STATE OF WISCONSIN

TAX APPEALS COMMISSION

SPA INDOOR SPEEDWAY, LLC,

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO. 21-J-248

RULING & ORDER

JESSICA ROULETTE, COMMISSIONER:

This case comes before the Commission for decision on Petitioner's Petition for Review of a Declaratory Ruling by the Department, and the Department's Answer to that Petition. The Petitioner, SPA Indoor Speedway, LLC ("SPA"), of Pewaukee, Wisconsin, appears in this matter by Scott Doster and David Schultz, CPA, of Goossen & Schultz CPAS, LLP. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jeremy R. Lange. The Commission affirms the Department's Ruling.

FACTS

The Department submitted Proposed Findings of Fact as a part of its September 23, 2021 Brief in Opposition to Petition for Review, which were taken largely from the Petitioner's Petition for Review. The Petitioner does not object to the

Department's Proposed Findings of Fact in its subsequently filed pleadings. The Commission adopts the following Proposed Findings of Fact, which it considers relevant to this Ruling.[1]

1. The primary business of SPA is to lease (rent) go-carts to its customers and let the customers use its indoor racetrack located in Pewaukee, Wisconsin. (Proposed Facts from Respondent's Brief in Chief ("PFRBC") ¶ 1.)

2. The business started in 2015 when SPA leased a portion of a building, established the indoor racetrack, purchased go-carts, opened for business, and started renting go-carts. (PFRBC ¶¶ 2, 3.)

3. Prior to opening, SPA incurred expenses to build out the facility so that the rental business could begin. (PFRBC ¶ 4.)

4. Prior to and after opening, and on an ongoing basis, SPA incurred expenses to acquire go-carts for the purposes of leasing to customers. (PFRBC ¶¶ 5, 6 and 7.)

5. SPA does not charge an admission fee to enter its building or racetrack. Customers can enter without charge. Only customers who rent or lease a go-cart are charged. (PFRBC ¶ 8.)

6. SPA collects rental amounts and sales tax from its customers and remits to the Department sales taxes on the amount charged for the rental or lease of the go-carts. (PFRBC ¶ 9.)

[1] Edited as to form only.

7. On December 30, 2020, SPA requested a declaratory ruling from the Department that no sales tax is due on SPA's purchase of go-carts[2] in future years under Wis. Stat. § 77.52(1)(a), as interpreted by Wis. Admin Code Tax §11.29(3)(a) and (b), because SPA rents those go-carts to consumers and so is not the end user of the go-carts for sales tax purposes. (Petition for Review, Attachment 1, p. 1.)

8. On February 25, 2021, the Department issued a Declaratory Ruling which stated that, under SPA's business model, SPA is the end user of the go-carts and therefore cannot claim to be exempt from sales tax when it purchases go-carts for its business. (Petition for Review, Attachment 1, pp. 1-5.)

9. On April 26, 2021, SPA filed this Petition for Review with the Tax Appeals Commission. (Commission file.)

APPLICABLE LAW

Wis. Stat. § 77.51 Definitions.

(5) For purposes of subs. (13)(e) and (f) and (15a) and s. 77.52(2m), "incidental" means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; or something incidental to the main purpose of the service. Tangible personal property or items, property, or goods under s. 77.52(1)(b), (c), or (d) transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, items, or goods, even though the property, items, or goods may be necessary or essential to providing the service.

(15a)(b)3. "Sales, lease or rental for resale, sublease, or subrent" does not include any of the following: . . . Transfers of tangible personal property or items, property, or goods

[2] Go-carts and related equipment.

under s. 77.52(1)(b), (c), or (d) to a service provider that the service provider transfers in conjunction with the selling, performing, or furnishing of any service, if the tangible personal property or items, property, or goods under s. 77.52(1)(b), (c), or (d) are incidental to the service, unless the service provider is selling, performing, or furnishing services under s. 77.52(a)7., 10., 11., or 20.

Wis. Stat. § 77.52 Imposition of retail sales tax[3].

(1)(a) For the privilege of selling, licensing, leasing or renting tangible personal property at retail a tax is imposed upon all retailers at the rate of 5 percent of the sales price from the sale, license, lease or rental of tangible personal property sold, licensed, leased or rented at retail in this state, as determined under s. 77.522.

(2) For the privilege of selling, licensing, performing or furnishing the services described under par. (a) at retail in this state, as determined under s. 77.522, to consumers or users, regardless of whether the consumer or user has the right of permanent use or less than the right of permanent use and regardless of whether the service is conditioned on continued payment from the purchaser, a tax is imposed upon all persons selling, licensing, performing or furnishing the services at the rate of 5 percent of the sales price from the sale, license, performance or furnishing of the services.

> (a). The tax imposed herein applies to the following types of services: . . . 2.a. Except as provided in subd. 2.b. and c., the sale of admissions to amusement, athletic, entertainment or recreational events or places except county fairs, . . . and the furnishing, for dues, fees or other considerations, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities, including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights. . .
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> .

(2m)(a) With respect to the services subject to tax under sub. (2), no part of the charge for the service may be deemed a sale

[3] Wis. Stat. § 77.52(1)(b) refers to the taxation of transactions involving coins and stamps, Wis. Stat. § 77.52(1)(c) refers to the taxation of transactions involving property affixed to real property, and Wis. Stat. § 77.52(1)(d) refers to the taxation of transactions involving digital goods. This case does not involve any such transactions, and so those subsections of the statute do not apply here.

or rental of tangible personal property or items, property, or goods under sub. (1)(b), (c), or (d) if the property, items, or goods transferred by the service provider are incidental to the selling, performing or furnishing of the service, except as provided in par. (b). . . .

Wis. Admin. Tax § 11.29 Leases, license and rentals of tangible personal property and items, property and goods under s. 77.52(1)(b), (c), and (d), Stats.

(3) Purchases for lease, license, or rental.

(a) A lessor's or licensor's purchase of tangible personal property or items, property, or goods under s. 77.52(1)(b), (c), or (d), Stats., to be used solely for lease, license, or rental shall be exempt as a purchase for resale.

(b) A lessor's or licensor's purchase of lubricants, repair parts, and repair services for tangible personal property and items, property, and goods under s. 77.52(1)(b), (c), or (d), Stats., used solely for leasing, licensing, or renting shall also be exempt as a purchase for resale . . . .

DECISION

SPA has requested a review of the Department's Declaratory Ruling that SPA's purchase of go-carts in future years is taxable under Wis. Stat. § 77.52(1)(a), as interpreted by Wis. Admin Code Tax §11.29(3)(a) and (b). The Department ruled that SPA is selling a taxable admission to an amusement, entertainment, or recreational place, device, or facility, that the go-carts are transferred incidentally with its admission service, and thus, under SPA's business model, SPA is the end user of the go-carts and therefore cannot claim to be exempt from sales tax when it purchases go-carts for its business.

Standards to Be Applied

This case comes as a request for review of a declaratory judgment. Under Wis. Stat. § 227.41(5)(a), taxpayers are bound to the Department's declaratory rulings

"unless [they are] altered or set aside by the tax appeals commission or a court or the applicable rule or statute is repealed or materially amended."

As the final arbiter of questions of tax law, the Commission does not defer to the prior decisions of an agency, especially when that agency is a party holding an interest in its own decision. Wis. Stat. § 227.10(2g).[4] Therefore, we review the issue addressed in the Department's Declaratory Ruling *de novo* as a question of law.

In reviewing the application of an exemption, we look first at the wording which constitutes the exemption. Under the rules of statutory interpretation, we assume that the legislature's intent is expressed in the statutory language. "If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the language is clear and unambiguous on its face, we must construe the statute in accordance with its ordinary meaning and may not resort to extrinsic aids." *Id.*

The Commission is bound to construe exemptions strictly but reasonably in favor of taxation, with the burden of proof resting with the person claiming the exemption. Wis. Stat. § 70.109. The Commission will resolve any doubts regarding the exemption in favor of taxability. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶ 13, 302 Wis. 2d 245, 733 N.W.2d 322.

[4] Wis. Stat. § 227.10(2g). No agency may seek deference in any proceeding based on the agency's interpretation of any law.

Analysis

SPA's business offers customers access to a go-cart racing speedway, on which customers can race go-carts rented to them by the business. The Department ruled that SPA's initial purchase of go-carts, go-cart parts, and go-cart maintenance supplies is not exempt from sales tax, because SPA rents go-carts to customers as an incidental part of granting access to its racing speedway. SPA has requested a ruling that its initial purchase of go-carts, go-cart parts, and go-cart maintenance supplies should be exempt from sales tax, because SPA rents the go-carts to its customers. The analytical gap between the parties consists of the question of whether the central activity being paid for by the customer is the rental of a go-cart or admission for access to the speedway racing experience, for which rental of a go-cart is incidental.

Under Wis. Stat. § 77.52(1)(a), a retail sales tax is imposed on the sale of tangible goods. All such sales are presumed taxable, and the burden is on the taxpayer to prove the contrary, per Wis Stat. § 77.52(13).

SPA makes extensive reference to the provisions of Wis. Admin Code Tax §11.29(3)(a) and (b) to support its position that its initial purchase of go-carts, go-cart parts, and go-cart maintenance supplies are not subject to sales tax. That section of the Administrative Code provides that purchases of property "to be used solely for lease, license, or rental" shall be exempt as a purchase for resale. SPA also highlights language from Wisconsin Department of Revenue Publication 201, p. 48, which provides "[a] lessor's purchase of tangible personal property to be used solely for lease or rental, and not otherwise by the lessor, is exempt as a purchase for resale." As the Department notes,

this language no longer appears in the publication, and so it is not considered by the Commission in this forward-looking declaratory judgment. The question remains: Is SPA simply renting go-carts, or is SPA providing an admission to an amusement/recreational event involving a racing experience, for which SPA rents go-carts as required, incidental equipment?

The language of Wis. Stat. § 77.51(15a)(b)3. specifically provides that tax-exempt sales do not include transfers of tangible property to a service provider that the service provider transfers in conjunction with the selling, performing, or furnishing of any service, if the property is incidental to the service. In the context of this case, if the transfer of the go-carts to customers is incidental to the furnishing of a speedway racing experience (amusement admission), then SPA's purchase of the go-carts is not exempt from tax.

Wis. Stat. § 77.51(5) defines "incidental" as depending upon something else as necessary. That statute further clarifies that property transferred by a service provider is incidental to the service if the purchaser's main purpose is to obtain the service even though the property may be necessary or essential to providing the service. SPA offers admission to an indoor racing speedway to its customers. The fee it charges is called a rental fee for a go-cart.

There is no indication in the record that SPA offers go-cart rentals to customers who wish to haul the go-carts away to drive at a location chosen by the customer. There is no indication in the record that SPA provides a racetrack to which customers can bring their own go-carts by trailer for the purpose of racing. There is no

evidence that customers can use the speedway to ride bikes on or to compete in footraces. The speedway is available to race only rented go-carts. The Commission concludes that SPA offers a racing experience, for which SPA rents required "equipment," to-wit, go-carts.

The language of Wis. Stat. § 77.52(2)(a)2. provides for the taxability of the sales of admissions to amusement, athletic, entertainment, or recreational events or places, including access to or the use of amusement, entertainment, athletic, or recreational facilities. Wis. Stat. § 77.52(2m)(a) provides that "no part of the charge for the service may be deemed a . . . rental of tangible personal property or items, property, or goods under sub. (1)(b), (c), or (d) if the property, items, or goods transferred by the service provider are incidental to the selling, performing or furnishing of the services, except as provided in sub. (1)(b). . . ." SPA's contention that Wis. Stat. § 77.52(2)(a) exists independent of Wis. Stat. § 77.52(1)(a) is wrong.

In *Telemark Co. v. Dep't. of Taxation*, 28 Wis. 2d 637 (1965), the Wisconsin Supreme Court addressed whether gross income received by a ski hill from furnishing rides on ski tows is taxable as the furnishing for a fee of the privilege of having access to or the use of a recreational facility within the meaning of Wis. Stat. § 77.52(2)(a)2. *Telemark* is pertinent to the inquiry in the matter before the Commission for its discussion of whether a fee called one thing (in *Telemark*, a "lift ticket," in SPA a "go-cart rental fee") is functionally an admission fee. In *Telemark*, the ski hill operator did not charge "admission" to its parking lot, chalet, or recreational area. The operator did sell lift tickets to customers, which granted customers access to the use of rope tows and T-bar lifts. Even

though customers were able to ski on the hills without the purchase of a lift ticket, if they chose to climb the hill to reach the top of the ski runs, the court ultimately determined that the lift tickets were an admission fee taxable under Wis. Stat. § 77.52(2)(a)2. as a fee for access to the facilities *Id.* at 646. SPA's go-cart rental fee could be described as a similar fee for access to the speedway.

Publication 226, which addresses taxes applicable to golf course operators, explains the taxability of various transactions involving golf courses on page 20 of the publication: "If it is mandatory that customers use carts, regardless of whether such requirement applies part or all of the time, the golf course's purchases of the carts are taxable. If (1) it is always optional for a customer to use a cart, and (2) the golf course makes a separate charge for the cart or charges an increased fee for golfing with a cart, the golf course may purchase the carts exempt from tax, claiming resale." SPA requires use of its rented go-carts for customers who wish to use the speedway to race go-carts; it does not charge separately for the go-carts nor does it allow customers access to the track without renting go-carts. In the same way that the purchase of golf carts that are required to be used by customers renders the initial purchase of the golf carts by the golf course operator taxable, so too is SPA's initial purchase of the go-carts it requires to be used on its speedway taxable.

SPA argues that it does not charge admission to the building or racetrack. However, it does charge for use of the facilities. Spectators are not charged "admission" per se, but customers who race on the speedway are charged a fee. That fee is called a "go-cart rental fee." What SPA chooses to call the fee is not determinative of the nature

of the fee. The "rental fee" is what allows customers access to race go-carts on the speedway. Based on the facts supplied by the parties, customers cannot remove the go-carts from the premises for use elsewhere, and customers must rent SPA's go-carts to access the speedway. Based on the record before this Commission, SPA's "go-cart rental fee" serves the purpose of an admission fee for the use of the speedway to race the go-carts provided by SPA, and the use of the go-cart is incidental to that experience.

SPA argues that its rental of a go-cart to a customer is identical to Home Depot's rental of a tool to a customer. However, when a customer rents a tool from Home Depot, the customer removes the tool from the premises, uses the tool for an agreed-upon period of time, and then returns the tool to Home Depot. The use of the tool is not at all under the supervision of Home Depot. SPA's go-cart rental is not analogous to Home Depot's rental of a tool to a customer, because the go-carts are only rented for use on SPA's premises under SPA's supervision. SPA also likens its rental of go-carts to rentals of boats or jet skis. However, when a customer rents a boat or a jet ski, the customer takes the rented property away from the business for use on a waterway. There is no evidence that SPA rents go-carts for removal from its premises: these rentals are not analogous.

Both parties refer to *Thumb Fun, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-465 (1984). In *Thumb Fun*, an amusement park operator claimed that his purchase of rides, among other things, should be exempt from sales tax, because he did not charge admission to the park, but instead charged an admission fee for each ride or event. The park operator argued that those charges meant that he was actually renting the individual rides or events to his customers. The Commission concluded that the

petitioner did not meet his burden to prove the purchase of equipment, including go-carts, by an amusement park operator was exempt from sales and use taxes as property purchased for resale under Wis. Stat. § 77.51(4)(j) (1983-1984)[5]. The statute numbers have changed, but the conclusion of the Commission in this matter follows the conclusions reached by the Commission in the *Thumb Fun* case.

Both parties also refer to the Commission's opinion in *Paintball Dave's, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-103 (2008). Paintball Dave's, Inc. (PDI) claimed that its initial purchase of paintballs was exempt from taxation because PDI purchased paintballs for resale to its customers. PDI argued that paintball games could not be played without paintballs, so customers were paying both for admission and for paintballs. The Commission ruled that the paintballs were incidental to the sale of admission to PDI's premises for the purpose of playing paintball games. Similarly, SPA's provision of go-carts is incidental to its sale of admissions to its race track experience.

Finally, SPA contends that to hold its purchase of go-carts to be taxable would subject SPA to double taxation. The sales tax applies to the purchase at retail of go-carts, go-cart parts, and maintenance supplies. After the purchase, SPA earns taxable

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[5] The former statute reads in pertinent part: "'Sale,' 'sale, lease or rental,' 'retail sale,' 'sale at retail,' or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services and includes: The granting of possession of tangible personal property by a lessor to a lessee, or to another person at the direction of the lessee. Such a transfer is deemed a continuing sale in this state by the lessor for the duration of the lease as respects any period of time the leased property is situated in this state, irrespective of the time or place of delivery of the property to the lessee or such other person." This statute has been renumbered in the intervening years and is now contained in the subsections at Wis. Stat. §§ 77.51(15a)(a) and (b).

income by providing a taxable service, namely a speedway racing experience. Taxing two different activities involving the same items is not double taxation.

CONCLUSIONS OF LAW

The Department issued a Declaratory Ruling that "[SPA]'s purchase of go-carts, go-cart parts, and its expenses for go-cart repairs and maintenance are taxable. [SPA] is not leasing or renting go-carts to customers, rather [SPA] is selling a taxable admission to an amusement, entertainment, or recreational event, place, device, or facility. The go-carts are used by [SPA] in providing its taxable admission and are transferred incidentally with its admission service. As such, [SPA] is the consumer of the go-carts, go-cart parts, and go-cart repairs for sales and use tax purposes."

The exemption section at issue states that "no part of the charge for the service may be deemed a sale or rental of tangible personal property or items, property, or goods under sub. (1)(b), (c), or (d) if the property, items, or goods transferred by the service provider are incidental to the selling, performing or furnishing of the service, except as provided in par. (b). . . ." Wis. Stat. § 77.52(2m)(a). We conclude:

1. SPA offers a speedway racing experience to its customers, which is taxable as a service.

2. SPA's provision of go-carts is incidental to SPA's business, and therefore, no part of the charge for the service may be deemed a rental of tangible personal goods under Wis. Stat. § 77.52(2m)(a).

3. SPA is the end user of the go-carts it purchases, and so when SPA purchases go-carts, go-cart parts, and go-cart maintenance supplies, the purchase is at

retail and therefore subject to sales tax.

ORDER

The Declaratory Ruling issued by the Department on February 25, 2021, is hereby affirmed.

Dated at Madison, Wisconsin, this 24th day of January, 2022.

WISCONSIN TAX APPEALS COMMISSION

Elizabeth Kessler, Chair

Lorna Hemp Boll, Commissioner

Jessica Roulette, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is *https://wicourts.gov*.

This notice is part of the decision and incorporated therein.