

STATE OF WISCONSIN
TAX APPEALS COMMISSION

WILC/2675 N. MAYFAIR ROAD
LIMITED PARTNERSHIP,

DOCKET NO. 17-T-154

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

Per Curiam.

This case comes before the Commission for decision on simultaneous Motions for Summary Judgment. The Petitioner, WILC/2675 N. Mayfair Road. Limited Partnership, a Wisconsin limited liability partnership, appears by Attorney Paul J. Hinkfuss. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney James W. McNeilly, Jr. The parties have submitted a Stipulation of Facts, and both parties have filed briefs in support of their respective Motions.

The Commission finds the real estate transfer in question was not exempt from the Real Estate Transfer Fee, and, therefore, upholds the Department's assessment.

FACTS

The following facts, stipulated to by the parties in the Joint Stipulation of Facts, demonstrate that there are no material facts at issue and that this case is ripe for summary judgment.

Jurisdictional Facts

1. On or about December 31, 2014, an eRETR (electronic real estate transfer return) was filed with the Milwaukee County Register of Deeds reporting the December 30, 2014 conveyance of real estate ("Property") from Grantor, WILC/2675 N. Mayfair Road Limited Partnership ("WILC"), to Grantee, MSC 2003-IQ4 2675 N. Mayfair Road LLC ("MSC"), via Special Warranty Deed. The conveyed Property consisted of the land and improvements valued at \$7,157,443.00. The eRETR indicated a transfer fee due of \$0.00 and claimed a transfer fee exemption of "14." (Stip. Jurisdictional Facts ("SJF"), ¶ 1, Ex. 1.)

2. On November 30, 2016, Respondent issued a Notice of Additional Assessment of Real Estate Transfer Fee in the total amount of \$32,205.55, including interest and penalty, to WILC. (SJF, ¶ 2, Ex. 2.)

3. By letter dated December 7, 2016, Petitioner timely appealed the assessment notice to the Department, claiming that the conveyance was exempt from the transfer fee under exemption 14 of Wis. Stat. § 77.25. (SJF, ¶ 3, Ex. 3.)

4. On March 22, 2017, the Department issued a Notice of Action denying the Petition for Redetermination. (SJF, ¶4, Ex. 4.)

5. On May 24, 2017, Petitioner filed a timely Petition for Review with the Commission appealing the Department's Notice of Action denying Petitioner's Petition for Redetermination. (SJF, ¶ 5.)

Evidentiary Facts

6. The Petitioner was at all times material hereto a Wisconsin Limited Partnership with its offices and principal place of business located c/o Wisconsin Investments, 19000 W. Bluemound Road, Brookfield, WI 53045. (Stip. Evidentiary Facts ("SEF"), ¶ 1.)

7. On or about May 16, 2014, Wells Fargo Bank National Association ("Wells Fargo") filed a Summons and Complaint in Milwaukee County Circuit Court, Wisconsin, as Circuit Court Case No. 2014CV004191 against WILC seeking foreclosure of the Property. (SEF, ¶ 3.)

8. On or about December 5, 2014, a judgment of foreclosure was entered in Milwaukee County, Wisconsin, against WILC and in favor of Wells Fargo in Circuit Court Case No. 2014CV004191. (SEF, ¶ 4.)

9. WILC and Wells Fargo entered into a Deed in Lieu of Foreclosure Agreement, dated December 20, 2014 ("Deed in Lieu Agreement"). (SEF, ¶ 5, Ex. 5.)

10. On or about December 30, 2014, in lieu of a Sheriff's Sale and a Sheriff's Deed on Foreclosure and pursuant to the Deed in Lieu Agreement, WILC executed a Special Warranty Deed to MSC; that deed was subsequently recorded. (SEF, ¶ 6.)

11. The conveyance of the Property resolved all of Wells Fargo's claims against WILC and, on February 2, 2015, Circuit Court Case No. 2014CV004191 was dismissed with prejudice. (SEF, ¶ 7.)

12. The mortgage which was the subject of the foreclosure was never assigned to MSC. Wells Fargo held the mortgage and a satisfaction of the mortgage was recorded. (SEF, ¶ 8.)

13. MSC is a separate entity from Wells Fargo and is a subsidiary of Wells Fargo, which is the sole member of MSC. (SEF, ¶ 9.)

14. While there are no regulations prohibiting Wells Fargo from holding assets or receiving the Property in a deed in lieu transaction, lenders such as Wells Fargo Bank National Association commonly form subsidiary entities to acquire and hold title to properties conveyed by deed in lieu of foreclosure. (SEF, ¶ 10.)

Applicable Statutes

Wis. Stat. § 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 not exempted or excluded under this subchapter. . . .

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

(14) Under a foreclosure or a deed in lieu of a foreclosure to a person holding a mortgage or to a seller under a land contract.

ANALYSIS

The underlying facts are not in dispute. The parties have submitted a Stipulation of Facts, and both parties have filed motions for summary judgment.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show 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 simultaneous motions for summary judgment is an assertion that the material facts are not in dispute and only questions of law remain for determination. *Lindner 1991 Convertible Trust v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-334 (WTAC 2019).

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 determinations. *Calaway v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). Tax exemptions, deductions, and privileges are matters of legislative grace and are strictly construed against the taxpayer. *Ramrod, Inc. v. Dep't. of Revenue*, 64 Wis. 2d 499, 504 (1974).

“While the ‘fee’ is not a ‘tax’, it has similar characteristics, such as having a value or ‘measure’, a statutorily imposed rate, and the moneys being used to fund state (and county) operations or programs. Exemptions from this fee are, similarly, narrowly construed against the claimant.” *Lindner*, quoting *Selle v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-410 (WTAC 1999).

Under the Wisconsin real estate transfer fee statutes, “a deed in lieu of foreclosure to the person holding the mortgage” is exempt from the fee. Wis. Stat. § 77.25(14). In this case, the parties have stipulated that 1) Wells Fargo held the mortgage;

2) Wells Fargo did not assign or otherwise transfer the mortgage to MSC before the Property was transferred to MSC;¹ and 3) While MSC is a subsidiary of Wells Fargo and Wells Fargo is its sole member, MSC is a separate entity from Wells Fargo.

Per the Deed in Lieu Agreement, Petitioner was required to transfer the Property, not to the mortgage holder, Wells Fargo, but to a separate entity, MSC. Wells Fargo remained the mortgage holder at the time of the conveyance. Thus, MSC was not the “person holding the mortgage.”

Petitioner’s primary contention is that Wells Fargo and MSC are “one and the same.” The Petitioner relies on what Petitioner describes as “common practice in the financial industry.” (Pet. Br., p.4.; SEF, ¶ 10.) This common practice, by Petitioner’s own description, negates the “one and the same” argument. According to “common practice,” lenders, like Wells Fargo, do not take title in their own names. Instead, they create new entities with the precise purpose that they are separate entities. These separate entities, such as MSC, hold real estate because “[a]n entity formed for the purpose of holding title shields the lender from such liability.” (Pet. Bf., p. 4.) Thus, the nature of the subsidiary as being separate and distinct from the lender is paramount. Entities designed to hold title, such as MSC, must be completely different entities from the lender, rather than “one and the same.”

Without authority, Petitioner parses the distinction between entity and subsidiary to say that the “one and the same” concept is “for the purposes of the

¹ The parties stipulated that the mortgage was never assigned to MSC.

Exemption.” Petitioner asserts that, for the purposes of the transfer fee, the subsidiary should be considered a disregarded entity. (Pet. Br., pp. 4-5.) Petitioner dismisses the fact that MSC is a separate entity – and not the actual mortgage holder – as simply a “distinction without a difference.” (Pet. Br., p. 6.) This assertion rings of having one’s cake and eating it too.

Wells Fargo is separate and distinct from MSC. Property owned by an LLC is not owned by its members. Wis. Stat. § 183.0701(1). Thus, although Wells Fargo held the mortgage, MSC did not. Petitioner conveyed the Property to the MSC, not to Wells Fargo. MSC is not Wells Fargo, and Wells Fargo is not MSC.

The transaction in this case is from Petitioner, not to the mortgage holder, but to the mortgage holder’s subsidiary. Petitioner stresses that Wells Fargo is the only member of MSC and intimates that such a relationship transforms MSC into the mortgage holder for the purpose of this exemption. No caselaw supports this position.

This case is not one of first impression. The Commission considered a similar set of facts in *Regency Partners, Ltd. Partnership v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-130 (WTAC 1995). As in this case, the partnership in *Regency*, which owned the properties, defaulted on the mortgages and the bank commenced foreclosure proceedings. The parties then entered into an agreement in lieu of foreclosure under which the partnership agreed to transfer title to the properties to the bank's subsidiary. In contrast to this case, however, the bank in *Regency* then conveyed the mortgages to the subsidiary. A day later, the partnership deeded the property to the subsidiary. When the Department of Revenue attempted to deny the Wis. Stat. § 77.25(14) exemption, the

Commission explained, in no uncertain terms, that the exemption did apply as long as the assignment to subsidiary occurred before the transfer of the property. Even though the assignment was only one day before the deed conveying the property, that was enough for the exemption to be valid.

In the case at hand, Wells Fargo never conveyed the mortgage to MSC but nevertheless required WILC to transfer the property to MSC. At the time of the deed, unlike the subsidiary in *Regency*, MSC was not the mortgage holder. Thus, the exemption does not apply.

Petitioner asks us to note that the Department occasionally does allow the exemption when property is transferred to a nominee of the mortgage holder. Petitioner cites to a 2016 update to an October 2008 article published in RETN (Real Estate Transfer News) regarding various aspects of Sheriff Sales, which outlined three scenarios under which an exception may be made to allow the Wis. Stat § 77.25(14) exemption:

The Department of Revenue's position on the exemption applying without having to provide or record an "assignment" of mortgage or lien is as follows:

1. The plaintiff assigns to an insurer such as HUD, Fannie May, Freddie Mac, VA, Etc.
2. To another lender who may actually be holding the mortgage and plaintiff was acting as servicing agent.
3. To a subsidiary of the lender due to regulations not allowing lender to hold assets. **Note:** this is a new position the Department is taking allowing the assignment to the lender's subsidiary regardless if the assignment occurs before or after the sale is confirmed by the court. In the past, if the assignment was after the sheriff's sale, a transfer fee was due on a conveyance to a subsidiary under Tax. 15.03, Wis. Adm. Code.

When the Sheriff's deed is assigned to a party not having a relationship as above and appears to be a "third party", the

assignment of the mortgage or lien must be **dated prior** to the Sheriff Sale.

Wis. Tax Rptr. (CCH) ¶ 401-132. Real Estate Transfer News (RETN), Sheriff Sales, Wisconsin Department of Revenue (October 2008).²

The third exception, which appears to expand the *Regency* holding to allow a broader timeframe for the assignment of the mortgage to the entity to which the property is deeded, potentially applies. In this case, the conveyance was to a subsidiary of the lender, but Petitioner has offered no regulations or law that would not allow Wells Fargo to hold the Property. Even if that were true, there would still have to be an assignment at some point, even as late as after an eventual sheriff's sale. The mortgage in this case was never conveyed to MSC. The exceptions which might allow the Wis. Stat. § 77.25(14) exemption do not apply.

In its response brief, Petitioner asserts that MSC acted as Wells Fargo's agent in receiving the Property and that the mortgage holder, Wells Fargo, therefore, took "constructive title." That argument is inconsistent with Petitioner's earlier explanation of the "industry practice" of establishing separate entities to hold title as a shield against liability. In invoking agency principles, Petitioner now argues that Wells Fargo actually does "constructively" hold title. Constructively holding title through a controlled agent would seem to vitiate the very reason for which Wells Fargo engaged in its liability avoidance strategy, since principals are generally liable for the liabilities of their agents. In any case, we reject the agency claim as unsupported and underdeveloped. The parties

² The parties did not provide the 2016 version to the Commission, and it does not appear to be available through CCH. However, it is substantially similar to the 2008 version cited.

have stipulated, that, while MSC is the “designee” to take title, MSC is a separate entity. In this case, the separate entity, not the mortgage holder, took title in its own name. Because Petitioner did not deed the property to “the person holding the mortgage,” the exemption does not apply.

Finally, Petitioner argues that enforcing the precise wording of the statute is unjust because this type of taxpayer is the type for whom this exemption was intended. This argument is one of equity. While we may agree that the Wis. Stat. § 77.25(14) exemption was likely enacted to assist property owners in default, such as the Petitioner, the Commission’s role is to interpret the statutes as written. “[I]t is not our role to attempt to divine the unwritten intentions of the legislature. The *Kalal* court was clear on this point: ‘We have stated time and again that courts must presume that the legislature says in a statute what it means and means in a statute what it says there.’” *Microsoft v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-163 (WTAC 2017), citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. As written, the Wis. Stat. § 77.25(14) exemption does not apply to the transaction at issue because MSC was not the “person holding the mortgage.” We cannot extend exemptions to situations or taxpayers not covered by the plain language of the statute.

CONCLUSIONS OF LAW

1. No material facts are in dispute, and the stipulated facts provide sufficient basis upon which to grant summary judgment.

2. Because Wells Fargo, not MSC, was the holder of the mortgage at the time of the conveyance of the Property, Petitioner is not entitled to claim the conveyance was exempt from the transfer fee under Wis. Stat. § 77.25(14).

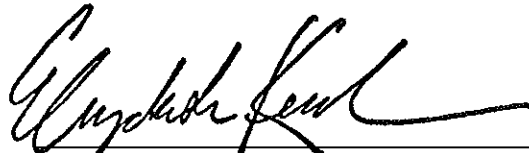
ORDER

Based on the foregoing, it is ordered that

1. The Department's Motion for Summary Judgment is granted.
2. Petitioner's Motion for Summary Judgment is denied, and the Petition is dismissed.

Dated at Madison, Wisconsin, this 28th day of January, 2020.

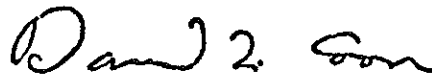
WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Lorna Hemp Boll, Commissioner



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. Alternately, 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 Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, 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 <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.