

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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JMJ INVESTMENTS, LLP,

DOCKET NO. 16-T-275

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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**DAVID D. WILMOTH, COMMISSIONER:**

This case comes before the Commission for a decision on cross motions for summary judgment. The Petitioner, JMJ Investments, LLP, of Brookfield, Wisconsin, is represented in this matter by Attorney John M. Gallo of Houseman & Feind, LLP. The Respondent, the Wisconsin Department of Revenue (“the Department”), is represented by Attorney James W. McNeilly, Jr.

On April 26, 2017, the parties filed a Joint Stipulation of Facts with the Commission. As part of the Joint Stipulation, the parties agreed that the case is submitted to the Commission on cross motions for summary judgment and that the Commission may decide the case based on the Joint Stipulation and the supporting briefs of the parties without further hearings or submissions. Each party filed a brief in support of its motion

and a reply brief in opposition to the other's motion. For the reasons set forth below, we grant summary judgment to the Petitioner.

## FACTS

### *Jurisdictional Facts*

1. On November 4, 2014, a Wisconsin Electronic Real Estate Transfer Return ("eRETR") was filed by the Waukesha County Register of Deeds reporting the September 30, 2014 conveyance of real estate from the Petitioner, as grantor, to James J. Schmitt, as grantee, via Quit Claim Deed. The conveyed property consisted of the land and improvements which, based on the assessor's estimated fair market value, the parties agree was worth \$268,500. The eRETR indicated a transfer fee due of \$0.00 and claimed a transfer fee exemption under Wis. Stat. § 77.25(6d).<sup>1</sup> (Joint Stipulation of Jurisdictional Facts ("Stip. JF") ¶ 1; Ex. 1.)

2. On September 23, 2016, the Department issued to the Petitioner a Notice of Additional Assessment of Real Estate Transfer Fee in the total amount of \$4,322.68, including interest and penalty. (Stip. JF ¶ 2; Ex. 2.)

3. By letter dated October 7, 2016, the Petitioner timely filed a Petition for Redetermination appealing the assessment and claiming that the conveyance was exempt from the transfer fee under exemption Wis. Stat. § 77.25(15m). (Stip. JF ¶ 3; Ex. 3.)

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<sup>1</sup> The Petitioner acknowledges that it mistakenly cited Wis. Stat. § 77.25(6d) in support of the exemption in its eRETR and is now relying on Wis. Stat. § 77.25(15m).

4. The Department denied the Petitioner's Petition for Redetermination by Notice of Action dated October 19, 2016. (Stip. JF ¶ 4; Ex. 4.)

5. The Petitioner timely filed a Petition for Review with the Commission on November 21, 2016. (Commission file.)

### *Evidentiary Facts*

6. The Petitioner was at all times material hereto a Wisconsin Limited Liability Partnership with its offices and principal place of business in Brookfield, WI. (Joint Stipulation of Evidentiary Facts ("Stip. EF") ¶ 1.)

7. Prior to September 30, 2014, the Petitioner was owned by three partners, James J. Schmitt, John Schmitt, and the Michael G. Schmitt Credit Shelter Trust (the "Trust"). On September 30, 2014, the Trust was an irrevocable trust. (Stip. EF ¶ 2.)

8. On September 30, 2014, James J. Schmitt bought the partnership interests of both John Schmitt and the Trust. Later that same day, the Petitioner conveyed its real estate to James J. Schmitt, pursuant to a decision to dissolve and wind up the partnership's affairs. (Stip. EF ¶ 3.)

9. The Trust is not related to the other partners in the manner described in Wis. Stat. § 77.25(15m). (Stip. EF ¶ 4.)

### **APPLICABLE LAW**

#### *Summary Judgment*

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law remain. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4, 308 Wis. 2d 684, 748 N.W.2d 154.

### *Burden of Proof*

Assessments made by the Department are presumed to be correct, and the burden is on the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

### *Applicable Statutes*

Wis. Stat. § 77.25 *Exemptions from fee.* The fees imposed by this subchapter do not apply to a conveyance:

...

(15m) Between a partnership and one or more of its partners if all of the partners are related to each other as spouses, as lineal ascendants, lineal descendants or siblings, whether by blood or by adoption, or as spouses of siblings and if the transfer is for no consideration other than the assumption of debt or an interest in the partnership.

Wis. Stat. § 178.25 *Dissolution of partnership defined.*

(1) The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

(2) On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Wis. Stat. § 178.28 *Dissolution terminates agency of partner.*  
Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership, ...

Wis. Stat. § 178.30 *Partner's agency after dissolution.*

(1) After dissolution a partner can bind the partnership except as provided in sub. (3):

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution.

Wis. Stat. § 178.32 *Right to wind up.* Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; ....

Wis. Stat. § 178.33 *Application of partnership property on dissolution.*

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against the other copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners.

Wis. Stat. § 227.483 *Costs upon frivolous claims.*

(1) If a hearing examiner or the tax appeals commission finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner or tax appeals commission shall award the successful party the costs and reasonable attorney fees that are directly attributable to responding to the frivolous petition, claim, or defense.

...

(3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:

...

- (b) That the party or the party's attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

## DECISION

This case involves a partnership which was owned by two brothers and an irrevocable trust. One of the brothers, James, purchased the partnership interests of his brother and the Trust and, later that same day, the partnership conveyed the partnership's real estate to James as the sole remaining partner. The partnership is claiming an exemption to the real estate transfer fee under Wis. Stat. § 77.25(15m) for a conveyance "[b]etween a partnership and one or more of its partners if all of the partners are related to each other as spouses, as lineal ascendants, lineal descendants or siblings, whether by blood or by adoption, or as spouses of siblings . . . ."

In *F.M. Management Co. Ltd. Partnership v. Dept. of Revenue*, 2004 WI App 19, 10, 269 Wis. 2d 526, 536-37, 674 N.W.2d 922, 928 (Ct. App. 2003), the court of appeals affirmed the Commission's decision denying an exemption under Wis. Stat. § 77.25(15s) (an exemption applicable to conveyances from an LLC to one or more members who are related to each other, but with language otherwise identical to Wis. Stat. § 77.25(15m) for a conveyance from an LLC to its sole member who was a partnership. The court noted the Department's established practice of allowing a related party exemption for a conveyance from an LLC to a sole member who is a human. But they stated that they did not have to rule on whether that practice was appropriate, because the case before them

involved an entity rather than a human. The court held that the language of the statute clearly applied only to related humans.

On its website, the Department confirms its position that exemptions are allowed for conveyances from a corporation to a sole shareholder under Wis. Stat. § 77.25(15), and from an LLC to a sole member under Wis. Stat. § 77.25(15s), but, without explanation, not from a partnership to a sole partner under Wis. Stat. § 77.25(15m):

**3. What are some examples of required relationships for Exemption (15) corporations, (15m) partnerships and (15s) limited liability companies?**

All Exemption (15) series require relationships to each other as spouses, lineal ascendants, lineal descendants, siblings or spouses of siblings.

**Examples:**

**Sole:** Sole individual (Corporation or LLC only)

**Spouses:** Spouse and spouse

**Lineal:** Parent(s) and child(ren); parent(s) and son-in-law/ daughter-in-law; or grandparent(s), parent(s) and grandchild(ren). Children includes adopted children but not foster children.

**Siblings:** Brother(s) and sister(s)

**Spouses of Siblings:** Brother(s) and sister(s)-in-law; sister(s) and brother(s)-in-law; brother(s) and brother(s)-in law; and sister(s) and sister(s)-in-law.

The Department has been provided an opportunity in this case to explain the distinction between their treatment of corporations and LLCs on the one hand and partnerships on the other. Here is what the Department said:

Because Wis. Stats. sec. 178.03 defines a partnership as an association of two or more persons, the partnership is dissolved the instant that the partnership only has one partner. At the time of that dissolution, the partners included an individual and an irrevocable trust.

...

The Department assessed a real estate transfer fee on the conveyance in dissolution to James J. Schmitt, the partnership's sole remaining partner. Because the partners at the time of the conveyance in dissolution were not related as required by the statutory exemption, it is subject to the transfer fee.

Each of these statements is a classic non-sequitur -- an inference that does not follow from the premise: "A partnership dissolves when it only has one partner; therefore, at the time of dissolution, it had two partners." "The partnership conveyed its real property to its sole remaining partner. The exemption is inapplicable because the remaining partners were not related as required by the statute." In each case, the premise is supported by the facts and the law, but the inference drawn from each premise is contrary to the premise and is unsupported by the facts, applicable law, or reason.

The non-sequiturs continue in the Department's analysis of the *F.M.*

*Management* case:

The *F.M. Management Co. Ltd.* case is not applicable here because a limited liability company is not required to have more than one member. In contrast, a partnership is required to have more than one partner and dissolves when there is only one. Thus, in order to determine whether a conveyance in dissolution of a partnership meets the Qualified Relationship Test, one must look to see who the partners are at the time of the dissolution. The parties agreed that the Trust does not meet the relationship requirement ...

And in the Department's reply brief:

A conveyance in dissolution of a partnership is subject to the transfer tax, unless the partners are related as required by the Related Partner Exemption. Wis. Stats. §§ 77.21, 77.22 and



Wis. Adm. Code § Tax 15.03(4). In sum, the unique nature of a partnership, which requires more than one partner, validates the Department's lookback directive for the purposes of administering the Related Partner Exemption to partnerships.

The Department does not explain what a “lookback directive” is, nor does it explain where or from whom such a directive may have come. Nothing in the applicable statutes, however, justifies examining the relationship of those persons who held partnership interests before a conveyance, as opposed to those who held interests at the time of a conveyance.

The Department’s argument seems to assume that there is a deemed or constructive conveyance of the property as a result of the dissolution. At the same time, the Department stipulated that “... the Petitioner conveyed its real estate to James J. Schmitt, pursuant to a decision to dissolve and wind up the partnership’s affairs.” First, even if there is a deemed or constructive conveyance as a result of the dissolution, it occurs only if there is one, sole remaining partner. Having one partner, as opposed to two, is a prerequisite to the dissolution. One cannot say in good faith: “The partnership dissolved because there was only one partner, but there were two partners when the partnership dissolved.” Nevertheless, that is exactly what the Department is saying.

Second, the Department cites no authority for the proposition that there is a deemed or constructive conveyance upon the dissolution of a partnership. As the Petitioner points out, under Wis. Stat. § 178.25(2), the dissolution of a partnership does not terminate the partnership, but allows it to continue for the purposes of winding up its affairs. Provisions of the Wisconsin Uniform Partnership Act, primarily Wis. Stats. §§

178.28, 178.30, 178.32 and 178.33, authorize partners of a dissolved partnership to take a broad range of actions appropriate to winding up the partnership's affairs, including the application of partnership property to satisfy the partnership's liabilities, the sale of partnership property for cash, and the distribution of property to the partners.

As an example, a more than eight-year process of winding up a dissolved partnership was discussed in *In Matter of Trust Estate of Schaefer*, 91 Wis.2d 360, 283 N.W.2d 410 (Ct. App. 1979):

When a partner dies, the partnership is dissolved. Sec. 178.26(4), Stats. On dissolution, however, the partnership is not terminated; it continues until the wind-up of the partnership affairs are completed. Sec. 178.25(2), Stats. Winding-up is the process of settling partnership affairs after dissolution. Partners, or those claiming through a deceased partner, may agree to settle the partnership affairs without a liquidation of the assets (by agreeing to a cash settlement or in-kind distribution). However, absent an agreement, winding-up involves reducing the assets to cash (liquidation), paying creditors, and distributing to partners the value of their respective interests.

*Id.* at 375-76 (citations omitted).

In this case, the conveyance by the Petitioner to its sole remaining partner occurred after the partnership's dissolution as part of the process of winding up the affairs of the partnership. As previously noted, the Department stipulated that "the Petitioner conveyed its real estate to James J. Schmitt, pursuant to a decision to dissolve and wind up the partnership's affairs." That conveyance was from a partnership to its sole remaining partner and qualified for the exemption under Wis. Stat. § 77.25(15m).

In fact, the Department acknowledged in a more recent case that a dissolved partnership can convey real estate, subject to the real estate transfer fee, years after its dissolution. In *Abrahamson, LLC v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401-569, (WTAC 2008), a father and son operated a farm as a partnership for many years. When the father retired on January 1, 1999, he and his son signed a dissolution agreement dissolving the partnership. The son then operated the farm as a sole proprietorship. Title to the real estate, however, remained in the partnership's name. In 2003, the son decided to transfer the farm to a limited liability company, and a deed was executed by the partnership conveying the real estate to a newly-formed LLC. The son claimed the exemption for a conveyance from a member to an LLC, asserting that the partnership effectively converted to a sole proprietorship as a result of the dissolution and, therefore, he owned the property as a sole proprietor at the time of the 2003 conveyance. The Department disagreed, determining that the partnership continued to hold the property after the dissolution, and that the 2003 conveyance was from a partnership to an LLC, which did not qualify for an exemption. The Commission agreed, stating:

The Petitioner argues that the partnership was transformed into his sole proprietorship upon the dissolution of the partnership. The Petitioner offers no legal support for this claim, except for his argument that the partnership no longer fit within the definition of "partnership" under Wisconsin law after January 1, 1999, because it had only one partner. See, Wis. Stat. §178.03. Even if true, that argument does not prove that the partnership then became a sole proprietorship under Wisconsin law.

What the Department did not conclude, as they do in this case, is that the dissolution of the partnership resulted in some kind of conveyance to the two persons who were partners immediately before the dissolution.

### CONCLUSIONS OF LAW

1. There being no material facts in dispute, the stipulated facts are sufficient to support a ruling as a matter of law.

2. The Department's conclusion, that conveyances from a corporation to a sole shareholder under Wis. Stat. § 77.25(15) and from an LLC to a sole member under Wis. Stat. § 77.25(15s) are exempt from the real estate transfer fee, is a reasonable application of those statutory provisions.

3. The Department's conclusion, that a conveyance from a partnership to a sole partner under Wis. Stat. § 77.25(15m) is not subject to the exemption, is not supported by law or reason.

4. The Petitioner's conveyance of the partnership's real estate to the sole remaining partner is exempt from the real estate transfer fee pursuant to Wis. Stat. § 77.25(15m).

### ORDER

Based on the foregoing, the Commission orders as follows:

1. The Petitioner's Motion for Summary Judgment is granted.
2. The Department's Motion for Summary Judgment is denied.
3. The Department's assessment is reversed.

Dated at Madison, Wisconsin, this 3rd day of August, 2017.

WISCONSIN TAX APPEALS COMMISSION



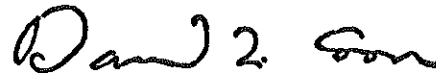
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Lorna Hemp Boll, Chair



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David D. Wilmoth, Commissioner



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David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION  
5005 University Avenue - Suite 110  
Madison, Wisconsin - 53705

**NOTICE OF APPEAL INFORMATION**

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED  
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS  
RESPONDENT**

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.