

A08-429

STATE OF MINNESOTA
IN SUPREME COURT

Stewart Title Guaranty Company,

Relator,

v.

Commissioner of Revenue,

Respondent.

**BRIEF
OF
RELATOR STEWART TITLE GUARANTY COMPANY**

LORI SWANSON
Attorney General
State of Minnesota

FREDRIKSON & BYRON, P.A.

KEVIN J. RODLUND
Atty Reg. No. 0309254
900 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2127
(651) 296-0986

THOMAS R. MUCK
Atty Reg. No. 75851
MASHA M. YEVZELMAN
Atty Reg. No. 387887
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7045

ATTORNEYS FOR RESPONDENT
COMMISSIONER OF REVENUE

ATTORNEYS FOR RELATOR
STEWART TITLE GUARANTY
COMPANY

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LEGAL ISSUES

(1) Whether funds retained by title insurance agents for services performed for a title insurer before the insurer enters into an insurance contract are includable in gross premiums subject to taxation under the insurance gross premiums tax?

Trial Court Held: In the affirmative.

Authorities:

Minn. Stat. § 60A.02 (1998) (2000) (2002)

Minn. Stat. § 60A.15 (1998)

Minn. Stat. § 297I.05 (2000) (2002)

Minn. Stat. § 297I.01 (2000) (2002)

(2) Whether the funds retained by STG's agents for services constitute "commissions" with the meaning of Minn. Stat. § 297I.01, subdivision 9?

Trial Court Held: In the affirmative.

Authorities: See Issue 1.

(3) Whether the Legislature intended to impose the gross premiums tax upon funds that were never received by a gross premiums taxpayer?

Trial Court Held: In the affirmative.

Authorities: See Issue 1.

STATEMENT OF CASE

This is a review by certiorari of Orders of the Tax Court, Honorable Kathleen Sanberg, affirming an assessment by Respondent Commissioner of Revenue (hereinafter "Commissioner") of additional Insurance Gross Premiums Tax against Relator Stewart

Title Guaranty Company (hereinafter “STG”), a title insurance company doing business in Minnesota. (See Order for Partial Summ. J., Jan. 9, 2008 at A-179 to A-198; Order Correcting Clerical Error in Ct. Decision, Jan. 22, 2008 [hereinafter Tax Court Order] at A-199 to A-200.)¹ The Commissioner’s assessment was premised on his belief that funds received by independent title insurance agents for services they perform for STG before STG enters into a contract for insurance are charges for title insurance subject to the gross premiums tax.

The case was submitted to the Tax Court on cross motions for summary judgment.² The parties entered into a stipulation of facts. (See Stipulation of Facts [hereinafter Stip. ¶ ___] at A-010 to A-102.) A deposition transcript and certain discovery responses were also presented in support of the parties’ motions.³

STATEMENT OF FACTS

STG was founded in the 19th century and has for many years done business in Minnesota. (See A-010 (Stip. ¶ 3).) It is licensed as an insurance company by the Minnesota Department of Commerce to issue insurance in Minnesota. (See A-011 (Stip.

¹ Citations in the form “A-___” refer to pages of Appellant’s Appendix.

² STG made its motion for summary judgment at oral argument. See Summ J. Hr’g Tr. 3-4.

³ When reviewing decision of the Minnesota Tax Court, the Minnesota Supreme Court evaluates “(1) whether the tax court had jurisdiction, (2) whether the tax court decision was supported by the evidence and was in conformity with the law, and (3) whether the tax court committed any other error of law.” Mayo Collaborative Servs., Inc. v. Comm’r of Revenue, 698 N.W.2d 408, 412 (Minn. 2005) (citations omitted). In Mayo Collaborative Services, this Court stated, “When parties stipulate to underlying facts, we need consider only whether applicable law was applied properly and our review is de novo.” Id. (citations omitted).

¶ 8.) STG insures titles to interests in real estate and thus, by issuing a policy, takes on the risks of an insurer. (See A-012 (Stip. ¶ 18); A-015 (Stip. ¶ 33).) STG title insurance policies indemnify the person insured (a buyer or a lender) against covered defects in the title to real estate. (See A-010 (Stip. ¶ 3).)

At a real estate closing, title insurance agents, who are often closing agents as well, collect funds for title insurance. (See A-011 (Stip. ¶ 9); A-013 (Stip. ¶ 23).) Only a portion of the funds collected at the closing by the agent is sent to the title insurer, however. (See A-013 to A-014 (Stip. ¶ 25).) The insurance company, such as STG, is the insurer on the title. (See A-015 (Stip. ¶ 33).) The funds sent to STG by agents are to compensate it for insuring the title; that is, for assuming the risks under the policy. (See A-014 (Stip. ¶ 26).) STG funds its insurance reserves and covers its own administrative and operating expenses from the funds remitted to it by agents. (Id.) Until remitted by the agent to STG, the agent is contractually obligated to hold the insurance company's portion in trust for STG. (A-013 to A-014 (Stip. ¶ 25).)

The agent retains the portion of the title insurance funds that is not sent to STG. (See A-013 (Stip. ¶ 24).) The agents, which are predominantly independent companies that enter into agency contracts with STG, perform various services for STG before STG issues a title insurance policy. (See A-011 to A-012 (Stip. ¶¶ 9-16).) Specifically, the agents search public records, surveys and other documents and analyze them to determine what they reveal regarding title. (See A-011 to A-012 (Stip. ¶¶ 10-12).) The agent then prepares a written report of title called a "commitment." (See A-011 to A-012 (Stip. ¶ 12).) In preparing that report, the agent evaluates and analyzes the title to the property.

(See id.) The commitment is used to define the terms and conditions under which the title is proposed to be insured. (Id.) Agents, finally, issue a title insurance policy in STG's name.

For their services, the agents retain a portion (70-80%, in fact) of the funds collected at the closing. (See A-013 to A-014 (Stip. ¶ 25).) STG never receives any part of the money retained by the agents. (Id.)

On its Minnesota Insurance Premiums Tax return, STG has traditionally reported taxable gross premiums as the amount of the premium that STG itself receives for taking on the risk of insuring the title. (See A-015 to A-016 (Stip. ¶¶ 38-40).) It has not included funds it never received—the funds retained by agents for services they performed for STG under their contracts with STG. (See A-016 (Stip. ¶ 39).)

For the 2000-2002 tax years at issue, STG computed its gross premium tax upon the amount it received from agents for taking on the risk of insuring the title, just as it had in earlier years. (See A-015 to A-016 (Stip. ¶¶ 38-40).) It did not include the funds retained by agents. (Id.)

The Commissioner audited STG and assessed additional tax in the following amounts:

	<u>Tax</u>	<u>Interest (to 12/7/06)</u>	<u>Total</u>
2000	\$56,315	\$18,683	\$74,998
2001	\$91,528	\$22,498	\$114,026
2002	\$182,065	\$32,747	\$214,812
Total	\$329,908	\$73,928	\$403,836

(A-016 to A-017 (Stip. ¶ 41).) The Commissioner computed the additional tax by including in taxable gross premiums the amounts retained by agents. (See id.)

ARGUMENT

I. FUNDS RETAINED BY TITLE INSURANCE AGENTS FOR SERVICES PERFORMED FOR A TITLE INSURER BEFORE THE INSURER ENTERS INTO AN INSURANCE CONTRACT ARE NOT INCLUDABLE IN GROSS PREMIUMS SUBJECT TO TAXATION UNDER THE INSURANCE GROSS PREMIUMS TAX.

Funds for title insurance collected at a real estate transaction consists of two parts—the part remitted to the insurance company for acting as an insurer and taking on the risk of the insurer and the part retained by the agent (and never received by the title insurance company) for services rendered to the insurance company before the insurance company enters into an insurance contract.

The tax years at issue are 2000 through 2002. For the 2000 tax year, the Insurance Gross Premiums Tax was in Minn. Stat. § 60A.15 (1998). For the 2001 and 2002 years, it is contained in Minn. Stat. ch. 297I (2000) (2002).

The statutes imposing the insurance gross premiums tax place the tax only on the funds remitted to the title insurance company. Only those funds are for “insurance.” The holding of the Tax Court, in finding that funds paid to independent title insurance agents

for services provided to STG before STG enters into the contract of insurance, is inconsistent with the statutory terms of the tax. The Tax Court misapplies both versions of the gross premiums tax statutes at issue.

A. In Both the Version of the Gross Premiums Tax Effective in 2000 and the Version Effective in 2001 and 2002, the Legislature Defined that Which Is Subject to the Tax as the Charge for “Insurance,” Which Is Defined as an Agreement to Indemnify.

For the 2000 tax year, Minn. Stat. § 60A.15 provided:

Subdivision 1. **Domestic and foreign companies.** (a) On or before April 1, June 1, and December 1 of each year, every domestic and foreign company, including town and farmers’ mutual insurance companies, domestic mutual insurance companies, marine insurance companies, health maintenance organizations, community integrated service networks, and nonprofit health service plan corporations, shall pay to the commissioner of revenue installments equal to one-third of the insurer’s total estimated tax for the current year. Except as provided in paragraph (d), (e), (h), and (i), installments must be based on a sum equal to two percent of the premiums described in paragraph (b).

(b) Installments under paragraph (a), (d), or (e) are percentages of gross premiums less return premiums on all direct business received by the insurer in this state, or by its agents for it, in cash or otherwise, during such year.⁴

The tax was thus computed on “gross premiums . . . received by the insurer in this state, or by its agents for it.”⁵ The term “gross premiums” was not defined in section 60A.15 or elsewhere in Chapter 60A. Minnesota case law has not defined the term “gross premiums.”

That the insurance Gross Premiums Tax is only on the premiums for “insurance,” is evident from several, related provisions of Chapter 60A. The statutory provision in

⁴ Minn. Stat. § 60A.15, subd. 1(a) and (b) (1998) (emphasis added).

⁵ See *id.* (emphasis added).

effect in 2000 was titled “Taxation of insurance companies.”⁶ Moreover, the reference to “premiums . . . received by the insurer” in section 60A.15, subdivision 1(b) depends on the term “insurer.” The term “insurer” is included within the definition of “insurance company,” which is, in turn, defined as an entity “engaged in **insurance** as principal.”⁷

What the Legislature meant by “insurance” is clear because Chapter 60A defines

“insurance” as:

Subd. 3. **Insurance.** (a) “Insurance” is any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage. A program of self-insurance, self-insurance revolving fund or pool established under section 471.981 is not insurance for purposes of this subdivision.⁸

“Indemnify” is not defined in chapter 60A. Its common meaning, however, is:

[t]o protect against or keep free from loss, damage, etc.; to insure.⁹

⁶ Additionally, Minn. Stat. § 60A.15, subdivision 1(b) states that the tax is upon “gross premiums . . . on all direct business” The term “business” undoubtedly refers to the business of an insurance company—insurance. See Minn. Stat. § 60A.02, subd. 4 (1998).

⁷ Minn. Stat. § 60A.02, subd. 4 (1998) provides:

Subd. 4. **Company or insurance company.** “Company” or “insurance company” includes every insurer, corporation, business trust, or association engaged in insurance as principal, but for purposes of this subdivision does not include a political subdivision providing self-insurance or establishing a pool under section 471.981, subdivision 3.

Minn. Stat. § 60A.02, subd. 4 (1998) (emphasis added).

⁸ Minn. Stat. § 60A.02, subd. 3 (1998) (emphasis added).

⁹ Webster’s New Twentieth Century Dictionary (Unabridged) 928 (2d ed. 1978).

Consequently, the statutory terms of the version of the statute in effect through the 2000 tax year, reveal the Legislature's intention to impose the tax only on premiums received by the insurer for insurance, which is to say for the agreement to indemnify.

In 2000, the Legislature recodified the Gross Premiums Tax and placed it in a separate chapter in the Minnesota Statutes—Chapter 297I. Under the new Chapter 297I, enacted effective for 2001 and latter years, the tax is imposed by section 297I.05:

Subdivision 1. **Domestic and foreign companies.** Except as otherwise provided in this section, a tax is imposed on every domestic and foreign insurance company. The rate of tax is equal to two percent of all gross premiums less return premiums on all direct business received by the insurer or agents of the insurer in Minnesota, in cash or otherwise, during the year.¹⁰

In addition, the Legislature added a definition of the term “gross premiums”:

Subd. 9. **Gross premiums.** “Gross premiums” means total premiums paid by policyholders and applicants of policies, whether received in the form of money or other valuable consideration, on property, persons, lives, interests and other risks located, resident, or to be performed in this state, but excluding consideration and premiums for reinsurance assumed from other insurance companies. The term “gross premiums” includes the total consideration paid to bail bond agents for bail bonds. For title insurance companies, “gross premiums” means the charge for title insurance made by a title insurance company or its agents according to the company’s rate filing approved by the commissioner of commerce without a deduction for commissions paid to or retained by the agent. Gross premiums of a title insurance company does not include any other charge or fee for abstracting, searching, or examining the title, or escrow, closing, or other related services.¹¹

¹⁰ Minn. Stat. § 297I.05, subd. 1 (2000) (2002).

¹¹ Minn. Stat. § 297I.01, subd. 9 (2000) (2002) (emphasis added).

The 2000 amendments did not change the base of the tax. In one of its publications following the 2000 Legislative Session, the Department described the recodification as follows:

Several substantive changes involving the administration of insurance taxes were made in the recodification. None make any changes in the rate of taxation, nor do they expand the tax base or create any new exemptions from tax. Most of them are intended to make the insurance tax provisions consistent with each other and with other taxes administered by the department. These changes include:

Definition of Gross Premiums. Minn. Stat. § 297I.01, subd. 9, provides a definition of gross premiums that conforms to industry standards and long standing practice of taxpayers and the department. Provides separate definitions for title insurance and bail bonds.¹²

The Legislature therefore continued to intend to include in the computation only charges for insurance, not funds retained by agents. This is plain from the language of the recodified tax. The next to last sentence, which refers to title insurance companies, refers to “charges” for title “insurance” according to the companies’ rate filing.

“Insurance” is a defined term in the new Chapter 297I:

Subd. 12. **Insurance.** “Insurance” means the same as that term is defined in section 60A.02, subdivision 3.¹³

Section 60A.02, subdivision 3, referred to in the definition, is the same definition referred to in the pre-recodification gross premiums tax.¹⁴ It provides:

¹² A-099 (Stip. ¶ 42, Attachment 8).

¹³ Minn. Stat. § 297I.01, subd. 12 (2000) (2002) (emphasis added).

¹⁴ See supra p. 7.

Subd. 3. **Insurance.** (a) “Insurance” is any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage. A program of self-insurance, self-insurance revolving fund or pool established under section 471.981 is not insurance for purposes of this subdivision.¹⁵

Thus, “insurance” is defined, just as it was before the recodification into Chapter 297I, as the agreement under which the insurer agrees to indemnify against loss or damage; that is to take on insurance risk.

The Legislature, therefore, enacted a gross premiums tax that is limited to the charges for insurance—funds received for the insurance contract.

B. The Legislature Limited the Taxable Gross Premium to the Charge for Insurance (for Taking on the Insurance Risk) Because of the Particular Risk Insured by Title Insurance.

That the Legislature limited taxable gross premiums to the funds sent to the insurer for entering into the contract of insurance is a recognition that there are research activities prior to the actual contract of insurance that are really not part of the insurance itself. Such pre-policy research is unique to title insurance. That it is conducted before the policy commences and should be considered separate from it is understandable given the nature of the risk against which title insurance insures and the differences between that risk and the risk involved in other types of insurance.

Title insurance is insurance against covered defects to title in real estate existing as of the date a policy is issued. In contrast, other types of insurance insure against an event which may or may not occur in the future.

¹⁵ Minn. Stat. § 60A.02, subd. 3 (2000) (2002) (emphasis added).

The risks that are taken on by the title insurer in a contract of insurance are risks as to something that has happened in the past. In other words, title insurance insures against a defect in title that, if it exists, has already occurred. Title insurance has therefore been said to be “backward looking.”¹⁶

In contrast, other types of insurance insure against an event which may or may not occur in the future. Other types of insurers rely on general actuarial studies that are not specific to any prospective policy holder, but that predict the risk of certain occurrences (e.g., an accident, a fire) in a general population of prospective policy holders.

Before a title insurer like STG issues a title insurance policy, its agents conduct thorough research on the specific property to determine if there is, in fact, a title defect shown in the public record.¹⁷ The agent’s research consists of conducting a detailed examination of public and other records regarding the real estate in question in order to

¹⁶ See In re Nat’l Mortgage Corp. v. Am. Title Ins. Co., 261 S.E.2d 844, 847-48 (N.C. 1980); Revere House Assocs. v. Commonwealth Title Ins. Co., 8 Pa. D.&C. 4th 657, 659 1991 WL 279832 (Pa. Com. Pl. 1991).

¹⁷ Title insurance agents have substantive duties that make the issuance of title insurance more than “mere guesswork.” See United States v. City of Flint, 346 F. Supp. 1282, 1285 (E.D. Mich. 1972). Title insurance agents must conduct a “careful examination of the muniments of title, [perform] an exhaustive study of the applicable law and [] exercise expert contract draftsmanship.” Id. Other types of insurance agents, on the other hand, typically rely on the representations and actions of the insured to evaluate risk. See Lawyers Title Ins. Corp. v. First Fed. Sav. Bank & Trust, 744 F. Supp. 778, 784 (E.D. Mich. 1990) (stating that comparing automobile insurance with title insurance is like “comparing apples with oranges”); Revere House Assocs. v. Commonwealth Title Ins. Co., 8 Pa. D.&C. 4th 657, 659, 1991 WL 279832, at *2 (Pa. Com. Pl. 1991) (“[T]itle insurance is fundamentally different from other lines of insurance, such as health and accident insurance.”).

ascertain the state of title to it. The agents then analyze and evaluate the research in order to define the terms and conditions of the policy the title insurer will issue.¹⁸ If a defect is found, it is excluded from the coverage of the policy or cured prior to issuance of the policy. This acts, of course, as a policing mechanism.

The specific property research conducted by title insurance agents is unique to the title insurance industry and is intended to define and reduce the risk which the insurer takes on in the policy. It is unique to title insurance because title insurance is insurance regarding something that has already happened. Such research is possible as to title insurance. It is not possible as to other types of insurance which insure against future events based on actuarial studies that predict the occurrence of the events.

In any event, in title insurance, all of the research is conducted before the policy is entered into at all. Only on the issuance of the policy does an insurance contract come into existence.

¹⁸ See A-011 to A-012 (Stip. ¶¶ 10-12). The agent's function is very similar to the tasks performed by attorneys who rendered "title opinions" prior to the advent of title insurance. An attorney's opinion consists of a description of the status of the title. If there were any clouds on the title, such as a judgment lien, they would be noted. The written report the agent prepares, which is called a "commitment" (A-011 to A-012 (Stip. ¶ 12)), is similar to an attorney's title opinion. Title insurance does what an attorney's title opinions could not do, however. An attorney who has issued an erroneous title opinion can only be held responsible for an error due to negligence. Title insurance provides protection from non-negligent errors in the title search, examination, and analyses process. This is so, because the title insurance company takes on that risk. In fact, title insurance developed in response to a need for more protection than that afforded by an attorney's title opinion.

These differences between title insurance and other types of insurance explain why the legislature limited the gross premium tax for title insurance companies to the “charge” for “insurance.”

C. **Courts Have Regarded the Work that Title Insurance Agents Do Before an Insurer Enters into an Insurance Contract as Separate from Insurance Itself.**

That the actual insuring against the particular risks identified in an insurance policy is separate from related work performed by agents prior to the commencement date of the insurance contract has been recognized by other courts.

For example, in Stewart Title Guaranty Co. v. State Tax Assessor, 2005 WL 2723026 (Me. Super. May 5, 2005), the State of Maine dealt with an issue very similar to that in the instant case regarding Maine’s gross premium tax.¹⁹ A copy of the unreported opinion is included in the Appendix at A-204 to A-206. The Kennebec County Superior Court, a trial level court of general jurisdiction, interpreted language in Maine’s gross premiums tax statute to allow inclusion only of the amounts STG actually received for providing title insurance coverage in the calculation of its Premium Tax and not amounts retained by agents.²⁰

¹⁹ The Kennebec County Superior Court had remanded the case for further proceedings, but the tax assessor attempted an interlocutory appeal. That appeal was dismissed by the Maine Supreme Court as “interlocutory and not ripe for appeal.” Stewart Title Guar. Co. v. State Tax Assessor, 892 A.2d 1162 (Me. 2006). It is now on appeal from a final order.

²⁰ See 2005 WL 2723026, at *3 (A-206).

In the Maine case, STG appealed the Maine State Tax Assessor's inclusion of funds retained by agents in the tax calculation.²¹ Maine imposes a tax on "gross direct premiums," a term not defined in the statute. Me. Rev. Stat. Ann. title 36, § 2513 (2004) provides:

Every insurance company or association that does business or collects premiums or assessments including annuity considerations in the State . . . shall, for the privilege of doing business in this State, and in addition to any other taxes imposed for such privilege pay a tax upon all gross direct premiums including annuity considerations, whether in cash or otherwise, on contracts written on risks located or resident in the State for insurance of life, annuity, fire, casualty and other risks at the rate of 2% a year.²²

The Kennebec County Court held that "gross direct premiums" meant only that portion of property buyers' payments for title insurance which is attributable to insurance coverage.²³

The Maine Court remarked:

Finally, in the struggle between the arguments of each side, the position of the petitioner benefits from the always welcomed comfort of fairness and common sense. Taxing an insurance company on monies which it actually receives for the insurance coverage it provides is fair. Taxing it for payments for other services such as title searches, escrow fees and closing costs, for which it receives no benefits, or payment, would be unfair.²⁴

²¹ Id. at *2 (A-205).

²² Me. Rev. Stat. Ann. title 36, § 2513 (2004).

²³ Stewart Title Guar. Co., 2005 WL 2723026, at *2 (A-205).

²⁴ Id. at *3 (A-206) (emphasis added).

The Maine Court therefore held that only the amounts STG received for actual title insurance coverage were to be included in the computation and that amounts retained by agents for the services they perform under their contracts with STG should not be.²⁵

Likewise, the United States Court of Appeals for the Third Circuit distinguished the insurer's agreement to insure from the preceding activities of title agents in Ticor Title Insurance Co. v. FTC, 998 F.2d 1129 (3d Cir. 1993). The FTC had brought an antitrust challenge against several title insurers' collective submission of search and examination rates to state regulators.²⁶ The insurers asserted several defenses, including the insurance industry's exemption from federal antitrust law under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997).²⁷ The court, however, remarked that "title search and examination does not itself spread or transfer risk."²⁸ Even though search and examination precedes the issuance of a title insurance policy and, indeed, may shape the terms and conditions of coverage, the court found that search and examination was not

²⁵ See id. (A-206).

²⁶ Ticor, 998 F.2d at 1130-31.

²⁷ Id. at 1133. The other defenses were (1) what is known as the Noerr Pennington petitioning officials defense and (2) the State action defense articulated in Parker v. Brown, 317 U.S. 341 (1943).

²⁸ Id. at 1134.

the actual assumption of the insurance risk.²⁹ Only the insurer can enter into the agreement to insure against risk.³⁰

At pages 19-20 of its opinion, the Tax Court attempts to distinguish Ticor.³¹ The Court's distinction is premised on its interpretation that Ticor dealt with title search and examination and not the analyses of agents resulting in a "commitment." The Tax Court's narrow distinction is to no avail, however, because in Ticor, the Third Circuit viewed all pre-contract activity as distinct from the spreading of risk, even though they were closely related.³² The only thing that the Ticor court considered to be the "business of insurance" was that encompassed by the assumption of risk in an insurance contract between the title insurer and title holder.

Whether or not the decision in Ticor was correct as a matter of antitrust law,³³ its discussion of the division of labor between insurer and agent was the backdrop against which the Minnesota Legislature acted. The Legislature knew that the services of agents prior to the insurer agreeing to enter into an insurance contract have been recognized as separate from the contract itself.

²⁹ Id.

³⁰ See id. at 1138.

³¹ A-197 to A-198 (Tax Court Order 19-20).

³² See Ticor, 998 F.2d at 1136.

³³ See id. at 1141-43 (Alito, J., dissenting).

That under the terms of section 60A.15 and Chapter 297I the Legislature limited the gross premiums tax to charges for “insurance” and thus to the portion of the premium received by the title insurer for its “agreement . . . to indemnify another”³⁴ is therefore understandable.

D. Funds Retained by Title Insurance Agents Constitute Payment for Services the Agents Perform and Are Not for “Insurance” as Defined in the Statute.

The application of the gross premiums tax to the instant facts is therefore clear—it applies only to funds received by STG for “insurance,” which means the funds received by the insurer for entering into the agreement to indemnify. It does not apply to the funds retained by agents for services conducted prior to the commencement of the insurance contract.

The portion of the title insurance funds collected at the closing that STG agents send to STG are for taking on the risk of insuring the title.³⁵ Only the amounts remitted to STG by the agents are for insurance per se. Those funds are used by STG to fund its insurance reserves and to cover its administrative and operating expenses.³⁶ It could hardly be otherwise. Only STG has an agreement to indemnify, that is, an insurer/insured relationship, with the customer.

³⁴ See Minn. Stat. § 60A.02, subd. 3 (1998) (2000) (2002).

³⁵ A-014 (Stip. ¶ 26).

³⁶ Id.

In contrast, the agents are not insurers and are not licensed, like STG, as insurance companies. The agent is not a party to any insurance policy issued by STG. The agent issues no policy on its own behalf to the title insurance customer. Nothing paid to the agent, therefore, is for insurance within the meaning of section 60A.15. Instead, the funds retained by the agents from closing proceeds, are for services they performed for STG prior to the insurance contract.

Therefore, only the title insurance funds paid to STG for taking on the insurance risk should be included in taxable gross premiums. Only the portion of the premium the agent remits to STG is for the agreement between STG and the customer for STG to insure the risk. In contrast, the amounts retained by agents are for services they perform that precede the taking on of risk. They are therefore not contemplated by the language of the Legislature.³⁷

³⁷ To attribute to the Legislature an intention to include in taxable gross premiums the funds retained by agents seems untenable in any event. STG's Minnesota agents are not subject to the Insurance Gross Premiums Tax. But they are subject to the Minnesota Franchise (Corporate Net Income) Tax. The effect therefore of the Commissioner's position is to subject the amounts retained by the agent to both the insurance Gross Premiums Tax (with STG as the taxpayer) and the Franchise Tax (with the agents as the taxpayers), producing a form of duplicative taxation. In First American Title Insurance Co. v. State Department of Revenue, 27 P.3d 604 (Wash. 2001), the issue was whether amounts retained by title insurance agents (UTC's) should be included in the computation of the insurance company's B&O (Business & Occupation) tax. The Washington Supreme Court affirmed the Court of Appeals, which had held that the amounts retained by agents should not be included in the tax computation of the insurance company because the insurance company and the agents were "distinct retailers with the UTC's providing abstracting services and First American providing title insurance." First American, 27 P.3d at 606. The Washington Supreme Court observed that the tax assessed by the Commissioner "duplicated" the B&O tax already paid by the UTC's. Id. at 605. In other words, the court observed that the effect of the Washington Revenue

E. Since the Funds Retained by Agents Are Not for Insurance, They Are for “Other Related Services” Which Are Expressly Excluded from Taxable Gross Premiums.

That the amount retained by title agents are not “charges for insurance” and are therefore not included in the definition of gross premiums is, further, bolstered by, and is consistent with, the final sentence of the “gross premiums” definition. The final sentence states,

Gross premiums of a title insurance company does not include any other charge or fee for abstracting, searching, or examining the title, or escrow, closing, or other related services.³⁸

The word “related” is not defined in the statutes so its common meaning governs. According to Webster’s New Twentieth Century Dictionary (Unabridged) 1525 (2d ed. 1978), the common meaning of the word “related” is “connected; associated.” Thus, a service should be regarded as a “related service” if it is “connected” or “associated” with abstracting, searching, or examining the title, or escrow or closing services. The services for which title insurance agents retain payment most certainly are so connected and associated.

After title insurance agents perform title searches, they “analyze and evaluate what the search has revealed and issue a written report called a ‘commitment.’”³⁹ In preparing the commitment, title agents reflect on the results of the title searches to make “risk

Department assessment was to tax both the insurance company and the agent on the same receipt and that doing so was unfair.

³⁸ Minn. Stat. § 297I.01, subd. 9 (emphasis added).

³⁹ A-011 to A-012 (Stip. ¶ 12).

assessment decisions which are part of an analytic and evaluative process.”⁴⁰ It is for these services that the title agents retain money.

It is indisputable that without a title search and examination, the title agent would be unable to conduct his analysis and prepare the commitment. Accordingly, it is also indisputable that the title agent’s analysis, evaluation, risk assessment decision making, and eventual writing of the commitment are “connected” and “associated” with its searching and examination services. Therefore, the title agent’s contractual obligations to conduct the analysis and prepare a commitment constitute “other related services” within the context of the gross premiums definition.

Thus, the two sentences in the definition of “gross premiums” pertaining to title insurance are consistent. The statement that the charges for other services are not to be included as gross premiums in the final sentence of the definition, bolsters and clarifies the previous sentence that gross premiums only include charges for insurance.

At pages 18 to 19 of its opinion, the Tax Court determined that the amounts retained by the agents could not be for “other related services” because they constitute payment for “due diligence.”⁴¹ Due diligence, the court held, “is not similar to examining the title, or escrow, closing, or other related services because due diligence helps spread or transfer the risk.”⁴² The Tax Court cited Ticor Title Insurance Co. v.

⁴⁰ Id.

⁴¹ See A-196 to A-197 (Tax Court Order 18-19).

⁴² Id.

FTC, 998 F.2d 1129, 1134 (3d Cir. 1993), in support of this conclusion. In Ticor, however, the Third Circuit Court of Appeals stated: “The title search and examination does not itself spread or transfer risk. At most, title searchers identify defects of title. Title searchers themselves have no power to insure against any risk they identify.”⁴³ “Due diligence,” or the services performed by STG’s agents prior to STG entering into a contract for insurance, helps spread or transfer the risk only to the same extent as “abstracting, searching, or examining the title” in that it identifies defects of title. Like abstracting, searching, or examining the title, preparation of the commitment does not itself insure against any risks.

Moreover, at page 19 of its opinion, the Tax Court cites paragraph 23 of the Stipulation of Facts for the proposition that “[i]f the agent charges for a service other than title insurance, the charge is separately stated from title insurance on the closing statement.”⁴⁴ The record does not support the Tax Court’s statement. Paragraph 23 of the Stipulation states:

23. The Agent typically collects the title insurance premium at the time of the closing. At the same time, the Agent may also collect other charges for services provided by the Agent to the customer. These include, for example, abstracting, Title Search, escrow, and closing fees. These fees are also disclosed to the customer by means of entries on the Closing Statement.⁴⁵

⁴³ Ticor Title Ins. Co., 998 F.2d at 1134.

⁴⁴ See A-197 (Tax Court Order 19).

⁴⁵ A-013 (Stip. ¶ 23).

The Stipulation does not support the Tax Court's inference.

STG's agents do not in fact separate out on the closing statement that portion of the fees which they will remit to Stewart as a charge for insurance and that portion of the fees that they retain as charges for the services they perform. But the statute does not refer to the way in which title insurance agents list charges on a closing statement.⁴⁶ If the legislature wanted to base the tax on what was listed on the closing statement, it could have easily done so by defining gross premiums in terms of what appears on a closing statement. This is not what the Legislature did. Instead, the legislature specifically stated that title searching, abstracting, and other related services are not included in gross premiums.

II. THE TAX COURT ERRS IN ITS CONCLUSION THAT FUNDS RETAINED BY AGENTS ARE TO BE INCLUDED IN TAXABLE GROSS PREMIUMS.

A. The Tax Court Errs by Ignoring the Statutory Definition of Insurance.

The Tax Court fails to consider the statutory definition of insurance in its opinion. In analyzing section 60A.15, effective for the 2000 tax year, the Tax Court does not include in its analysis the definition of insurance which the Legislature provided for the gross premiums tax.⁴⁷

⁴⁶ See *infra* pp. 31-34.

⁴⁷ See A-186 to A-190 (Tax Court Order 8-12).

The Tax Court addresses the language of the statute effective for 2001 and 2002 at pages 13-20 of its opinion.⁴⁸ At pages 14-15, the Tax Court again neglects to consider the definition of insurance which the Legislature provided, just as it had done when analyzing the statute effective for 2000.⁴⁹ Because every law shall be construed to give effect to all of its provisions,⁵⁰ the Court erred as a matter of law.

B. The Tax Court's Conclusion that the Taxable Gross Premium Is the Total of the Title Insurance Premiums Paid by Consumers to Obtain Title Insurance Is Not Supported by the Statute.

The Tax Court, in both its analysis of the 2000 version of the statute⁵¹ and the 2001-2002 version,⁵² declares in conclusion that the taxable “gross premiums are the total of the title insurance premiums paid by consumers to obtain title insurance”⁵³

The Legislature enacted no such language. The Tax Court's focus on “total consideration paid” is contrary to the plain language of the statute, which in 2000 imposed a tax on “gross premiums . . . received by the insurer,” and in 2001 and 2002 on

⁴⁸ See A-191 to A-198 (Tax Court Order 13-20).

⁴⁹ See A-192 to A-193 (Tax Court Order 14-15).

⁵⁰ Minn. Stat. § 645.15; see also Minn. Stat. § 645.17(2) (“[T]he legislature intends the entire statute to be effective and certain.”).

⁵¹ See A-188 to A-189 (Tax Court Order 10-11) (“[T]he gross premiums are the total of the title insurance premiums paid by consumers to obtain title insurance from Stewart”). The statute, however, is not this broad.

⁵² See A-193 (Tax Court Order 15) (citing Stip. ¶ 22) (“As discussed above, the facts show that the entire amount quoted, charged and paid by the customer is for title insurance.”).

⁵³ A-188 to A-189 (Tax Court Order 10-11) (emphasis added).

the “charge for title insurance.”⁵⁴ By looking to dictionary definitions and omitting relevant statutory analysis, the Tax Court effectively broadens the scope of the statute by shifting the focus away from what the insurer receives as a charge for insurance to what the insured (a buyer or lender) pays to obtain a title insurance policy. Doing so is quite contrary to the language of the 2001-2002 version (which was a clarification and recodification of the earlier version).⁵⁵

Possibly, the Tax Court is applying the first sentence of the 2001-2002 recodified gross premiums definition, which states that gross premiums means “total premiums paid by policyholders.”⁵⁶ The first sentence, however, is not applicable to title insurance companies. In contrast, the third sentence is applicable to title insurance companies. It provides a different definition of “gross premiums” specifically for title insurance companies. In the third sentence, the Legislature provides that for title insurance companies, “gross premiums” means “the charge for title insurance,” not “total premiums paid.”

Had the Legislature wanted to tax the entire amount a consumer pays for a title insurance policy, rather than the amount the insurer receives for insurance, it could have stated so. It could have enacted a gross premiums definition for title insurance companies to the effect that the gross premium consists of the “total consideration paid.”

⁵⁴ Minn. Stat. § 60A.15, subd. 1 (1998); Minn. Stat. § 297I.01, subd. 9 (2000) (2002).

⁵⁵ See supra p. 9.

⁵⁶ See Minn. Stat. § 297I.01, subd. 9 (2000) (2002) (emphasis added); supra p. 8.

When such is its intention, it knows how to express itself. It is noteworthy that the Legislature used the term “charge” for “insurance,” a term consistent with its intention that only the insurance portion of the premium be subject to tax rather than the more expansive language that it had, one sentence before, employed as to bail bonds. As to bail bonds, the Legislature defined gross premiums as “the total consideration paid to bail bond agents.”⁵⁷ It made no reference to total consideration paid to agents in regard to title insurance. Instead, it refers only to the “charge” for “insurance.” Thus, the Legislature specifically limited the scope by placing the tax only on what is received for insurance. As shown above, the term “insurance” refers to the agreement to indemnify. The Tax Court’s analysis is flawed and its conclusion erroneous because they are inconsistent with the terms of the statute imposing the tax.⁵⁸

C. **The Tax Court Relied on the Fact that Both the Funds Retained by Agents and the Funds Remitted to STG for Insuring the Title Are Included in the Rates Filed with the Commissioner of Commerce to Conclude that Both Parts Are Therefore Taxable. The Tax Court’s Conclusion Has no Basis in Fact and Is Not Supported by the Language of the 2001-2002 Statute.**

As part of its erroneous thinking in its analysis of the 2001-2002 version of the Gross Premiums Tax statute, the Tax Court at pages 15-16 of its opinion concludes that,

⁵⁷ See Minn. Stat. § 297I.01, subd. 9 (2000) (2002) (emphasis added).

⁵⁸ Hutchinson Tech., Inc. v. Comm’r of Revenue, 698 N.W.2d 1, 8 (Minn. 2005) (“[W]e will not add requirements to the statute beyond those specified by the legislature.”); Dahlberg Hearing Sys., Inc. v. Comm’r of Revenue, 546 N.W.2d 739, 743 (Minn. 1996) (refusing to add requirements to a taxing statute because that task is properly left to the legislative branch); Green Giant Co. v. Comm’r of Revenue, 534 N.W.2d 710, 712 (Minn. 1995) (“We will not supply that which the legislature purposefully omits or inadvertently overlooks.”).

since funds retained by the agent and funds remitted to STG for insuring the title are both included in the premiums reflected in the rates filed with the Commissioner of Commerce, the Legislature intended that the retained amounts be included in gross premiums for taxation purposes.⁵⁹

This conclusion is not supported by the Stipulation of Facts or the statutory definition of “gross premiums.”

It is not supported by the Stipulation of Facts because ¶ 37 of that stipulation merely provides:

37. The rates filed with the Commissioner of Commerce include both the portion of the premium remitted to Stewart by agents under their contracts with Stewart and the premium retained by Agents.⁶⁰

The stipulation thus establishes that the filed rate reflects premiums consisting of two parts—the portion received by insurer and the portion retained by the agent. The Tax Court seems to suppose that the analysis ends there. In this, it errs. Since the premium per the rate filing consists of two parts, the analysis only begins where the Tax Court ended its analysis. Since the premiums consist of two parts, the issue is whether the Legislature intended to tax both parts.

The portion sent to STG is to compensate STG for assuming the risks on the title insurance policy. STG uses it to fund its insurance reserves and covers administrative

⁵⁹ See A-193 to A-194 (Tax Court Order 15-16).

⁶⁰ A-015 (Stip. ¶ 37).

and operating expenses.⁶¹ This is the portion of the premium for “insurance,” as defined in the statute for all the years at issue.⁶² Only it is the portion pertaining to the insurer’s “agreement . . . to indemnify another.”

The Tax Court took a “broad definition” approach when, in fact, the Legislature enacted a narrow definition of gross premium for title insurance companies—“the charge for title insurance made by a title insurance company or its agents according to the company’s rate filing.”⁶³ In so doing, the Legislature intended to tax only that part of the premium per the rate filing that actually related to the contract of insurance.

The Legislature could have, but did not, frame the definition more broadly. It could have, for example, defined gross premiums for title insurance companies as the “entire amount paid for the premiums shown on the company’s rate filing approved by the commissioner of commerce.” It could have defined it as the “total consideration for title insurance paid to a title insurance agent, according to the rate filing approved by the commissioner of commerce.” It did not. It restricted its definition to that portion of the premium referred to in the rate filing which constitutes the “charge” for “insurance.” It, moreover, defined insurance narrowly as the agreement to indemnify.

⁶¹ A-014 (Stip. ¶ 26).

⁶² See supra pp. 6-10.

⁶³ Minn. Stat. § 297I.01, subd. 9 (2000) (2002).

D. The Tax Court's Apparent Reasoning that NAIC Regulatory Reporting Methods Were Intended by the Legislature to Define the Gross Premiums Subject to Taxation Is Not Supported by the Language of the Statute.

At page 11, note 48, the Tax Court, in support of its conclusion that the total of the title insurance premium paid by the consumer is the correct taxable amount, refers to the NAIC insurance regulatory reporting regime.⁶⁴ It states that “the gross premiums are the same amounts that Stewart is required to report to the NAIC on Schedule T.”⁶⁵ It goes on to state “[t]hese ‘direct premiums written,’ are defined as the entire premium amount charged to consumers at closings, exclusive of escrow services, regardless of whether only a portion of these premiums is remitted to the insurer.”⁶⁶

NAIC, the National Association of Insurance Commissioners, is an association of state insurance regulatory agencies. It was formed, *inter alia*, to establish uniform standards for reporting of financial data to State Insurance Departments.⁶⁷ For a number of years, NAIC forms have required insurers to report, for insurance regulatory purpose “direct premiums written” on a form known as NAIC Schedule T.⁶⁸

⁶⁴ See A-189 (Tax Court Order 11 n.48).

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ See CUNA Mut. Ins. Soc’y v. Comm’r of Revenue, 2001 WL 1009290, at *4 n.8 (Minn. Tax Ct. Aug. 31, 2001), rev’d on other grounds, 647 N.W.2d 533 (Minn. 2002).

⁶⁸ The Schedule T of STG for the 2000 year is part of the Stipulation of Facts, Attachment 5 (the 2000 Return of STG). See A-090.

The Tax Court erred in concluding that NAIC reporting somehow defines what the Legislature intended to tax. First, language making NAIC reporting part of the definition is not to be found in the 2000 version of the statute, which contains no definition of gross premiums.⁶⁹ Nor is such language to be found in the 2001-2002 version.⁷⁰

The Legislature could have easily enacted language specifying that NAIC regulatory standards define the taxable gross premiums. For example, it could have defined the “gross premium” for title insurance companies as “direct premiums written as shown on Schedule T of the Company’s annual report filed with the NAIC.” Instead, it provided no definition of gross premium prior to the 2001 year. In the recodification first effective in 2001, the Legislature defined gross premium for title insurance companies as the “charge” for title “insurance” according to the rate filing. It is therefore evident that it did not have NAIC reporting in mind at all.

The Tax Court may not add terms to a tax statute which the Legislature did not enact.⁷¹ It did so by presuming that NAIC reporting was part of the definition of gross premiums.

Second, the Tax Court erred in concluding that NAIC reporting defines what is taxable because it is apparent that the NAIC regulatory reporting regime is ill-suited for tax purposes. It is regarded as separate and distinct in purpose from gross premiums

⁶⁹ See Minn. Stat. § 60A.15, subd. 1 (1998); supra p. 6.

⁷⁰ See Minn. Stat. § 297I.01, subd. 9 (2000) (2002); supra p. 8.

⁷¹ See supra note 58 and accompanying text.

taxation. Indeed, the instructions to Schedule T disassociate reporting of “direct premiums written” for rate regulation purposes from the amount to be reported for gross premiums tax purposes.⁷² The instructions clearly state that the states vary regarding their regulatory reporting requirements and, further, state:

The data reported in Schedule T of the annual statement is not intended to be used for the calculation of the amount of premium tax due. In the event the basis used for the calculation of premium tax differs from the basis required for reporting in the annual statement as defined in this instruction, the company should submit to the respective state insurance department or other premium tax collection agency a separate schedule to support its premium tax calculation.⁷³

The Court in Stewart Title Guaranty Co. v. State Tax Assessor, discussed supra at pages 13 to 15, rejected arguments by the Assessor that STG should have reported the amount of direct premiums reported on NAIC Schedule T, which would include the amounts paid to agents.⁷⁴ The court recognized that NAIC insurance regulatory reporting differs from gross premiums tax reporting and held that only the amounts STG received for actual title insurance coverage were to be included in the computation and that amounts retained by agents for the services they perform under their contracts with STG should not be.⁷⁵

⁷² See A-029 to A-030. The instructions to Schedule T are part of the Stipulation of Facts, Attachment 3. See A-029 to A-032.

⁷³ A-030 (emphasis added).

⁷⁴ 2005 WL 2723026, at *3 (A-206).

⁷⁵ See id. at *1, *3 (A-204, A-206).

Plainly, the Legislature did not enact the definition of gross premiums or “direct premiums written” as defined for NAIC regulatory reporting purposes. The Tax Court erred as a matter of law in thinking so.

E. The Legislature Did Not Define Gross Premiums by Referring to How Title Insurance Charges Appear on HUD Real Estate Closing Statements.

At several points in its analysis, the Tax Court refers to title insurance charges as they appear on HUD real estate closing statements.⁷⁶ At page 11 of its opinion in discussing the 2000 version of the statute, the Tax Court states that the “entire Title [*sic*] Premium paid to the agent is for title insurance,” and cites as authority paragraph 22 of the Stipulation of Facts.⁷⁷ Paragraph 22 provides:

22. At the time of closing, the Agent discloses the title insurance premium to the customer on a HUD-1 settlement statement or other closing statement (collectively, “Closing Statement”). The amount listed on the Closing Statement for “Title Insurance” represents the total consideration the Agent collects from the customer for title insurance, consistent with HUD reporting requirements.⁷⁸

On pages 14-15 of its opinion, this time with reference to the 2001-2002 version of the statute, the Tax Court agrees with an argument of the Commissioner that the amount stated on the closing statement as title insurance is the taxable “charge” for title

⁷⁶ See, e.g., A-187 (Tax Court Order 9) (observing that the agents were authorized and directed under their agency agreement with Stewart to collect the entire premium as listed on HUD closing statements).

⁷⁷ See A-189 (Tax Court Order 11 & n.49).

⁷⁸ A-013 (Stip. ¶ 22).

insurance.⁷⁹ On page 15, the Tax Court reiterates the conclusion it had reached as to the 2000 version of the Gross Premiums Tax statute that the entire amount paid by the customer for title insurance is the taxable charge for insurance, again referring to Stipulation paragraph 22, which describes HUD closing statements.⁸⁰

The Tax Court's view is unsupported by the language of the statute. The 2000 version of the statute contained no definition of gross premiums at all and certainly contains no reference to HUD closing statements.⁸¹ The 2001-2002 version contains a definition of "gross premiums,"⁸² but it contains no reference to HUD reporting requirements.

The HUD closing (or "settlement") statement referred to by the Tax Court and mentioned in paragraph 22 of the Stipulation of Facts is a form prescribed by the Department of Housing and Urban Development under the Real Estate Settlement Procedure Act, 12 U.S.C. §§ 2601-2617 (2001). The Real Estate Settlement Procedure Act ("RESPA") was enacted in 1974, for the purpose of making changes in the settlement

⁷⁹ See A-192 to A-193 (Tax Court Order 14-15).

⁸⁰ See A-193 (Tax Court Order 15 & n.56).

⁸¹ See Minn. Stat. § 60A.15, subd. 1 (1998); supra p. 6.

⁸² See Minn. Stat. § 297I.01, subd. 9 (2000) (2002); supra p. 8.

process for residential real estate. It is a broad policy regulatory act dealing with issues having to do with real estate transactions.⁸³

One of the changes RESPA made was to create a more effective advance disclosure of settlement costs to homebuyers and sellers.⁸⁴ To that end, Congress in RESPA directed the Secretary of Housing and Urban Development to develop a standard form for the statement of settlement costs to be used in all transactions involving federally related mortgage loans.⁸⁵ The form is, as a general proposition, intended to be made available to the borrower/buyer at or before the settlement (closing) date.⁸⁶

The form that has been prescribed by HUD is that referred to by the Tax Court and Stipulation of Facts paragraph 22. The use of form HUD-1 is required for every RESPA covered transaction.⁸⁷ The form lists a number of possible cost items in a real estate transaction. One of them is title insurance.

There is no indication whatsoever that it was the intention of the Legislature to define “gross premium” for title insurance in terms of how title insurance appears as a charge in HUD closing statements. Indeed, it would have been difficult to do so because

⁸³ Consistent with that reality, Stipulation of Facts ¶ 22 states merely that the amount listed on HUD-1 for Title Insurance is the total the agent collects “consistent with HUD reporting requirements.” See A-013 (Stip. ¶ 22).

⁸⁴ See 12 U.S.C. § 2601(b).

⁸⁵ 12 U.S.C. § 2603(a).

⁸⁶ See 12 U.S.C. § 2603(b).

⁸⁷ See 24 C.F.R. § 3500.8(a).

“title insurance,” or for that matter “premiums” or “gross premiums,” are not defined in RESPA or in the HUD Regulations promulgated pursuant to it. Had it nonetheless desired to do so, the Legislature could have, for example, defined gross premiums for title insurance companies as “the amount appearing on the HUD settlement statement as the cost of title insurance.” It did not. There is no evidence whatsoever that the broad disclosure provisions of RESPA were intended by the Legislature.

It was, therefore, an error by the Tax Court to incorporate them into the definition of gross premium for tax purposes.⁸⁸

III. THE FUNDS RETAINED BY STG’S AGENTS FOR SERVICES ARE NOT “COMMISSIONS” WITHIN THE MEANING OF THE 2001-2002 STATUTORY DEFINITION OF GROSS PREMIUMS.

The version of the gross premiums tax statute applicable to the 2001 and 2002 years includes a provision that gross premiums means the charge for title insurance “without a deduction for commissions paid to or retained by the agent.”⁸⁹

At pages 16-18 of its opinion, the Tax Court, after observing that the term “commission” is not defined in the statute, chooses a particular dictionary definition which states that a “commission” is a fee for a transaction, usually a percentage of money

⁸⁸ See supra note 58 and accompanying text.

⁸⁹ See Minn. Stat. § 297I.01, subd. 9 (2000) (2002); supra p. 8.

from the transaction.⁹⁰ The court concludes that, since the agents were compensated on a percentage basis, what they retained was a “commission.”⁹¹

The Tax Court erred in this conclusion. First, it ignores the undisputed facts before the Court.⁹² Respondent filed a motion for summary judgment and in supporting it relied upon a transcript of a deposition of Steve Tierney, STG’s senior underwriting counsel and vice president. The Tax Court mentions in its opinion at page 17 that “Stewart argues that the retained portion is not meant to be a commission and is not called a commission.”⁹³ It does not mention, however, actual and uncontested Tierney deposition testimony placed before it supporting the summary judgment motions of the parties that, in the title insurance industry, the amounts retained by the agent are not referred to as a “commission.”⁹⁴ Specifically, that testimony was as follows:

Q Now, in our example again -- or strike that.

⁹⁰ See A-194 to A-196 (Tax Court Order 16-18).

⁹¹ See A-195 (Tax Court Order 17).

⁹² None of the facts in the Tierney deposition was disputed by the Commissioner. Indeed, he filed the transcript with the Tax Court and relied on it in support of his motion. See Papenhausen v. Schoen, 268 N.W.2d 565, 571 (Minn. 1978) (explaining that it is well settled in Minnesota that specific facts must be identified to present a triable issue of fact). Thus, the statements in the Tierney deposition comprise the undisputed facts upon which the conclusions of law in this case must be based. Moreover, on appeal, all evidence must be viewed “in the light most favorable to the party against whom summary judgment was granted.” State Farm Fire & Cas. v. Aquila Inc., 718 N.W.2d 879, 883 (Minn. 2006).

⁹³ A-195 (Tax Court Order 17).

⁹⁴ See Tierney Dep. 52:22-54:2.

When a policy is sold and the agent collects the premium, in our example this \$400, and remits 30 percent of that to Stewart, in our example of the amount referred to in the sample agreement, the other 70 percent is retained by the agent; is that correct?

A That's correct.

Q Would you refer to any portion of that 70 percent as a commission to the agent?

A No, I would not.

Q What is your understanding of what a commission to an insurance agent would be?

MR. MUCK: Are you asking the witness for a legal opinion?

MR. ANDERSON: No, no, unless he has one.

BY MR. ANDERSON:

Q Is the term "commission" used in your business?

A No.

Q It is not used?

A It is not used.

Q Are you familiar with how it's used -- do you have any opinion one way or another of -- or any knowledge one way or any knowledge of how it's used statutorily in Minnesota?

A No, I do not.

Q So you don't use the term yourself at all?

A. No, we never do. I never do. I never hear anybody in custom and practice use it in the business that I've been involved in.⁹⁵

Instead, the Tax Court at page 16 refers to Tierney's deposition testimony that the amounts received by the agent are the total compensation for the agent's services in

⁹⁵ Id.

connection with the issuance of the policy.⁹⁶ The court does not explain the relevance of the testimony to the question of whether the amounts retained by agents are a commission, on the one hand, or some other form of remuneration for services, on the other.

So, it is clear that the Tax Court ignores a direct and uncontested statement regarding the issue of whether the funds retained by agents are commissions and, instead, relies on some statement whose pertinence to the question is not clear.

Possibly, the unspoken assumption of the Tax Court was that whatever an agent receives in compensation, is a “commission.” This assumption is belied, however, by Minn. Stat. § 60K.48,⁹⁷ which in describing payments to insurance agents (referred to in the statutes as “producers”), refers to several ways in which agents can be compensated. A “commission” is only one of those ways. Other means of compensation referred to include “service fee,” “brokerage,” or the generic “other valuable consideration.”⁹⁸

⁹⁶ See A-194 (Tax Court Order 16 & n.58).

⁹⁷ Minn. Stat. § 60K.48, subdivision 1 provides:

Subdivision 1. Payment prohibited. An insurance company or insurance producer shall not pay a commission, service fee, brokerage, or other valuable consideration to a person for selling, soliciting, or negotiating insurance in this state if that person is required to be licensed under sections 60K.30 to 60K.56 and is not so licensed.

Minn. Stat. § 60K.48, subd. 1.

⁹⁸ See *id.*

Consequently, the Tax Court's pigeonholing of the funds retained by agents into the category of commissions is entirely unexplained and unjustified.

A second error of the Tax Court in concluding that the amounts retained by agents were commissions is to be seen in the particular definition of "commission" on which the court relies. The term "commission" is not defined in Chapter 297I. Thus, the Tax Court relies on two dictionary definitions that it selected when others were available. It refers on page 17 of its opinion to definitions from a Merriam Webster and Black's Law Dictionary⁹⁹ which suggested to the Tax Court that the defining characteristic of "commission" is that it is a percentage of the proceeds of a transaction.¹⁰⁰

⁹⁹ The sixth edition of Black's Law Dictionary defines "commission" as:

Compensation. The recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor, broker, or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. Weiner v. Swales, 217 Md. 123, 141 A.2d 749, 750. A fee paid to an agent or employee for transacting a piece of business or performing a service. Fryar v. Currin, App., 280 S.C. 241, 312 S.E.2d 16, 18. Compensation to an administrator or other fiduciary for the faithful discharge of his duties.

Black's Law Dictionary, 272 (6th ed. 1990). The eighth edition of Black's, the one on which the Tax Court relies, contains a shortened definition, which accordingly uses the term "usually" when referring to a percentage calculation. It should be viewed in light of the earlier editions from which it originated, which mention a percentage calculation as only one variation of a commission. Thus, Black's Law Dictionary should not be seen as establishing that the defining characteristic of a commission is that it is a percentage. Black's Law Dictionary 286-87 (8th ed. 2004).

¹⁰⁰ See A-195 (Tax Court Order 17 & nn. 60-61).

Other dictionaries, however, suggest the connotation of “commission” is compensation received in connection with sales activities. This can be seen in the common meaning of “commission” shown in another, widely used, dictionary:

In common usage, a “commission” is a percentage of sales price to a sales clerk or agent:

A percentage of the money taken in on sales, given as pay to a sales clerk or agent, usually in addition to salary or wages.¹⁰¹

The clear implication of this definition is that “commissions” are associated with sales work. Title insurance agents, however, “sell” policies only in the very loosest of senses. They clearly do not “sell” insurance like agents of other types of insurance do. What agents receive is compensation for actual work performed prior to the issuance of the policy, not for “selling” it.¹⁰² This is why the amounts actually retained by the agents are not referred to in the contract as “commissions.” They are instead fees for services. This is why “commission” is not a term used in the title insurance industry in referring to the funds retained by agents.

In any event, if there is confusion about what the Legislature meant by “commission,” it should be resolved in the taxpayer’s favor. When a key term in a statute is capable of more than one construction, it has been a long-standing practice of Minnesota courts to consider that term to be ambiguous.¹⁰³ When an ambiguous term is

¹⁰¹ Webster’s New Twentieth Century Dictionary (Unabridged) 364 (2d ed. 1978).

¹⁰² See supra pp. 11-12 & notes 17-18.

¹⁰³ See, e.g., BCBSM, Inc. v. Comm’r of Revenue, 663 N.W.2d 531 (Minn. 2003) (holding that when a term could reasonably be interpreted in more than one way, it

crucial to the applicability of the tax, it must be construed in favor of the taxpayer.¹⁰⁴ If the term “commission” is subject to multiple constructions and because that term is not used in the title insurance industry, its presence in the statute may well render it ambiguous. Should that be the case, it should be construed in favor of STG to exclude the funds retained by STG’s agents from its application.

Plainly, the Tax Court erred in finding the funds retained by agent to be commissions.

IV. THE LEGISLATURE DID NOT INTEND TO IMPOSE THE TAX ON FUNDS WHICH ARE NEVER RECEIVED BY A GROSS PREMIUMS TAX TAXPAYER.

Minn. Stat. § 60A.15, subd. 1(b) (1998), in describing the computation of the tax, states:

(b) Installments under paragraph (a), (d), or (e) are percentages of gross premiums less return premiums on all direct business received by the insurer in this state, or by its agents for it, in cash or otherwise, during such year.¹⁰⁵

The intention of the Legislature is therefore apparent that only amounts actually received by the insurance company are to be included in the computation.

renders the statute ambiguous); State ex rel W. Union Tel. v. Lord, 155 N.W. 1061, 1064 (Minn. 1916) (same).

¹⁰⁴ See BCBSM, Inc., 663 N.W.2d 531 (citing Dahlberg Hearing Sys., Inc. v. Comm’r of Revenue, 546 N.W.2d 739, 743 (Minn. 1996) and Northland Country Club v. Comm’r of Taxation, 241 N.W.2d 806, 807 (Minn. 1976) (concluding that while the commissioner’s interpretation of the statute was rational, the presence of crucial undefined terms will invoke the principle that tax statutes are interpreted in favor of the taxpayer)).

¹⁰⁵ Minn. Stat. § 60A.15, subd. 1(b) (1998) (emphasis added).

No change in law was intended in the Chapter 2971 recodification applicable to the 2001 and 2002 years.¹⁰⁶ The word “received” still appears in the language of the statute.¹⁰⁷

The only funds that come within the language “received by the insurer in this State, or by its agents for it” are the funds remitted to STG for taking all the policy risks. The funds retained by the agent are not received by STG in Minnesota. They are never received by STG at all.¹⁰⁸ Nor are they received by the agents “for it.” The agent received them for itself. The amounts to be received by STG are held in trust for STG until such time as the agent remits them to STG.¹⁰⁹ They are segregated and handled differently than the amounts retained by the agent.

The State of Maine has recently dealt with a very similar issue in Stewart Title Guaranty Co. v. State Tax Assessor, where STG appealed the action of the Maine State Tax Assessor in including funds retained by agents in the tax calculation.¹¹⁰

The Kennebec County Court held that “gross direct premiums” meant only that portion of property buyers payments which is attributable to insurance coverage.

The Maine Court remarked:

¹⁰⁶ See supra p. 9.

¹⁰⁷ See Minn. Stat. § 297L.05, subd. 1 (2000) (2001); supra p. 8.

¹⁰⁸ A-013 to A-014 (Stip ¶ 25).

¹⁰⁹ Id.

¹¹⁰ 2005 WL 2723026 (A-204 to A-206); see also supra pp. 13-15.

Finally, in the struggle between the arguments of each side, the position of the petitioner benefits from the always welcomed comfort of fairness and common sense. Taxing an insurance company on monies which it actually receives for the insurance coverage it provides is fair. Taxing it for payments for other services such as title searches, escrow fees and closing costs, for which it receives no benefits, or payment, would be unfair.¹¹¹

The Maine Court therefore held that only the amounts STG actually received for actual title insurance coverage were to be included in the computation and that amounts retained by agents for the services they perform under their contracts with STG should not be.¹¹²

Although the Tax Court acknowledges that STG contended that funds not actually received by it were not subject to tax,¹¹³ it addresses STG's contention only indirectly.

Its analysis as to the language effective in 2000 is contained at pages 9-10 of its opinion, where it reasons that, because STG's agents meet the statutory definition of "insurance agents" and because they "received" the amounts under authority STG gave them in its contract with them, those amounts are subject to the tax.¹¹⁴ The court's analysis, however, overlooks a crucial phrase in the statute: "received by the insurer in this state, or by its agents for it"; that is, "for the insurer."¹¹⁵

¹¹¹ 2005 WL 2723026, at *3 (A-206) (emphasis added).

¹¹² See id. (A-206).

¹¹³ See A-186 to A-188 (Tax Court Order 8-10) (discussing the 2000 tax year); A-192 to A-193 (Tax Court Order 14-15) (discussing tax years 2001 and 2002).

¹¹⁴ A-187 to A-188 (Tax Court Order 9-10).

¹¹⁵ See Minn. Stat. § 60A.15, subd. 1(b) (1998).

STG submits that the “for it” language in the context of title insurance suggest a recognition by the Legislature that the agent does not receive the entire amount of a title insurance charge for the insurer, only a portion of it. This recognition is certainly consistent with the nature of the risk a title insurance takes on and the historic separateness between the taking on of risk in the policy and activity which preceded it.¹¹⁶

The only amounts that STG’s agents receive “for it” are those amounts that the agents remit to STG. The rest of the amounts STG’s agents collect, and those at issue in this case, are those STG’s agents receive for themselves.

In addressing the 2001-2002 version of the statute (as recodified in Chapter 297I) at page 14 of its decision, the Tax Court erroneously focused on the phrase “made by” in the definition of “gross premiums.”¹¹⁷ The Tax Court determines that the definition of “gross premiums” permits taxation upon those charges “made” either by a title insurance company or by its agents.¹¹⁸ In this analysis, the Tax Court overlooks that the only amounts collected by STG’s agents that qualify as “charges for title insurance” are those that the agents remit to STG. When STG’s agents make charges and collect premiums for title “insurance,” a term that is defined by the statutes as the indemnification of risk, they remit those amounts to STG and STG pays the tax on those amounts. But when STG’s agents make charges for services they perform rather than for title insurance itself,

¹¹⁶ See supra pp. 10-13.

¹¹⁷ See A-192 (Tax Court Order 14).

¹¹⁸ See id.

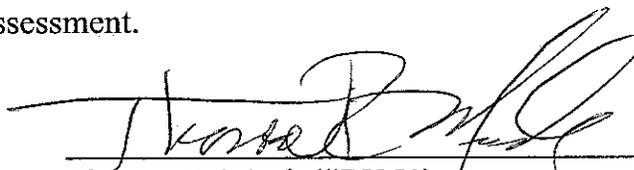
they retain those amounts. It is upon these retained amounts that the statute prohibits the state's imposition of the tax. Because the Tax Court overlooks this, its analysis is incomplete and erroneous.

CONCLUSION

The Tax Court's Order Should be reversed. This Court should order the entry of judgment dismissing the Commissioner's assessment.

Dated: _____

4/7/08



Thomas R. Muck (#75851)
Masha M. Yevzelman (#387887)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7000

ATTORNEYS FOR RELATORS

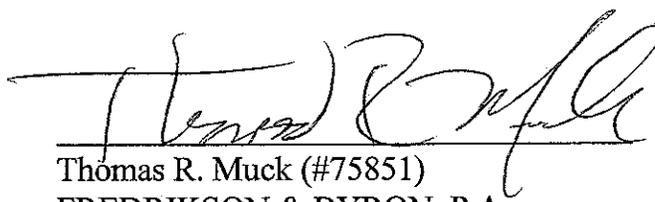
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CERTIFICATE OF COMPLIANCE

The undersigned, Thomas R. Muck, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the attached Brief And Appendix Of Relator Stewart Title Guaranty Company, Inc., is 11,556 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.

Dated: _____

4/7/08



Thomas R. Muck (#75851)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7045

ATTORNEYS FOR RELATORS
STEWART TITLE GUARANTY
COMPANY, INC.