existence. The primary persons or entities involved in the creation of the Washington Square

Partnerships were Washington National and Lee.[6] Lee had total control over Van Buren, and both Lee and Washington National had named Van Buren as general partner and given it the authority to act through an agent. It is undisputed that the entire rationale for the transfer of the subject properties to an intermediary before they were ultimately titled in the Washington Square Partnerships was the recommendation of bond counsel for the Partnerships. It is likewise undisputed that both Lee and Washington National concurred in following this advice. Where one reasonably believes, from conduct for which another is responsible, that he is authorized to act for the other, there is an agency relation. Comment (a) to § 15 Restatement (2d) of Agency. Here the entire course of conduct culminating in the creation of the Washington Square Partnerships and the implicit authorization by their general partner to Washington National that it convey the properties to the Partnerships yields the inescapable conclusion that Washington National reasonably believed it had authority to do so. Thus, in doing so, it was acting as agent for the Partnerships.

Moreover, the parties do not dispute that Washington National's sole purpose in the acquisition of the properties was to serve as an intermediary between Jackson Development and the Washington Square Partnerships in order not to jeopardize the bonding for the Washington Square Partnerships. "One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself." § 14K Restatement (2d) of Agency. Thus, in addition to the fact that it was upon the recommendation of bond counsel

[6]Together they held an 84.5% ownership interest in Washington Square I and a 97% ownership interest in Washington Square II.

for the Washington Square Partnerships that the properties were conveyed to Washington National, Washington National was acting as an agent because it is undisputed that Washington National's sole purpose in serving as intermediary was to avoid compromising the Washington Square Partnerships' receipt of industrial revenue bond financing and Washington National fully ratified the understanding it had at the time it took title to the properties on November 30, 1986 by conveying the properties without any consideration on December 30, 1986.

Finally, contrary to the statement by the Commission, "Nor is there anything apparent from the conveyances themselves confirming that they were agent-to-principal transfers," (Decision at 10) the parties in fact explicitly noted on the deeds themselves, in addition to the transfer fee returns, that they were exempt as a transfer between principal and agent. Washington National executed and delivered the deeds with this representation, and the Washington Square Partnerships accepted them with this representation. It is hard to imagine how the parties could have made their intention any more "apparent."[7]

In sum, I conclude that Washington National has brought itself clearly within the terms of the exemption and that, even according due weight to the Commissions' conclusion, the decision of the Commission must be reversed. There is, therefore, no need to address the application of Wis. Adm. Code § Tax 15.02(1) or Washington National's challenge to the Department's valuation of the Parking Lot.

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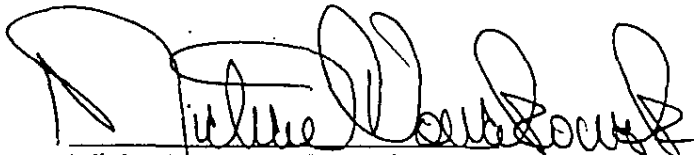
[7]The Commission attached significance to the fact that the conveyances in question were by warranty deeds and not quit claim deeds. (Decision at 10) On the same page, however, it pointed out that the essential ingredient to the creation of an agency relationship is "authority". What relevance the form of deed used has in assessing whether Washington National had authority to act on the account of the Partnerships escapes me.

For all of the foregoing reasons,

IT IS ORDERED that the September 27, 1993 Decision and Order of the Commission is hereby reversed and this matter is remanded to the Commission with instructions that Washington National's Petitions For Review of the Department's assessments be granted.

Dated this 3rd day of August, 1994.

BY THE COURT:



Michael N. Nowakowski
Circuit Court Judge