

TELEMARK DEVELOPMENT 96CV2795 072297 DANE CTY CIR CT

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Sept 24 1996

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 6

DANE COUNTY

TELEMARK DEVELOPMENT, INC.,

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent

MEMORANDUM DECISION  
AND ORDER  
(Summary Judgment)

Case No. 96-CV-2795

*[Handwritten signature]*

Petitioner appeals to this Court for judicial review, pursuant to sec. 227.53, Stats., of a decision of the Tax Appeals Commission<sup>1</sup> issued on October 28, 1996. The Commission granted Respondent's motion for summary judgment in that administrative proceeding. Petitioner claims that the Commission erroneously interpreted sec. 77.52(2)(a)1, Stats., and also that this statute is unconstitutional. Petitioner and Respondent both move for summary judgment.

I. REVIEW OF THE RECORD

Petitioner is a Wisconsin corporation in the business of developing and selling time-share condominium units at the Telemark Resort complex near Cable, Wisconsin. On January 11, 1994, Respondent issued an assessment of sales and use tax against Petitioner for \$481,958.70 including tax, interest, and penalties, for sales of units in the years 1988 through 1992.

<sup>1</sup> Hereafter, "the Commission."

The assessment against Petitioner included a credit of \$9,627.00, which constituted a refund of the real estate transfer fee paid by Petitioner on sales of those time-share units which were designated by Petitioner as "flexible use period" units.

Petitioner's sales of time-share units can be classified in two categories: 1) units with guaranteed use periods, and 2) units with flexible use periods. The largest portion of the tax assessment was against Petitioner's sales of the "flexible use period" time-share units. Sales and use tax were not assessed against the sale of the "guaranteed use period" units.

The difference between these two types of time-share units lies in the way they may be used by their owners. Owners of the "guaranteed use period" units are entitled to the "exclusive use, possession, and occupancy of a Unit during the specific Unit Weeks identified in the purchase agreement." Tax Appeals Commission, Docket No. 94-S-223 at 3, (October 28, 1996) (emphasis added). Owners of "flexible use period" units are "entitled to exclusive use, possession, and occupancy of a unit...pursuant to a reservation executed by or on behalf of the Management firm." *Id* (emphasis added). However, in order to occupy a flexible use period unit, the owner must make a reservation not more than 210 days in advance and not less than 30 days in advance. If a flexible use period unit owner failed to make such a reservation, the owner was in danger of losing their right to the occupancy of a unit for a week.

A beginning date of occupancy, and a unit number were recorded on the deeds of these flexible use time-share units. However, the deeds also state that the ownership of these units is subject to the Telemark Rules that explicitly provide that flexible use periods do not come with any guarantee of a specific unit at a specific time. Petitioner and Respondent have stipulated before the commission that the flexible use period units in question are time-share units as defined sec. 707.02 (32), Stats.

## II. APPLICABLE WISCONSIN STATUTES

### 77.52 Imposition of retail sales tax

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

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

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

707.03 *Status of time-share estates*

(2) Each time-share estate constitutes for all purposes a separate estate in real property.

70.03 *Definition of real property*

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

III. STANDARD OF REVIEW

This court reviews the record of the Tax Appeals Commission decision of October 28, 1996 on Docket No. 94-S-223, pursuant to sec. 227.53, Stats. This Court does not defer to the findings of the Commission on any questions of law in this matter, as this is a case of first impression in Wisconsin.

Both parties have moved for summary judgment, and there are no genuine disputes as to material facts, so the court considers the record in light of the standard as set forth in Grams v. Boss, 97 Wis. 2d 332, 338-39 (1980).

IV. CONCLUSIONS OF LAW

A. The Commission Correctly Interpreted and Applied sec. 77.52 (2)(a)1, Stats.

Petitioner's correctly assert that "a tax can only be imposed by clear and express language, and all ambiguities as to the applicability of the tax must be resolved in favor of the person upon whom the tax is sought to be imposed." Kollasch v. Adamany, 104 Wis. 2d 552, 561 (1981). However, the Court agrees with the Commission that Petitioner's sales of flexible use period time-share units falls within the clear and express language of sec. 77.52 (2)(a)1, Stats.

Petitioner's sales of these units meets all the required elements of sec. 77.52 (2)(a)1, Stats., in order for Respondent to impose the tax. First, these units were available for sale to the general public. Second, Petitioner furnished rooms or lodging through the sale of time-share property, and the use of the rooms or lodging was not fixed at the time of sale as to the starting day, because of the language on the deed stating that ownership is subject to the "Telemark Rules". Third, and finally, the sale of the time-share units at issue was to transients as defined in this statute, because the occupancies sold were for periods of only a week at a time.

Petitioner argues that time-share units as defined by sec. 707.02 (32), Stats. are real property, and therefore cannot be subject to sales tax. Apparently, there is some conflict between

sec. 707.03 (2), Stats., and sec. 70.03, Stats., as to the status of this particular form of time-share property. Petitioner has produced an affidavit claiming that these units have been subject to an annual property tax. Vortanz Aff., para. 4. Despite this, the flexible use period units clearly fall within the purview of sec. 77.52 (2)(a)1, Stats., imposing a tax on these sales. Therefore, this Court affirms the Commission's ruling on this issue.

B. Sec. 77.52 (2)(a)1, Stats. Withstands Petitioner's Challenge to its Constitutionality under the Equal Protection and Uniformity of Taxation Clauses.

Respondent claims that the issue of the constitutionality of sec. 77.52 (2)(a)1, Stats. is not properly before this court because the Commission made no findings on this issue in the prior administrative proceeding. However, in administrative proceedings, a party may reserve constitutional claims for an appeal to the circuit court. Hogan v. Musolf, 163 Wis. 2d 1, 22 (1991). This Court now considers Petitioner's constitutional claims.

Petitioner realizes that there is a "strong presumption that legislative enactments are constitutional, and that the burden on one asserting the unconstitutionality of a properly enacted state is heavy indeed." Simanco v. Department of Revenue, 57 Wis. 2d 47, 54 (1972). The Simanco court further stated that:

[W]here a tax measure is involved, the presumption of

constitutionality is strongest. The courts have given recognition to the essentiality of taxation in preserving an ordered society, and there is implicit recognition in judicial decisions that the principle of absolute equality and complete congruity of the treatment of classifications is impossible and must be sacrificed in the interests of preserving the governmental function.

Id. Petitioner has the burden of establishing the statute's unconstitutionality beyond a reasonable doubt. Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 625 (1979).

#### 1. Equal Protection Clause

Petitioner claims that sec. 77.52 (2) (a)1, Stats. violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution, and its Wisconsin equivalent in art. I, sec.1 of the Wisconsin Constitution. In considering the constitutionality of tax statutes under the Equal Protection Clause, courts are bound only to determine whether the statute is capricious or arbitrary in its classifications. Simanco, 57 Wis. 2d at 56. The challenger must prove, first, that the classification is arbitrary, and second, that the classification "has no reasonable purpose or relationship to the facts or a justifiable and proper state policy." Id. at 57. Petitioners fail to prove that sec. 77.52 (2) (a)1, Stats. is faulty on either basis.

The sales tax is imposed on all time-share units in Wisconsin that do not have a fixed starting date. Petitioner



produces no evidence showing that it alone is injured by this statute. Raising revenue through taxation is a legitimate state purpose, and this statute was promulgated in furtherance of that end. This Court finds that sec. 77.52 (2)(a)1, Stats. does not violate the Equal Protection Clause.

## 2. Uniformity Clause

The uniformity clause provides that "[t]he rule of taxation shall be uniform." Wis. Const. art VIII, sec. 1. The initial question for review of a statute under the uniformity clause is whether that statute is subject to the clause. Wisconsin case law interpreting the uniformity clause has established that "privilege taxes are not direct taxes on property and are not subject to the uniformity rule." State ex. rel La Follette, 85 Wis. 2d 94, 106 (1978). This Court finds that the sales tax imposed by sec. 77.52 (2)(a)1, Stats. is not a direct tax on property.

Direct taxes are ad valorem taxes based on assessments of the value of real property. The tax at issue in this case is not based on the value of property as assessed by some governmental authority, but rather upon a percentage of a contractual price as bargained between a buyer and a seller. Petitioner has failed to establish that the tax imposed by sec. 77.52 (2)(a)1, Stats. is a direct tax subject to the uniformity clause; thus the tax does not violate the uniformity clause.

In sum, this Court affirms the Commission's decision as to the tax assessment pursuant to sec. 77.52 (2) (a)1, Stats., and finds that sec. 77.52 (2) (a)1, Stats., is constitutional.

Accordingly,

O R D E R

IT IS HEREBY ORDERED that the Motion for Summary Judgment of the Petitioner in the above-captioned matter are DENIED and the Motion for Summary Judgment of the Respondent in the above-captioned manner is GRANTED, and the Ruling and Order of the Tax Appeals Commission is AFFIRMED.

Dated, at Madison, Wisconsin, this 22<sup>nd</sup> day of July, 1997.

BY THE COURT

  
Richard J. Callaway, Judge  
Circuit Court, Branch 6

cc: Attorney Catherine M. Doyle (Petitioner)  
Attorney F. Thomas Creeron III (Respondent)