STATE OF WISCONSIN

TAX APPEALS COMMISSION

CENTRAL DODGE TITLE, LLC, **DOCKET NO. 07-T-208**

Petitioner,

vs. **DECISION AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This case comes before the Commission on a stipulation of facts, with supporting exhibits 1 through 21, filed by the parties on March 12, 2008 (hereinafter referred to as the "Stipulation"). There was also testimony taken before Commissioner LeGrand on May 13, 2008. The Petitioner appears in this litigation by Attorney Nicholas J. Loniello, of the Law Offices of Loniello, Johnson & Simonini, in Madison, Wisconsin. The Respondent, the Wisconsin Department of Revenue (the "Department"), is represented by Attorney John R. Evans. Both parties have submitted briefs. The issue in this case is whether or not a real estate transfer between the Petitioner and another entity is exempt from the transfer fee imposed for real estate transactions under Chapter 77 of the Wisconsin Statutes by virtue of the exemption for transactions between agents and principals granted by Wis. Stat. Section 77.25(9).

Having considered the entire record before it, the Commission finds, concludes, rules, decides and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS[1]

A. Jurisdictional Facts

1. The Petitioner's transfer tax form at issue here was filed on May 14, 2003. (Exhibit 1.)

2. The Department's Notice of Assessment was issued to the Petitioner on July 30, 2006. (Exhibit 21.)

3. The Petitioner's Petition for Redetermination was filed with the Department on September 28, 2006. (Exhibit 21.)

4. The Department denied the Petition for Redetermination on October 30, 2007. (Exhibit 21.)

5. The Commission received the Petitioner's timely Petition for Review on November 7, 2007.

B. Material Facts

6. The conveyance at issue (Exhibit 1) was the "back leg" of a reverse tax deferred exchange transaction under Section 1031 of the Internal Revenue Code ("IRC"). The buyer in the transaction was Ridgeview Investments of Madison, LLP ("Ridgeview," "Buyer" and "Exchangor" and "Lessee"). In this transaction, Central Dodge Title, LLC ("Central Dodge") acted as Qualified Intermediary under the terms of a Qualified Exchange Accommodation Agreement with Ridgeview (the "Exchange

[1] The material facts are taken from the Stipulation with minor revisions by the Commission for form, clarity and consistency.

Agreement"). (Exhibit 2.)

7. This matter concerns the applicability of the "agency" exemption to the real estate transfer fee under Wis. Stat. §77.25(9) to the last of a series of transactions under IRC §1031, namely, the "back leg" of a reverse tax deferred exchange transaction pursuant to IRC §1031. This is also called a "parking transaction."

8. As background, IRC §1031 is a provision that allows the exchange of "like kind" property without the recognition of taxable gain. The basis of the property traded or exchanged away, often called the relinquished property, is transferred for the property received, often called the replacement property. Taxable gain is not recognized until the property received (or subsequent properties received in subsequent "like kind" exchanges) is disposed of in a taxable manner. A "like kind" exchange is usually a two-party exchange. However, variations have developed for situations wherein one party does not want the other party's property or one party does not have a property to exchange.

9. In the reverse exchange at hand, Ridgeview desired to exchange a portion of a property at 150 W. Gorham St. ("150 W. Gorham Street" or "Relinquished Property") for a portion of a property at 433 W. Gilman Street ("433 W. Gilman Street" or "Replacement Property" or "Parked Property"). Since the seller of the 433 W. Gilman Street property did not desire Ridgeview's 150 W. Gorham Street property, Ridgeview had to arrange to sell the 150 W. Gorham Street property. Central Dodge, as an accommodation holder, purchased and held the 433 W. Gilman Street property until the 150 W. Gorham Street property sold to an unrelated third party. Upon the sale,

Ridgeview acquired the 433 W. Gilman Street property from Central Dodge by assigning the proceeds of the 150 W. Gorham Street sale to Central Dodge, and Central Dodge deeded the 433 W. Gilman Street property to Ridgeview.

10. For the purposes of this matter only, the transactions that are the subject of this matter, in their entirety, qualify as a "like kind" exchange pursuant to IRC §1031 and, specifically, Internal Revenue Service Revenue Procedure 2000-37. Central Dodge and Ridgeview reported the transactions as bona fide sales of 150 W. Gorham Street and 433 W. Gilman Street for federal income tax purposes and for Wisconsin franchise/income tax purposes.

11. Ridgeview is a Wisconsin Limited Liability Partnership. (Exhibit 6.) Its sole partners are Michael J. Fisher and Fisher Construction, Inc. Michael J. Fisher is the sole shareholder of Fisher Construction, Inc. Ridgeview and its partners are wholly unrelated to Central Dodge.

12. Central Dodge is a wholly owned subsidiary of Preferred Title, LLC ("Preferred"). Preferred is a licensed title insurance agent engaged in the business of providing title insurance, closing services and tax deferred exchange services in connection with real estate transactions. Central Dodge was organized for the purpose of accommodating tax deferred exchange transactions under IRC §1031 as an "Exchange Accommodation Title Holder" ("ATH").

13. The first leg of the transaction involved the acquisition from the sellers (unrelated third parties) of 433 W. Gilman Street by three entities, to wit: Ridgeview, Fisher Construction, Inc. and Central Dodge. (Exhibits 7-8.) The full

$2,625,000.00 sale price was reported on the applicable transfer return. (Exhibit 10.)

14. In the first leg of the reverse exchange transaction, a transfer fee was fully paid in the amount of $7,875.00.

15. In the first leg of the transaction, Ridgeview acquired outright a 28.78% interest as a tenant in common. However, Ridgeview desired to acquire an additional 38.13% out of the proceeds of the future sale of replacement property identified as 150 W. Gorham Street. For this purpose, Ridgeview engaged Central Dodge as the "Parking Intermediary" under the Exchange Agreement. (Exhibit 2.) Relevant portions of the Exchange Agreement provide as follows:

a. Ridgeview and Central Dodge "expressly intend to comply" with the essential requirements of Rev. Proc. 2000-37, and Central Dodge "shall hold the Parked Property for the benefit of Exchangor in order to facilitate an exchange under IRC §1031."

b. Ridgeview selected and identified the Parked Property to be acquired by Central Dodge, and assigned its purchase rights to Central Dodge. From the inception of the transaction, Central Dodge agreed "to acquire and hold the Parked Property for an eventual exchange and conveyance to Exchangor."

c. Ridgeview was obligated to "arrange for any necessary first mortgage financing for the acquisition of the Parked Property" by Central Dodge. Ridgeview had "the sole and exclusive right to negotiate the terms of said first mortgage financing and the sole and exclusive right to

designate the first mortgage lender." Any such financing was required to be "without recourse" to Central Dodge.

d. Ridgeview or its principals were obligated to "give and grant a personal guaranty of the full payment and performance" of all the obligations of Central Dodge under the Loan Documents.

e. Ridgeview was obligated to loan Central Dodge all of the cash down payment required to close the transaction, and further required to pay all settlement charges and closing costs in connection with the acquisition of the Parked Property by Central Dodge.

f. Ridgeview agreed to lease the Parked Property back from Central Dodge under the terms of a "Triple Net Lease." (*See* Exhibit 20.) Ridgeview, not Central Dodge, had the exclusive right and obligation to possess, manage and control the property and to collect rents and security deposits from tenants.

g. Under the Triple Net Lease, Ridgeview was obligated to pay the first mortgage payments directly to the lender. If the rents were not sufficient, then Ridgeview, not Central Dodge, was obligated to pay the deficiency.

h. Ridgeview identified its Relinquished Property and assigned its right to acquire the Parked Property to the Qualified Intermediary in the sale of the Relinquished Property.

i. Upon the sale of the Relinquished Property to an unrelated

third party, Central Dodge promised to convey the Parked Property to Ridgeview solely in exchange for the proceeds of the sale of the Relinquished Property plus Ridgeview's assumption of the first mortgage indebtedness.

j. If the proceeds of the Exchanged Property were not sufficient to fully pay the loan by Ridgeview to Central Dodge for the down payment financing, then Ridgeview as Exchangor agreed to suffer the loss.

k. For the purposes of the transfer fee imposed by Wis. Stat. § 77.22, the parties agreed that Central Dodge as "ATH shall be deemed to be the agent or trustee of Exchangor for the purpose of holding title to the Parked Property pursuant to Revenue Procedure 2000-37."

16. To finance the acquisition of the 38.13% interest in 443 W. Gilman Street by Central Dodge, Ridgeview loaned Central Dodge $188,349.70 for its share of the cash down payment. (Exhibit 11.) The down payment loan was secured by a second mortgage against the property. (Exhibit 12.)

17. Ridgeview's cash funded Central Dodge's acquisition of the 38.13% interest as a tenant in common. Central Dodge contributed none of its own cash toward the down payment for the interest in the property.

18. In connection with the first mortgage financing, Ridgeview arranged for non-recourse financing with AnchorBank. All three purchasers (Ridgeview, Fisher Construction and Central Dodge) joined in the execution of the $2.16

million Mortgage Note. (Exhibit 13.)

19. Ridgeview's Relinquished Property in the transaction was its undivided half interest in 150 W. Gorham Street. The sale of the Relinquished Property closed on May 14, 2003, which was 48 days after Central Dodge acquired its 38.13% interest in the Replacement Property. (Exhibits 15-16.)

20. The total selling price of the Relinquished Property was $2.0 million, as shown on the Closing Statement and transfer return. (Exhibit 17.) A transfer fee was fully paid in the amount of $6,000.00.

21. Immediately after closing on the sale of the Relinquished Property, Ridgeview acquired the 38.13% interest in the Replacement Property titled in the name of Central Dodge. The Closing Statement (Exhibit 18) shows the purchase price to be the sum of the first mortgage balance which was assumed by Ridgeview (Exhibit 19), plus the second mortgage debt plus all accrued interest thereon. There were no cash proceeds to Central Dodge.

22. There was no economic cash profit in the transaction to Central Dodge, and no such profit was intended.

23. Central Dodge was paid a $2,000.00 fee for its services holding title for the benefit of Ridgeview.

24. Central Dodge held title to the property from March 28, 2003 through May 14, 2003. During that period of time, Central Dodge leased the entire interest of Central Dodge in the Replacement Property to Ridgeview under the terms of the Triple Net Lease. (Exhibit 20.)

25. The monthly rent under the Triple Net Lease was exactly equal to the carrying costs for first mortgage interest and second mortgage interest. All the "rent" payments were paid directly to the first mortgage lender.

26. Under the Triple Net Lease, all taxes, insurance, maintenance and repair obligations were the responsibility of Ridgeview alone.

27. During the entire period Central Dodge held title, tenants paid their rent to Ridgeview, not Central Dodge. Ridgeview, not Central Dodge, was in control of the leasing and management of the entire property.

CONCLUSION OF LAW

The Petitioner has not met its burden of establishing that the transfer of the property from Central Dodge to Ridgeview was exempt from the real estate transfer fee under Wis. Stat. § 77.25(9) as a conveyance between agent and principal.

OPINION

The issue in this case is whether the agent and principal exemption to the real estate transfer fee applies to the final leg of this transaction. In brief, Ridgeview and its owner, Mr. Michael Fischer, desired in 2003 to perform an exchange of real properties under IRC §1031 known as a "Reverse Starker" exchange.[2] The Regulations issued for §1031 specifically approved such an exchange starting in 2001. In order to qualify under those safe harbor rules, Ridgeview hired Central Dodge to hold title to the property as an intermediary pursuant to a written agreement. When Central Dodge transferred the property to Ridgeview, a transfer tax form was properly filed, but the

[2] *Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979). *Starker* is the seminal case for like-kind exchanges. The facts in *Starker* are complicated and will not be summarized here, as *Starker's* specific results were altered by the passage of IRC §1031(a)(3) by Congress in 1984.

transfer was claimed to be exempt under Wis. Stat. § 77.25 as a transfer between agent and principal. The Department, however, later issued an assessment of $5,989.91 to Central Dodge as the transferor, on the grounds that the transfer did not qualify for the claimed exemption. Central Dodge then filed this appeal. The legal questions that must be answered here are (1) whether or not there was an agency relationship between Central Dodge and Ridgeview and (2) whether or not there was actual consideration for the transfer.

Central Dodge argues that its transfer of the 433 W. Gilman Street property to Ridgeview fits within the claimed exemption, which the Department denies. In this case, we hold in favor of the Department because Central Dodge has not proved that it was an agent for Ridgeview at the time of the conveyance, or that this transfer was otherwise exempt under Wis. Sta. §77.25(9).

A. STATUTES INVOLVED

Wis. Stat. § 77.22(1)(a) imposes a transfer fee on every conveyance of real estate:

> **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 . . . .
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> * * *

The exemption at issue in this case states as follows:

> **77.25 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.

B. STANDARD OF REVIEW

A number of principles govern this matter as to procedure and as to interpretation. On appeal to the Commission, the Petitioner has the burden of showing that the Department's determination is incorrect. *Laabs v. Tax Commission,* 218 Wis. 414, 424, 261 N.W. 404 (1935); *Dept. of Taxation v. O.H. Kindt Mfg. Co.,* 13 Wis.2d 258, 268, 108 N.W.2d 535 (1961); and *Woller v. Dept. of Taxation,* 35 Wis.2d 227, 232, 151 N.W.2d 170 (1967). While a tax cannot be imposed without clear and express language for that purpose, tax exemptions are a matter of legislative grace and not of right. *Janesville Community Day Care v. Spoden,* 126 Wis. 2d 231, 233, 376 N.W.2d 78 (Ct. App. 1985). Exemption statutes are construed against the taxpayer, who must bring himself or herself clearly within the terms of the exemption. *Gottfried, Inc. v. Dep't of Revenue,* 145 Wis. 2d 715, 719-20, 429 N.W.2d 508 (Ct. App. 1988). The exemption canon of construction generally requires a strict reading of statutes having to do with exemptions, refunds, and other tax privileges. *Ho-Chunk Nation v. Dep't of Revenue*, 2009 WI 48, 312 Wis. 2d 484, 766 N.W.2d 738. An exemption from taxation must be clear and express. All presumptions are against it, and it should not be extended by implication. *Soo Line R.R. Co. v. Dep't of Revenue,* 89 Wis. 2d 331, 359, 278 N.W.2d 487 (Ct. App. 1979), *aff'd,* 97 Wis. 2d 56, 292 N.W.2d 869 (1980). In Wisconsin, the transfer fee is treated like a tax. *Gottfried, Inc. v. Dep't of Revenue*, 145 Wis. 2d 715, 429 N.W.2d 508 (Ct. App. 1988).

In construing a statute and determining its scope, the first recourse is to the language of the statute itself. *State v. Derenne,* 102 Wis. 2d 38, 45, 306 N.W.2d 12, 15 (1981). If statutory language is plain and unambiguous, it must be given effect. Words

and phrases which have received judicial construction before enactment are to be understood according to that construction. If a statute is not ambiguous, we look to the statutory language for its meaning. *In re T.P.S.,* 168 Wis. 2d 259, 263, 483 N.W.2d 591, 593 (Ct. App. 1992). A statute is ambiguous only if it is capable of two or more reasonable interpretations. *Id.* at 264, 483 N.W.2d at 593. That the parties disagree about its meaning does not necessarily make a statute ambiguous. *Milwaukee Firefighters' Ass'n., Local 215 v. City of Milwaukee,* 50 Wis. 2d 9, 14, 183 N.W.2d 18, 20 (1971). Moreover, the provisions of a statute are not rendered ambiguous simply because they are difficult to apply to the facts of a particular case. *Lawver v. Boling,* 71 Wis. 2d 408, 422, 238 N.W.2d 514, 521 (1976). With these principles in mind, we turn to the litigants' arguments as to the agent-principal exemption to the transfer tax.

C. THE PETITIONER'S ARGUMENTS

Central Dodge challenges the assessment on several grounds. First, Central Dodge argues that under substantive Wisconsin law governing agency in real estate transactions, it was acting primarily for Ridgeview's benefit and therefore was Ridgeview's agent within the meaning of the exemption. Second, Central Dodge contends that the substantive federal tax law that disqualifies certain classes of agents from acting as a parking intermediary in a §1031 exchange transaction is entirely different from Wisconsin substantive law governing the agency exemption at issue. Third, Central Dodge argues that the Exchange Agreement stripped it of all of the benefits and burdens of ownership and Ridgeview "called all of the shots." Pet. Brief, at

22.[3] Fourth, Central Dodge contends that the purpose of the agency exemption under §77.25(9) is to protect taxpayers against an unfair and unintended "doubling up" of the transfer fee.[4] Finally, Central Dodge contends that its conveyance of the parked property to Ridgeview was without any actual consideration.

D. THE RESPONDENT'S ARGUMENTS

The Department makes several responses to Central Dodge's petition. First, the Department argues that Central Dodge was not an agent under Wisconsin law because Ridgeview did not manifest the intent that Central Dodge act for it. The Department points out that Central Dodge controlled important aspects of the transaction and that Ridgeview and Central Dodge engaged in businesses set apart from each other. Second, the Department also argues that Central Dodge received actual consideration in exchange for the title to the parked property. Third, the Department contends that fairness requires that Central Dodge pay the transfer fee, because the Reverse Starker structure obtained a significant federal income tax benefit for Ridgeview.[5] Finally, the Department posits that the IRS Letter Ruling cited by Central Dodge is not relevant and is not a persuasive interpretation of the Wisconsin transfer fee law.

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[3] According to W*ordreference.com,* "calling the shots" is a reference either to billiards or to target shooting. It means to make the decision, to decide what is to be done.

[4] In the first leg of this transaction, a transfer fee of $7,785.00 was paid. In the second leg, $6,000 was paid. The initial assessment for the third leg of the transaction was $5,989.91 of which $3,617.40 was for the transfer fee. Upon redetermination, the Department added interest in the amount of $2,033.67 and a penalty in the amount of $904.35, for a total assessment of $6,555.42.

[5] Both parties make arguments based on fairness which we will not address directly. Our primary purpose here is to interpret the meaning of the relevant exemption to taxation the legislature created.

E. ANALYSIS

Central Dodge argues that its transfer of the property to Ridgeview was exempt from the transfer fee because it was acting as Ridgeview's agent and the transfer was without actual consideration. Central Dodge points to the written agreement, which states that Central Dodge is Ridgeview's agent for the purposes of the transfer fee. As mentioned above, this transaction was part of a multi-part exchange designed to qualify for non-recognition treatment of capital gain under IRC §1031 for federal income tax purposes. This particular form of exchange is also known as a "Reverse Starker" exchange.[6]

Starting in 2001, this particular form of exchange was explicitly recognized by the IRS as qualifying for treatment under §1031. However, in order to so qualify, the property in question must be placed, albeit temporarily, in the hands of an intermediary and the federal regulations limit what type of organizations and persons can act as intermediaries. Under Treas. Reg. §1.1031(k)(1)(K)(2), one of the restrictions imposed is that a class of "agents" is disqualified from acting as a "parking intermediary."[7] The class of "disqualified agents" is defined by the Regulations to include the taxpayer's employee, attorney, accountant, investment banker, investment broker, real estate agent or real estate broker. Thus, one view is that in order to qualify for non-recognition treatment of capital gain in the federal system, the taxpayer must disclaim agency with

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[6] There are numerous articles about this topic. *See, e.g.,* Bradley T. Borden, *Reverse Like-Kind Exchanges: A Principled Approach,* 20 Va. Tax Review 659 (2001); Joanna Weindorf, Comment, *Reverse Like-kind Exchanges: Is the Safe Harbor Provided by Revenue Procedure 2000-37 Really So Safe?,* 33 Ariz. St. L. J. 1243 (2001).

[7] According to Central Dodge, the reason for this limitation is to minimize the risk and temptation of fraudulent production of exchange documentation upon an audit. Pet. Brief, at 19.

the parking intermediary, but to qualify for the Wisconsin exemption to the real estate transfer fee, the taxpayer must claim that the parking intermediary is the taxpayer's agent.[8] The question in this case is whether or not that effort was successful on these particular facts.

The first question that must be answered here is whether Central Dodge was acting as Ridgeview's agent when it transferred the property to Ridgeview. In Wisconsin, there is no real estate transfer fee-specific definition of agency. Instead, the Commission and the courts have largely looked to case law and the Restatements.[9] Agency embraces a number of relations between two or more persons or entities. 2A C.J.S. Agency §5. The Wisconsin Supreme Court has determined that there are at least two necessary elements of agency that are relevant to this case. In *Peabody Seating Co. v. Cullen,* the Court stated the following:

> The elements necessary to support such finding of agency have been set forth by this court to be: (1) the express or implied manifestation of one party that the other party shall act for him; (2) who has retained the right to control the details of the work; . . . .

Peabody Seating Co. v. Cullen, 56 Wis. 2d 119, 201 N.W.2d 546, 549 (1972). [10]

The Wisconsin Court of Appeals has held that a necessary element of

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[8] Central Dodge does not claim that any other exemption provided under Wis. Stat. §77.25 would apply to this transaction, and the legislature has not enacted a specific exemption to the transfer fee for a Reverse Starker exchange.

[9] The Department's regulations cover the value subject to the transfer fee as follows: "In an exchange of real properties, 2 separate and distinct conveyances are involved and the value should be separately determined for each." Wis. Adm. Code Tax § 15.02(2). The Department's regulations do not specifically cover the agent-principal exemption or the applicability of the fee to the parts of a Reverse Starker exchange.

[10] The last part of the test in *Peabody* dealt with matters involving subcontractor liens that would have no applicability to a case not involving subcontractor liens. *James W. Thomas Construction Co., Inc. v. City of Madison,* 79 Wis. 2d 345, 352-354, 255 N.W.2d 551(1977).

agency is that one party be acting primarily for the benefit of the other party. *Washington Nat'l Development Co. v. Dep't of Revenue,* 194 Wis. 2d 567, 535 N.W.2d 71 (Ct. App. 1995). Wisconsin courts have also quoted the Restatements of Agency with approval.[11] The latest Restatement defines agency as follows:

> Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Interestingly, as the *Washington National* Court observed, an agency agreement need not be in writing. *See also, Fuller v. Riedel,* 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990).(contracts may be formed by conduct as well as by words).

The agent-principal exemption has been considered by this Commission and the courts on several occasions.[12] In *Washington National, supra*, a real estate development company conveyed a parking garage and an office building to separate partnerships as part of a series of interrelated transactions. The partnership intended to finance the development of the properties through IRC §144 tax-exempt industrial revenue bonds issued by the City of Milwaukee. The taxpayer and the individual, as principals acting on behalf of themselves and "entities to be formed," appointed themselves, the partnership, and another corporation to act as their agent to deal with the properties until the closing of the industrial revenue bond or other permanent financing. On the advice of counsel, the partnership engaged in a series of transactions

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[11] The Restatement (Second) of Agency has been superseded by the Restatement (Third) of Agency as of 2005. To date, though, no Wisconsin court has cited the Restatement (Third).

[12] In addition to the cases cited herein, see *Kasprzak v. WDOR,* Wis. Tax Rptr. (CCH) (WTAC 2000) (regarding substantiation of an alleged oral agreement), and *Miller v. Dep't of Revenue,* Wis. Tax Lexis 11 at 6 (WTAC 1999).

designed to ensure that the acquisition of the office building and the parking garage would comply with IRC §144 restrictions against "related party" transactions. The transactions at issue in the case happened when the company, as agent, acquired and then conveyed the office building and the parking garage to separate newly formed limited partnerships. The transferee limited partnerships had not been formed at the time of the execution of the agency agreement. The company argued that the conveyances were exempt from the real estate transfer fee because the company acted in its capacity as agent for the transferee partnerships and there was no exchange of consideration.

The Commission held that although the transfers were made without consideration, they were subject to the transfer fee because there was no agent-principal relationship. The Commission stated that under Wisconsin law, a valid agency relationship requires that there be a manifestation by the principal to the agent that the agent is authorized to act on its behalf. In that case, the newly formed partnerships did not exist at the time of the execution of the agency agreement and thus could not have authorized the company to act as their agent in connection with these conveyances of real property. As support for this conclusion, the Commission relied on 2A C.J.S. § 27 which states as follows:

> "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."

Washington Nat'l. Development Co. v. Wis. Dep't of Revenue, Wis. Tax Rptr. (CCH) ¶400-

023 (WTAC 1993).

On appeal of the Commission's decision, the Dane County Circuit Court held that the last transfer from the development company to the two limited partnerships was exempt because both the principals and the agent were in existence at the time of the conveyance. *Washington Nat'l. Development Co. v. Wis. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶400-084, Case No. 93CV101 (Dane Co. Cir. Ct., August 3, 1994). The Circuit Court noted that the Commission was correct that an agent-principal relationship exists only if there has been a manifestation by the principal to the agent that the agent may act on the principal's account. The Circuit Court said that the Commission's ensuing analysis, however, was flawed because the Commission focused exclusively on the written Agency Agreement and the date of its execution and concluded because the principals were not in existence when the agreement was made, the agreement could not have granted Washington National the authority to act as an agent. The Circuit Court noted that 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 and the agent. 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 to so act on the principal's account." *Id.,* Decision at 6 (quoting §26, Restatement (Second) of Agency). According to the Circuit Court, it is the *manifestation* and not the intention of the principal that is important.

The Court of Appeals affirmed the Circuit Court's decision reversing the

Commission. The appellate court agreed with the Circuit Court that the entire course of conduct culminating in the creation of the partnerships and the conveyance of the properties by Washington National to the partnerships led to the "inescapable conclusion" that Washington National acted as an agent for the partnerships. As noted by the parties here, the following language appears in the appellate court's decision:

> 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. Restatement (Second) of Agency § 14K (1958).

Washington Nat'l, 194 Wis. 2d at 572. The Court did not hold that such an agreement is the only requirement for establishing agency. Instead, the Court concluded that the Commission incorrectly focused on the Agency Agreement date rather than the conveyance date.

In *Sunburst IV Ltd. Partnership v. Wis. Dep't of Revenue,* Wis. Tax Rep. (CCH) ¶400-550 (WTAC 2001), a developer conveyed a property to an LLP in order to satisfy a HUD loan guarantee requirement that the record title holder be a single asset entity. The nominee agreement stated several times that the developer was the principal and the LLP was the developer's agent. The Department contended that the LLP's ownership of the property precluded it from being the agent of Sunburst (the developer) and that an unrecorded document could not act as a conveyance document, because it would effectively reverse the recorded deed.

The Commission held the unrecorded nominee agreement between the developer and the LLP that was formed to hold record title to the developer's property

established an agency relationship. The LLP's record ownership of the developer's property did not preclude it from being the developer's agent. Also, the nominee agreement was not a conveyance document, and the fact that it was unrecorded was of no consequence. The Commission also agreed that the developer received no consideration in the transfer by being relieved of indebtedness on the mortgage because the developer assumed continuing responsibility for all of the liabilities and expenses relating to the property. Thus, the transfer from the developer to the LLP qualified for the real estate transfer fee exemption. [13]

The Department did not appeal the Commission's broad construction of the exemption to the circuit court and no notice of nonacquiescence was issued pursuant to Wis. Stat. § 73.01(4)(e)2. The taxpayer, however, appealed the Commission's refusal to award it attorney's fees under the Wisconsin Equal Justice Act, Wis. Stat. § 227.485. *Sunburst IV Limited Partnership vs. Wis. Dep't of Revenue,* Wis. Tax Rep. (CCH) ¶400-623 (Waukesha Co. Cir. Ct. 2002); *aff'd,* Wis. Tax Rep. ¶400-691 (Ct. App. 2003) (unpublished). In that appeal, the Waukesha County Circuit Court reversed the Commission's finding as to attorney's fees. The Circuit Court wrote that the Department's construction of Wis. Stat. § 77.25(9) was not "substantially justified" since the nominee agreement "could not be reasonably construed in any manner other than

[13] In a concurring opinion, Commissioner Millis suggested that even if the legislature had intended that the exemption apply to the situation where a buyer wishes to remain anonymous, the words the legislature actually used unquestionably exempt all transfers between agent and principal without consideration regardless of the context. In a colorful turn of phrase apparently originating with the Department, Commissioner Millis noted that if the Commission's construction of the section allowed for "chaos and limitless skullduggery", it was because the legislature used words that allowed it. Commissioner Millis further noted in footnote 4 that the file maintained by the Legislative Reference Bureau sheds no light on the legislature's intent for this exemption.

the creation of the agency/principal relationship." *Sunburst IV,* ¶400-623 at p. 32. The Circuit Court noted that the very term "agent" was used in several places in the agreement. The Circuit Court stated that the Department did not make a reasonable effort to prove a legal basis for denying the claimed exemption nor did it offer a novel but credible interpretation of the law for denying the exemption. The Department appealed the Circuit Court decision to the Wisconsin Court of Appeals, which subsequently affirmed the Circuit Court's finding that the Department's construction of Wis. Stat. § 77.25(9) was not substantially justified. *Sunburst IV Limited Partnership vs. Wis. Dep't of Revenue,* 266 Wis. 2d 693, 667 N.W.2d 377 (Ct. App. 2003).

From review of these decisions, several principles emerge. First, it is clear that the gravamen of an agent-principal relationship within the context of the transfer tax is the agreement between the principal and the agent that the agent will act on the principal's behalf. *Washington Nat'l. Development Co.,* 194 Wis. 2d at 572. Thus, we must look to who "controls the shots," as well as the manifestation by the principal and consent by the agent. Second, according to *Sunburst IV*, another controlling factor is the understanding that exists between the parties at the time of the conveyance. As mentioned above, in Wisconsin an agency agreement need not necessarily be in writing.[14] Third, prior cases indicate that, for purposes of Wis. Stat. § 77.25(9), the terms "agent" and "principal" are to be given their common and ordinary meaning. Fourth, the exemption applies to arrangements similar to those in *Sunburst IV* and *Washington National*, both of which involved transfers made for financing purposes, which bear

[14] The federal courts have held that it is reasonable to require "unequivocal proof" of an agency relationship, at least in the shareholder context. *Commissioner v. Bollinger, 485 U.S. 340 (1988).*

some similarity to the facts at issue in this case.

Whether an actual agent-principal relationship exists usually turns on facts concerning the understanding between the alleged agent and principal. *Johnson v. Minn. Mut. Life Ins. Co.,* 151 Wis.2d 747, 445 N.W. 2d 736 (Ct. App. 1989). In this case, the best evidence of that understanding is the written agreement between Ridgeview and Central Dodge, which provides as follows:

> 5.8 *No Agency* Exchangor [Ridgeview] and ATH [Central Dodge] mutually acknowledge that ATH is entirely independent of Exchangor and **is not an agent under the direct or indirect control of Exchangor** for the purposes of accomplishing a reverse tax deferred exchange. At the same time, the parties mutually acknowledge their respective obligations to close and consummate a reverse exchange transaction as contemplated by this Agreement within 180 days after the date on which ATH acquired the Parked Property and that ATH acquires the Parked Property for the sole benefit of Exchangor. **Accordingly, for the sole purposes of the transfer fee imposed by Wis. Stat. §77.22, and for no other purpose whatsoever**, ATH shall be deemed to be the agent or Trustee of Exchangor for the purpose of holding title to the Parked Property pursuant to Revenue Procedure 2000-37. At the direction of Exchangor, ATH shall execute a transfer return which declares an exemption from transfer fee on the grounds of such limited agency between ATH and Exchangor. For this purpose, Exchangor, at Exchangor's sole risk and expense, relies on Exchangor's own interpretation of the transfer fee statute and IRS Letter Ruling 200148042. If Exchangor directs that such an exemption be claimed, then Exchangor shall indemnify and hold ATH harmless against the risk of any transfer fee audit by the Wisconsin Department of Revenue. If a transfer fee is determined to be due, Exchangor shall pay the full amount of the transfer fee plus any penalties or interest.

(emphasis added in bold).

There simply is no getting around the fact that the agreement in question

expressly *disclaims* agency as a general matter and yet the law of agency expressly requires a manifestation of assent of agency. Indeed, in *Washington National* the court stated that it is the manifestation, and not the intention of the principal, that is important. Admittedly, there are many aspects of this relationship that would appear to be agency-like under *Washington National* and *Sunburst IV*. What has not been shown here, however, is why those aspects should prevail over what is expressly stated in the written agreement, particularly when the exemption at issue must be strictly construed.

In many similar contexts, the Commission and the courts have employed a substance and realities test. *See, Dept. of Revenue v. Sterling Custom Homes Corp.*, 91 Wis. 2d 675, 679, 283 N.W.2d 573, 575 (1979); *Madison Newspapers, Inc. v. Dept. of Revenue,* 228 Wis. 2d 745, 599 N.W.2d 51 (Ct. App. 1999); *River City Refuse Removal, Inc. v. Dept. of Revenue,* 289 Wis. 2d 628, 712 N.W.2d 351 (Ct. App. 2006**);** *Manpower, Inc. v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶401-223 (WTAC 2009).[15] Additionally, where parties engage in a transaction pursuant to a written agreement, the entire agreement, as opposed to a particular clause within the agreement, should be examined to determine if the agreement creates an agent-principal relationship. *Sevey v. Jones,* 235 Wis. 109, 112, 292 N.W. 576 (1940); *see also,* Restatement (Second) of Agency § 1, Comment b (a clause within a written agreement that characterizes the relationship between the parties to the agreement as one of agency, or as one not of agency, is not

[15] At oral argument, counsel for Central Dodge cited *Park Bank v. Coulee State Bank*, 2000 WI App 233, 239 Wis. 2nd 234, 619 N.W.2nd 308 (Ct. App. 2000) (unpublished decision), as support for the proposition that what the parties call their relationship is not controlling as to whether or not an agency relationship exists. However, we cannot rely on an unpublished decision in reaching our decision. Moreover, the result in that case does not support Central Dodge's position, because the Court ultimately resolved the issue of control by waiver and by reviewing only the written contract.

controlling).

There are several additional problems with Central Dodge's approach. First, as stated above, this is an exemption to taxation case, and the burden is on Central Dodge to bring itself squarely within the exemption. Even in the light most favorable to the taxpayer, what we have on this record is equivocal. In the agreement, Central Dodge expressly disclaimed agency, and, at best, then engaged in a course of conduct that could have resulted in agency. Ordinarily, when there is a conflict between what is written and what is spoken or communicated, the preference is that the written word prevails.[16] In brief, this case can be easily distinguished from *Washington National* and *Sunburst IV* because, in those cases, the principals claimed agency throughout and there were no mixed signals.[17] We have not been made aware of any taxation case in which an alleged principal successfully claimed an agency based on a course of conduct that contradicted such a clear written provision. Second, we agree with the Department that for the agent-principal exemption to have any meaning at all, it must be the case that the relationship has some significance beyond merely gaining a tax exemption.[18] Anything less would not give meaning and substance to what the legislature wrote in the statute. Here, the written agreement expressly disclaims *any* relationship other than gaining the tax exemption.

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[16] The parol evidence rule would be one example of this.

[17] Consistent with *Washington Nat'l* and *Sunburst IV*, we take the view that every alleged agent-principal relationship must be examined according to the facts and circumstances of the individual case.

[18] While we are aware that the subject clause in the written agreement attempts to gain the tax exemption at issue here, we have determined that the substance of the paragraph is that there is no agency. On many occasions, this Commission has looked to "substance and realities." *See, e.g., Manpower, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-223 (WTAC 2009).

Finally, on the record before us, there is no clear-cut manifestation of assent other than the parties' course of conduct. While undoubtedly agency is a flexible concept, not all relationships that have indicia of agency rise to that level. Indeed, the Restatement (Third) of Agency states as follows:

> The common-law definition also has the effect of excluding situations that many think of and refer to as agency. In general, agency does not encompass situations in which an 'agent' is not subject . . . . This fact leads to awkwardness both in terminology and in the need to draw distinctions between relationships of 'true agency', on the one hand, and other relationships in which one person's acts affect the legal interests of another person. For example, the defining characteristics of 'true agency' are not present in the relationship between a corporation's shareholders and its directors, between a guardian and the guardian's ward, and between a public official designated by statute to receive service of legal process and the person for whom process is received. The law applicable to those relationships is not covered by this Restatement.

At another point, the Restatement (Third) of Agency uses the term "non-agent service provider" to describe the situation where "true agency" does not exist. §1.01, p. 20. In this case, we find that Central Dodge has not met its burden of showing that there was "true agency."[19]

CONCLUSION

In sum, as stated above, exemptions from taxation are not easily granted and, on these facts, Central Dodge has not shown that it is entitled to the exemption.

[19] To clarify, we do not hold that an intermediary in a Reverse Starker exchange can never qualify as an agent for purposes of the exemption from the transfer fee under Wis. Stat. §77.25(9). However, we find that there are simply too many factors in the record in this case that militate against a finding of agency to overcome the requirement for strict construction of the exemption at issue.

The record before us does not establish "true agency" at the time of the conveyance for several reasons. First, the written agreement expressly disclaims agency. Second, for the concept of agency to have any significance at all, it must mean something other than gaining a tax exemption. Finally, through this all, there is no clear-cut manifestation of assent.[20]

ORDER

The Department's action on the Petitioner's petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 6th day of October, 2009.

WISCONSIN TAX APPEALS COMMISSION

_____
David C. Swanson, Chairperson

_____ (Dissenting)
Roger W. Le Grand, Commissioner

_____
Thomas J. McAdams, Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**

ROGER W. LEGRAND, COMMISSIONER, DISSENTING:

I dissent from the ruling. I believe that the transfer of the property from Central Dodge to Ridgeview was a transfer between agent and principal without actual

[20] Given our holding on the question of whether or not an agent/principal relationship existed, and the fact that the Petitioner does not claim that it acted as a trustee for Ridgeview, it is unnecessary for us to consider whether or not there was actual consideration for the transfer at issue.

consideration and was thus exempt from transfer tax under Wis. Stat. § 77.25(9). I agree with the majority opinion's statement of facts and law, but reach a different conclusion on whether there is an agency relationship between Central Dodge and Ridgeview. I believe *Sunburst IV Ltd. Partnership v. Wis. Dep't of Revenue,* Wis. Tax Rep. (CCH) ¶400-550 (WTAC 2001) controls this case. In *Sunburst*, the Commission found that the Wis. Stat. § 77.25(9) exemption applied to a case where an agency was created to "park" property to obtain a federal benefit. The same type of situation exists in this case. Central Dodge was the recipient of "parked" property, which it conveyed to Ridgeview for no consideration. Ridgeview controlled ("called the shots") all aspects of the transaction. Under the Wisconsin Law of Agency, Central Dodge was the agent of Ridgeview and thus was entitled to the exemption on the conveyance back to Ridgeview.

The majority opinion acknowledges the *Sunburst* precedent, but finds that there is no agency relationship between Ridgeview and Central Dodge. It relies upon this language from the agreement between Ridgeview and Central Dodge:

> No Agency. Exchangor and ATH mutually acknowledge that ATH is entirely independent of Exchangor and is not an agent under the direct or indirect control of Exchangor for the purposes of accomplishing a reverse tax deferral exchange . . . .

Quite frankly, this language is troubling in that it appears to disclaim an agency relationship between Ridgeview and Central Dodge. But it is clear that this language was used for the purpose of accomplishing a "Reverse Starker" exchange under IRC § 1031 and specifically Rev. Proc. 2000-37. The agreement between Central

Dodge and Ridgeview goes further, however, and contains this language:

> At the same time, the parties mutually acknowledge their respective obligations to close and consummate a reverse exchange transaction as contemplated by this agreement within 180 days after the date on which ATH acquired the Parked Property and that ATH acquires the Parked Property for the sole benefit of Exchangor. Accordingly, for the sole purposes of the transfer fee imposed by Wis. Stat. § 77.22 and for no other purpose whatsoever ATH shall be deemed to be the agent or trustee of Exchangor for the purpose of holding title to the Parked Property pursuant to Revenue Procedure 2000-37.

I believe that this language is sufficient to show that Central Dodge and Ridgeview "manifested" their intent to have Central Dodge act as the agent of Ridgeview in the conveyance from Central Dodge to Ridgeview, which is the subject of this transfer tax question.

The majority opinion believes you can't have it both ways. You can't disclaim agency for federal "Reverse Starker" purposes and at the same time claim to be an agent for state transfer tax purposes. I don't see why not. The rules for accomplishing a "Reverse Starker" exchange under IRC § 1031 are matters of federal law and are not relevant in this case. The matter before the Commission is solely a question of state law. Indeed, the Federal Safe Harbor Rules for reverse exchanges contemplates the possibility of different treatment by federal and state tax bodies. Rev. Proc. 2000-37 states that:

> Property will not fail to be treated as being held in a Qualified Exchange Accommodation Agreement merely because the accounting, regulatory, or state, local, or foreign tax treatment … is different from the treatment (under Rev. Proc. 2000-37). Rev. Proc. 2000-37 4.04 at AP.103.

I believe the correct analysis is to look at the substance of the Central Dodge to Ridgeview conveyance. In doing so, I conclude that it is a conveyance between an agent and a principal without actual consideration and thus exempt from the transfer tax under Wis. Stat. § 77.25(9).

Respectfully submitted,

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Roger W. LeGrand, Commissioner