

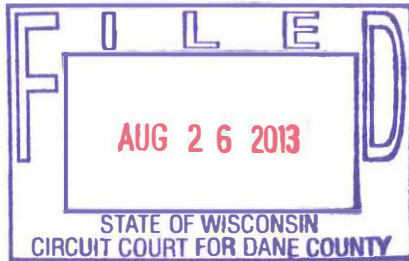
Cellar Door North Central, Inc,

Petitioner

vs.

Wisconsin Department of Revenue,

Respondent



Case No. 13CV617

FINAL DECISION AND ORDER

This is a Wis. Stat. Ch. 227 review of a January 22, 2013 Ruling and Order of the Wisconsin Tax Appeals Commission (“Commission”) in Docket No. 08-S-067. The Commission affirmed the Wisconsin Department of Revenue (“Department”) October 30, 2006 Notice of Action assessing sales and use tax against petitioner in the amount of \$542,354.19, including interest and penalties through December 29, 2006. Because the plain meaning of Wis. Stat. § 77.59(9m) allows assessments in the alternative and because the Commission’s determination of Cellar Door’s liability under Wis. Stat. § 77.52 is reasonable, the court affirms the decision of the Commission.

SUMMARY

The Department audited Cellar Door North Central, Inc. (“Cellar Door”) for the period between January 1, 2001 and December 31, 2004. During the audit period, Cellar Door and New Riverside Corporation (“Riverside”) co-promoted approximately sixty-four events which took place at the Riverside Theatre in Milwaukee, Wisconsin. Sales tax was collected on the sale of admissions and merchandise for these events, but was never remitted the Department. Pursuant to Wis. Stat. § 77.59(9m), the Department issued a sales/use tax assessment “in the alternative” against Riverside and Cellar Door for sales of admissions to these performances and for merchandise sold during these performances. Cellar Door filed a Petition for Redetermination with the Department, which was denied. Cellar Door then filed a Petition for Review with the Commission. The case was submitted to the Commission on cross-motions for summary judgment. By agreement of the parties the Commission was permitted to supplement stipulated facts based upon its reading of competing affidavits entered into the record.

In its January 22, 2013 Ruling and Order, the Commission concluded that Cellar Door sold admissions to Riverside Theatre events and that it was liable in the alternative for the sales tax collected on the sale of admissions and merchandise sold at the events under Wis. Stat. §§ 77.52(1), (2), and 77.59(9m). The Commission granted summary judgment to the Department and dismissed Cellar

Door's appeal.

STANDARD OF REVIEW

The parties disagree on the standard of review the court should apply to the Commission's decision. Petitioner argues that it should be *de novo* while Respondent argues that the Commission's decision should be given "great weight deference." An agency's "interpretation and application of a statute is a question of law to be determined by a court." *Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals*, 2006 WI 86, ¶ 14, 292 Wis. 2d 549, 717 N.W.2d 184. A reviewing court may, however, give deference to an agency's interpretation of a statute. *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue*, 2010 WI 33 ¶32, 324 Wis. 2d 68, 84, 781 N.W. 2d 674, 682. Case law has established three levels of deference that courts can give to agency interpretations, depending on the circumstances: "great weight," "due weight," or "no deference," also referred to as *de novo*. *Id.* ¶34.

This case involves two distinct issues for which the Commission interpreted and applied two statutes. First, the Commission determined that Cellar Door was a "retailer" that sold admissions and merchandise under Wis. Stat. §77.52(1) and (2). Next, the Commission determined that under Wis. Stat. § 77.59(9m), Cellar Door is "liable in the alternative" with its co-promoter, Riverside, for the sales tax collected on the sale of admissions and merchandise. The court will give "great weight" deference to the Commission's interpretation and application of Wis. Stat. § 77.52(1) and § 77.52(2)(a)2. However, because the interpretation of Wis. Stat. § 77.59(9m) is an issue of first impression, the court will review this issue *de novo*.

1. Wis. Stat. §77.52(1) and (2)

The Commission's application of Wis. Stat. § 77.52(1) and § 77.52(2) meets the criteria for "great weight" deference. Cellar Door argues that this is a case of first impression because there are no prior Wisconsin sales tax cases for the sale of admissions that presents similar facts or address the concert promotion industry. (Pet. Br. 22). However, the appropriate test for great weight deference is not whether the agency has previously decided a case presenting the exact same facts. *Va. Sur. Co. v. LIRC*, 2002 WI App 277, ¶ 13, 258 Wis.2d 665, 654 N.W.2d 306. Rather, the correct test is whether the agency "has experience in interpreting [the] particular statutory scheme" at issue. *Honthaners Rests., Inc. v. LIRC*, 2000 WI App 273, ¶ 12, 240 Wis.2d 234, 621 N.W.2d 660.

The legislature charged the Commission with interpreting and administering the tax code and adjudicating taxpayer claims. Wis. Stat. § 73.01(4), (5). This is not the first case in which the Commission has utilized its expertise and experience to interpret Wis. Stat. § 77.52(1) and (2). The Commission has regularly interpreted when services are taxable and when a taxpayer is a "retailer" or "seller" under this statutory scheme. The Commission has expertise, specialized knowledge and a longstanding history of interpreting when a retailer or seller owes sales tax. The Commission has also previously interpreted tax cases involving event sponsors and admissions. See *Milwaukee Symphony Orchestra v. Wis. Dep't of Revenue*, 2010 WI 33, 324 Wis. 2d 68, 781 N.W. 2d 674; *Milwaukee Repertory Theater, Inc. v. Wis. Dep't of Revenue*, Docket No. 97-S-330, Wis. Tax Rptr. (WTAC 2000); *Italian Community Center, Inc., and Festa Italiana, Inc. v. Wis. Dep't of Revenue*, Docket Nos. S-10466 and S-10467, Wis. Tax Rptr. ¶202-795 (WTAC 1986). Giving great weight to the

Commission's decision will also provide uniformity and consistency on the taxability of event promoters and admissions sellers. Accordingly, the Commission's legal interpretation must be affirmed if it is reasonable, even if there is a more reasonable interpretation.

Cellar Door also argues that the court should review the Commission's decision *de novo* because the Commission inconsistently applied the law with respect to "compensation determined on a commission basis." (Pet. Br. 21). Cellar Door's argument is that the Commission made its decision based on Cellar Door's receipts of a share of the net profits from the events. However, the Commission determined that Cellar Door was a retailer providing the service of selling admissions. This was not an inconsistent application of the law with respect to compensation on a commission basis, and therefore are not grounds for applying *de novo* deference with respect to Wis. Stat. §§ 77.52(1) and 77.52(2)(a)2.

2. Wis. Stat. § 77.59(9m)

The court gives the Commission's interpretation of Wis. Stat. § 77.59(9m) no deference. Although the Commission is a specialized administrative tribunal with the long-standing responsibility and expertise to interpret and apply Wisconsin's tax laws, *see* Wis. Stat. § 73.01(4), there are no prior cases or determinations interpreting Wis. Stat. § 77.59(9m) and it is an issue of first impression that the court must review *de novo*. A court giving no deference to an agency's interpretation of a statute benefits from the agency's analysis but interprets the statute independent of the agency's interpretation and in effect adopts an interpretation that the court determines the most reasonable interpretation. *Milwaukee Symphony Orchestra* 324 Wis. 2d 68 at ¶37.

3. Sufficiency of the Evidence

The court applies a "substantial evidence" standard to the agency's findings of fact affording them significant deference. *Milwaukee Symphony Orchestra, Inc.* ¶ 31. The substantial evidence standard is met if after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact. *Id.* citing *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶¶ 16, 25, 293 Wis.2d 1, 717 N.W.2d 166. The weight and credibility of the evidence are for the agency, not the reviewing court, to determine. *Hilton ex rel. Pages Homeowners' Ass'n* ¶ 25. An agency's findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence. *Milwaukee Symphony Orchestra, Inc.* ¶ 31. It is the Commission's role to determine the persuasiveness and weight to give the evidence and testimony before it. *Id.* ¶ 102. If the Commission's action depends on any fact it finds in a contested case proceeding, the court shall not substitute its judgment for that of the Commission's as to the weight of the evidence on any disputed finding of fact. Wis. Stat. § 227.57. In this case the parties consented to the commission finding supplemental facts based upon competing affidavits and those supplemental findings are entitled to the same deference as would be facts found after a contested hearing.

DISCUSSION

Cellar Door spends several pages of its brief suggesting changes or additions to the stipulated and supplemental facts that the Commission found. (Pet Br. 5-20). However, the case came before the Commission on summary judgment motions filed by both parties. The effect of counter-motions for

summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law are before the court. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4, 308 Wis. 2d 684, 748 N.W. 2d 154. The Commission found that the relevant facts in this case were either undisputed or supported by affidavits of record on which the parties consented it could rely. The Commission could have reached its findings of fact in this case from the evidence before it, so this court will not set aside the Commission's findings of fact.

1. Cellar Door was a “retailer” of merchandise and admissions under Wis. Stat. §77.52(1), (2), and Wis. Adm. Code § Tax 11.54

The relevant parts of Wis. Stat. § 77.52(1) and (2) read:

(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% 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% 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...or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities...

Wis. Adm. Code § Tax 11.54(3) provides:

(a) Entrepreneurs, promoters, sponsors, or managers of an amusement, entertainment, or recreational event shall be regarded as retailers for the purposes of s. 77.51 (13) (c), Stats., if the entrepreneurs, promoters, sponsors, or managers have control and direction of the event including activities such as controlling the sale of admissions or admission tickets; controlling or regulating the admittance of all persons to the event or place; determining the nature of the amusement, entertainment, or recreation to be offered; deciding the scale of the prices to be charged for admission; receiving the proceeds from ticket sales, including amounts from ticket agents or brokers; and deciding, or having the right to decide, the disposition of the net profits, if any, realized from the event.

(b) As retailers, the entrepreneurs, promoters, sponsors, or managers are persons liable for the sales tax...

The Commission reasonably concluded that Cellar Door was a retailer providing the service of selling taxable admissions to the events at issue. The Commission also reasonably concluded that Cellar Door was liable for the tax collected on the sale of merchandise sold at the events. Because this court is reviewing this issue under great weight deference, the court must accept the Commission's legal conclusions even if alternative legal conclusions are equally reasonable or even more reasonable.

a. Ticket Sales

The Commission found that Cellar Door sold admissions to the events in question through the box office and through its agreement with the Ticketmaster system. The Commission found that Ticketmaster paid the event proceeds directly to Cellar Door through "Client Disbursement Checks" and then through wire transfers into Cellar Door's bank account. It also found that the agreement between Cellar Door and Riverside gave both parties joint responsibility to manage and control the events, including ticketing. (Order 12). The Commission found that part of Cellar Door's "concert promotion services" included the sale of admissions and that Cellar Door is a retailer under Wis. Stat. § 77.51(13) and is liable under Wis. Stat. § 77.52(1) and (2).

Cellar Door argues that Ticketmaster sold tickets to the events pursuant to the 1995 Agreement between Ticketmaster and Riverside instead of the 1993 Agreement between Ticketmaster and Cellar Door. However, the Commission found that the evidence showed that all proceeds of Ticketmaster sales were transferred directly to Cellar Door through either check or wire transfer. Cellar Door claims that the reason that the money from the Ticketmaster sales was transferred directly to Cellar Door was because it was instructed to do so by Riverside and that Cellar Door was simply handling the money on behalf of Riverside.

Cellar Door's argument is not supported by the record. The Commission's finding that the proceeds from Ticketmaster sales were handled under the 1993 contract between Ticketmaster and Cellar Door is supported by substantial evidence in the record.

Cellar Door next argues that the "substance and realities" of its activities were only concert promotion services which did not include selling admissions to the events in question. (Pet. Br. 31-34). However, the court finds that Cellar Door is clearly a "retailer" under Wis. Adm. Code § Tax 11.54(3). Although the Commission did not explicitly discuss § Tax 11.54(3), Cellar Door's own description of its activities and services show that it is a retailer under this code.

Cellar Door and Riverside shared joint control and direction of the event. Cellar Door controlled the sale of admissions through the box office and Ticketmaster. In its brief, Cellar Door lists several of its services which fit directly into the definition of a promoter regarded as retailer. (Pet. Br. 32-33). Cellar Door determined the nature of the event by communicating with artists' agents, researching sale potential, and building, submitting, and negotiating an offer for the artist. Cellar Door worked with the artist and venue to decide the price and scale of admissions. Finally, Cellar Door received proceeds from the ticket sales. Given the record regarding Cellar Door's control and direction of events, there

was substantial evidence to support the Commission's conclusion that Cellar Door was a "retailer" selling taxable admissions to events.

b. Merchandise

The Commission found that part of "concert promotion services" was the sale of merchandise. (Order 12). The Commission found that the proceeds of the merchandise were included in the division of profits between Cellar Door and Riverside and that this made Cellar Door jointly and severally liable for the taxes on these sales. Cellar Door shared control and direction of the events where merchandise was sold and sales tax was collected on the merchandise but never remitted to the Department. Under these facts, it was reasonable for the Commission to conclude that Cellar Door is liable for the tax on the merchandise sold at the events it co-promoted. While there might be another reasonable interpretation or an even more reasonable interpretation that Cellar Door did not sell merchandise and is not liable for the tax on the merchandise sold, the court must accept the Commission's legal interpretation under the great weight deference standard.

In sum, the court is persuaded that the interpretation and application of Wis. Stat. §§ 77.52(1) and 77.52(2)(a)2 adopted by the Commission in this case is reasonable and supported by substantial evidence.

2. Cellar Door was properly assessed "in the alternative" under Wis. Stat. § 77.59(9m)

Since the Commission has apparently never before interpreted Wis. Stat. § 77.59(9m), the court reviews this aspect of the Commission's decision *de novo*. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W. 2d 110. Statutory interpretation begins with the plain language of the statute. *Id.* ¶ 45. A statute is read in context and in relation to surrounding or closely-related statutes. *Id.* ¶ 46. If the meaning is clear, the analysis ends there. *Id.* If the plain language does not yield a clear meaning then it is proper to consult sources extrinsic to the statute, such as legislative history. *Id.* ¶ 50-51.

Even giving no deference to the Commission's interpretation of Wis. Stat. § 77.59(9m), the court agrees with the Commission's interpretation. The relevant part of Wis. Stat. § 77.59 (9m) reads:

If the department determines that a liability exists under this subchapter and that the liability may be owed by more than one person, the department may assess the entire amount to each person, specifying that it is assessing in the alternative.

Since the plain meaning of the statute is clear, the court does not need to look to rules of statutory construction or other extrinsic aids. *State Historical Society v. Maple Bluff*, 112 Wis.2d 246, 252, 332 N.W.2d 792 (1983). The plain language of the statute supports the Department's application of Wis. Stat. § 77.59 (9m) in this case. The Department determined that (1) a liability exists, and (2) the liability may be owed by more than one person (Riverside and Cellar Door). Then, the Department assessed the entire amount to both Riverside and Cellar Door and specified that it was doing so in the alternative. The Department followed the plain language of the statute.

Although the court does not need to examine this issue further since the plain language of the statute is clear, the court notes that multiple liabilities are allowed under the Wisconsin tax statutory scheme. See Wis. Stat. §71.10(6)(a); Wis. Stat. § 71.83(b)(2); Wis. Stat. § 77.60(9). Additionally, the court notes that the Commission has upheld other assessments in the alternative under the above statutes. See *Tracey A. Smith v. Wis. Dep't of Revenue*, Barron County Circuit Court, Case No. 93-CV-356, Wis. Tax Rptr. [CCH] ¶ 400-098 (April 7, 1994); *Casey O'Keefe v. Wis. Dep't of Revenue*, Dane County Circuit Court, Case No. 95-CV-280, Wis. Tax Rptr. [CCH] ¶400-214 (April 22, 1996).

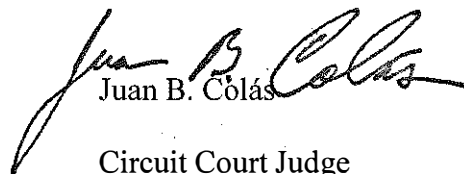
The case on which Cellar Door relies to argue that joint tax liability is not allowed is a divorce case that involves defining payments to determine who owes the tax. (Pet. Br. 38). The present case does not involve defining or classifying Riverside's or Cellar Door's income to determine which party owes tax. The present case involves two parties which were jointly sponsoring events and collecting sales tax from the events, but did not remit this collected tax to the Department. Under these facts, it is reasonable and correct under the plain meaning of the statute that the Department assessed both parties in the alternative as they were jointly responsible for collecting and remitting sales tax generated from their events.

CONCLUSION AND ORDER

For the reasons stated above, the January 22, 2013 Ruling and Order of the Tax Appeals Commission is AFFIRMED and the petition is DISMISSED. This is a final order as defined in Wis. Stat. § 808.03(1) for purposes of appeal.

Dated: August 26, 2013

BY THE COURT:


Juan B. Colás
Circuit Court Judge

Copy: Counsel