STATE OF WISCONSIN

TAX APPEALS COMMISSION

ERIN, LLC, **DOCKET NO. 08-T-122**

Petitioner,

vs. **DECISION AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

This matter comes before the Commission on a Stipulation of Facts, with supporting exhibits filed by the parties on January 28, 2009 (hereinafter referred to as "The Stipulation"). The Petitioner, Erin, LLC ("Erin"), appears in this litigation by Attorney Terence P. Fox, of Kummer, Lambert & Fox, of Manitowoc, Wisconsin. The Respondent (also referred to in this opinion as "The Department") appears by Attorney John R. Evans, of Madison, Wisconsin. Both parties have submitted briefs for the Commission to consider. The legal issue in this case is whether or not the conveyance at issue is exempt from the real estate transfer fee under Wis. Stat. § 77.22 by way of the exemption granted by Wis. Stat. § 77.25(10) for conveyances solely to provide or release security for a debt or obligation.

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. On June 10, 2004, Erin filed a real estate transfer return ("original Erin return") (Exhibit 1) as the grantor of real estate by quit claim deed ("quit claim deed") (Exhibit 2) to Cedar Grove Warehousing, LLC ("Erin conveyance") with the Sheboygan County Register of Deeds Office, declaring the consideration for the Erin conveyance to be $611,100. The real estate transfer fee return that Erin filed claimed the transfer fee exemption pursuant to Wis. Stat. § 77.25(10).

2. On or about November 29, 2007, the Department issued a Notice of Additional Assessment of Real Estate Transfer Fee to Erin in the amount of $3,091.45 as respects the Erin conveyance. (Exhibit 6.)

3. On or about January 25, 2008, Erin filed a Petition for Redetermination with the Department objecting to the Erin assessment. (Exhibit 7.)

4. On or about July 29, 2008, the Department issued an action letter to Erin denying the Erin Petition. (Exhibit 8.)

5. On or about August 12, 2008, Erin filed a timely Petition for Review with the Commission.

[1] The facts in this case are largely taken from the Stipulation with revisions by the Commission for form, clarity, and punctuation. We have, however, added necessary facts from the record submitted by the parties and the source of each added fact is indicated in brackets. Also, the parties filed an amendment to the Stipulation on April 22, 2009 which contains several corrections to the original Stipulation, and we have incorporated the corrections into our findings here.

b. Material Facts

1. Erin is located in the State of Wisconsin and owned real estate in the State of Wisconsin and was the grantor of real estate in the State of Wisconsin and is subject to the real estate transfer fee laws in Ch. 77 of the Wisconsin Statutes for all years that are relevant.

2. The Department is an agency of the State of Wisconsin created pursuant to Chapter 13 of the Wisconsin Statutes and engaged in governmental duties including, but not limited to, the administration of the real estate transfer fees pursuant to Chapter 77, subchapter II of the Wisconsin Statutes.

3. Erin is a Wisconsin limited liability company (LLC) and was so at all times relevant to this matter. Erin was a single purpose LLC created in 1998 to assist Chicago Art Glass & Jewels, Inc. ("Chicago Art") in stabilizing its business and as such was created to lend money. Erin's bylaws state that its purpose was to make investments. [Affidavit of Terence P. Fox, exhibit B.] Erin dissolved shortly after the transfer of the real estate back to Cedar Grove Warehousing, LLC ("Cedar Grove"). [Exhibit 7.]

4. Chicago Art Glass & Jewels, Inc. was a Wisconsin corporation at all times relevant to this matter. Mr. Ray Selk and Ms. Debra Selk were the shareholders, owners, officers and employees of Chicago Art at all times relevant to this matter. Neither of the Selks were members of Erin. [Affidavit of Terence P. Fox, Exhibit B.]

5. Cedar Grove Warehousing, LLC ("Cedar Grove") is a Wisconsin limited liability company and was so at all times relevant to this matter. Cedar Grove was formed by the Selks to hold the property at issue in this case and the Selks are the sole members of the LLC. [Petitioner's Brief at 3.]

6. The Selks originally owned and operated Chicago Art at a location in Plymouth, Wisconsin. In 1998, due to financial difficulties, the Selks decided to sell the Plymouth location and move Chicago Art to a new location in Cedar Grove, Wisconsin.

7. Acquaintances and friends of the Selks formed Erin to secure financing for the Selks' mosaic glass making business. Erin borrowed $150,000 from a bank ("Bank") and loaned the $150,000 to the Selks secured by the personal property of Chicago Art in order to provide working capital to Chicago Art. The personal property stayed in the possession of the Selks and Chicago Art in order to continue the business of Chicago Art.

8. The Selks sold the Plymouth, Wisconsin location and used the proceeds as well as a portion of the $150,000 referenced in paragraph 7 preceding as well as additional funds borrowed from the Bank (mortgage loan) to purchase a new location for Chicago Art in Cedar Grove, Wisconsin ("Chicago Art real estate"), said Chicago Art real estate being the parcel which is the subject of this appeal. The new facility in Cedar Grove allowed recycled glass to be shipped in via railroad and the

glass tiles Chicago Art made from the recycled glass could also be shipped out by railroad. [Petitioner's Brief at 2; Affidavit of Terrence P. Fox, ¶11.]

9. The Chicago Art real estate was titled in the name of Chicago Art, secured by a note and mortgage issued by Chicago Art.

10. From 1999 on, the Selks and Chicago Art continued to have financial difficulties in the operation of Chicago Art. The Selks were not making payments on the Bank mortgage loan to the Selks for the Chicago Art real estate. The Bank notified Erin on April 29, 1999 that the Bank was going to foreclose on the mortgage securing the loan and repossess the Chicago Art real estate and would also call the $150,000 loan to Erin due to Erin's involvement with Chicago Art, specifically the personal property of Chicago Art securing the $150,000 loan to Erin.

11. At the time Erin was notified of the Bank's impending foreclosure as set forth in the preceding paragraph, Erin assumed the mortgage loan to the Selks secured by the mortgage in the Chicago Art real estate. As a result of the assumption, Erin became obligated to and owed the Bank $855,000, which was the total of the $150,000, previously set forth herein and the balance on the mortgage loan by the Bank secured by the mortgage to purchase the Chicago Art real estate.

12. As part of the assumption of the mortgage loan, a quit claim deed was executed by the Selks and Chicago Art to Erin for the Chicago Art real estate in Cedar Grove.

13. The Selks and Chicago Art continued in business at the Chicago Art real estate location. By the end of 2003, Chicago Art became commercially viable, in part because the Cedar Grove facility was being let out for the storage of cheese, such that the Selks and Chicago Art could borrow additional money without Erin's backing from a new bank and enter into a new financial arrangement as respects the Chicago Art real estate. [Petitioner's Brief at 3.]

14. In February of 2004, the Selks and Chicago Art borrowed money from the second bank and paid Erin $659,536.40, the balance owing on Erin's obligation to the first bank, which was the amount owing on the $150,000 and the amount assumed on the mortgage loan at the time of the assumption of the mortgage loan and the quit claim deed.

15. The February 11, 2004 written agreement between the Selks and Erin that is exhibit 4 with the Stipulation provides, in part, as follows:

> **WHEREAS**, Erin provided working capital for Cedar Grove and later assumed the debt on Cedar Grove's industrial complex to Community Bank and Trust, Sheboygan, so that Selk could restructure Cedar Grove, as well as explore various avenues available to Cedar Grove to expand and improve its operation; and
>
> * * *
>
> **WHEREAS**, Selk agreed to pay, on an installment basis, the debt that Erin assumed for Cedar Grove, as well as the working capital loan that Erin provided to Cedar Grove, and upon repayment of that debt, Erin would transfer to Cedar Grove all property Erin held as security for Erin's loans to Cedar Grove; and . . . .

* * *

> **WHEREAS**, the parties agree that Erin shall, upon receipt of the balance due and owing Erin and any other requirements contained herein, transfer to Cedar Grove or Selk, as directed by Selk, all assets Erin holds as collateral for the loan to Cedar Grove.

[Exhibit 4, paragraphs 2, 3, and 5.]

16. Throughout the time Erin assumed the Chicago Art debt, Chicago Art paid Erin the sum of $9,500 per month, of which $8,000 was applied to Chicago's indebtedness and $1,500 per month was escrowed for real estate taxes. [Affidavit of Terence P. Fox, ¶6.] Chicago Art kept all rents and profits from the Chicago Art real estate and paid Erin on a monthly basis pursuant to the amortization schedule required by the bank to keep the Chicago enterprise going. At all times material to this transaction, Erin did not conduct itself in any manner other than that of a lender. [Affidavit of Terence P. Fox, ¶12.]

17. The documents executed pursuant to the events described in paragraphs 13 and 14 preceding include the following:

a. Quit claim deed from Erin to Cedar Grove dated May 25, 2004. (Exhibit 2.)

b. Satisfaction of Mortgage on the Cedar Grove property executed on August 30, 2004 concerning the mortgage given by Chicago Art to Erin, which had been recorded in Sheboygan County on April 27, 1998. (Exhibit 5.)

c. Wisconsin Real Estate Transfer Return dated May 28, 2004 (original Erin return). (Exhibit 1.)

d. Written Agreement between the Selks and Erin dated February 11, 2004. (Exhibit 4.)

18. The June 5, 2009 affidavit of Mr. Raymond E. Selk provides as follows:

> That Erin took title to the Cedar Grove facility and agreed to deed it back to us when all of the debt Erin assumed for Chicago Art Glass & Jewels, Inc was repaid and Community Bank would be repaid in full for the sums that were owed and secured by the Cedar Grove building. This included the $415,000 that Erin, LLC had borrowed from the Community Bank to loan to Chicago Art Glass & Jewels, Inc., as well as the balance of the mortgage Chicago Art Glass & Jewels, Inc., owed Community Bank. I believe that total was in the amount of $835,000. There were future advances that increased that amount to $855,000.

[Petitioner's Reply Brief, exhibit A.]

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 of Revenue's determination is incorrect. *Laabs v. Tax Commission,* 218 Wis. 414, 424, 261 N.W. 404 (1935); *Dep't. of Taxation v. O.H. Kindt Mfg. Co.,* 13 Wis.2d 258, 268, 108 N.W.2d 535 (1961); and *Woller v. Dep't. 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. Dept. 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 real estate transfer fee is treated like a tax. *Gottfried, Inc.,* 145 Wis. 2d at 719.

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 exemption to the transfer tax.

C. THE PETITIONER'S ARGUMENTS

The Petitioners argument for the exemption is essentially factual. In its initial brief, Erin states that it was a single purpose LLC that was organized in 1998 to assist Chicago Art. When Chicago Art ran into financial difficulties in 1999, the Petitioner agreed to assume the debt to the bank on the facility in Cedar Grove. Thus, Chicago Art's entire debt became secured by the real estate and the Petitioner accepted the Chicago Art real estate to hold as security for the loan and the real estate was again pledged to the bank. Eventually, in 2004, Chicago Art was able to demonstrate to a new bank that it was viable because part of the facility was being let out for cheese storage. Chicago Art was then able to repay its indebtedness to the bank, thus causing the Petitioner to release its interest in the Cedar Grove facility in 2004 and convey it back to Cedar Grove, the LLC which Chicago Art had formed to own the building. When the Petitioner conveyed the Cedar Grove property back, the Petitioner invoked Wis. Stat. § 77.25(10) as an exemption to the transfer fee, claiming the transaction was completed solely in order to release the security for the debt of Chicago Art. The Petitioner asserts

that the transaction that took place between the Petitioner and Chicago Art is tantamount to an assignment of the vendor's interest in a land contract, an arrangement which is allowed under Wisconsin Administrative Code Section 15.04(4) without a transfer fee.[2]

D. THE RESPONDENT'S LEGAL ARGUMENTS

The Department's response to the Petitioner's claim of exemption is also essentially factual, relying heavily on the circumstance that the Petitioner has to prove that it is entitled to the exemption. First, the Department characterizes the 1999 transfer to Erin as a foreclosure or a deed in lieu of foreclosure, in part because the deed to Erin is stamped "Fee Exempt, #77.25(14)."[3] According to the Department, the transaction at issue here is the equivalent of a foreclosure where the mortgage holder subsequently sells the property back to the original owner, which, the Department states, is clearly a taxable transfer. Second, the Department argues that a transfer fee is due because the $611,100 amount paid was in excess of the $415,000 debt that was extinguished. Finally, the Department argues the transfer fee is due because the ultimate grantee was not the obligee/mortgagor on the property. In sum, the Department's view is that Cedar Grove

[2] In its Reply Brief, the Petitioner posits that penalties and interest should not be assessed because the Petitioner did not knowingly, willingly, or purposefully attempt to subvert the law or attempt to avoid the tax. The penalties and interest, however, are assessed by statute and are not discretionary, as the Petitioner's argument implies. Given our conclusion in this case, it is unnecessary to address this request further.

[3] Wis. Stat § 77.25(14) provides a transfer fee exemption for conveyances under certain foreclosures. It is not clear how the stamp came to be on the deed, but presumably someone in the Register of Deeds' Office put the notation on the deed at the suggestion of one or more of the parties to that transaction.

became successful and was able to repurchase the property, and that this conveyance is, therefore, taxed.

E. APPLICABLE STATUTES

> **§ 77.21. Definitions.** In this subchapter:
>
> **(1)** "Conveyance" includes deeds and other instruments for the passage of ownership interests in 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 . . .
>
> **§ 77.25 Exemptions from fee**. The fees imposed by this subchapter do not apply to a conveyance:
> * * *
> **(10)** Solely in order to provide or release security for a debt or obligation.

F. ANALYSIS

This is a case where the Petitioner is claiming the exemption to the real estate transfer fee for a conveyance that is solely in order to provide or release security for a debt or obligation. The facts here are complicated and somewhat convoluted. In brief, Erin is an LLC that was created by a group of friends to provide financial assistance to Chicago Art and its mosaic glass business.[4] At one point in 1999, Chicago Art needed a loan, and transferred the property at issue here to Erin. After more

[4] Chicago Art Glass & Jewels was a company that used discarded glass and recycled it into elegant glass tile. Most of the glass that Chicago Art used in this process was bottles and jars that it was paid to take from various municipalities or haulers. Las Vegas casinos utilized the glass tiles manufactured by Chicago. Petitioner's Brief at 1.

refinancings over the next several years, Chicago Art was able to get ownership of the Cedar Grove property back from Erin in 2004 (through a related entity, Cedar Grove). When Erin filed the transfer fee return, Erin claimed that the "back leg" transfer was exempt under Wis. Stat. § 77.25(10). In 2007, the Department notified the Petitioner that the exemption did not apply and that a transfer fee of $1,833.30 was due, plus a penalty of $458.33 and interest of $799.82.[5] A timely appeal to this Commission was filed. The legal issue in this case requires that we consider the scope of the exemption for transfers that provide or release security for a debt or obligation. The first part of this section will summarize the applicable case law and the second part of this section will show why the transfer is exempt.

1. Applicable Case Law

The security exemption to the transfer fee has been considered by this Commission on at least three prior occasions. In the first case, the Department assessed a transfer fee when the Petitioners transferred three separate parcels of real estate to a partnership. *Marek, Marek, and Pieper,* Wis. Tax Rptr. (CCH) ¶400-111 (WTAC 1995), *nonacq.* In October of 1982, the Petitioners in that case conveyed the three properties via three land contracts to an investment company. In June of 1987, the investment company deeded the property (an apartment complex), back to the Petitioners in lieu of foreclosure. Upon repossession, the underlying mortgage on the apartment complex

[5] The amount due at the time of the Notice of Action on Petition for Redetermination was $3,237.91.

was in serious default, the real estate taxes were delinquent, and repairs were necessary. The Petitioners applied for and subsequently received a $21,700,000 mortgage through an HUD loan program, but only on the express condition that the Petitioners create a partnership and transfer ownership of the property to the partnership. Rather than risk losing the apartment complex, the Petitioners met the requirements of the lender. Transfer fee returns were filed contemporaneously with the recording of the quit claim deeds to the partnership. On September 14, 1993, after the *Mark* case was decided, the Petitioners filed an amended transfer tax return, claiming exemption under Wis. Stat. § 77.25(10).[6]

This Commission voided the Department's assessment, holding that the Petitioners had shown that the conveyances in question fell squarely within the exemption. The Commission was satisfied that the Petitioners had proved that although they preferred to hold title as tenants in common, they only deviated from that form of ownership when they had to do so to provide security for a mortgage. Had there been any other reason for the conveyance whether it be a business reason or a personal reason, then the "solely" requirement of the exemption would not have been met and the conveyances would have been subject to the fee. The Commission specifically wrote as follows:

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[6] In that case, the Wisconsin Court of Appeals held that the transfer by all of the owners of a property held as a tenancy in common to a partnership was a taxable conveyance. *Dep't. of Revenue v. Mark,* 168 Wis. 2d 288, 483 N.W.2d 302 (Ct. App. 1992).

> Under these circumstances, where evidence in the record clearly shows that the sole reason for the conveyance was to provide security for a debt or obligation, even though the conveyance was not given for security as such, we hold that petitioners have met their burden of showing themselves to be clearly within the exemption language, as required by *Ramrod* and *Fall River Canning*, . . .

The *Marek* decision is dated March 10, 1995.

Later that same year, the Commission again considered the security exemption in a case with similar facts. *Treml, Treml, and Treml v. Dep't. of Revenue,* Wis. Tax Rptr. (CCH) ¶400-163 (WTAC 1995). In that case, three brothers purchased a grocery store by land contract in 1989 and the land contract provided that the payment in full would be due within one year. When their bank indicated that it had ceased making loans for real estate acquisitions, the Tremls analyzed the options available to them to pay the balance due on the land contract and decided that their best option was an SBA loan. In order to prevent foreclosure of the land contract and in order to secure the financing, the Tremls assigned their interest in the grocery store property as individuals to a corporation in which the Tremls were the sole shareholders by assignment of the land contract. In 1994, the Department issued a Notice of Additional Assessment to Real Estate Transfer Fees.

The Commission held that it was clear from the evidence that the transfer at issue was made solely in order to obtain the financing the Petitioners sought from the SBA. Thus, the standard from the *Marek* case was met. The Commission then

considered, however, whether the *Marek* standard should continue to be followed by the Commission. The Commission's concern was that the language of the statute makes it clear that Wis. Stat. § 77.25(10) applies only to conveyances that create security for a debt or obligation. In *Treml*, the Commission stated the problems with *Marek* as follows:

> The problems with the *Marek* construction can be seen in the necessarily intrusive nature of its application to a set of facts. Under *Marek*, when the conveyance is not itself given for security, the transaction is exempt only if there is no other business or personal reason for the conveyance. Ascertaining whether there is an ancillary business or personal reason may require an examination of the motivation of the parties and their tax advisors and a determination of their credibility if they deny the existence of another purpose. The examination could involve an analysis of all possible benefits to the transaction, even if those are disclaimed by the parties to the transaction and their tax advisors. No other exemption under § 77.25, Stats., contains an element of scienter and requires such an extensive examination of the motives of the parties or attributes of the transaction. The *Marek* construction, therefore, not only creates the need for problematic examination of motives but also departs from the other exemptions noted under §77.25, Stats.

The Commission, therefore, decided in *Treml* that it would not follow the holding of *Marek* and limited *Marek*'s application to the particular facts and parties presented in *Marek*.[7]

The Chairperson of the Commission at the time that *Trem*l was decided

[7] The membership of the Commission changed between *Marek* and *Treml.*

wrote in dissent that the majority's determination to abandon the holding in *Marek* was illogical and unnecessary. According to the chair, the crux of the exemption language is the legislature's choice of the words "solely in order to provide … security …" Thus, the exemption did not require that the transfer create a security interest, but only that it be made solely in order to provide security. The chair also disagreed with the majority's suggestion that the *Marek* standard could exempt a wide range of transactions and that the *Marek* construction would require an examination of anything other than the facts that the parties presented to the Commission.

The third occasion the Commission has had to consider the security exemption came approximately five years later. *Ridgewood Associates v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-477 (WTAC 2000). In that case, the Petitioner[8] had a mortgage on a multi-family apartment complex in Fitchburg when a dispute arose relating to payments of the mortgage by funds held in escrow. Because the Petitioner was eventually deemed by the lender to be in default, the Petitioner pursued a new mortgage loan from a new lender in order to avoid the risk of losing the property in a foreclosure action. A new lender extended a mortgage loan commitment to the Petitioner, but required the Petitioner to be a "Special Purpose, Bankruptcy Remote Entity." In compliance with this condition, the apartment complex was then deeded from the Petitioner to Ridgewood Associates II, LLC, a newly formed Wisconsin limited

[8] In an interesting twist of fate, the Petitioners in *Marek* were the same individuals who owned the Petitioner in *Ridgewood Associates*.

liability company with the same members as Ridgewood Associates, which was a general partnership. The Department disallowed the exemption from transfer fee claimed by the Petitioner and assessed the Petitioner $120,538.85.

After summarizing the holdings in *Marek* and *Treml*, the Commission noted that the two 1995 cases had similar facts and cited the same authorities, but reached different conclusions. After comparing the statutory language contained in the exemption to the stipulated facts, the Commission concluded that the conveyance at issue in Ridgewood was exempt. The Commission wrote as follows:

> The language of the exemption is unambiguous. The statute exempts from the transfer fee conveyances "solely in order to provide . . . security for a debt or obligation." "Provide" means "to make preparation to meet a need." *Webster's Ninth New Collegiate Dictionary (1991),* p. 948. The subject conveyance was made solely in preparation for new financing needed to avoid the risk of foreclosure. . . . The financing could not have been obtained without the security provided by the subject conveyance. This satisfies the exemption language of § 77.25(10).

As to the Commission's decision five years earlier in *Treml*, the Commission stated the following:

> In *Treml*, the majority concluded that this exemption "applies only to conveyances that *create* security for a debt or obligation (p. 30,258, emphasis supplied). In so concluding, the majority changed the word "provide" to "create," thereby crafting a new definition to narrow the unambiguous statutory exemption language. Only the Legislature and the Governor have the authority to change statutory language; the Commission does not.

The Commission rejected the Department's contention that the transfer was not solely to obtain financing because in the transition to the new form the partners in Ridgewood also acquired better protection from lawsuits and more beneficial rights, noting that virtually any change to a different entity would result in some different rights or obligations.

The Ridgewood decision[9] also generated a concurrence and a dissent. Commissioner Boykoff's concurrence expressed his concern that in *Marek*, *Treml*, and *Ridgewood Associates,* the Commission had reached opposite successive conclusions based on similar facts. Commissioner Boykoff also expressed his concern that while administrative agencies are not bound by *stare decisis*, the history of this exemption may not give landowners guidance in structuring their financial transactions. In his dissent, Commissioner Millis noted that the majority was construing the exemption in the most expansive manner possible. According to the author of the dissent, the term "provide" is ambiguous, and he preferred to invoke one of the other seven listings in that particular dictionary for "provide." Commissioner Millis, who wrote the *Treml* decision, again noted that the majority's approach here and in *Marek* was intrusive, overly broad, and internally inconsistent.

[9] The Commission's decision in *Ridgewood Associates* was affirmed by the circuit court. *Ridgewood Associates v. Dep't. of Revenue,* Wis. Tax Rptr. (CCH) ¶400-487, Case No. 00-CV-1357 (Dane Co. Cir. Ct., July 6, 2000). The circuit court appears to have adopted the Commission's reasoning *in toto.*

2. Opinion

The review of the three cases above leads us to several conclusions that are relevant to this case. First, in the "provide v. create" debate, the broader definition of "provide" applied in *Ridgewood Associates* remains the applicable definition. Second, we examine the transaction as a whole to determine if the Petitioner has proved the conveyance fits the exemption, and not just the conveyance documents. Third, personal motives and business motives can be examined by the Commission to determine if the exemption is appropriate. Fourth, as in *Ridgewood Associates*, some variations in rights and obligations may occur in conveyances that fit the exemption. In sum, we take from our review of the three cases above that we are to look to "substance and realities." On numerous occasions, this Commission has adopted this approach. *Manpower v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-223 (WTAC 2009).

Applying these principles to this case leads us to the conclusion that Erin has proved that it is entitled to the exemption. First, examining the evidence presented in the Stipulation as a whole, there is no evidence in this record of any business or personal reason for the transaction at issue other than to provide and release security. While this conveyance may not be a typical arm's-length transaction, there are no

indicia that the conveyance at issue was a sale[10] or a gift. When Erin and the bank got paid back, Erin returned the property to the LLC the Selks owned. Indeed, the only evidence in the record before us as to purpose is the affidavit of Mr. Selk, which clearly and credibly sets forth the reasons for these transactions and conveyances. Second, the 1999 conveyance was exempt from the transfer fee and we see no compelling reason why the "back leg" in 2004 should not be as well.[11] Nothing happened between 1999 and 2004 that changed the nature of the arrangement between Chicago Art and Erin. The Department does not appear to have challenged the claim of exemption as to the 1999 conveyance which provided the original security to be released here.[12]

The Department makes two arguments against Erin's claim of exemption. First, the Department points out that the property was conveyed back to a different

[10] The Respondent characterizes the February 11, 2004 written agreement between the Selks and Erin that is exhibit 4 to the Stipulation of Facts as a "sale agreement." Respondent's Brief at 3. While the word "sale" is used on the second page at least twice (e.g. "...items included in the sale: none.), we would note that the title of the document on the first page is "AGREEMENT" and that the document begins with the language quoted above in Fact 15. Also, the Petitioner states in reply that it was the bank that required the document as evidence of the transfer. Petitioner's Reply Brief at 4. Given these facts, we do not view the form of the document as determinative of the legal question in this case.

[11] Not to pile Mt. Pelion upon Mt. Ossa, but there are in fact two deeds in the record concerning conveyances of property in Cedar Grove in 1998 and 1999 from Chicago Art to Erin. The deeds are attached as exhibits to the Respondent's Reply Brief. The quit claim deed recorded on July 7, 1999 is stamped "Fee #77.25(14) Exempt" and the warranty deed recorded on September 25, 1998 is stamped "Transfer fee $345." [Affidavit of Auditor Russel Reppen, Attachments AA and BB]. The transfers appear to our examination to concern different but perhaps adjacent lots. The Respondent's Reply Brief indicates that it is the 1999 deed that concerns the property that is ultimately the subject of this case. Respondent's Brief at 6. As to the 1998 deed, the Petitioner states in reply that the handwritten "$345.00" refers to the sale price of $345,000 and admits that in 1998 Chicago Art sold a portion of the Cedar Grove property to Erin, which turned around and sold it to a 3rd party. Petitioner's Reply Brief at 3.

[12] To be certain, there are some differences between this case and the *Marek, Treml*, and *Ridgewood Associates* cases. First, this is a "release" of security case and those were cases where security was provided. By definition then, this is a "backleg" case. Second, Erin's case is much more complicated than those cases, as Erin's case involves several lenders and consists of several steps over a period of about 5 years. Nevertheless, we believe those cases guide our analysis here. This case law is not discussed in the briefs.

entity than the entity that made the original transfer in 1999. While it is true that the 1999 conveyance was from the Selks and the 2004 conveyance back was to an LLC, we fail to see why that should defeat the exemption claim where the Petitioner has shown that the members are identical. As *Ridgewood Associates* points out, some variations in form are tolerable and to be expected and we view this difference as *de minimis* on the facts presented to us in this case. In substance and reality, the property was returned to the original owners. Further, nothing in Wis. Stat. § 77.25(10) requires the transferee to be identical.

The second challenge the Department makes concerns the size of the debt. In brief, the Department argues one reason that a transfer fee is due is because the $611,100 amount paid was in excess of the $415,000 debt that was extinguished. In support of this argument, the Department points out that the agreement recites the consideration as $855,000 with a balance left of $659,536. In the Department's view, the exemption claim is defeated by the fact that the amount recorded on the transfer return does not match any debt recited or the mortgage amount of $415,000. While these numbers do not seem to line up, we reject this challenge because it appears to use the *Treml*-type analysis that the Commission departed from in *Ridgewood Associates*. Simply put, nothing in the statute requires that the numbers align. Further, we note that Wis. Stat. § 77.25(10) uses the phrase ". . . to provide or release security for a debt *or obligation.*" (emphasis added).[13] Presumably, the legislature's use of the additional

[13] *Dictionary.com* lists more than 10 separate definitions for "obligation." The one most relevant here is "any bond, note, bill, certificate, or the like, as of a government or corporation, serving as evidence of indebtedness."

term "obligation" adds something to Wis. Stat. § 77.25(10) and the additional term is not surplusage.[14] In sum, neither distinction made by the Department makes a difference in relation to the actual language of the statutory exemption.

CONCLUSION

Exemptions from taxation in Wisconsin are not easily granted because of long-standing precedent. Based on this unique factual record, however, Erin has proved that the 2004 conveyance at issue was done solely to release security for a debt or obligation and that the conveyance was not a sale.

ORDER

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

Dated at Madison, Wisconsin, this 4th day of December, 2009.

WISCONSIN TAX APPEALS COMMISSION

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David C. Swanson, Chairperson

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Roger W. LeGrand, Commissioner

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Thomas J. McAdams, Commissioner

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

[14] Statutes must be construed, if possible, so that no word or clause is rendered surplusage. *Hayne v. Progressive N. Ins. Co.*, 115 Wis. 2d 68, 339 N.W.2d 588 (1983). A trip to the Legislative Reference Bureau did not produce any legislative materials for Wis. Stat. § 77.25(10). No legislative history is discussed in *Marek*, *Treml*, or *Ridgewood Associates*.