

FILED

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STATE OF WISCONSIN  
TAX APPEALS COMMISSION

Wisconsin Tax Appeals Commission  
Drew Fox - Clerk

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MOHNS, INC.

DOCKET NO. 24-I-008

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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**ELIZABETH KESSLER, COMMISSIONER:**

This matter comes before the Commission based on cross-motions for summary judgment filed by the Wisconsin Department of Revenue (the "Department") and Petitioner regarding whether funds transferred from Petitioner Mohns, Inc. to its sole shareholders, Benjamin C. and Nancy A. Mohns, were payments on loans from the shareholders or non-deductible returns of capital contributions to the shareholders. Petitioner contends that the funds transferred were loans and that it properly deducted interest payments made to shareholders, who were subsequently taxed on the income earned from those payments. The Department argues that the funds transferred were not loans and must be treated as non-deductible returns of capital contributions.

The Petitioner was represented by Attorney John Machulak of Machulak, Robertson & Sodos, S.C. of Milwaukee and Brookfield. The Department was represented

by Attorney Heather Morrissey.

### **JURISDICTIONAL FACTS**

1. On February 9, 2023, the Department sent a Notice of Office Audit Amount Due – Corporate Franchise Tax to Mohns, Inc. with respect to tax years March 31, 2018, through March 31, 2020. (Commission file.)

2. Mohns, Inc. filed a Petition for Redetermination of the Notice dated March 6, 2023. (Commission file.)

3. On December 8, 2023, the Department sent Mohns, Inc. a Notice of Action that denied the Mohns, Inc. Petition for Redetermination. (Commission file.)

4. On February 20, 2024, Mohns, Inc. timely filed a Petition for Review with the Wisconsin Tax Appeals Commission. (Commission file.)

### **EVIDENTIARY FACTS**

Facts five through twelve were specifically agreed to by both parties during a telephone status conference on April 30, 2025. (Reissued Mohns Stipulated Facts Found, hereinafter “Stip. Facts.”)

5. Benjamin C. Mohns and Nancy A. Mohns incorporated Mohns, Inc. on November 28, 1978. Throughout the time that the Company has existed they have been the only two shareholders of Mohns, Inc. (Stip. Facts ¶ 6.)

6. The shareholders made an initial capital contribution of \$4,200 by purchasing stock in Mohns, Inc. (Stip. Facts ¶ 7.)

7. From at least 1984 forward, Mohns, Inc. had loans from banks.

Generally, the loans Mohns, Inc. took out were personally guaranteed and the shareholders had to subordinate their advances to these loans. (Stip. Facts ¶ 8.)

8. The advances made to Mohns, Inc. by its shareholders were to cover payroll, make debt payments, and to provide funds necessary to run the business on a day-to-day basis. (Stip. Facts ¶ 9.)

9. All of these advances were made to Mohns, Inc. for business purposes and not for the avoidance or reduction of state income or franchise taxes. (Stip. Facts ¶ 10.)

10. All of the advances that the shareholders made to Mohns, Inc. changed the economic position of the company in a meaningful way apart from tax effects. (Stip. Facts ¶ 11.)

11. Mohns, Inc. did not set up any kind of reserve or fund to collect money to repay the advances given by the shareholders. (Stip. Facts ¶ 13.)

12. Mohns, Inc. filed a Schedule RT for all of the three tax years at issue. (Stip. Facts ¶ 14.)

13. When Mohns, Inc. paid what it characterized as interest on loans made by shareholders Benjamin C. and Nancy A. Mohns, those individuals reported the interest on their individual income tax returns. (Affidavit of Benjamin C. Mohns ("Mohns Aff.") ¶ 10.)

14. During the audit period, Mohns, Inc. and Benjamin C. and Nancy A. Mohns, the shareholders of Mohns, Inc., used the accounting and tax preparation services

of Thomas S. MacDonald. (Affidavit of Thomas S. MacDonald ("MacDonald Aff.") ¶ 2.)

15. Mr. MacDonald retired at the end of the calendar year 2020. His accounting responsibilities for Petitioner had been passed along to Mr. Tom Schmidt. Mr. Schmidt passed away unexpectedly on January 13, 2021. (MacDonald Aff. ¶ 3.)

16. Mr. MacDonald indicated that he treated the transactions at issue as loans by the shareholders and not capital contributions, and that they had been treated as such in the company's tax returns and financial statements during his time working as the accountant and tax preparer for Petitioner. (MacDonald Aff. ¶ 5.)

17. Mr. MacDonald indicated that in his opinion the transactions at issue "fairly reflected an arm's-length relationship," based on their terms. (MacDonald Aff. ¶ 10.)

### APPLICABLE LAW

Wis. Stat. § 71.26(2)(a)(7) through (9)

(2) NET INCOME.

(a) *Corporations in general.* The "net income" of a corporation means the gross income as computed under the Internal Revenue Code as modified under sub. (3) and modified as follows: . . .

7. Plus the amount deducted or excluded under the Internal Revenue Code for interest expenses...that are directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, one or more related entities.

8. Minus the amount added to gross income under subd. 7., to the extent that the conditions under s. 71.80 (23) are satisfied.

9. Minus the amount added, pursuant to subd. 7. or s. 71.05 (6) (a) 24., 71.34 (1k) (j), or 71.45 (2) (a) 16., to the

federal income of a related entity that paid interest expenses, rental expenses, intangible expenses, or management fees to the corporation, to the extent that the related entity could not offset such amount with the deduction allowable under subd. 8. or s. 71.05 (6) (b) 45., 71.34 (1k) (k), or 71.45 (2) (a) 17.

Wis. Stat. § 71.80(23)

(23) RELATED ENTITY ADDBACKS.

(a) The deductions provided under ss. 71.05 (6) (b) 45., 71.26 (2) (a) 8., 71.34 (1k) (k), and 71.45 (2) (a) 17. shall be allowed for any interest expenses, rental expenses, intangible expenses, or management fees described in ss. 71.05 (6) (a) 24., 71.26 (2) (a) 7., 71.34 (1k) (j), or 71.45 (2) (a) 16. if any of the following applies to the interest expenses, rental expenses, intangible expenses, or management fees:

3. The taxpayer establishes that the transaction satisfies any other conditions that the department considers relevant, based on the facts and circumstances, to determine that the primary motivation for the transaction was one or more business purposes other than the avoidance or reduction of state income or franchise taxes; that the transaction changed the economic position of the taxpayer in a meaningful way apart from tax effects; and that the interest expenses, rental expenses, intangible expenses, or management fees were paid, accrued, or incurred using terms that reflect an arm's-length relationship.

(b) Notwithstanding par. (a), the deductions provided under ss. 71.05 (6) (b) 45., 71.26 (2) (a) 8., 71.34 (1k) (k), and 71.45 (2) (a) 17. shall not be allowed for any interest expenses, rental expenses, intangible expenses, or management fees that are directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, one or more related entities, if the aggregate amount paid, accrued, or incurred for those related entity transactions is not disclosed on a separate form prescribed by the department in the manner prescribed by the department.

## SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that 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 party moving for summary judgment has the burden "to establish the absence of a genuine, that is, disputed, issue as to any material fact." *Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). "Summary judgment is only appropriate if there are no genuine issues of material fact, and the moving party, having established a prima facie case, is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." *AccuWeb, Inc. v. Foley & Lardner*, 746 N.W.2d 447, 2008 WI 24, ¶16 (internal citations omitted). Furthermore, "matters of complex factual proof ... usually cannot be decided on the basis of affidavits in support of summary judgment." *Peters v Holiday Inns, Inc.* 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979).

## ANALYSIS

This case presents an unusual analytical position for the Commission. Ordinarily when we are faced with cross-motions for summary judgment, the parties are in agreement as to the material facts and have filed a joint stipulation as to all or most of the material facts as part of the summary judgment processes. In this case, the

Department filed a motion for summary judgment without having negotiated such a stipulation with the Petitioner or having conducted substantial discovery in the matter, and the Petitioner then filed its own motion for summary judgment in response. The parties set a summary judgment briefing schedule during a telephone status conference with the Commission on February 3, 2025.

Informal discovery continued during the briefing process, leading to a written request in the form of a letter, not a motion, on April 25, 2025, from the Department, requesting “that summary judgment in this matter be paused.” The Commission held a telephone status conference on April 30, 2025, primarily to understand what legal procedure the Department believed might apply to the request, which was opposed by Petitioner. Finding no other appropriate procedure to consider, the Commission offered the Department the opportunity to withdraw its motion and continue to oppose that of the Petitioner. The Department declined, and the process continued according to the previously set briefing schedule.

A small number of material facts were stipulated to by the parties, narrowing the legal dispute to the single question of whether or not the claimed loans and interest payments between Petitioner and its shareholders were conducted using terms reflecting an arm’s-length relationship. Unfortunately, this question of law itself depends on many material facts to which no joint stipulation could be reached by the parties. Parties filed affidavits, documents, and deposition transcripts in support of their

motions. Each party has moved for summary judgment, so each party has the burden to prove that there are no genuine issues of material fact.

The Department's main argument is that Mohns, Inc. fails to meet all of the requirements of the addback statute, Wis. Stat. §§ 71.80(23)(a)(3) and (b). The statute includes four requirements. First, the primary motivation for the transaction must be for a business purpose other than tax avoidance. Second, the transaction must change the economic position of the taxpayer in a meaningful way other than for tax purposes. Third, the interest expenses must be paid, accrued, or incurred with terms that show an arm's-length relationship. Finally, the aggregate amount paid, accrued, or incurred for those related entity transactions must be disclosed on a separate form prescribed by the department.

The Department conceded the first two requirements, and although there was an initial dispute over whether all three tax years included the separate form prescribed by the Department, that issue has been resolved.<sup>1</sup> The only matter remaining in dispute is the third statutory requirement, whether or not the transactions characterized by Petitioners as loans between the corporate entity (Mohns, Inc.) and the related entity (Benjamin C. and Nancy A. Mohns, the sole shareholders) involved with the transaction were loans and were conducted "using terms reflecting an arm's-length

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<sup>1</sup> The issue seems to have arisen due to confusion about the fiscal year. Petitioner files corporate taxes based on fiscal years ending on March 31. The dispute involves fiscal years *ending* in calendar years 2018, 2019, and 2020, but which primarily concerned the calendar years of 2017, 2018, and 2019. Form RT was filed for each of these fiscal years.



relationship.” Wis. Stat. § 71.80(23)(a)(3).

The Department contends that two cases provide applicable controlling tests to determine whether the funds provided from Benjamin and Nancy Mohns to Mohns, Inc. were loans or capital contributions: *In re Mader’s Store for Men, Inc.*, 77 Wis. 2d 578 (1977) and *Toccata Gaming Int’l, LLC v. Wis. Dep’t. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-561 (WTAC 2023). We note that *Toccata* drew heavily on *Kelly v. Commissioner of Internal Revenue*, T.C. Memo. 2021-76 (“*Kelly*”) which set forth an eight-factor list of criteria to be used to determine whether corporate transfers of funds should be treated as loans or as corporate distributions. Importantly for this matter, both *Kelly* and *Toccata* stand for the proposition that these are fact-intensive questions that require considering a plethora of economic and behavioral factors.

First, we consider whether the Department can establish that the transactions at issue were not loans, but capital contributions; and second, if they were loans, that they were not conducted using terms reflecting an arm’s-length relationship. If the Department cannot establish that there are no genuine issues of material fact and that either the transactions at issue were not loans but capital contributions; or that they were not conducted using terms reflecting an arm’s-length relationship, then its motion for summary judgment must fail. Then we consider whether Mohns, Inc. can establish that the transactions at issue were conducted using terms reflecting an arm’s-length relationship. If Mohns, Inc. cannot establish that there are no genuine issues of material fact and that the transactions at issue were conducted using terms reflecting an arm’s-

length relationship, then its motion for summary judgment must fail.

The Department has asserted that these transactions are capital contributions instead of loans, basing its argument on the assertion that in 1978, when the company was founded, the shareholders undercapitalized it by contributing only \$4,200. While both parties agree to the underlying facts regarding the amount of the initial capitalization, the Department has provided no support for the assertion that in 1978, the sum of \$4,200 was insufficient capital, and therefore ongoing capital contributions were necessary. By contrast, Shareholder Benjamin C. Mohns' sworn affidavit states that the amount was "more than sufficient for the needs of the business in 1978." The Department did not rebut this sworn statement. While the Commission exercises caution in relying upon self-serving affidavits as support for our rulings, at a minimum, the question of whether or not \$4,200 was or was not sufficient capital for Mohns, Inc. in 1978 and still impacting the business in the tax years at issue is subject to conflicting interpretation. "If the material presented on the motion is subject to conflicting interpretations or reasonable [persons] might differ as to its significance, it is improper to grant summary judgment." (internal citations omitted, *Kraemer Bros.*, *ibid.* at 567.) This, then, cannot be the basis for granting the Department's motion.

In order to determine whether or not there are genuine issues of material fact regarding whether or not transactions at issue were conducted using terms reflecting an arm's-length relationship, the Commission turns to the factors outlined and explained in *Toccata*:

Wisconsin law does not provide substantial guidance for determining when a transfer of funds between a business and another entity should be classified as a loan. However, this question has come before the U.S. Tax Court on multiple occasions, providing ample guidance. The core of that court's reasoning comes down to the idea that all of the facts and circumstances should be considered when attempting to determine whether or not two entities have a bona fide debtor-creditor relationship. (Paraphrasing *2590 Assocs., LLC v. Commissioner*, T.C. Memo 2019-3 (2019).) In *Kelly* (supra), the court identified eight objective factors which are to be considered:

1. Whether the promise to repay is evidenced by a note or other instrument that evidences indebtedness,
2. Whether interest was charged or paid,
3. Whether a fixed schedule for repayment and a fixed maturity date were established,
4. Whether collateral was given to secure payment,
5. Whether repayments were made,
6. What the source of any payments was,
7. Whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan, and
8. Whether the parties conducted themselves as if the transaction was a loan.

*Kelly, id.* at pp. 57-58.

Critically, *Kelly* does not require that all of these factors be present for a debtor-creditor relationship to exist, nor does it stand for the proposition that if any single factor is present, a debtor-creditor relationship must exist. Instead, *Kelly* extends a long line of federal cases supporting the idea that determination of a bona fide debtor-creditor relationship requires considering many economic and behavioral factors that are rooted in the specific facts of the case. *Id. at pp. 7-8.*

Turning to the specific facts of this case, the parties disagree as to how to

interpret the *Kelly* economic and behavioral factors that can help us to determine whether or not there was a bona fide debtor-creditor relationship between Mohns, Inc. and its sole shareholders, Benjamin C. and Nancy A. Mohns.

The threshold question is: are there genuine issues of material fact which would preclude us from reaching a summary judgment determination? We find that there are. While summary judgment does not require us to find support for or against all of the *Kelly* factors, the Commission is not able to find that either party is entitled to summary judgment in their favor, based on how much information about the various factors is missing and how many questions we have about the evidence that is available to us.

**Factor 1: Whether the promise to repay is evidenced by a note or other instrument that evidences indebtedness.** For the years of the audit period, the record does not contain any contemporaneous notes or other instruments directly evidencing indebtedness. On its face, this favors the Department's interpretation. However, Petitioner provided a sworn affidavit from Thomas S. MacDonald, who served as an independent accountant and tax preparer for both Petitioner and the shareholders from 2012 through the end of the calendar year 2020. Mr. MacDonald indicated in his sworn statement that he recalled there being outstanding loans from the shareholders to the company when he began working for them, and that he created documents to memorialize those loans at year end. He further stated that such loans had been accounted for in both the corporate tax returns and financial statements "for decades."

Finally, Mr. MacDonald indicated that on his retirement, his work for Mohns, Inc. and its shareholders was taken over by Mr. Tom Schmidt, who died unexpectedly two weeks after Mr. MacDonald retired. Mr. MacDonald indicated that Mr. Schmidt's death, following so closely after his own retirement, "added difficulty to retrieving information and records."

There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 1, so it cannot support Mohns, Inc.'s or the Department's motion for summary judgment.

**Factor 2: Whether interest was charged or paid.** Although the instruments for the audit period are missing, all of the other documents and testimony addressing this question indicate that interest was charged. Earlier contemporaneous promissory notes list an interest rate of 18%. Considerable argument was submitted from both sides regarding the retroactive change from an 18% to a 12% interest rate following discussions with Department Auditor Rita Singh. There does not appear to be a serious dispute over whether or not interest was charged.

There is less evidence in the record as to whether or not interest was paid. The primary document supporting Petitioner's assertion that interest was paid is Exhibit C of Mr. Mohns' affidavit, an undated one-page document purported to have been created by Mr. MacDonald but extending years past Mr. MacDonald's retirement date. Mr. Mohns explains his use of the document further in his affidavit. It is unclear from the document whether or not it was contemporaneously created. While the document lists

dollar amounts under a column called “interest paid,” those dollar amounts have no clear relationship to the amounts under the parallel columns called “interest expense” or “net interest cumulative.”

The material presented by Mohns, Inc. on this factor is subject to conflicting interpretations and reasonable people may differ as to its significance, so it also cannot support either Mohns, Inc.’s or the Department’s motions for summary judgment.

**Factor 3: Whether a fixed schedule for repayment and a fixed maturity date were established.** Mr. Mohns’ affidavit includes exhibits supporting a history of annual repayment, though not including the tax years at issue. This is supported by the affidavit of Mr. MacDonald. As with factor one, it would, of course, be better for Petitioner if it was in possession of the loan forms Mr. MacDonald states that he created. But there is a sworn statement from a third party that he created such forms, along with a plausible explanation as to why those forms cannot be found. This creates, at a minimum, unrefuted evidence that such documents did exist contemporaneously.

There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 3, so it cannot support Mohns, Inc.’s or the Department’s motion for summary judgment.

**Factor 4: Whether collateral was given to secure payment.** There are sworn statements in the record that a number of vehicles were used as collateral in these loans. The Department argued that the value of the collateral is negligible compared to the loans, and the claim that they are used to offset the value of the unpaid loan should

not be taken seriously. This is disputed by Petitioner. Neither party has produced substantial evidence as to the value of the collection of work vehicles. While the Commission has a difficult time imagining that the value of the identified vehicles could reach the value of the outstanding loans during the audit period, such a use of our imagination cannot be the primary basis of this evaluation. There are documents supporting the Petitioner's claim, and no documentary evidence to the contrary from the Department.

There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 5, so it cannot support Mohns, Inc.'s or the Department's motion for summary judgment.

**Factor 5: Whether repayments were made.** There is at least some evidence in the record, primarily from Mohns Aff. Ex. C, that hundreds of thousands of dollars in repayments were made. There are also references to the shareholders' individual income tax filings, which assert that the interest payments were reported as income. Examination of the individual tax filings seems likely to be able to shed light on the truth or falsity of that claim, but those records have not been entered into the record.

This seems like a glaring omission, from both parties, which raises a genuine issue of material fact which would be helpful to the Commission in resolving this matter. There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 5, so it cannot support Mohns, Inc.'s or the Department's motion for summary judgment.

**Factor 6: What the source of any payments was.** The Department notes that Mohns, Inc. repaid the shareholders \$200,000 during the audit period, and also that the shareholders lent Mohns, Inc. an additional \$140,000 during the same period. This speaks to the closely related entity relationship between the shareholders and the business, similarly to that described by the court in *Mader*: "...it is only natural that those most concerned with the success of the corporate venture should be those first to extend credit to it when additional funds are required, and there is no legal policy to discourage the making of loans under such circumstances." *Ibid.* at 602.

On the other hand, it is the responsibility of the Department to question the circular flow of funds between such closely related entities. There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 6, so it cannot support Mohns, Inc.'s or the Department's motion for summary judgment.

**Factor 7: Whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan.** Mr. Mohns has made seemingly conflicting statements, but he has also explained them. This is a genuine issue of material fact which is not resolved by the record. There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 7, so it cannot support Mohns, Inc.'s or the Department's motion for summary judgment.



**Factor 8: Whether the parties conducted themselves as if the transaction**

**was a loan.** As we explained in *Toccata*:

A number of U.S. Tax Court decisions have listed this factor, but it has been more generally developed in the negative than in the positive, e.g. *Ronald B. and Annette C. Talmage v. Commissioner*, T.C. Memo, 2008-34 (2008); *Charles L. Garavaglia v. Commissioner*, T.C. Memo 2011-228 (2011); *Knutsen-Rowell, Inc. et al. v. Commissioner*, T.C. Memo 2011-65 (2011). In these cases, the parties were found to have actively engaged in conduct that is unlike the behavior of a debtor and creditor, such as providing funds to a business and taking on a management role in that business, or engaging in fraudulent activity.

...

How parties conducted themselves when a transaction was found to be a loan was described by the U.S. Tax Court on at least one occasion:

In addition, Caspian reported petitioner's \$48,344.76 payment as interest income on its 2000 income tax return. Caspian treated the disbursements to petitioner as notes receivable, indicating Caspian's expectation that the amounts would be repaid.

The behavior of the parties weighs heavily in favor of finding a loan.

*Toccata, ibid, citing Nariman Teymourian v. Commissioner*, T.C. Memo 2005-232 (2005)

In the instant case, we have claims that the payments were reported as interest income on the shareholders' income tax return. We have the sworn statements from accountants who previously worked with Petitioner and its shareholders who stated that the shareholders lent money to and received interest payments from Petitioner "for decades." The Commission presumes that the individual income tax returns for the shareholders would resolve this question, but those returns have not been entered into

the record. And it has long been our practice to limit our reliance on self-serving sworn statements which are not supported by documentary evidence. When such documentary evidence ought to have been easy to provide, we are particularly reluctant to rely on these claims. However, the Department has not provided any substantial evidence rebutting Petitioner's assertion that the shareholders' individual income tax filings support their claim that the parties conducted themselves as if the transaction was a loan. There are genuine disputes and conflicting interpretations which can be drawn from the evidence available in considering Factor 8, so it cannot support Mohns, Inc.'s or the Department's motion for summary judgment.

Of the eight factors outlined in *Kelly* and repeated by the Commission in *Toccata*, there remain genuine issues of material fact in every factor, in spite of the documents and affidavits filed by both parties.

### CONCLUSIONS OF LAW

1. There is insufficient evidence to support Respondent's claim that the financial distributions at issue, from Mohns, Inc. to its sole shareholders, were not conducted "using terms reflecting an arm's-length relationship." Wis. Stat. § 71.80(23)(a)(3).

2. There is insufficient evidence to support Petitioner's claim that the financial distributions at issue, from Mohns, Inc. to its sole shareholders, were conducted "using terms reflecting an arm's-length relationship." Wis. Stat. § 71.80(23)(a)(3).

**ORDER**

The Department's Motion for Summary Judgment is denied.

The Petitioner's Motion for Summary Judgment is denied.

Dated at Madison, Wisconsin, this 26th day of November, 2025.

**WISCONSIN TAX APPEALS COMMISSION**



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Elizabeth Kessler, Chair



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Jessica Roulette, Commissioner



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Kenneth Adler, Commissioner