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05-31-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV001975

BY THE COURT:

DATE SIGNED: May 31, 2023

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN

DANE COUNTY
BRANCH 15

CIRCUIT COURT

ASAP CRUISES, INC.,

Petitioner,

vs.

Case No. 22-CV-1975

WISCONSIN DEPARTMENT
OF REVENUE,

Respondent.

DECISION AND ORDER

INTRODUCTION

ASAP Cruises, Inc. (“ASAP”) seeks review under Wis. Stat. ch. 227 of two decisions of the Wisconsin Tax Commission (“the Commission”). Although both parties spend considerable portions of their briefs discussing the proper interpretation of 15 U.S.C. § 381, which “prohibits a State from taxing the income of a corporation whose only business activities within the state consist of ‘solicitation of orders’ for tangible goods ...”, I do not reach that legal issue because I conclude the Commission improperly granted summary judgment in favor of the Wisconsin

Department of Revenue (“DOR”) when it ignored an affidavit submitted by ASAP.¹

BACKGROUND

A. ASAP’s business activities leading up to the tax audit.

ASAP is a Florida corporation with a principal place of business in Jacksonville. Stipulated Facts, dkt. 35, ¶ 1.² Between January 1, 2012 and December 31, 2017—the time period for DOR’s tax audit—ASAP entered into at least 100 “Independent Travel Consultant Agreements” with Wisconsin residents. *Id.* ¶ 2. In relevant part, those agreements looked something like this:

IN CONSIDERATION of the promises and mutual covenants and agreements contained herein, the parties agree as follows:

Work to Be Performed by Independent Travel Consultant:

COMPANY desires that the Independent Travel Consultant perform, and the Independent Travel Consultant agrees to perform, the following work: Sales of cruises, tours or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc. as provided by vendors designated by the Company.

Id. Ex. A; *See also id.* Exs. B-F (other form agreements). Under these agreements, ASAP’s independent travel agents (“ITAs”) “sold cruises, tours and vacation packages ...” *Id.* ¶ 5. From the revenue this generated, “ASAP retained a percentage of the income ... paying the [ITAs] commissions on those sales.” *Id.* ¶ 6.

ASAP never paid any Wisconsin income or franchise taxes on this income. *Id.* ¶ 8. On December 12, 2018, DOR estimated that ASAP owed approximately \$4,000 plus interest and fees for the six-year audit period. *Id.* ¶ 9. ASAP petitioned for a redetermination of those assessments, but DOR denied that petition. *Id.* ¶¶ 10-11.

¹ I considered issuing a decision on the legal merits (given ASAP’s alternative argument that it should prevail even if the Commission’s finding that it provided services is accepted), but decided not to do so because, in general, I believe it is best practice for a court to limit its decision to the narrowest grounds possible.

² The Commission’s clerk has certified and filed a copy of the record in this matter as docket entries 7-36. *See* Certification of Record, dkt. 6. For clarity, I cite to the record using docket number:page number, rather than cross-referencing each document with the Commission’s certification to identify a record number.

B. The Wisconsin Tax Commission's decisions.

1. The Commission grants summary judgment in favor of DOR.

On October 24, 2019, ASAP appealed DOR's decision to the Commission. *Id.* ¶12. In its appeal, ASAP made three arguments. First, DOR's assessments violated the Due Process Clause of the United States Constitution "because ASAP lacked 'minimum contacts' with Wisconsin and it did not 'purposefully avail itself' of Wisconsin's economic market." Pet. for Rev., dkt. 7, ¶ 21. Second, ASAP "lacked 'substantial nexus' with Wisconsin ...," a prerequisite for taxes under the Commerce Clause. Pet. for Rev., dkt. 7, ¶ 30. Third, ASAP's software was "tangible personal property." *Id.* ¶36 (relying on the definition in Wis. Stat. § 77.51(20)). Then, applying the rule set forth in 15 U.S.C. § 381 that a business cannot be taxed for the "solicitations of orders for the sale of tangible personal property," ASAP argued that it did not owe taxes because it "did not exceed the protections of [15 U.S.C. § 381]." Pet. for Rev., dkt. 7, ¶ 37.

Nearly two years later,³ on October 8, 2021, both parties moved for summary judgment. Dkt. 19; Dkt. 36. The Commission issued its final decision on May 23, 2022. Dkt. 27. In its decision the Commission rejected each of ASAP's three arguments. Pertinent here, the Commission rejected ASAP's claim "to be in the business of selling Software as a Service ..." Dkt. 27:9. The Commission instead found that ASAP's contracts with its ITAs "referred to the sale of *travel services* ..." so ASAP must also have sold a service and not any tangible good. Dkt. 27:9 (emphasis in original). The Commission found that the only evidence supporting ASAP's

³ DOR has supplied a comprehensive timeline explaining why this case took two years. DOR Letter to the Commission (Nov. 18, 2021), dkt. 24.

claim to sell software—arguably a tangible property—came from ASAP’s co-owner Chad Burt, which the Commission believed it could disregard because “a taxpayer’s self-serving testimony must generally be substantiated by other proof.” Dkt. 27:9 (quoting a previous Wisconsin Tax Commission decision).

2. The Commission denies ASAP’s motion for a rehearing.

On June 13, 2022, ASAP sought a rehearing under Wis. Stat. § 227.49 so that the summary judgment order could be set aside and the matter fully tried. Dkt. 28. ASAP argued that the Commission erred when it “gave no weight at all to the sworn affidavit of Mr. Burt [describing, in ASAP’s view, its business model as selling tangible property].” Dkt. 28:7.

DOR responded in a June 30, 2022, letter brief, arguing that the Commission properly disregarded Burt’s affidavit for two reasons. First, Burt’s affidavit “contradicts the stipulated contracts ...” each of which “specifically provide that the [ITA]s are selling travel services on behalf of ASAP Cruises.” Dkt. 30:2. Second, according to DOR, “[s]pinning of facts without supporting documentation is not evidence.” Dkt. 30:3. DOR’s letter brief cited no authority to support either explanation for why it believed the Commission could disregard sworn testimony on summary judgment.

On July 6, 2022, the Commission denied ASAP’s motion for rehearing in a one-page order. Dkt. 31. The Commission concluded that ASAP “has shown no material error of law or fact nor the discovery of new evidence sufficiently strong to reverse or modify its decision and which could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3).” Dkt. 31.

C. ASAP’s petition for judicial review.

On August 5, 2022, ASAP petitioned for judicial review of the Commission’s decisions under Wis. Stat. ch. 227. Dkt. 2. On August 12, 2022, the Commission filed a certified copy of its

record. Dkt. 6. Following oral argument on March 30, 2023, the Court invited limited and supplemental briefing on the application of 15 U.S.C. § 381 to this matter. The parties have since fully completed briefing.

LEGAL STANDARD FOR CH. 227 REVIEW

Chapter 227 of the Wisconsin statutes governs judicial review of administrative decisions. Wis. Stat. § 227.52. Ordinarily, a court's review "shall be confined to the record ..." Wis. Stat. § 227.57(1). A court shall affirm an agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). In doing so, courts gives "no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3 n. 1, 382 Wis. 2d 496, 914 N.W.2d 21.

"The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). A plaintiff may satisfy this burden in several ways. *See* Wis. Stat. §§ 227.57(4)-(8). As relevant here, a court "shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure." Wis. Stat. § 227.57(4).

DISCUSSION

ASAP contends that the Commission should not have made any decision about the characterization of its business activity on summary judgment. I agree with ASAP that the Commission improperly granted summary judgment.

The summary judgment methodology is well-known. Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). A dispute is "genuine" if "a reasonable jury could return a

verdict for the nonmoving party.” *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 658 (Ct. App. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).). “A material fact is one that impacts the resolution of the controversy.” *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142 (quoted source omitted). “In analyzing whether there are genuine issues of material fact, we draw all reasonable inferences in favor of the nonmoving party.” *Id.* (citation omitted).

Applied here, ASAP contends Chad Burt’s affidavit created a genuine dispute of material fact regarding the issue of whether ASAP sold tangible goods. In relevant part, Chad Burt averred as follows:

2. I am the co-owner and Vice President of ASAP Cruises, Inc ... I am jointly responsible for the day-to-day operations of ASAP Cruises. ...

4. ASAP Cruises provides an online platform that independent travel agents ("ITAs") use to grow their businesses.

5. The online platform provided by ASAP Cruises is outsideagents.com.

...

24. During the [audit] Period, Wisconsin-based ITAs used third party online booking tools available through - but not directly offered by - outsideagents.com to book travel packages for the customers of the Wisconsin-based ITAs.

...

27. When a Wisconsin-based ITA booked travel for a customer during the Period, the booking was facilitated through the online travel platform accessible through outsideagents.com.

...

31. ASAP Cruises charged Wisconsin-based ITAs a monthly membership fee for access to the resources available on and through outsideagents.com. The membership fees were paid by the Wisconsin-based ITAs to ASAP Cruises via credit card. ASAP Cruises charged the membership fee to recover its costs

associated with developing and maintaining its online platform at outsideagents.com

32. Commissions were paid by third party travel vendors to ASAP Cruises with respect to the travel hooked through outsideagents.com by Wisconsin-based ITAs during the Period (the "ITA Commissions"). The commissions received by ASAP Cruises from the third party travel vendors were matched by ASAP Cruises to the bookings of each Wisconsin-based ITA.

33. ASAP Cruises paid a percentage — 85% on average — of the ITA Commissions to each Wisconsin-based ITA. These payments to Wisconsin-based ITAs were made at the direction of employees of ASAP Cruises located in Jacksonville, Florida. The balance of the ITA Commissions not paid to the Wisconsin-based ITAs was retained by ASAP Cruises as a fee for the services provided through its online platform - outsideagents.com.

Burt Aff., dkt. 36:94-98.

ASAP argues that the Commission should not have granted summary judgment because Burt's testimony shows that ASAP sold software—arguably tangible property—and not any services. ASAP contends that Mr. Burt's affidavit explains the course of performance between ASAP and the Wisconsin ITAs. According to ASAP this course of performance is crucial to understanding exactly what ASAP provided under the terms of the agreements. Having reviewed the submitted materials, I agree that, viewed in the light most favorable to ASAP, a reasonable person could infer from Burt's affidavit that ASAP's business activity was not to sell services but was instead to sell the software contained on its online platform. Specifically, Burt testified that ASAP "provides an online platform" for accessing software then "charged Wisconsin-based ITAs a monthly membership fee for access" to that software. Burt Aff. ¶¶4, 31. This testimony is material because if ASAP limited its business activity to solicitations for sales of tangible personal property, then 15 U.S.C. § 381 will apply, and the material dispute created by Burt's testimony is genuine because ASAP's corporate officers have good reason to understand ASAP's business model. Burt Aff. ¶2.

The Commission disregarded this testimony because it was “self-serving” and because “no evidence in the record ... corroborates Mr. Burt’s statement.” Dkt. 27:9. This was wrong. The summary judgment procedure contemplates no such inquiry. *See Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003)(discussing the misconception that evidence presented in a “self-serving” affidavit is never sufficient to thwart a summary judgment motion, provided that the evidence meets the usual requirements for evidence submitted on summary judgment). Neither the Commission nor DOR have cited any authority that says otherwise.⁴

In sum, DOR failed to “show that there is no genuine issue as to any material fact ...” Wis. Stat. § 802.08(2). The Commission therefore committed a procedural error when it granted summary judgment. Of course, “[s]ummary judgment procedure is a drastic remedy because it deprives the losing party of a trial or even an evidentiary hearing.” *Strasser v. Transtech Mobile Fleet Service*, 2000 WI 87, ¶29, 236 Wis. 2d 435. As such, this procedural error impaired the fairness of the proceedings and constitutes a ground for remand to the Commission. Wis. Stat. § 227.57(4). Accordingly, I remand this matter to the Commission for further proceedings consistent with this decision.⁵

ORDER

IT IS ORDERED that the Wisconsin Tax Appeals Commission committed a material error in procedure when it granted summary judgment in favor of the Wisconsin Department of Revenue. The Tax Appeals Commission’s May 23, 2022 decision in the matter of docket no. 19-

⁴ The only “authority” the Commission cited on this point was its own prior decision, *Dvorak v. DOR*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 4/30/2002), *aff’d* ¶ 400-603 (Milwaukee Co. Cir. Ct., 11/25/2002). That case does not discuss summary judgment. In *Dvorak*, the Commission held a trial on tax issues, then appears to have relied on an inapposite federal treasury regulation to reject trial testimony as uncorroborated.

⁵ Because I remand this matter for further action I need not decide whether the Commission also erred by denying ASAP’s motion for a rehearing under Wis. Stat. § 227.49.

I-258 is therefore remanded for further action consistent with this decision.

This is a final judgment for purposes of appeal. Wis. Stat. § 808.03(1).