

A08-429

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STATE OF MINNESOTA  
IN SUPREME COURT

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Stewart Title Guaranty Company,

Relator,

v.

Commissioner of Revenue,

Respondent.

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REPLY BRIEF  
OF  
RELATOR STEWART TITLE GUARANTY COMPANY

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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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**I. THIS APPEAL CONCERNS A STATUTE IMPOSING A TAX RATHER THAN A TAX EXEMPTION. THE STATUTE SHOULD THEREFORE BE CONSTRUED IN FAVOR OF THE TAXPAYER.**

At pages 14-15, the Commissioner states that this case concerns a tax exemption.<sup>1</sup>

The Commissioner is wrong. An exemption is an exception from a tax otherwise intended to be imposed by the Legislature.<sup>2</sup> No such thing is at issue here. Instead, what is at issue is a “taxing statute”—a provision in which the Legislature extended a tax to insurance premiums and, more specifically, the definition of the premium on which it intended to impose the tax.<sup>3</sup> Exemptions to the gross premiums tax are actually found in a separate section of the Minnesota Statutes—§ 297I.15. None of those provisions is at issue in this case.

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<sup>1</sup> At pages 14 to 15, the Commissioner frames one of the issues in this case as whether any portion of the amounts retained by STG’s agents is “exempt from the insurance premium tax.” At page 15, the Commissioner misstates STG’s argument: “Stewart Title broadly asserts that all agent-retained premiums are tax exempt.” See Respondent’s Brief 14-15 (emphasis added).

<sup>2</sup> An exemption is a secondary legislative judgment to take out of the coverage of a tax that which it has already determined should be taxed. In State v. City of Hudson, 42 N.W.2d 546, 549 (Minn. 1950), this Court described the concept of a tax “exemption” by distinguishing it from tax “immunity”: “exemption from taxation involves the supposition that the property so exempted otherwise would be subject to taxation.” See also State v. Goodman, 288 N.W. 157, 159 (Minn. 1939) (“[A]n exception in a statute exempts from its operation something that would otherwise be in it.”).

<sup>3</sup> See Dahlberg Hearing Sys., Inc. v. Comm’r of Revenue, 546 N.W.2d 743 (Minn. 1996) (holding that terms in the definition of “use” in sales/use tax are regarded as a taxing statute question); Dumont v. Comm’r of Revenue, 154 N.W.2d 196, 200 (Minn. 1967) (finding that the term “final notice” within a statute requiring notification of the Commissioner of federal adjustment to income within 90 days of a change presents a taxing statute question).

The distinction between a taxing statute and an exemption is important because, while exemptions are strictly construed against the taxpayer, any ambiguities in a law extending a tax are construed in the taxpayer's favor.<sup>4</sup> This Court in Charles W. Sexton Co. v. Hatfield stated that it was not "permitted to extend the scope of the tax-levying statute beyond the clear meaning of the language used."<sup>5</sup> This statement reflects a judicial conservatism born of a desire to defer to the Legislature if at issue is whether the Legislature intended to extend a tax or not.

Based on his premise that this case concerns an exemption, the Commissioner goes so far as to state that there must be a "plausible basis for suggesting that the entire premium should not be part of Stewart Title's premium tax base."<sup>6</sup> STG suggests, however, that in determining whether the Legislature, the branch of government responsible for the enactment of legislation, intended to impose the gross premiums tax on amounts retained by agents, the question before the Court is "why," in view of the terms of the statute, should the Court find that those amounts are subject to the tax. The question is not "why not."

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<sup>4</sup> See Northland Country Club v. Commissioner of Taxation, 241 N.W.2d 806, 807 (Minn. 1976) (quoting Charles W. Sexton Co. v. Hatfield, 116 N.W.2d 574, 580 (Minn. 1962) ("[W]here the meaning of a taxing statute is doubtful, the doubt must be resolved in favor of the taxpayer. We are not permitted to extend the scope of a tax-levying statute beyond the clear meaning of the language used.")).

<sup>5</sup> Charles W. Sexton Co., 116 N.W. at 580. This is, no doubt, the rule because of the separation of powers between the executive, judicial, and legislative branches of our state government. Taxation is uniquely and exclusively a legislative function. See Reed v. Bjornson, 253 N.W. 102, 104-106 (Minn. 1934).

<sup>6</sup> Respondent's Brief 16 (emphasis added).

**II. THE LEGISLATURE HAS NARROWLY IMPOSED THE GROSS PREMIUMS TAX ON THE CHARGE FOR TITLE INSURANCE RATHER THAN UPON THE SEVERAL ALTERNATIVE TAX BASES SUGGESTED BY THE COMMISSIONER.**

**A. The Gross Premiums Tax Is Imposed on the Charge for Title Insurance.**

The definition of gross premiums<sup>7</sup> effective for the 2001 and 2002 years (which the parties agree was not substantively different from the prior version of the tax which contained no definition of gross premiums<sup>8</sup>) provides:

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

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<sup>7</sup> Because the Legislature has specifically defined the term “gross premiums,” this Court does not need to guess what the Legislature meant in 1907 when it added the term “gross” to the premiums tax. The Commissioner’s discussion at page 9 of his brief of the legislative history of 1907, regarding the Legislature adopting a tax on “gross” rather than “net” premiums, is, therefore, moot with regards to the issue before this Court—what the Legislature meant by the definition of “gross premiums” that it enacted in 2001. In any event, although the Commissioner suggests that the Legislature’s use of “gross” instead of “net” means that the Legislature rejected the idea of any subtractions from a gross tax base, experience has been to the contrary. In the gross earnings tax context, for example, the Legislature provided that the “gross earnings” tax for express companies should be based on the entire receipts of the express company from business within the state, whether actually received or not, minus amounts the express company paid to railroads for the transportation of its freight. Minn. Stat. §§ 295.15, 295.21 (1978); see also Minn. Stat. § 295.34 (1978) (allowing telephone companies to not treat as “gross earnings” amounts paid to other companies for connecting and switching fees).

<sup>8</sup> See Respondent’s Brief 11.

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.<sup>9</sup>

In Relator's Brief of April 7, 2008, STG showed that the Legislature imposed a narrow tax on title insurance companies because the tax is limited to the "charge for title insurance,"<sup>10</sup> insurance having been defined by the Legislature as follows:

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.<sup>11</sup>

The Legislature accordingly intended to tax only the funds received by the insurer for its undertaking to indemnify another against loss or damage, not funds received by others for pre-insurance services.<sup>12</sup>

That the insurance premiums tax is imposed only upon the charge for insurance and not upon amounts retained by agents for pre-insurance services is corroborated by another provision in the definition of "gross premiums." The last sentence of the definition of "gross premiums" broadly excludes pre-insurance relationship services:

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<sup>9</sup> Minn. Stat. § 297L.01, subd. 9 (2000) (2002) (emphasis added).

<sup>10</sup> See *id.*; Brief of Relator Stewart Title Guaranty Co. 6–10 [hereinafter "Relator's Brief"].

<sup>11</sup> Minn. Stat. § 60A.02, subd. 3 (1998) (emphasis added); Minn. Stat. § 60A.02, subd. 3 (2000) (2002) (emphasis added).

<sup>12</sup> See Relator's Brief 6-22.

“any other charge or fee for abstracting, searching, or examining the title, or escrow, closing, or other related services.”<sup>13</sup>

Additionally, that the Legislature only intended to tax charges for insurance itself is consistent with the earlier version of the tax applicable to the 2000 year in which, to be taxable, the premium had to have been “received by” the insurer or its agents for it. As shown in Relator’s Brief, only the amounts the insurer receives are for insurance. The amounts retained by agents for pre-insurance services are never received by STG at all.<sup>14</sup> They are, moreover, not received by agents “for it.” The agents receive the funds for themselves.<sup>15</sup> The pre-2001 version of the statute, which the parties agree did not substantively change the law, is consistent with the later version and reflects the Legislature’s awareness that only amounts received by insurers are for insurance.<sup>16</sup> Both the old and the new versions of the statutes therefore recognize that funds retained by agents are not for insurance.

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<sup>13</sup> Minn. Stat. § 297I.01, subd. 9 (2000) (2002) (emphasis added); see also infra Part II. B, p. 7-9.

<sup>14</sup> Relator’s Brief 40-44; see also A-013 to A-014 (Stip. ¶ 25).

<sup>15</sup> See Relator’s Brief 40-44 (demonstrating that the phrase “received by the insurer . . . or by its agents for it” means that the amounts received by the agents for themselves are not subject to the insurance premiums tax).

<sup>16</sup> The Commissioner, at pages 12 to 13 of his brief, argues that the statutory requirement that the charges be actually received by the insurer impermissibly elevates form over substance. The Commissioner overlooks that the “received by” language contemplates substance—that only amounts received by the insurer are for insurance. Accord Stewart Title Guaranty Company v. State Tax Assessor, 2005 WL 2723026 (Me. Super. Ct. May 15, 2005).

All of this is consistent with an historic separateness between the insurer's transferring and spreading of risk and activities constituting pre-insurance services.<sup>17</sup>

The Commissioner has made no attempt to respond to STG's arguments. He has not suggested why the Legislature's definition of insurance does not require a decision in STG's favor. In fact, the Commissioner's only attempt at dealing with the actual language of the statute is found at page 20 of his brief. The Commissioner there states that including the amounts retained by agents along with the amounts received by STG yields the "only amount that is consistent with Stewart Title's rate filing with the commissioner of commerce."<sup>18</sup> This erroneous contention is refuted at pages 25 to 27 of Relator's Brief.<sup>19</sup>

In addition, the Commissioner misinterprets the statute because he contends at page 12 that amounts reported on STG's rate filing are "precisely what Minn. Stat. § 297I.01, subd. 9, and its predecessor defined as 'gross premiums' for tax purposes."<sup>20</sup> The Commissioner is wrong because the scope of the gross premiums tax is specifically

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<sup>17</sup> See Relator's Brief 13-17.

<sup>18</sup> Respondent's Brief 20.

<sup>19</sup> See Relator's Brief 25-27.

<sup>20</sup> Respondent's Brief 12.

limited to the charge for title insurance<sup>21</sup> and, explicitly and broadly in the final sentence of the definition, excludes charges for pre-insurance services.<sup>22</sup>

**B. The Legislature's Imposition of Tax Only on the Charge for Insurance Is Consistent with the Exclusion from Gross Premiums of "Any Charges or Fees for Abstracting, Searching, or Examining the Title, . . . or Other Related Services."**

At pages 19 to 20 of Relator's Brief, STG showed that by preparing a title report (called a commitment), title insurance agents perform "other related services" that are connected and associated with abstracting, searching, or examining the title within the last sentence of the definition of "gross premiums."<sup>23</sup> This is so because without a title search and examination, the title agent would be unable to conduct his analysis and prepare the commitment. Additionally, the drafting of the commitment is related to performing a title search, examining the title, and abstracting the title because they all constitute pre-insurance services. None of these activities constitute insurance itself, or an undertaking to indemnify another against loss or damage from specified causes.

At pages 19-21 of his brief, the Commissioner asserts the funds retained by the agents cannot be regarded as "charges or fees for . . . other related services" solely because, he contends, those amounts are a component of the gross premium.

The Commissioner errs in this contention. First, the Commissioner's argument begs the question. He assumes that his interpretation of the statute is correct—that the

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<sup>21</sup> See supra p. 3-4 and Relator's Brief 6-10.

<sup>22</sup> See infra Part II. B, p. 7-9.

<sup>23</sup> See Relator's Brief 19-20.

amounts retained by agents constitute charges for title insurance—to contend that they are therefore not “other related services.”

Moreover, the Commissioner’s argument is based largely on his view that HUD closing statement disclosure requirements define what is taxable. His contention is that since the amount retained by an agent is listed on HUD real estate closing statements as part of title insurance and is not separately itemized as a service, the Court should find that it is for title insurance rather than for an “other related service.”<sup>24</sup> That the Legislature did not define “gross premiums” via how charges for title insurance and for “other related services” appears on HUD closing statements is shown at pages 31 to 34 of Relator’s Brief and at pages 3-7 of this brief. The Legislature similarly did not define “other related service” with reference to what services appear separately itemized on a closing statement. HUD closing statements are simply nowhere mentioned in the definition of “gross premiums.” The Commissioner seeks to narrow the Legislature’s broad exclusion of any charges or fees for pre-insurance services in the final sentence of the definition by adding terms to the statute which the Legislature did not itself choose to enact.<sup>25</sup>

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<sup>24</sup> See Respondent’s Brief 20-21.

<sup>25</sup> The Commissioner would like the statute to state:

Gross premiums of a title insurance company do not include ~~any other~~ only those charges or fees that are separately stated on a closing statement for abstracting, searching, or examining the title . . . or other related services.

Moreover, the Commissioner misstates the facts when he repeatedly states that all charges that are for services performed by the agents, and not for title insurance, are stated separately on closing statements.<sup>26</sup> In support of this proposition, the Commissioner cites Stipulation of Facts paragraph 23, which provides:

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.<sup>27</sup>

The stipulation, therefore, only provides examples of charges that are disclosed to customers by means of separate entries on closing statements. Nothing in the stipulation of facts provides that all charges that are not for insurance are separately stated on the closing statement.

**C. The Legislature Did Not Impose the Tax on the Alternative Tax Bases Suggested by the Commissioner.**

The Commissioner, in an attempt to rewrite the language the Legislature enacted, has provided this Court with several different standards according to which he feels the base of the gross premiums tax should be determined. None comport with the language the Legislature enacted.

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<sup>26</sup> Respondent's Brief 5 (citing R.A. 13 (Stip. ¶ 23); Respondent's Brief 21 (citing R.A. 11, 13 (Stip. ¶¶ 24 [sic])).

<sup>27</sup> A-013 (Stip. ¶ 23) (emphasis added).

**1. The Legislature Did Not Impose the Tax on the Entire Amount Collected by a Title Insurance Agent.**

At page 1 of his brief, the Commissioner frames the issue to the Court as whether the gross premiums tax applies to “the entire amount of title insurance premium collected by a title insurance agent.”<sup>28</sup> But the Legislature defined the term “gross premiums” not broadly as “the amount collected by a title insurance agent,” but rather narrowly, as the “charge for title insurance,” or, in other words, the charge for the insurance itself. The Commissioner’s interpretation impermissibly expands the scope of the gross premiums tax to cover not only charges for insurance itself, but also charges for pre-insurance services.<sup>29</sup>

**2. The Legislature Did Not Impose the Tax on the Total Consideration Paid for a Contract of Insurance.**

At page 9 of his brief, the Commissioner provides yet another interpretation of the appropriate base for the gross premiums tax when he contends that the Tax Court in this case properly determined that the term “gross premiums” means “total consideration paid for a contract of insurance.”<sup>30</sup> STG showed that the Tax Court erred in this statement at pages 23 to 25 of Relator’s Brief.

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<sup>28</sup> Respondent’s Brief 1 (emphasis added).

<sup>29</sup> See *id.* at 12 (quoting *Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 8 (Minn. 2005) (“Rather than accepting ‘attempts to circumvent the direct and plain language of the statutes at issue, a court must give effect to plain statutory language.’”)).

<sup>30</sup> *Id.* at 9 (citing Tax Court Order 4); see also A-188 (Tax Court Order 10). In deciding that “gross premiums” means “total consideration paid for a contract of insurance,” the tax court relied on dictionary definitions of the terms “gross” and “premium.” Reliance on a dictionary is unwarranted in this case because the version of the statute relevant for

In concentrating on the amounts “paid” or “consideration paid,” the Commissioner has overlooked that when the Legislature wants to use those terms it does. In the first sentence of the recodified version (2001, 2002) of the definition of “gross premiums,” which does not apply to title insurance, the Legislature does refer to “total premiums paid by policyholders.”<sup>31</sup> And, the phrase “total consideration paid” is actually used in the definition of “gross premiums” that relates to bail bonds.<sup>32</sup> Had the Legislature wanted the definition of “gross premiums” to be the same for title insurance as it is for bail bonds (“total consideration paid”) then the Legislature would have so stated.

**3. The Legislature Did Not Impose the Tax on Gross Premiums as Defined by NAIC Regulatory Reporting Methods.**

The Commissioner, at pages 12 and 13 of his brief demonstrates the significance he places upon the amounts STG reports on its Schedule T filed with the NAIC. At page 13, for example, the Commissioner goes so far as to state: “the reporting requirements of Schedule T embody an established distinction in the title insurance field.” This, “established distinction,” however, was not recognized by the Legislature when it drafted

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tax years 2001 and 2002 (and which, as agreed by the parties, also defines the scope of the gross premiums tax in 2000) provides a definition of the term “gross premiums” as “the charge for title insurance.” Moreover, the dictionary cannot provide an accurate representation of what the Legislature meant by “gross premiums” because the Legislature has already made clear, by defining “gross premiums” differently in various contexts, that the phrase “gross premiums” has more than one meaning. See Minn. Stat. § 297I.01, subd. 9.

<sup>31</sup> See Minn. Stat. § 297I.01, subd. 9; Relator’s Brief 25 (emphasis added).

<sup>32</sup> See Minn. Stat. § 297I.01 subd. 9.

the insurance tax statutes. Had the Legislature desired to base the gross premiums tax on the amounts reported on an insurer's Schedule T, it would have stated so.<sup>33</sup>

**4. The Legislature Did Not Impose the Tax Upon Title Insurance Charges as They Appear on HUD Real Estate Closing Statements.**

Throughout his brief<sup>34</sup> the Commissioner suggests that the way charges to real estate buyers are listed on a HUD closing statements is relevant to determining the base of the gross premiums tax. The Commissioner states that “[t]here can be no doubt concerning what portion of the total amount is actually taxable premium. The identified title insurance premium will be subject to tax, but the separately stated charges for title searches and other related services will be non-taxable.”<sup>35</sup> The Commissioner thus seeks to adopt how various charges appear on a HUD closing statement as defining the gross premiums our Legislature intended to tax.

As shown by STG at pages 31 to 34 of Relator's Brief, the Legislature did not adopt HUD closing statement disclosure methodology as the test for determining the gross premiums it sought to tax. Indeed, it would have been difficult for it to do so because the regulatory disclosure policies behind RESPA did not require Congress to even define “premiums” or “gross premiums.” Consequently, transporting HUD

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<sup>33</sup> See Relator's Brief 28-31.

<sup>34</sup> See, e.g., Respondent's Brief 4 (stating that the amount listed on a HUD-1 settlement statement or other closing statement represents gross premiums for title insurance); *id.* at 20-21 (arguing that the amounts retained by agents are not charges or fees for “other related services” because they are not separately itemized on a closing statement).

<sup>35</sup> See *id.* at 14.

disclosure requirements into the taxation context, which calls for careful definition of terms, would have been unsuitable.

In addition, the Commissioner misstates the facts in the record when he cites paragraph 22 of the Stipulation of Facts. On page 20 of his brief, the Commissioner asserts that the parties have agreed that the total consideration agents collect for title insurance is shown on HUD closing statements, relying on Stipulation ¶ 22:

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 the HUD reporting requirements.<sup>36</sup>

Paragraph 22 (specifically the language underscored above) provides only that according to HUD reporting requirements the total consideration collected by agents is defined as being for title insurance. The Commissioner, however, erroneously suggests that it was so agreed for tax purposes. His assertion is contrary to the stipulated facts.

**D. The Cases Cited by the Commissioner at Pages 16 to 17 of His Brief in Support of His Interpretation of the Gross Premiums Tax Statute and Contrary to STG’s Interpretation Neither Support the Commissioner Nor Contradict STG.**

The opinions cited by the Commissioner at pages 16 to 17 of his brief as either supporting his assessment or contradicting STG’s contentions do not do either.

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<sup>36</sup> A-013 (Stip. ¶ 22) (emphasis added).

**1. The Opinions the Commissioner Cites as Contradicting STG's Position in Fact Support It.**

At pages 17 to 18 of his brief, the Commissioner cites two cases that he suggests are contradictory to STG's contentions: First American Title Insurance Co. v. Department of Revenue, 27 P.3d 604 (Wash. 2000), and Stewart Title Guaranty Co. v. State Tax Assessor, 2005 WL 2723026 (Me. Super. May 5, 2005). Both opinions, however, fully support STG's position in this case.

Stewart Title Guaranty Co., is discussed in Relator's Brief at pages 13 to 15 and 41 to 42. Without question, the Maine court held that amounts retained by agents were not subject to its tax on "gross direct premiums." Like the predecessor version of the Minnesota gross premiums tax, the Maine tax contained no definition of gross premiums. The Maine court found that amounts retained by agents for what it referred to as "other title services, such as title searches and examinations, preparation of title reports and policy issuance"<sup>37</sup> were not taxable gross direct premiums.

The Commissioner contends at page 17 that the Maine case is not relevant because the Maine statute did not address the issue of whether amounts retained by agents were taxable as gross premiums to the insurer. Nor did it, says the Commissioner, foreclose deduction from the tax base of commissions or insurance related services.

By this, the Commissioner is merely reasserting his erroneous view of Minnesota's statutes as a ground for distinguishing the Maine opinion. The Commissioner's arguments simply beg the question because the proposition the

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<sup>37</sup> Stewart Title Guar. Co., 2005 WL 2723026, at \*1 (emphasis added).

Commissioner advocates in this case—that amounts retained by agents are subject to the tax—is assumed by him as the premise for his attempt to distinguish the Maine opinion. The Commissioner’s arguments, therefore, amount to the assertion that the Maine case is distinguishable because he is right in this case.

In response to the Commissioner’s attempt to distinguish the Maine opinion on the grounds of the court’s perception of fairness, STG refers the Court to the quote from the opinion that it cited on page 42 of Relator’s Brief—that the taxpayer’s position benefits from “fairness” and “common sense.”

The other case cited by the Commissioner, but which supports STG, (First American) dealt with Washington’s B&O (Business and Occupation) Tax. STG cited this case in support of its contentions at page 18, footnote 37, of Relator’s Brief. The Court in First American held that amounts retained by title insurance agents (UTC’s) should not be included in the computation of the insurance company’s B&O tax.<sup>38</sup> The Court reasoned that only the title insurer provides insurance and that the agents provide pre-insurance services such as abstracting services and creating a title report.<sup>39</sup> The opinion thus highlights the separateness of the agent’s role in performing pre-insurance services and the role of the insurer in providing insurance—indemnification against loss or damage.<sup>40</sup>

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<sup>38</sup> 27 P.3d at 606.

<sup>39</sup> Id.

<sup>40</sup> See infra p. 19-20.

The Commissioner attempts at page 17 of his brief to distinguish First American on the ground that while at issue in First American was a double excise (B&O) tax, “[h]ere the Commissioner seeks to tax a title insurance premium only once.”<sup>41</sup> The Commissioner’s attempt to distinguish First American on this ground is surely made “tongue in cheek” because the consequence of the Commissioner’s position in this case is to produce a form of duplicate taxation, which the Legislature did not likely intend. The effect 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.<sup>42</sup>

**2. The Cases Cited by the Commissioner as Supporting His Position Are Not Relevant.**

The only case actually dealing with title insurance that was cited by the Commissioner as supportive of his assessment is Inter-County Title Guaranty & Mortgage Co. v. State Tax Commission, 269 N.E.2d 585 (N.Y. 1971). In Inter-County, however, the New York Court of Appeals based its decision on a statute that is much broader than Minnesota’s statute. The New York statute contained a very broad definition of the term “premium,” as including “all amounts received as consideration for insurance contracts . . . and shall include premium deposits, assessments, policy fees, membership fees, and every other compensation for such contract.”<sup>43</sup>

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<sup>41</sup> Respondent’s Brief 17.

<sup>42</sup> See Relator’s Brief 18 n.37.

<sup>43</sup> 269 N.E.2d at 586 n.4.

The Commissioner cites two bail bond cases in support of his assessment:

Stuyvesant Insurance Co. v. State Tax Commission, 332 N.Y.S.2d 314 (N.Y. App. Div. 1972),<sup>44</sup> and Groves v. City of Los Angeles, 256 P.2d 309 (Cal. 1953).<sup>45</sup> Bail bond cases are not relevant to the issues before this Court because bail bond premiums are treated much differently from title insurance premiums for gross premiums tax purposes by many states. The definition of “gross premiums” in Minnesota is significantly broader with regards to bail bonds than with regards to title insurance. For bail bonds, “gross premiums” includes “the total consideration paid to bail bond agents.”<sup>46</sup> Thus, the bail bond cases cited by the Commissioner are not persuasive.

**III. THE SERVICES PERFORMED BY STG’S AGENTS ARE PRIOR TO THE INSURANCE RELATIONSHIP BETWEEN STG AND ITS POLICYHOLDERS. THE AGENTS ARE NOT INSURERS THEMSELVES. THEIR SERVICES DO NOT SPREAD OR TRANSFER RISK.**

At pages 13-14, the Commissioner presents two themes which he attempts to weave into the proposition that amounts retained by STG’s agents for services completed prior to the commencement of the insurance relationship between STG and its

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<sup>44</sup> The analysis in Stuyvesant is also inapplicable to the issues before this Court because Stuyvesant was based the same broad definition of “premiums” as the one at issue in Inter-County, which encompassed all consideration received for insurance contracts. See 332 N.Y.S.2d at 315 (citing subdivision 1 of section 550 of New York’s Insurance Law); 269 N.E.2d at 586 n.4 (quoting subdivision 1 of section 550 as “all amounts received as consideration for insurance contracts”).

<sup>45</sup> The analysis in Groves is also inapplicable because it implicates a provision which imposed a tax on gross premiums but did not define the term. See generally 256 P.2d 309.

<sup>46</sup> Minn. Stat. § 297I.01, subd. 9.

policyholders should be seen as charges for insurance. Specifically, the Commissioner suggests at pages 13 and 14 that the agents are themselves insurers since they take on “risks” in issuing a policy. At pages 13 and 14, he also suggests that title search and examination do not “spread or transfer risk,” but that the activities of agents in issuing title reports/commitments do.

Neither of these themes withstands analysis.

**A. STG’s Agents Are Not Insurers.**

The Commissioner’s argument that the amounts retained by the agents are subject to the gross premiums tax is in part premised on the Commissioner’s belief that the agents assume risks under a title insurance policy.<sup>47</sup> The Commissioner therefore concludes that the amount retained by agents constitutes compensation for the assumption of insurance risks and is therefore taxable under the gross premiums tax.

The Commissioner’s conclusion is erroneous, however, because title insurance agents do not assume any risks under title insurance policies. They cannot. They are not parties to the policy. They do not enter into any agreements to indemnify buyers or lenders against loss or damage. Indeed, they could not enter into such agreements because they are not licensed as insurance companies. Rather, the agents perform pre-

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<sup>47</sup> See, e.g., Respondent’s Brief 14 (“[T]he customer pays a title insurance premium to compensate the insurer and its agent for the risks they assume in issuing the policy.”) (emphasis added); *id.* at 15 (“Stewart Title’s customers paid designated premiums to Stewart Title and its agents for assuming insurance risks.”) (emphasis added).

insurance services, including title search, title examination, and commitment drafting and risk elimination functions, for which they receive compensation.<sup>48</sup>

**B. The Role of STG's Agents Is Prior to the Commencement of the Insurance Relationship—Prior to When Risk Is Transferred to the Insurer and Is Spread and Assumed by the Insurer.**

The Commissioner correctly recognizes that insurance is the spreading and transferring of risk and the assumption of that risk by an insurer. For this proposition, he cites Ticor Title Ins. Co. v. FTC, 998 F.2d 1129 (3d. Cir. 1993), cert. denied, 510 U.S. 1190 (1994), at page 14 of his brief. In addition, at page 15 of his brief, the Commissioner cites National Council of Knights & Ladies of Security v. Garber, 154 N.W. 512 (Minn. 1915) for the proposition that premiums are “for the obligations assumed by the insurer.”<sup>49</sup>

The Commissioner fails, however, to recognize that only STG is the insurer, only STG enters into a contract for insurance, and only STG assumes the risk of incurring liability. The insurance risk is transferred only to STG. The insurance risk is spread only through STG.

The role of the agent is different and is prior to the assumption of risk by the insurer. The agent conducts a title search and examination. For this, the agent is compensated by the customer. The agent then prepares a title report, which is much like a title opinion of an attorney in presenting a description of the status of the title. For this,

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<sup>48</sup> See id. at 15 (acknowledging that title insurance agents perform complex tasks).

<sup>49</sup> 154 N.W. at 513.

and for performing the risk elimination process which defines the terms of the policy, the agent is allowed by STG to retain part of the amounts the agent receives from the insured. (The remainder is sent to STG for taking on the insurance risk.) All of these services are pre-insurance services, meaning that the agents perform them before STG, the insurer, enters into a contract for insurance with buyers of real estate and lenders.<sup>50</sup> The agent's activity is all before STG enters into the insurance relationship and takes on the insurance risk.

Consequently, the Commissioner's attempts to blur the role of the agent are unavailing. The activity of the agent is no more "part and parcel" of the insurance process, as the Commissioner puts it,<sup>51</sup> than title search and examination which was found not to be part of the business of insurance in Ticor.<sup>52</sup> This is why, STG submits, the services of agents are not part of the charge for insurance and are instead "other related services,"<sup>53</sup> which are expressly and broadly excluded from gross premiums for title insurance companies.<sup>54</sup>

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<sup>50</sup> As described at pages 13 to 17 of Relator's Brief, case law supports treating these services as separate and distinct from insurance itself.

<sup>51</sup> See Respondent's Brief 16.

<sup>52</sup> See Ticor Title Ins. Co., 998 F.2d at 1134, 1138; Relator's Brief 15-16.

<sup>53</sup> See Minn. Stat. § 297I.01 subd. 9; Relator's Brief 17-22; supra Part II. B, p. 7-9.

<sup>54</sup> Infrequently, STG issues a policy without the services of an agent. On its Minnesota returns, STG reported the entire amount it received from the customer and did not attempt to reduce it by some amount attributable to preparation of the title report. The amount of these "direct premiums" was small. They were \$25,185 in 2000, \$42,849 in 2001, and \$5,059 in 2002. See A-090; A-094; A-098. It is suspected that this occurred

#### **IV. AMOUNTS RETAINED BY TITLE INSURANCE AGENTS ARE NOT “COMMISSIONS.”**

The Commissioner has made no attempt at page 18 of his brief to refute STG’s arguments presented in Relator’s Brief at pages 34 to 40 that amounts retained by STG’s agents are not commissions.

There STG showed that the facts of the case on summary judgment are that the agent retained amount is not referred to as a “commission” in the title insurance industry.<sup>55</sup> This fact was not in any way contradicted by the Commissioner in the record on summary judgment. It is therefore an uncontroverted fact that amounts retained by STG’s agents do not constitute “commissions.” Consequently, the Commissioner’s argument is contrary to the facts before this Court and should be rejected.

Nor has the Commissioner attempted to answer STG’s showing in Relator’s Brief at pages 38 to 39 that the Tax Court was wrong as a matter of law when it concluded that amounts retained were a “commission” because the amounts retained are computed on a percentage basis. Because the term “commission” is undefined in the statute, the Tax Court relied on a dictionary definition which suggested that the defining characteristic of

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out of administrative convenience, even though it resulted in STG paying too much tax. Certainly, however, the statement of the Commissioner at page 16 of his brief that STG has “conceded” that the entirety of the direct premium is subject to tax is wrong.

<sup>55</sup> None of the facts in the Tierney deposition, quoted at pages 35 to 36 of STG’s Relator’s Brief, 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.

a commission was that it is a percentage of the proceeds of a transaction. As STG pointed out, however, other dictionaries suggest otherwise.<sup>56</sup> And, the insurance statutes themselves define a percentage commission as only one form of agent compensation.<sup>57</sup> All of these contentions have gone unanswered by the Commissioner who simply relies on a definition from Black's Law Dictionary.

Plainly, the Commissioner's contention and the holding of the Tax Court are wrong as a matter of fact and a matter of law.

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<sup>56</sup> See Relator's Brief 39. Should the Court find that the undefined term "commission" is unclear, it should decide the issue for STG. 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. 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 renders the statute ambiguous); State ex rel W. Union Tel. v. Lord, 155 N.W. 1061, 1064 (Minn. 1916) (same). And when an ambiguous term is crucial to the applicability of the tax, it must be construed in favor of the taxpayer. BCBSM, Inc., 663 N.W.2d 531 (citing Dahlberg Hearing Sys., Inc. v. Comm'r of Revenue, 564 N.W.2d 739, 743 (Minn. 1996); 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)).

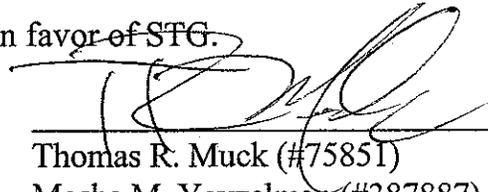
<sup>57</sup> See Relator's Brief 37 to 38.

CONCLUSION

The Tax Court's grant of Summary Judgment in favor of the Commissioner should be reversed and summary judgment awarded in favor of STG.

Dated: \_\_\_\_\_

5/27/08



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

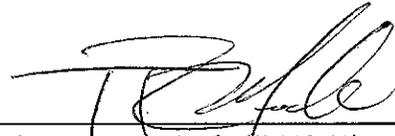
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**CERTIFICATE OF COMPLIANCE**

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 Reply Brief And Appendix Of Relator Stewart Title Guaranty Company, Inc., is 6,209 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: \_\_\_\_\_

5/27/08



\_\_\_\_\_  
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.