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CIRCUIT COURT
DANE COUNTY, WI
2021CV000876

BY THE COURT:

DATE SIGNED: December 1, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

AMI Entertainment, Inc.,

Plaintiff,

v. case number 21CV876

State of Wisconsin Department of Revenue,

Defendant.

DECISION AND ORDER

This case comes to the Court for review of an agency decision. Petitioner, AMI Entertainment, Inc., seeks judicial review of Respondent, the State of Wisconsin Department of Revenue's denial of a refund request. The unusual procedural history before DOR is discussed in detail below. In sum, DOR denied AMI's claim for a refund of certain taxes, interest and penalties. AMI pursued review with the Wisconsin Tax Appeals Commission, which rejected AMI's request for a refund based on procedural bars. AMI then sought review under Wis. Stat. Ch. 227 bringing the Commission's decision to me for review. As the Commission's decision rested on erroneous facts and thus contained erroneous legal conclusions, I vacate that decision and remand for further proceedings before the Commission.

FACTUAL AND PROCEDURAL POSTURE

The following provides context to the issues. AMI provides trivia and music-related products to bars and restaurants. These products include music for digital jukeboxes and a trivia entertainment system. Bars and restaurants then provide and charge their patrons to use these products. AMI did not charge taxes on the transactions with its customers. I do not need to discuss or review the arguments

why AMI believed taxes were not owed on these sales or DOR's arguments to the contrary, as the Commission never reviewed those issues.

The procedural facts relevant to my review are as follows. DOR issued a "Notice of Field Audit Action" dated May 28, 2015 for the tax period January 1, 2008 to December 31, 2014. After its audit, DOR assessed against AMI "additional" sales and use tax of $479,775.75, interest of $215,658.48, a penalty of $119,943.95, and a late filing fee of $560 for a total assessment of $815,938.18 as of July 27, 2015. A delinquent tax collection ("DTC") fee was separately assessed after the due date lapsed and AMI had not paid the assessment. AMI paid the Department $868,974.16 in August 2015, which included the $815,938.18 initially assessed plus the DTC fee of $53,035.98.

AMI disagreed with these additional assessments and filed a Claim for Refund dated May 9, 2017. DOR recorded receipt of that claim on May 11, 2017 and received a supplemented version on May 19, 2017. Document 6[1] at 50-51 is the original Claim for Refund AMI sent on May 9, 2017. The supplemented version was identical to the original but was accompanied by DOR Form A-222, discussed further below.

In its Claim for Refund AMI never stated something to the effect of "AMI seeks a refund in the amount of $_____." Rather, AMI stated it sought a refund "to recover that amount of additional tax, interest, and penalties paid by AMI as a result of a field audit by the Department…" The Claim for Refund goes on to state "The May 28, 2015 Notice of Field Audit Action identified additional sales & use tax, interest and penalty in the amount of $815,938.18 as of July 27, 2015….AMI paid $868,974.16 in August 2015." The letter does not explain why the ultimate amount it paid was $868,974.16 and never specifically mentions or objects to the DTC, but does argue why AMI believes it is entitled to a refund on the other charges.

AMI's supplemental submission dated May 19, 2017, restated the claim for refund and submitted DOR Form A-222, Power of Attorney, designating attorneys Joseph Pickart and John Healy as its attorneys-in-fact to represent AMI before DOR on these issues. AMI checked a box instructing DOR to submit notices and written communications directly to its Attorney-in-fact. Because the content is the same, I use the term Claim for Refund to refer to AMI's submissions to DOR.

Upon receipt of the Claim for Refund, DOR employee Brandon Eichelkraut input AMI's claim into the DOR WINPAS computer system. Mr. Eichelkraut input the Claim for Refund as seeking a $53,035.98 refund. He explains that number as reflecting the difference between the $868,974.16 AMI paid and the $815,938.18 in additional sales & use tax, interest and penalty owed as a result of the audit. In other words, he believed AMI disputed owing the DTC. He entered the claim into the system based on the original Claim for Refund, so he did not note AMI's designated attorneys-in-fact. After DOR received the supplemental submission

[1] I refer to the court's document numbers and pagination reflected in the court's electronic file numbering.

designating AMI's attorneys-in-fact, DOR never updated the WINPAS system claim file to reflect the designation.

DOR assigned the Claim for Refund to auditor Cecilia Bajoon. She reviewed the claim over the course of months. On May 10, 2018, 364 days after DOR received AMI's claim, she issued a Notice of Field Audit Action ("Denial Notice") denying the Claim for Refund. The Denial Notice on page 1 stated in relevant part:

> Pursuant to sec. 77.59(4)(a), you are hereby notified that the Claim for Refund of $53,034.98 is denied for the following reasons: Please see Denial Explanations page for more information about your claim.

Dkt. 7 at 264. Page 2 was the Denial Explanations. This explained in more detail that DOR rejected AMI's arguments and explained taxes were due, that AMI was assessed a 25% non-filer penalty for not being registered with DOR to report sales taxes and other reasons, and that late fees were imposed pursuant to statute. Dkt. 7 at 265. DOR explicitly stated "The final determination at the time of the field audit remains the same." *Id.*

DOR did not send the Denial Notice to AMI's attorneys. DOR claims it mailed the Denial Notice to AMI directly, but, as discussed below, offers no evidence to support that claim. AMI submitted evidence that it did not receive the Denial Notice until June 2019 when Atty. Pickart learned about it. He then secured a copy of the Denial Notice from DOR on June 12, 2019. A series of communications ensued in which AMI asked when it would receive a refund for the $815,938.18 that DOR did not reject, as DOR only stated explicitly in its Denial Notice that the Claim for Refund of $53,034.98 was rejected. After some communications back and forth, on July 25, 2019, DOR issued a Second Notice of Denial which now said it denied the request for a refund in the amount of $868,974.16 and restated the remaining content of the original Denial Notice.

AMI treated the Second Notice of Denial as a redetermination and appealed that decision to the Commission on September 20, 2019. AMI also petitioned DOR for a redetermination of the Second Notice, which was denied, and then appealed that denial to the Commission. The Commission consolidated both cases.

Before the Commission, the review supposedly proceeded as one for summary judgment. The Commission granted DOR's motion and denied AMI's motion. The Commission found that the undisputed facts proved AMI received the Denial Notice in 2018 and failed to seek redetermination or review by the Commission in a timely manner. As such, it lost the right to seek review and the Denial Notice became final. The Commission also held that the error in the monetary amount stated in the Denial Notice was immaterial, as the content of that document made clear the entire amount assessed to AMI was denied for a refund. The Commission held that it was "abundantly clear that the Denial Notice rejects the entire Claim for Refund." While the Denial Notice mentioned the number $53,034.98, it specifically

stated that the claim was denied and said the denial was for the reasons stated in the Denial Explanations page. Those explanations make clear that "'[t]he final determination at the time of the field audit remains the same' followed by an extensive itemization of the various aspects of the original audit findings." Moreover, the Commission explained that the $53,035.98 was a late filing penalty and it would make no sense to deny refunding a late filing penalty while agreeing to refund all the amounts assessed that formed the basis for the late filing penalty when not paid timely. *See generally* Dkt 23.

STANDARD ON JUDICIAL REVIEW

Both sides agree on the standard of review I apply. I adopt AMI's recitation as follows, less the extensive emphasis AMI included:

> Review of agency determinations is governed by Wis. Stat. § 227.57. ("Scope of review"), providing that the "[t]he review shall be conducted by the court without a jury and shall be confined to the record." It further provides in relevant part that:
>
> > …
> > (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
> >
> > (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.
> >
> > (7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.
> >
> > (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional

> or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.
>
> (9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.
> …
> (11) Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law.
>
> *Id.*[]
>
> Reviewing courts review an administrative agency's interpretation and application of statutes de novo. *See, e.g. Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 753, ¶84, 82 Wis. 2d 496, 914 N.W.2d 21 ("[W]e will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo"). Review courts will set aside or remand a matter based on a factual deficiency when "the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." *See, e.g. Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶27, 264 Wis. 2d 200, 664 N.W.2d 651. "Substantial evidence" in this review context means "whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674.

Dkt. 28 at 13-14.

Neither side briefs what standards apply on summary judgment or if the standards were the same before the Commission as apply for summary judgment in a civil proceeding. Therefore, I assume that the same summary judgment standards apply as for a civil proceeding.

THE COMMISSION MADE ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT TAINTED ITS DECISION.

The Commission effectively ignored the standards applicable to summary judgment. It ignored certain uncontroverted facts. It assessed the credibility of affidavit testimony. It ignored portions of an affidavit as not credible but accepted other portions as undisputed, even though some of those were disputed. Because of these many errors in the Commission's review, Commission Findings of Fact 20 and 21 are erroneous. These errors undercut the remainder of the decision.

Of critical importance here, the Commission found as an undisputed fact that DOR sent AMI the Denial Notice and that this apparently occurred around the time DOR issued that decision in May 2018. The Commission thus concludes that AMI received notice of the Denial Notice sometime shortly thereafter, failed to appeal it and thus lost the right to review.

The Commission's finding of fact is wrong. Though one would think DOR could easily prove that it mailed the Denial Notice and one, as this seems an important thing to document, DOR utterly failed to do so. It offers no affidavit testimony from the person who mailed the Denial Notice saying that she placed the Notice in the mail on a specific date. Instead, in Ms. Bajoon's affidavit, Document 7 at 6-7, she states only that she "issued" the Denial Notice. That she "issued" the Denial Notice means nothing more than she wrote it out as the final decision of DOR. That she "issued" the decision does mean that she mailed it to AMI, much less when or how she did so. When AMI received the Denial Notice is critically important and receipt triggers the time to appeal. The Commission erred in concluding that the Denial Notice was mailed based on the lack of any proof that it was mailed or the date it was mailed.

The only other evidence to support that the Denial Notice was mailed to AMI comes from Ms. Bajoon's supervisor, Mr. MacKenzie's affidavit, Document 7 at 8-10. Mr. MacKenzie states "I approved the May 10, 2018 Denial Notice that Revenue Auditor Cecilia Bajoon created and mailed to AMI Entertainment, Inc." Dkt. 7 at 8, ¶4. However, Mr. MacKenzie does not establish that he has personal knowledge that Ms. Bajoon mailed out the Denial Notice. Without establishing the foundation for his statement that Ms. Bajoon mailed the Denial Notice, his unfounded statement that it was mailed does not actually prove it was. Thus, the Commission erred in relying on this affidavit to reach a finding that AMI received the Denial Notice.

Further, neither Ms. Bajoon's or Mr. MacKenzie's affidavits state when Ms. Bajoon mailed out the decision. As that date is crucial for determining when the 60-day appeal window occurred, it was erroneous to issue summary judgment concluding the appeal period expired when the Commission has no factual basis to determine when that period started or stopped.

Commission finding of fact 21 is erroneous. It states that AMI "does not refute receiving the Denial within a reasonable time of its May 10, 2018 issuance." Wrong. AMI specifically filed affidavits stating that neither AMI nor its attorneys have any record of receiving the Denial Notice. Dkt. 8 at 35, ¶6; Dkt. 6 at 30, ¶7. If AMI's submissions are not sufficient for summary judgment for some reason, the Commission needed to explain why it deemed them insufficient. It offered no such explanation why these facts are not admissible or what other basis the Commission had to ignore them. The Commission apparently simply acts as those this evidence does not exist. It does. On summary judgment where both sides

submit evidence showing a dispute as to the material fact of when the appeal period started, then summary judgment is not appropriate. The Commission needed to hold a hearing to resolve this dispute of fact.

DOR argues that AMI's averments by counsel for AMI that AMI did not receive the Denial Notice are inadmissible hearsay. Though the Commission never addressed this argument, I reject it. The rules of evidence do not apply to the agency proceeding. Wis. Stat. §227.45(1); Wis. Admin. Code § TA 1.53. DOR's reliance on *Gehin v. Wisconsin Grp. Ins. Bd.* is unavailing. 2005 WI 16, ¶56, 278 Wis. 2d 111, 692 N.W.2d 572. The present facts are nothing like those in *Gehin* where uncorroborated hearsay evidence was contradicted by other evidence. There the Supreme Court held it erroneous for an agency to rely on that hearsay evidence alone. *Gehin* also involved different agency evidentiary rules than apply here. As such, *Gehin* is not controlling. Here DOR offered no proof that it mailed the Denial Notice or when it did so.

Further, the many errors by DOR staff make it very believable that AMI never received the Denial Notice. In other words, unlike in *Gehin*, the evidence supports rather than controverts the hearsay that AMI did not receive the Denial Notice. Specifically, DOR started the process for reviewing the Claim for Refund with errors. DOR staff immediately misunderstood what the Claim for Refund actually asked to have refunded, and thus put an incorrect refund amount in its system. The amount DOR understood the Claim for Refund as seeking frankly made no sense. Compounding this original error, that neither Ms. Bajoon or Mr. MacKenzie realized what the Claim for Refund actually requested to have refunded strongly suggests that Ms. Bajoon and Mr. MacKenzie were either very sloppy in the review of AMI's claim or that they gave it only a perfunctory review. If sloppy in the review itself, that Ms. Bajoon also failed to actually mail the Denial Notice is not have to believe.

What is more frustrating is that the Commission ignored what Ms. Bajoon and Mr. MacKenzie stated in their affidavits. Both stated that they performed their reviews and believed that AMI sought a refund for the DTC only. I agree with the Commission that this conclusion was not reasonable after reading the Claim for Refund. That a trained DOR auditor and her supervisor both swear under oath that they reviewed the file and understood the Claim for Refund as seeking only the DTC surprises this Court. It seemed to shock the Commission also, as it noted it "question[ed] the veracity or competence of" Ms. Bajoon as well, noting "It is simply not credible that she did not realize that the entire assessment was being refuted…It also is not credible that someone responsible for reviewing the refund claim for a period of nearly six months was 'not aware' of the POA which was announced very clearly on the front page of the supplemental filing." Dkt. 23 at 7, FN 6. The Commission also found Mr. MacKenzie's affidavit "not credible or competent" as to his statements that he had no reason to believe AMI was not appealing the entire audit decision or that he reviewed the file but was unaware of the POA designation. Dkt. 23 at 7, FN 7.

Even if this was hard for the Commission to believe, on summary judgment the Commission cannot assess credibility. It had to accept these statements, unless they were disputed or inadmissible. It did not find them disputed by other facts or inadmissible. Thus, though the Commission could conclude on this record that Ms. Bajoon and Mr. MacKenzie failed to perform their jobs properly when they misunderstood what was being sought for a refund, the only conclusion the evidence allows is that these two employees believed the Claim for Refund as seeking a refund of only the DTC and based the Denial Notice decision on that mistaken belief. The Commission erred by ignoring these uncontroverted statements and concluding that, despite no evidence to support this, Ms. Bajoon and Mr. MacKenzie actually knew the Claim for Refund sought a refund for all amounts AMI paid and decided to reject that claim in the Denial Notice.

The Commission further erred by entirely ignoring Mr. MacKenzie's uncontroverted explanation that DOR reconsidered the Denial Notice and issued a Second Denial Notice. More specifically, after discussions in 2019 with AMI's attorney, Mr. MacKenzie states he first realized that the Claim for Refund could be read as requesting a refund of all amounts AMI paid. Thus, Mr. MacKenzie and his supervisor concluded that DOR should re-evaluate AMI's Claim for Refund as one seeking review of the entire amount paid. DOR did so – it reconsidered the Denial Notice - and issued the Second Denial Notice to address what AMI actually sought to be refunded.

The Commission's conclusion that the Second Denial Notice simply corrected a typo style error is not only unsupported by evidence but is contradicted by Mr. MacKenzie's affidavit. The Commission cannot on summary judgment simply ignore his explanation that "because it seemed that the initial May 9, 2017 claim for refund was processed for an amount that was not consistent with what the taxpayer had intended it to be, we wanted to correct this wrong and allow the taxpayer their right to appeal a corrected denial notice which accurately reflected their claim for refund." Dkt. 7 at 10, ¶15. This was not a typo correction – DOR reconsidered the request as appealing the full amounts assessed and paid rather than just the DTC. The Commission should have concluded, and I find, that the undisputed evidence shows DOR reconsidered the Denial Notice and thus the Second Denial Notice is a reconsideration.

Based on this evidence, I find that AMI first received the Denial Notice on June 12, 2019. Commission Findings 20 and 21 are contrary to the evidence and erroneous, as is Conclusion of Law ¶2 resting on those erroneous findings. With this faulty foundation, the rest of the Commission's decision fails.

I further find that AMI effectively requested reconsideration, DOR reconsidered the Denial Notice and issued the Second Denial Notice on July 25, 2019. AMI timely sought appeal of that Second Denial Notice.

The Commission's conclusion that AMI's appeal is untimely fails. I therefore vacate the Commission's decision and remand for the Commission to consider AMI's petition on the merits as to the Second Denial Notice.

OTHER ISSUES.

Based on my decision above, whether AMI properly designated an attorney-in-fact or whether DOR's A-222 Form is unenforceable are irrelevant. I therefore do not discuss those issues.

I do address and reject AMI's argument that the Denial Notice either only denied the refund as to $53,035.98 or that DOR's error in inserting that dollar value means that AMI must receive a refund for what it paid less the $53,035.98. The undisputed facts show that DOR misunderstood the refund request. Though DOR denied less than what AMI intended to seek review of, DOR still denied the Claim for Refund in its entirety as DOR understood the request. AMI cites no law to transform that misunderstanding into a windfall for AMI. Once DOR properly understood the Claim for Refund, it issued the Second Denial Notice denying it entirely.

Further, DOR completed its original review timely. Wis. Stat. §77.59(4)(a) directed DOR to make a determination on AMI's Claim for Refund within one year of receiving that claim. DOR undisputedly rendered the Denial Notice within this one-year timeframe, satisfying the statute. It did not tell AMI of its decision during that one-year window, but the statute only requires the determination occur within one year, not that the taxpayer receive a copy of it within one year.

The deadlines for reconsideration and appeal are triggered by AMI's receipt of a decision, not the filing of the Claim for Refund. Thus, that DOR realized it misunderstood the Claim for Refund and reconsidered its decision well after a year from the filing of the Claim for Refund does not matter.

Moreover, even if DOR needed to send the determination to AMI within one year, the statute does not impose a penalty for failing to do so. As DOR explains, "Statutory interpretation starts with the statutory language, and if that language is clear, the inquiry stops. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110." Dkt. 29 at 12. The Court can rely on legislative and statutory history "to confirm or verify a plain-meaning interpretation." *James v. Heinrich*, 2021 WI 58, ¶26, 960 N.W.2d 350.

The statute provides no consequence for DOR failing to make a determination within one year. If the Legislature intended a penalty for DOR's failure, it could have enacted one. It did just that in §71.75(7) relating to another type of tax refund. That another tax refund statute provides a consequence for DOR not acting promptly on a refund request while this similar statute for a different tax refund does not provide any consequence for the same delay means the two statutes are

different. The penalty only applies to the statute that contains it. I cannot read it into §77.59(4)(a) when it does not exist there.

Likewise, the history of §77.59 confirms that DOR's failure to decide a refund claim within a year does not result in the refund being granted. Specifically, from 1961 to 1969 the statute provided for that exact consequence AMI argues should apply - when DOR failed to act on a refund claim within one year, the refund was granted automatically by statute. The Legislature removed that language in 1969 and never restored it. Removing that language must affect the statute or the language was meaningless. I must give meaning to the statutory language, including additions and subtractions from that language. *See* State ex rel. Kalal, 2004 WI 58, ¶46, ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.") That the Legislature removed this penalty for DOR's tardiness confirms both that the Legislature is explicit when it wants to provide a penalty for DOR's failure to act and that the Legislature chose not to impose such a penalty here by removing that statutory language. I must give the Legislature's choice meaning. Though DOR must act on a claim for refund within one year, DOR's violation of that requirement does not result in automatic approval of the refund. Rather, it seems the consequence is an aggrieved party could take action to force DOR to act if the one-year timeframe expires with no decision.

This case is remanded to the Commission for further proceedings consistent with this Decision.

cc: Parties