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David Wilmoth was a partner in the Milwaukee office of Quarles & Brady LLP for more than 30 years, where he was national chair of the firm's tax practice group. He also served a term as one of three commissioners on the Wisconsin Tax Appeals Commission.

In this article, Wilmoth responds to criticism of recent Wisconsin Tax Appeals Commission decisions regarding real estate transfer fees.

In a recent article in *Tax Notes State*,[1] entitled "Wisconsin's Real Estate Transfer Fee Jurisprudence Needs Repair," Robert Willens criticizes two recent decisions of the Wisconsin Tax Appeals Commission (WTAC) upholding the imposition of the state real estate transfer fee and concludes that they "appear incorrect as a matter of law." However, those familiar with Wisconsin law surrounding the real estate transfer fee likely view them as run-of-the-mill decisions, consistent with decades of precedential case law, each involving a taxpayer that failed to structure a conveyance so as to qualify for a statutory exemption to the fee.

In critiquing these decisions, other than quoting the statutes under which an exemption was claimed, the author cites no applicable Wisconsin law. Instead, he argues that the WTAC should have used concepts drawn from federal income tax principles applicable to a corporate reorganization in one case and to a liquidation and reincorporation in the other. In either case, applying these principles would require the WTAC to ignore conveyances that were admittedly made and to "regard" conveyances as having been made that, in fact, were not — all in the interest of pursuing "substance over form."

Wisconsin's Real Estate Transfer Fee Law

Conceptually, the Wisconsin real estate transfer fee law is quite simple. Wis. Stat. section 77.22(1) provides: "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. section 77.21(1) defines a conveyance as including "deeds and other instruments for the passage of ownership interests in real estate." The fee is collected by the register of deeds at the time the instrument of conveyance is submitted for recording.[2]

If we were to stop there — that is, if we were to assume that there were no exemptions to the fee — it is difficult to imagine how a dispute over the fee could arise, other than for the value placed on the property. There is no legitimate substance-over-form discussion to be had. The real estate transfer fee is simply a fee payable by the grantor upon the recording of an instrument conveying an interest in real estate. But alas, there are statutory exemptions from the fee.

Almost all litigation in this area relates to the patchwork of exemptions to the real estate transfer fee in Wis. Stat. section 77.25. From a tax policy standpoint, one can certainly take issue with the legislature's decision to exempt some conveyances but not others that often achieve the same or conceptually similar results. For the most part, however, the statutes describe with relative clarity the conveyances that are subject to exemption.

[1] Robert Willens, "Wisconsin's Real Estate Transfer Fee Jurisprudence Needs Repair," *Tax Notes State*, May 18, 2020, p. 911.

[2] Wis. Stat. section 77.2277.22(1)(1).

Over the years, the WTAC and Wisconsin appellate courts have consistently rejected taxpayers' attempts to recharacterize the form of or parties to conveyances actually made so as to qualify for a real estate transfer fee exemption. Nor have they been willing to extend an exemption provision beyond the specific language of the statute.[3] Decisions are largely grounded in two long-standing principles of statutory construction. First, tax exemptions are a matter of legislative grace and are to be strictly construed against granting an exemption. One who claims an exemption must point to express language granting the exemption and bring the specific facts of their case clearly within its terms.[4] Second, when interpreting a statute, it is assumed that the legislature's intent is expressed in the statutory language. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry."[5]

North Mayfair Road Case

The first case the article critiques is *WILC/2675 North Mayfair Road*.[6] The petitioner in that case, WILC, defaulted on a mortgage loan with Wells Fargo, which then obtained a judgment of foreclosure. Ultimately, Wells Fargo and WILC agreed that WILC would provide the bank with a deed in lieu of foreclosure in exchange for a satisfaction of the mortgage. Wells Fargo set up MSC, a special purpose single-member limited liability company, to take title to the property. Under the agreement, WILC conveyed the property directly to MSC by a deed in lieu of foreclosure, while Wells Fargo, which continued to hold the mortgage, recorded a satisfaction of the mortgage.

WILC claimed an exemption to the Wisconsin real estate transfer fee under Wis. Stat. section 77.25(14) for a conveyance made "under a foreclosure or a deed in lieu of a foreclosure to a person holding a mortgage." The Wisconsin Department of Revenue (DOR) denied the exemption on the grounds that the conveyance had been made to a person, MSC, that did not hold the mortgage. The WTAC agreed.

The article's author noted that these types of three-party transactions are common when a bank takes a property by a deed in lieu of foreclosure. It is true that these transactions are common, and Wisconsin banks generally understand that in order to qualify for the exemption to the real estate transfer fee, the mortgage needs to be held by the special purpose entity to which the deed in lieu of foreclosure is delivered.[7]

The author reviewed the unsuccessful arguments advanced by WILC and concluded that WILC did not prevail because it had not made the "correct" argument. According to the author, WILC should have argued for the application of the "cause to be directed" principle. Citing a 1970 IRS revenue ruling involving a proposed reorganization under IRC section 368(a)(1)(C), he argued that because Wells Fargo at all times had dominion and control over the subject property, it "should therefore be regarded

[3] *See, e.g.*, *Gottfried Inc. v. Department of Revenue*, 145 Wis. 2d 715, 719-20, 429 N.W.2d 508 (Ct. App. 1988); *Department of Revenue v. Mark*, 168 Wis. 2d 288, 483 N.W.2d 302 (Ct. App. 1992); *Heritage Place Limited Partnership v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 400-162 (WTAC 1995); *J. and R. Hotel Partnership v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 400-286 (WTAC 1997); *Wolter v. Department of Revenue*, 231 Wis. 2d 651, 655-56, 605 N.W.2d 283 (Ct. App. 1999); *Sunset Meadows Partnership v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 400-409 (WTAC 1999); *F.M. Management Co. Ltd. Partnership v. Department of Revenue*, 2004 WI App 19, para. 10, 269 Wis. 2d 526, 674 N.W.2d 922, *rev. denied*, 2004 WI 50, 271 Wis. 2d 112, 679 N.W.2d 547; *Abrahamson v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 401-569 (WTAC 2008); *Turner v. Department of Revenue*, 2004 WI App 82, 679 N.W.2d 880, 271 Wis. 2d 760; *Central Dodge Title LLC v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 401-257 (WTAC 2009), *aff'd* by Dane County Circuit Court, No. 09CV5346, Apr. 5, 2010.

[4] *Ramrod Inc. v. Department of Revenue*, 64 Wis. 2d 499, 504, 219 N.W.2d 604, 607 (1974), citing *Fall River Canning Co. v. Department of Taxation*, 3 Wis. 2d 632, 637, 89 N.W.2d 203 (1958) ("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"). *Linder v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 402-334 (WTAC 2019), quoting *Selle v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 400-410 (WTAC 1999).

[5] *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004).

[6] *WILC/2675 North Mayfair Road Limited Partnership v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 402-378 (WTAC Jan. 2020, released Feb. 2020).

[7] In *Regency Partners v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 400-130 (WTAC 1995), the bank that held a mortgage on the taxpayer's property delivered an assignment of mortgage to its special purpose subsidiary the day before the taxpayer conveyed the mortgaged property to the subsidiary by a deed in lieu of foreclosure. The taxpayer claimed an exemption under Wis. Stat. section 77.25(14), which was denied by the Department of Revenue on the basis that the mortgage assignment had not been recorded before the conveyance. The WTAC determined that under applicable Wisconsin law the mortgage assignment was effective upon delivery and upheld the taxpayer's exemption claim.

as having received the property and then as having conveyed the property to MSC." He concludes:

> WILC did enough to avail itself of the exemption since it conveyed the property under a foreclosure or deed in lieu of foreclosure to the very person, Wells Fargo, who held the mortgage. The fact that Wells Fargo then transferred the property to its controlled subsidiary, MSC, is of no moment, even though a retransfer was obviously contemplated from the outset. All that matters is that the transferee of the property be the same party who holds the mortgage — and here, the transferee, after its proper identification under cause to be directed principles, was that party.

First, the author's claimed "fact" that Wells Fargo transferred the property to its controlled subsidiary *is* of moment. There is no exemption under Wis. Stat. section 77.25 for a conveyance from a corporation to a single-member LLC. Consequently, the conveyance "regarded" to have been made from Wells Fargo to MSC would be subject to the Wisconsin real estate transfer fee.[8] More importantly, it is simply not a fact that Wells Fargo transferred the property to its subsidiary — it is a fiction. It is precisely the kind of fiction that the WTAC and Wisconsin appellate courts have consistently rejected in real estate transfer fee cases.

I note that while the fee exemption depends on whether the recipient of the deed in lieu holds the mortgage, application of the author's "caused to be directed" principle does not. Its application is justified, the author argues, because Wells Fargo at all times had dominion and control of the property. Following his reasoning, had Wells Fargo actually assigned the mortgage to MSC before WILC delivered the deed in lieu, WILC would fail to qualify for the exemption otherwise clearly available under Wis. Stat. section 77.25(14) because WLIC would be "regarded" as having conveyed the property to Wells Fargo, no longer the mortgage holder, rather than to MSC, the person holding the mortgage. Moreover, the transaction, as cast by the author, would now be subject to not one, but two real estate transfer fees. One fee would be due on the conveyance regarded to have been made by WILC to Wells Fargo (because Wells Fargo no longer holds the mortgage), and a second fee would be due on the conveyance regarded to have been made by Wells Fargo to MSC (because a conveyance from a corporation to a single-member LLC is not exempt). The result is an absurdity that is wholly inconsistent with the law or reason.

The decision of the WTAC in *North Mayfair Road* is not "incorrect as a matter of law," as the article's author suggests. The WTAC rightly followed decades of Wisconsin case law and applied the language of the statute to the facts presented.

Doneff Case

Perhaps the most common fact pattern in real estate transfer fee exemption cases coming before the WTAC and the Wisconsin courts involves conveyances made by a family partnership.[9] Typically, family members own interests in a partnership that holds real estate. They decide that they want to convert their ownership of the property to an LLC, and to that end they cause the partnership to transfer the real property to a newly-formed LLC, the interests in which are held by the same family members in the same percentages as they held in the partnership. Wis. Stat. section 77.25(15m) provides an exemption for conveyances "between a partnership and one or more of its partners if all the partners are related to each other as spouses, lineal ascendants, lineal descendants, siblings, or spouses of siblings and if the transfer is for no consideration other than the assumption of debt or an interest in the partnership." Subsection (15s) provides an exemption for conveyances between an LLC and its members who are similarly related. There is, however, no exemption from the fee for conveyances from a partnership directly to an LLC. As a result, the DOR imposes the fee.

[8] The "regarded" conveyances would, however, shift the burden of the fee from WILC to Wells Fargo.

[9] *See, e.g.*, *J. and R. Hotel Partnership*, *Wolter*, *Abrahamson*, *Sunset Meadows Partnership*, and *Turner*.

Time and again, the WTAC and the Wisconsin courts have declined to recast the partnership to LLC conveyance as a conveyance of the property from the partnership to the family members followed by a conveyance by the family members to the LLC. Nor have they been willing to exempt the partnership to LLC conveyance on the theory that sections 77.25(15m) and (15s) display the intent of the legislature to exempt all conveyances in which the identified family members retain their percentage ownership in the property. Again, the WTAC and courts must strictly construe the exemption against the taxpayer, and the taxpayer must place itself squarely within the express terms of the statute.

The second case critiqued in the article, *Doneff and Southbrook LLP*,[10] involved a family's attempt to avoid this common pitfall when changing the form of its family–owned real estate holding company. Three members of the Doneff family, two siblings and their uncle (the Doneffs), owned interests in a family LLP holding real property. The Doneffs decided that they wanted to change the form of the company to an LLC. Apparently believing that the relationships among the Doneffs would qualify for the exemptions to the real estate transfer fee under sections 77.25(15m) and (15s), they had the family partnership convey the real estate to the Doneffs and the Doneffs convey it to a newly-formed LLC.

Unfortunately for the Doneffs, a niece/nephew-to-uncle relationship is not one of those described in sections 77.25(15m) and (15s). As a result, the DOR issued two fee assessments: one on the conveyance from the partnership to the Doneffs, and the other on the conveyance from the Doneffs to the LLC. Upon receiving the assessments, and apparently recognizing their mistake, the Doneffs recorded a corrective deed reflecting a conveyance of the property from the partnership directly to the LLC.

On appeal, the Doneffs argued that the corrective deed modified the conveyance to be a conveyance from the partnership to the LLC instead of a conveyance from the partnership to the Doneffs and from the Doneffs to the LLC. Citing the decision of the Wisconsin Court of Appeals in *Turner*,[11] the Commission determined that the corrective deed was an attempt to nullify, not correct, the original conveyance, and was ineffective to do so.

The article's author begins his analysis by quoting language he identifies as being in "Wisc. Stat. section 77-25." This appears to be a reference to Wis. Stat. section 77.25(6m), which was quoted in *Doneff*. The author's quote, however, omits critical language in the statute without indicating, by use of an ellipsis or otherwise, that language has been omitted. Section 77.25(6m) provides an exemption from the real estate transfer fee for the following (with the language omitted from the quote bolded): "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."[12] The omitted language is important because it makes clear that the exemption does not apply to the conversion of a business entity in any general sense, but only if the business owners convert the entity under the provisions of the specified statutes,[13] which the Doneffs did not do.

Nevertheless, the author argues that the conveyances made by the Doneffs should be eligible for this exemption based on the federal income tax principle of "liquidation-reincorporation":

> These transactions, however, followed the classic "liquidation/reincorporation" pattern in which there are distributions to an entity's owners of the entity's properties, which are followed by the prearranged transfer of the distributed property to another entity that they own in the same proportions as they owned the "liquidating" entity. The transaction has historically been recharacterized and treated as if the distributing corporation instead had effected the transfer, with the

[10] *Doneff v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 402-379 (WTAC Feb. 7, 2020)

[11] *Turner v. Wisconsin Department of Revenue*, 679 N.W.2d 880.

[12] This quote reflects the language of the statute as it existed when the Doneffs made their conveyances. The statute was later amended.

[13] *Northside Development of La Crosse LLC v. Department of Revenue*, Wis. Tax Rptr. (CCH) para. 401-374 (WTAC 2010).

owners serving as merely a conduit to convey the property to its ultimate destination, the successor entity.

Aside from the fact that the Doneffs would not have been eligible for the exemption in Wis. Stat. section 77.25(6m) even if the conveyances were recharacterized as a direct entity-to-entity transfer, the application of this federal income tax principle to the Wisconsin real estate transfer fee suffers from the same infirmities as the author's critique of the *North Mayfair Road* decision. The real estate transfer fee is not a tax imposed on and measured by the result of a transaction or series of transactions; it is a fee imposed on a conveyance. The Doneffs purposefully avoided an entity-to-entity conveyance, which would have resulted in the imposition of a transfer fee, under the mistaken assumption that a conveyance of property to them from their family LLP followed by a conveyance by them to their new family LLC would be exempt under Wis. Stats. section 77.25(15m) and (15s). The Doneffs intended those conveyances to have substance. They misread the statutes, however, and ended up making two nonexempt conveyances and paying two fees.

The absurdity of recharacterizing the conveyances under the author's proposed "liquidation-reincorporation" principle becomes obvious when you consider the fate of someone whose family relationships, unlike the Doneffs, *do* meet the requirements of sections 77.25(15m) and (15s). Understanding those exemption provisions, they carefully avoid a nonexempt direct entity-to-entity conveyance. Instead, they convey real estate from their family partnership to the family members, who then convey the real estate to a newly formed family LLC. Wouldn't they be surprised to learn that, despite following the express language of the exemption provisions, they are nevertheless subject to a fee because the transaction is recharacterized, under the federal income tax concept of liquidation-reincorporation, as a nonexempt entity-to-entity conveyance?

Once again, in its *Doneff* decision, the WTAC followed decades of Wisconsin case law and applied the language of the statute to the facts of the case. The decision is not "incorrect as a matter of law."

Navigating the numerous exemptions in Wis. Stat. section 77.25 can be a treacherous undertaking, and sometimes taxpayers and their representatives do not get it right. But that is the nature of the statute the Wisconsin legislature has crafted. If a change to the law is to be made to add consistency or simplicity or to broaden the availability of exemptions, this task falls properly on the state legislature. It is not the place of the WTAC or Wisconsin courts to rescue people from their mistakes by conjuring up exemptions that are not in the statutes or regarding conveyances to have been made when they were not.

The decisions of the WTAC and the Wisconsin courts in real estate transfer fee cases are not in need of repair, as the title of the article suggests. I can scarcely think of an area of the law in which cases have been so consistently decided. Criticism of these two decisions is unwarranted. The WTAC simply applied the law as written to the facts as presented. ■