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TELEMARK DEVELOPMENT INC 94S223 102896 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION

OCT 28 1996

TELEMARK DEVELOPMENT, INC.
P.O. Box 1289
Crossville, TN 38557,

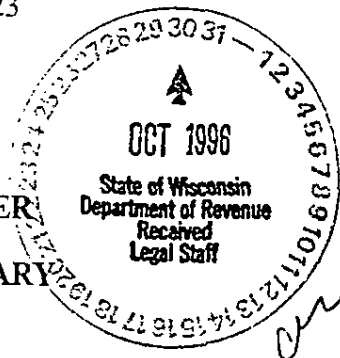
Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,

Respondent.

* DOCKET NO. 94-S-223
*
*
* RULING AND ORDER
* GRANTING SUMMARY
* JUDGMENT
*



**DON M. MILLIS, COMMISSIONER, JOINED BY MARK E. MUSOLF,
COMMISSION CHAIRPERSON:**

The above-entitled matter came before the Commission on cross motions for summary judgment. In addition to a stipulation of facts, both parties have filed briefs and voluminous supporting papers in support of their respective positions on the cross motions for summary judgment. Petitioner is represented by McCarthy, Lenz, Doyle & Tolkan, S.C., by Attorney Catherine M. Doyle. Respondent is represented by Attorney Linda M. Mintener. For the reasons stated below, the Commission grants respondent's motion for summary judgment.

Based upon the entire record in this matter, the Commission finds, rules, and orders as follows:

UNDISPUTED MATERIAL FACTS

1. Petitioner is a Wisconsin corporation in the business of developing and selling time-share condominium units at the Telemark Resort complex near Cable, Wisconsin.
2. Telemark Resort is a 1,600-acre resort complex consisting of a hotel, convention facilities, petitioner's time-share condominium development, and numerous recreational facilities. Petitioner's time-share condominium development occupies approximately 10 acres of the

Telemark Resort.

3. Lake Properties, Inc. ("LPI"), is a Tennessee corporation that owns the hotel, conventional facilities, and recreational facilities at Telemark Resort. Both petitioner and LPI are owned by the same individuals.

4. Telemark Interval Owners Association ("TIOA") is a Wisconsin nonstock corporation created pursuant to §707.30, *Stats.*, and is a membership organization of the owners of petitioner's time-share units. Purchasers of petitioner's time-share units automatically become members of TIOA. TIOA is responsible for the management of petitioner's time-share development.

5. During the period under review (October 1, 1988 through September 30, 1992), petitioner sold its time-share units to the public. Each of these sales used condominium deed Form 17 prepared by the State Bar of Wisconsin.

6. The condominium deed form provided, in part:

Grantor warrants that title is good, indefeasible in fee simple and free and clear of encumbrances, except: ... all terms, provisions, conditions and restrictions ... contained in any of the "Condominium Documents" (consisting of the aforementioned Declaration and Condominium Plat, the Bylaws, any Articles of Incorporation of such Owner's Association, and any Rules or Regulations adopted pursuant to the Declaration or Bylaws)

7. TIOA is the "Owner's Association" referred to in the condominium deed.

8. Each purchaser of a time-share unit during the period under review received a copy of a Wisconsin Timeshare Disclosure Statement that included Telemark Rules and Regulations Pertaining to Flexible Time ("Telemark Rules").

9. Purchasers of petitioner's time-shares receive a fee simple interest in furnished residential units that can be occupied by the purchaser or the purchaser's transferee for certain weeks each year. The year is divided into 52 "unit weeks." The first unit week of each year begins on the first Sunday of the calendar year and ends on the succeeding Sunday. Remaining unit weeks are defined in the same manner.

10. Telemark Rules provide, in part, as follows:

B. USE PERIODS

The Unit Weeks in every Condominium Unit are hereby segregated into the following two different kinds of use periods:

Guaranteed Use Periods: Unit Weeks 7, 8, 26, 27 and 52

Flexible Use Periods: Unit Weeks 1 thru 6, 9 thru 25 and 28 thru 51 inclusive.

1. PURCHASERS OF FLEXIBLE USE PERIODS SHOULD CAREFULLY NOTE THE DATES AND "FIRST COME-FIRST SERVE" BASIS FOR HONORING RESERVATION REQUESTS DESCRIBED ABOVE. IF REQUESTS ARE DELAYED UNTIL ONLY THIRTY (30) DAYS BEFORE THE REQUESTED UNIT WEEK(S), THEY MIGHT NOT BE AVAILABLE.

2. PURCHASERS WHO DO NOT MAKE THEIR RESERVATIONS IN A TIMELY MANNER WILL BE OBLIGATED TO TAKE WHATEVER REMAINING FLEXIBLE USE PERIODS ARE AVAILABLE. IF THE AVAILABLE FLEXIBLE USE PERIODS ARE NOT CONVENIENT TO THE PURCHASER'S PLAN OR SCHEDULE, THE PURCHASER MAY LOSE HIS USE OF THE PROJECT FOR THAT YEAR. IN SUCH EVENT, THE MANAGEMENT IS NOT OBLIGATED TO MAKE ALTERNATIVE ARRANGEMENTS OR TO EXCUSE PAYMENT OF APPROPRIATE MAINTENANCE FEES OR TO REFUND ANY OF THE PURCHASER'S PAYMENTS.

3. GUARANTEED USE PERIODS: Owners purchasing Unit Weeks designated herein as Guaranteed Use Periods shall be entitled to the exclusive use, possession and occupancy of a Unit during the specific Unit Weeks identified in the Purchase Agreement.

4. RESERVATION OF FLEXIBLE USE PERIODS: Owners purchasing Unit Weeks designated herein as Flexible (Floating) Use Periods shall only be entitled to the exclusive use, possession and occupancy of a Unit in accordance with the terms of the Condominium Rules and Regulations and pursuant to a reservation executed by or on behalf of the Management Firm.

5. EFFECT OF PREVIOUS PARAGRAPH: Regardless of the Use Period(s) owned by any Flexible Use Period Owner, and regardless of the particular Unit with which such Use Period(s) may be associated, in the Purchase Agreement or otherwise, no person shall have any right whatsoever to occupy a particular Unit at any time, except pursuant to a reservation executed by or on behalf of the Management Firm. ...

11. The Telemark Rules were explicitly incorporated into the time-share condominium deeds utilized in all of the transactions that are at issue here.

12. A real estate transfer fee was paid to the Bayfield County Register of Deeds on each of the deeds filed with respect to the sale of time-share units at issue here.

13. No sales tax was paid on the sale of time-share units at issue here, and petitioner did not hold a Wisconsin sales tax permit during the period under review.

14. Under date of January 11, 1994, respondent issued an assessment for sales and use tax for the period under review against petitioner in the total amount of \$481,958.70, including principal tax, interest, and penalty pursuant to § 77.60(3), *Stats.*

15. The largest portion of respondent's assessment was attributed to petitioner's sale of those condominium units designated under the Telemark Rules as "flexible use periods" and falling in unit weeks 1-6, 9-25, and 28-51. Respondent's assessment did not include sales of condominium units designated under the Telemark Rules as "guaranteed use periods" and falling into unit weeks 7, 8, 26, 27, and 52.

16. Respondent's assessment included a credit of \$9,627 (subtracted from principal sales and use tax due prior to the calculation of interest and penalty) constituting a refund for the real property transfer fee paid by petitioner on the sales of condominium units designated as flexible use periods under the Telemark Rules.

17. Under the date of January 31, 1994, petitioner filed a petition for redetermination challenging respondent's assessment. Under the date of May 18, 1994, respondent issued a notice of action denying the petition for redetermination. Petitioner filed a timely petition for review with the Commission.

18. Respondent's assessment also included additional use tax on the petitioner's purchase of tangible personal property for which no sales tax was paid.

19. The parties have stipulated that the only portion of respondent's assessment that remains at issue is whether petitioner's sales of time-share condominium units for flexible use periods are taxable under the sales tax. Petitioner concedes other elements of the assessment are

correct. including the use tax on petitioner's purchases and the calculation of the sales tax, interest, and penalty that would be due if respondent's position on the sales taxability of sales of units for flexible use periods is upheld.

APPLICABLE WISCONSIN STATUTES

70.03 Definition real property. "Real property", "real estate" and "land", when used in chs. 70 to 76, 78 and 79, include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto, except that for the purpose of time-share property, as defined in s. 707.02(32), real property does not include recurrent exclusive use and occupancy on a periodic basis or other rights, including, but not limited to, membership rights, vacation services and club memberships.

77.52 Imposition of retail sales tax.

* * *

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

1. The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations, including the furnishing of rooms or lodging through the sale of a time-share property, as defined in s. 707.02(32), if the use of the rooms or lodging is not fixed at the time of sale as to the starting day or the lodging unit. In this subdivision, "transient" means any person residing for a continuous period of less than one month in a hotel, motel or other furnished accommodations available to the public. ...

RULING

In matters before the Commission, petitioner generally bears the burden of showing that respondent's action on its petition for redetermination is false. *Woller v. Department of*

Taxation, 35 Wis. 2d 227, 232 (1967). However, in order for respondent to prevail on its motion for summary judgment, respondent bears the burden of showing it is entitled to summary judgment. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

The Commission must determine whether the sales at issue are subject to the sales tax under § 77.52(2)(a)1, *Stats.* Under this statute, the sales tax is imposed upon the furnishing of lodging to transients through the sale of time-share property if the use of the rooms or lodging is not set at the time of sale as to starting day or lodging unit. Because this is an imposition statute, transactions will be subject to the tax only by the clear and express language of the statute, with all ambiguity and doubt, if any, resolved against respondent. *Kearney & Trecker Corp. v. Dept. of Revenue*, 91 Wis. 2d 746, 753, 284 N.W.2d 61 (1979).

This case hinges on the application of § 77.52(2)(a)1, *Stats.*, to the sale of petitioner's time-share condominium units during flexible use periods. The parties have stipulated that these time-share units fall within the definition of "time-share property" set forth in § 707.02(32), *Stats.* In order for respondent to obtain summary judgment imposing the sales tax on the transactions at issue, it must demonstrate that (1) the use of the time-share units were not fixed as to unit or starting time at the time of sale and (2) the sales were to transients.¹

The Telemark Rules explicitly provide that purchasers of time-share units during flexible use periods are not guaranteed a specific unit during a specific week at the time of purchase. Flexible use purchasers must reserve units with the TIOA for their desired particular units and weeks

¹ Arguably, the phrase "including the furnishing of rooms or lodging through the sale of a time-share property" modifies all of the text preceding in § 77.52(2)(a)1, *Stats.* If so, it would not matter whether the sale of the time-share property was to a transient or not. Alternatively, this phrase may only modify the second element of the statute: "hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public." This is the only ambiguity in this statute as it applies to the facts of this case. Since this is an imposition statute, the ambiguity must be resolved in favor of the taxpayer. Moreover, respondent concedes in its brief that both elements of the statute must be proven if respondent is to prevail.

on a first come-first serve basis. Such purchasers are simply guaranteed the right to use an unspecified unit for one or more weeks during the 47 unit weeks within the flexible use period. The transactional documents submitted to the Commission make it clear that purchasers of time-share units during the flexible use periods do not receive the right to use a particular unit at a particular time at the time of the sale.² Therefore, the first element of the statute is met.

The only remaining issue is whether all of the sales at issue were to "transients" as that term is defined in § 77.52(2)(a)1, *Stats.* This statute defines transients as any person residing for a continuous period of less than one month in a motel, hotel or other furnished accommodations available to the public. Petitioner argues that the time-share units are not accommodations available to the public because once they have been purchased they are no longer available to the public for rental or lease. In so doing, petitioner reads an additional requirement into this statute. The time-share units are available for sale "to the public" and this satisfies the statute. There is no additional requirement that accommodations be available for one-time rental by the public in the nature of a hotel or motel.

The time-share units are sold only in one-week intervals (as opposed to month-long intervals), and even if someone purchased four consecutive unit-weeks, there is no guarantee that the purchaser would be able to use the four unit-weeks continuously. Therefore, the only inference that can be drawn is that all of the sales have been to persons that will reside for a continuous period of less than one month. Therefore, the second element of the imposition statute is met.

Petitioner claims that the sales of the time-share units should be exempt from the sales tax because such sales are in fact sales of real property that cannot be considered a service. At

² Without submitting any admissible evidence to support its position, petitioner argues that the designation of the unit week and number on the face of the condominium deed indicates that the sales were in fact for a specific unit and a specific date. However, the clear and unambiguous language of the deed provides that the deed is subject to the Telemark Rules that explicitly provide flexible use periods do not come with any guarantee of a specific unit at a specific time.

common law, time-share units would be real estate. The legislature is the master of the common law. See, e.g., *Aaby v. Citizens Nat'l. Bank*, 97 Wis. 56, 57 (1928). In its wisdom, the legislature has determined that for certain tax purposes "real property" does not include flexible use time-share property and that the sale of such property to transients constitutes a service that is taxable. §§ 70.03 and 77.52(2)(a)1, *Stats.*

Petitioner also argues that following the sale it provides no services (such being provided by TIOA) to be taxed. Such post-sale services are irrelevant. The service is the sale of the flexible use time-share unit.

Petitioner also argues that it cannot be taxed because, in common parlance, (1) it is not a "hotelkeeper" and (2) does not "furnish rooms or lodging." Again, petitioner ignores the unambiguous wording of the statute. If petitioner sells time-share property where the lodging is not fixed at the time of sale as to starting day or lodging unit, the second element of the statute is met. The ordinary definitions of "hotelkeeper" or "furnishing rooms or lodging" are irrelevant. The legislature has determined that, at a minimum, these terms include the sale of time-share property where the lodging is not fixed at the time of sale as to starting day or lodging unit. We need go no further.

Petitioner also cites *National Land Management, Inc. d/b/a Dogwood Canyon v. Missouri Director of Revenue*, Case No. RS-81-0639, Mo. Tax Lexis 6 (Mo. Adm. Hrg. Comm. June 6, 1984), for the proposition that sales of time-share units are not subject to the sales tax. This case has no persuasive authority here because the Missouri statutes in question bear no similarity to § 77.52(2)(a)1, *Stats.*

Petitioner also argues that § 77.52(2)(a)1, *Stats.*, is ambiguous and therefore should be construed in its favor. Petitioner does not, however, explain the manner in which the statute is ambiguous. Except as described in note 1, *supra.*, the statute is unambiguous as applied to these

facts.

Respondent has submitted voluminous documentary evidence in affidavit form in an attempt to bolster its case. Petitioner has objected to the admissibility of much of this evidence, and both parties have filed response briefs, reply briefs, and supplemental briefs on whether the Commission may consider respondent's evidence on summary judgment. Even though many of petitioner's objections are valid, most of the parties' arguments are irrelevant to the resolution of this case because the contract documents are clear and unambiguous. Where contract language is unambiguous and there is no evidence showing a dispute as to the meaning of the contract language, the construction of contract language is a question of law properly resolved on summary judgment. *Energy Complexes v. Eau Claire County*, 152 Wis. 2d 453, 467, 449 N.W.2d 35 (1989); *Jones v. Sears Roebuck & Co.*, 80 Wis. 2d 321, 327, 259 N.W.2d 70 (1977).

For purposes of this Ruling and Order, the Commission finds superfluous all of respondent's supporting papers, with one exception. The Commission has incorporated the fact that all purchasers of petitioner's time-share units received a copy of the Wisconsin Timeshare Disclosure Statement. Petitioner conceded that this fact was properly before the Commission.

In its third brief, petitioner asserted its right to challenge respondent's denial of its petition for redetermination on constitutional and related grounds. The petition for review asserted a number of theories, including a constitutional challenge, to support its position. However, petitioner stipulated that the sole issue for the Commission to resolve in this matter is whether the "sale of time-share property included in the measure of tax upon which sales tax was assessed in this matter are subject to Wisconsin sales tax."

Petitioner may be arguing that the stipulation contemplates more than just whether the language of the sales tax statute applies to this case but also whether the sales tax may constitutionally apply to the sales at issue. This argument not only strains the language of the stipulation, but is also inconsistent with the actions of the petitioner in this matter. In its initial brief

in support of its motion for summary judgment, petitioner ignored the constitutional issue. Moreover, in its brief filed March 8, 1996, petitioner asserted that the "sole issue presented is whether the Petitioner's gross receipts from the sale of time-share property are taxable as a service under § 77.52(2)(a)1., Stats." It is clear that at the time petitioner wrote that brief, it considered the applicability of the sales tax statute (as opposed to the constitutionality of the sales tax statute) to be the only issue before the Commission. Petitioner may not now raise other challenges to respondent's assessment. Therefore, no issues remain to be resolved.

There is no genuine issue of material fact, and respondent is entitled to summary judgment as a matter of law. We conclude that the sales at issue here were sales to transients of time-share property where the use of the rooms or lodging was not fixed as to starting date or unit at the time of sale. These sales are properly subject to the sales tax imposed by § 77.52(2)(a)1, Stats.

Therefore,

IT IS ORDERED

That respondent's motion for summary judgment is granted and its actions on petitioner's petitions for redetermination are affirmed.

Dated at Madison, Wisconsin, this 28th day of October, 1996.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner

ATTACHMENT: "Notice of Appeal Information"