

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ANTON DONEFF, SR., SARAH L. BONOVIK
AND NICHOLAS J. DONEFF,

DOCKET NO. 18-T-059

AND

SOUTHBROOK, LLP,

DOCKET NO. 18-T-153

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID L. COON, COMMISSIONER:

These two companion cases come before the Commission for decisions on Cross Motions for Summary Judgment. The Petitioners, Anton Doneff, Sr., Sarah L. Bonovich, Nicholas J. Doneff, and Southbrook, LLP, appear by Attorney Terrence Fox, Kummer, Lambert, Fox & Glandt, LLP, Manitowoc, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney James McNeilly. As these matters involve the same parties and the same real estate and arise from a series of connected transactions, we consolidate these matters for decision. The parties filed Joint Stipulations of Fact for each matter. All parties have filed briefs in support of their positions. For the reasons stated below, we find for the Department.

FACTS

1. Southbrook, LLP, is a Wisconsin Limited Liability Partnership, formed under Wis. Stats. Chapter 178. (Southbrook, LLP, Joint Stipulation of Evidentiary Facts (“Southbrook SEF”) ¶¶ 1 & 9; Doneff Joint Stipulation of Evidentiary Fact (“Doneff SEF”) ¶ 7.)

2. Sarah Bonovich and Anton Doneff, Sr., are siblings, and Nicolas Doneff is their uncle. (Southbrook SEF ¶ 4; Doneff SEF ¶ 4.)

3. On or about January 12, 2016, an Electronic Real Estate Transfer Return (“eRETR”) was filed with the Manitowoc County Register of Deeds, reporting the December 29, 2015 conveyance of real estate (“the Property”) from Grantor, Southbrook LLP, to Grantees, Nicolas J. Doneff, Anton A. Doneff, Sr., and Sarah L. Bonovich, via Quit Claim Deed, Document Number 1164161 (“First Deed”). The Property conveyed by the First Deed consisted of land and improvements valued at \$5,116,400.00. The eRETR indicated a transfer fee due of \$0.00 and claimed a transfer fee exemption under Wis. Stat. § 77.25(15m). (Southbrook SJF ¶ 1, Ex. 1.)

4. On or about January 12, 2016, an eRETR was filed with the Manitowoc County Register of Deeds, reporting the December 29, 2015 conveyance of the Property from Grantors, Nicolas J. Doneff, Anton A. Doneff, Sr., and Sarah L. Bonovich, to Grantee, Southbrook Apartments, LLC, via Quit Claim Deed, Document Number 1164162 (“Second Deed”). The Property conveyed by the Second Deed consisted of the same real estate conveyed in the First Deed, including land and improvements

valued at \$5,116,400.00. The eRETR indicated a transfer fee due of \$0.00 and claimed a transfer fee exemption of Wis. Stat. § 77.25(15s). (Doneff SJF ¶ 1, Ex. 1.)

5. On November 17, 2017, the Department issued a Notice of Additional Assessment of Real Estate Transfer Fee on the conveyance by the Second Deed (“Second Deed Notice”)¹ in the total amount of \$22,895.54, including interest and penalty, to Grantors, Nicolas J. Doneff, Anton Doneff, Sr., and Sarah L. Bonovich. (Doneff SJF ¶ 2, Ex. 2.)

6. By letter dated December 6, 2017, Petitioners, Nicolas J. Doneff, Anton A. Doneff, Sr., and Sarah L. Bonovich, timely petitioned the Department for a redetermination of the Second Deed Notice, claiming that the conveyance by the Second Deed was exempt from the transfer fee under the exemption in Wis. Stat. § 77. 25(6m). (Doneff SJF ¶ 3, Ex. 3.)

7. By Notice dated December 21, 2017, the Department denied the December 6, 2017 Petition for Redetermination related to the Second Deed. (Doneff SJF ¶ 4, Ex. 4.)

8. The Petitioners, Nicolas J. Doneff, Anton A. Doneff, Sr., and Sarah L. Bonovich, timely appealed the redetermination to the Tax Appeals Commission. (Commission file; Doneff SJF ¶ 5, Ex. 5.)

9. On February 5, 2018, the Department issued a Notice of Additional Assessment of Real Estate Transfer Fee in the total amount of \$23,299.24, including

¹ The record does not explain why the Department issued its assessment against the transaction involving the Second Deed before its assessment against the transaction involving the First Deed.

interest and penalty, to Southbrook, LLP, related to the First Deed (“First Deed Notice”). (Southbrook SEF ¶ 3, Ex. 2.)

10. On February 23, 2018, a Correction Instrument, Document Number 1191333, was recorded with the Register of Deeds for Manitowoc County. That document purported to modify the First Deed (Document Number 1164161) to be a transfer from Southbrook, LLP, to Southbrook Apartments, LLC, instead of from Southbrook, LLP, to Nicolas J. Doneff, Anton A. Doneff, Sr., and Sarah L. Bonovich. (Southbrook SEF ¶ 6, Ex. 8; Doneff SEF ¶ 8, Ex. 8.)

11. By letter dated April 4, 2018, Petitioner, Southbrook, LLP, timely petitioned for a redetermination of the Department’s First Deed Notice, claiming that the conveyance was exempt from the transfer fee under exemption Wis. Stat. § 77. 25 (6) or (6m). (Southbrook SJF ¶ 4, Ex. 3.)

12. No merger between or conversion of Southbrook, LLP, and Southbrook Apartments, LLC, was ever completed. (Southbrook SEF ¶ 8.)

13. By Notice dated April 18, 2018, the Department denied the April 4, 2018 Petition for Redetermination related to the First Deed. (Southbrook SJF ¶ 5, Ex. 4.)

14. The Petitioner, Southbrook, LLP, timely appealed the April 18, 2018 redetermination to the Tax Appeals Commission by correspondence dated June 14, 2018. (Commission file; Southbrook SJF ¶ 6, Ex. 5.)

15. The parties filed Joint Stipulations of Fact, Motions for Summary Judgment, briefs, and supporting documents. (Commission file.)

APPLICABLE LAW

Summary Judgment Standard

Summary judgment is appropriate when 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 parties have stipulated that summary judgment is appropriate. 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. *Healthcare Services, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-085 (WTAC 2016).

Burden of Proof

As a general matter, 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).

Statutes

Wis. Stat. § 77.25 (2014-2015):

The fees imposed by this subchapter do not apply to a conveyance: ...

(6) Pursuant to mergers of entities.

...

(6m) Pursuant to the conversion of a business entity to another form of business entity under s. 179.76, 180.1161, 181.1161, or 183.1207, if, after the conversion, the ownership interests in the new entity are

identical with the ownership interests in the original entity immediately preceding the conversion.²

...

(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.

(15s) Between a limited liability company and one or more of its members if all of the members 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 limited liability company....

Wis. Stat. § 706.085(1)(b)1:

The addition, correction, or clarification of information other than a legal description, including any of the following information:

A party's name, including the spelling of the name; a first or middle name or initial; a name suffix, such as senior or junior; alternate names by which the party is known; or a description of an entity as a corporation, company, or similar identifier.

DECISION

The Department issued two assessments for Real Estate Transfer Fee. The assessments related to two transactions. The First Deed transferred the Property from Southbrook, LLP, to Anton Doneff, Sr., Sarah L. Bonovich, and Nicholas J. Doneff. The Second Deed transferred the Property from those three individuals to Southbrook Apartments, LLC.

² This statute was amended by 2015 Wisconsin Act 295 with an enactment date of March 30, 2016 and a publication date of March 31, 2016. The Wisconsin Statutes 2014-2015 version is included here to accurately represent the statute in effect at the time the transactions took place, prior to the change made by 2015 Wisconsin Act 295.

The ultimate goal of these transactions was to convey the Property from Southbrook, LLP, to Southbrook Apartments, LLC. The parties completed this transfer in two steps via two conveyances with two separately recorded deeds. The Petitioners subsequently attempted to change these two transactions into one transaction, with a "Corrective Instrument" recorded on February 23, 2018. The Corrective Instrument purports to change the First Deed to one that directly conveys the Property from Southbrook, LLP, to Southbrook Apartments, LLC.

Petitioners claim that this correction is allowed under Wis. Stat. § 706.085(1)(b)1, which states:

The addition, correction, or clarification of information other than a legal description, including any of the following information:

1. A party's name, including the spelling of the name; a first or middle name or initial; a name suffix, such as senior or junior; alternate names by which the party is known; or a description of an entity as a corporation, company, or similar identifier.

Petitioners read the word "including" in Wis. Stat. § 706.085(1)(b)1 broadly to claim that the statute allows for practically any change that one wants to make. While the statute does allow for the correction of errors in deeds, including to a party's name, it does not, by its plain language, allow a correction that changes the actual party from one person or entity to another.

As to a correction of party names, Wis. Stats. § 706.085(1)(b)1 provides a list of examples, albeit non-exclusive, which includes correcting spelling of a name (typographical correction), as well as adding, deleting, or correcting a first or middle

name or initial (typographical or clarification), a name suffix, such as senior or junior (typographical or clarification), alternate names by which the party is known (clarification), or a description of an entity as a corporation, company, or similar identifier (typographical or clarification). On the face of the statute, each of these examples relates to correcting a typographical error or clarifying an aspect of the name of an actual party to the original deed. None of these examples include completely changing the party to the transaction, especially from three individuals, natural persons, to a completely different legally created business entity.

In *Turner v. Wisconsin Department of Revenue*, 2004 WI App 82, 271 Wis. 2d 760, 679 N.W.2d 880, the court determined that a correction to a deed could not change a party to the deed. The court stated:

We are not inclined, however, to nullify the original, valid transfer between EPCO and EPCO LLP. We agree with the WTAC's characterization that:

The "correction" deed did not, in fact, correct the original warranty deed transfer. Once real estate was conveyed from EPCO to EPCO LLP, the transfer was complete under [WIS. STAT.] § 706.02(1). The real estate was now under EPCO LLP. The "correction" deed attempted to transfer the real estate from EPCO to the Turners. This was an attempt to nullify, not correct, the original transfer. (*Id.* 767-768)

While *Turner* did involve one deed rather than two transactions, that fact was immaterial to the holding. The *Turner* decision stands for the proposition that changing a party by a corrective deed is not allowed. A deed that attempts to void the original transfer by changing the parties to the transaction would be a nullity.

Petitioners point out that *Turner* was decided before the passage of Wis. Stat. § 706.085. Even so, there is nothing in the plain language of the statute that would overrule *Turner*. The legislature is presumed to know the prior caselaw and could have explicitly allowed a correcting instrument to change a party. It did not.

The Petitioners' position would change the nature of the transaction in the First Deed by inserting a different legal party as the real party to the transaction and would render the Second Deed a nullity. We reject the Petitioners' assertion that the Corrective Instrument can be used here in this way under both the statute and caselaw.³

There are two completed transactions, two recorded deeds, in this matter. When real estate is conveyed, it is taxed unless an exemption applies. Wis. Stats. §§ 77.22(1)(a) and 77.25; *Gottfried, Inc. v. Dep't of Revenue*, 145 Wis. 2d 715, 429 N.W.2d 508 (1988). In order to be exempt from the Transfer Fee a valid exemption must apply to each transaction. "Exemption statutes, unlike taxing statutes, are construed against the taxpayer, who must bring himself or herself clearly within the terms of the exemption." (*Gottfried, supra.*)⁴

³ Petitioners claim that an unknown person for unknown reasons erroneously put the Doneff family members on the First Deed when the Grantee should have been Southbrook Apartments, LLC. The Commission rejects this scenario. It is clear that Petitioners made a decision to utilize a two-step process to try to avoid any transfer fees by means of the exemption in Wis. Stat. § 77.25(15m) or (15s), as they claimed on the two eRETR forms. Wis. Stat. §§ 77.25(15m) and (15s) require the parties to the transaction to be related in very specific ways. The parties to the two deeds were not so related. The error committed was a legal one based upon a very specific plan by Petitioners, not simply a correctible typographical error as contemplated by Wis. Stats. § 706.085.

⁴ While the Real Estate Transfer 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 1991 Convertible Trust v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-334 (WTAC 2019), quoting *Selle v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-410 (WTAC 1999).

As to the First Deed, Petitioners no longer argue exemption under Wis. Stat. § 77.25(15m), acknowledging that the parties' relationships do not meet the relational requirements of the statute. Petitioners' alternative theory was the claim that the Corrective Instrument changed the entire transaction to be between Southbrook, LLP, and Southbrook Apartments, LLC, which we rejected above.⁵ Petitioners have not clearly identified any other statutory exemption for this transaction.

As to the Second Deed, Petitioners had also originally attempted to claim an exemption under Wis. Stat. § 77.25(15s), but, as noted above, they have acknowledged that the family relationships in this matter do not satisfy the language of the statute. Instead, they rely on the Corrective Instrument being valid to change the First Deed into a transfer from the LLP to the LLC. They then claim that the Second Deed from Anton Doneff, Sr., Sarah L. Bonovich, and Nicholas J. Doneff to Southbrook Apartments, LLC, transfers nothing of value, since Anton Doneff, Sr., Sarah L. Bonovich, and Nicholas J. Doneff had no interest in the Property after the correction to the First Deed. If the Second Deed, therefore, transferred no interest and was valueless, no Transfer Fee could be due. Having rejected the Corrective Instrument as invalid, we hold that the Second Deed did transfer the Property from Anton Doneff, Sr., Sarah L. Bonovich, and Nicholas J. Doneff to Southbrook Apartments, LLC. No other valid exception or exemption has been identified by Petitioners. They did put forth arguments involving equity, trends in the

⁵ Petitioners argue that a transfer from Southbrook, LLP, to Southbrook Apartments, LLC, should be exempt either under the Wis. Stat. 77.25(6) or (6m), or by an equitable extension of the amended statute that became effective after the date of these transactions. We do not address that argument as we have determined that the Corrective Instrument is not valid to change the two transactions here into a single transaction between those two entities.

law, and statutes passed after all of the actions at issue in the case took place. Because those arguments all rely upon the Corrective Instrument being valid, which we have rejected, we do not address them further.

CONCLUSIONS OF LAW

1. The Corrective Instrument is invalid and has no effect on the transfers accomplished through the First Deed or the Second Deed.
2. No exemptions apply to the transactions accomplished through the First Deed or the Second Deed; therefore, the transfer fee applies to both transactions.
3. The Department's assessments are upheld.


ORDER

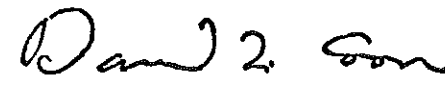
The Department's Motions for Summary Judgment are granted, and the Petitions for Review are dismissed.

Dated at Madison, Wisconsin, this 7th day of February, 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.