FILED
02-14-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV000800

BY THE COURT:

DATE SIGNED: February 14, 2023

Electronically signed by Jacob B. Frost
Circuit Court Judge

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

GREEN CAB OF MADISON, INC.,

Plaintiff,

v. Case Number 22CV800

WISCONSIN DEPARTMENT OF REVENUE,

Defendant.

DECISION AND ORDER

The Wisconsin Department of Revenue, acting through the Wisconsin Tax Appeals Commission, rejected Green Cab of Madison, Inc.'s request for refund of taxes it paid on sales of the short-term rental of vehicles. Green Cab filed this action pursuant to Wisconsin Statutes Ch. 227. Green Cab challenges the Commission's conclusion that it is operating primarily as a vehicle rental company rather than a business providing taxicab services. The Commission found that the stipulated facts show Green Cab primarily engages in renting vehicles to taxi drivers for their individual use as taxis, making Green Cab a vehicle rental business. For the reasons that follow, I agree and affirm the Commission's decision as correctly interpreting the law and applying it to the stipulated facts.

STANDARD OF REVIEW

I adopt portions of each parties' explanation of the applicable standard of review on a Ch. 227 review. First, from the Commission's brief:

> In a chapter 227 judicial-review action, "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [section 227.57], it shall affirm the agency's decision." Wis. Stat. § 227.57(2). "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." Wis. Stat. § 227.57(5). Upon review, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Wis. Stat. § 227.57(10).
>
> Green Cab has the burden to show that the Commission's decision should be overturned. *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984) ("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.").

Dkt. 20 at 15.

Green Cab accurately explains the deference I give to the Commission's interpretation of law. Green Cab states:

> When a court reviews a state agency's conclusions of law, including those of the Commission, the court affords no deference to the agency's legal conclusions. *Tetra Tech EC, Inc. v. Wis. Dept. of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21 ("We have also decided to end our practice of deferring to administrative agencies' conclusions of law."); *see also id.* at ¶ 84 (courts now "review an administrative agency's conclusions of law under the same standard . . . [applied] to a circuit court's conclusions of law—*de novo*.") (italics added).
>
> In addition to *Tetra Tech*, Wisconsin's administrative procedure statute, Chapter 227, states that a court must set aside, modify, or remand a case to the agency 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." Wis. Stat. § 227.57(5).

Dkt. 19 at 11-12. Lastly, §227.57(11) directs: "Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."

DECISION

I. Rules of Statutory Interpretation.

This dispute centers on Wis. Stat. §77.995. To elucidate the meaning of the statute, I recite and then apply well-known principles of statutory interpretation. The parties agree on the legal principles of statutory interpretation, though they recite them somewhat differently. I borrow the following from the Commission:

> "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Thus, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45. "If the words chosen for the statute exhibit a 'plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms." *State v. Grunke*, 2008 WI 82, ¶ 22, 311 Wis. 2d 439, 752 N.W.2d 769 (citation omitted).
>
> "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." Id. (citation omitted).

Dkt. 20 at 16.

II. The State Rental Vehicle Fee Statute is Unambiguous.

I turn next to the statute, Wis. Stat. §77.995. It states:

> (1) In this section:
>
> (a) Except as provided in par. (b), "limousine" means a passenger automobile that has a capacity of 10 or fewer persons, excluding the driver; that has a minimum of 5 seats behind the driver; and that is operated for hire on an hourly basis under a prearranged contract for the transportation of passengers on public roads and highways along a route under the control of the person who hires the vehicle and not over a defined regular route.

> (b) “Limousine" does not include taxicabs, hotel or airport shuttles or buses, buses employed solely in transporting school children or teachers, vehicles owned and operated without charge or remuneration by a business entity for its own purposes, vehicles used in car pools or van pools, public agency vehicles that are not operated as a commercial venture, vehicles operated as part of the employment transit assistance program under s. 106.26, ambulances or any vehicle that is used exclusively in the business of funeral directing.
>
> (2) There is imposed a fee at the rate of 5 percent of the sales price on the rental, but not for rerental and not for rental as a service or repair replacement vehicle of Type 1 automobiles, as defined in s. 340.01 (4) (a); of recreational vehicles, as defined in s. 340.01 (48r); of motor homes, as defined in s. 340.01 (33m); and of camping trailers, as defined in s. 340.01 (6m) by establishments primarily engaged in short-term rental of vehicles without drivers, for a period of 30 days or less, unless the sale is exempt from the sales tax under s. 77.54 (1), (4), (7) (a), (7m) or (9a). There is also imposed a fee at the rate of 5 percent of the sales price on the rental of limousines.

Id.

This statute is unambiguous in all regards. The statute imposes a sales tax of 5% on two types of sales. First are sales for certain short-term vehicle rentals. More specifically, and applicable here, “There is imposed a fee at the rate of 5 percent of the sales price on the rental, but not for rerental and not for rental as a service or repair replacement vehicle of Type 1 automobiles, as defined in s. 340.01 (4) (a)…by establishments primarily engaged in short-term rental of vehicles without drivers, for a period of 30 days or less”

A. The exclusion of taxicab services from the taxing of limousines is irrelevant to Green Cab’s business.

The parties stipulated that all of Green Cab’s vehicles are Type 1 automobiles. Green Cab argues, though, that the definition of “limousine” under §77.995(1) excludes the application of this 5% sales tax against all vehicles used as taxicabs. Green Cab grossly misreads the law and ignores statutory interpretation. The exclusion Green Cab relies on relates only to the second set of sales that this tax applies to - the rental of limousines.

Statute subsection (1) defines limousine in sub subsection (a) and then in sub subsection (b) excludes some uses of vehicles that otherwise fall in the definition of (a). Relevant here, (1)(b) states that “limousine” does not include “taxicabs.” Thus, though a minivan style vehicle used as a taxicab could fall within the definition under (1)(a) of a limousine, the statute excludes such a sale from this tax

for limousines. By excluding taxicabs from the definition of limousine, the Legislature made clear that this 5% sales tax does not apply to the charge a taxicab driver assesses his or her riders for the taxi ride.

This exclusion from the definition of "limousine" provides no insight or restriction regarding whether the 5% sales tax under the first type of sale – the rental of Type 1 automobiles – applies where a business rents such vehicles to customers knowing the customer will use the automobile to then offer taxicab services to third parties. The 5% sales tax on limousines is in an entirely separate sentence from the fee for rental of Type 1 automobiles for short-term rental. The structure of the statute makes clear that excluding taxicabs from the definition of "limousine" does only that. It does not exclude the rental of vehicles to be used as taxicabs from the first sentence of §77.995(2).

Indeed, that the Legislature excluded taxicabs from the definition of "limousine" confirms that it knew how to provide exemptions from this sales tax. The statute in the first category of taxable sales also unambiguously exempts any fees charged for the rerental or rental as a service or repair replacement vehicle. Had the Legislature wanted to exclude rental of taxicab cars to taxicab drivers, it knew how to do so. That it included no such exemption while including other exclusions and exemptions in the same statute shows an intentional choice not to broadly exclude rental of vehicles used as taxicabs from all application of this statute. The Commission correctly interpreted this statute. I find no error of law and affirm the Commission's interpretation that the exclusion of taxicabs from the definition of limousine has no bearing on Green Cab, as it is not a limousine company.

B. Whether a business is primarily engaged in the short-term rental of vehicles looks to both the revenue from the business and the overall business activities.

Green Cab next argues that the Commission erroneously interpreted the phrase "by establishments primarily engaged in short-term rental of vehicles without drivers, for a period of 30 days or less" in §77.995(2). The Commission explained that it "previously held that when 50% or more of a company's income is derived from an activity, that activity is the company's primary business or operation." Dkt. 9 at 659. I agree with Green Cab that merely looking at the percentage of income a business derives from a specific activity is too narrow a focus.

However, the Commission never said it only considered the source of a percentage of Green Cab's revenue to reach its conclusion that Green Cab is primarily engaged in the short-term rental of its vehicles. Rather, after noting the percentage of revenue from vehicle rental fees exceeds 50% of Green Cab's total revenue, the Commission then spent pages 13 through 17 of its decision detailing the many facts showing that Green Cab's primary business is the short-term rental of its vehicles to taxi drivers for their use as a taxi.

Therefore, even using Green Cab's interpretation of "primarily engaged", the stipulated facts confirm the Commission correctly concluded that Green Cab is primarily engaged in the short-term rental of vehicles without drivers for periods of 30 days or less. I adopt as reasonable Green Cab's interpretation of the words "primarily engaged." Green Cab explained:

> "Primarily engaged" is not defined in Wis. Stat. § 77.995 or generally in Wis. Stat. ch. 77. The statutory language is, therefore, interpreted as it is commonly understood, and according to its plain meaning. *See Stroede v. Society Ins.*, 2021 WI 43, ¶ 11, 397 Wis. 2d 17, 959 N.W.2d 305. The Court may consult dictionary definitions to determine the meaning of words that are not specifically defined in a statute. *Swatek v. County of Dane*, 192 Wis. 2d 47, 61, 531 N.W.2d 45 (1995) ("The common and approved usage of a word may be established by resort to dictionary definitions.") (citing *State v. Gilbert*, 115 Wis. 2d 371, 377–78, 340 N.W.2d 511 (1983)).
>
> The dictionary definition of "engaged" means "to participate in some . . . business activity" or to "carry on an enterprise, esp[cially] a business." Webster's Third New Int'l Dictionary 751, def. 3.c. and 6.2a (2002). The definition of "primarily" is "first of all: FUNDAMENTALLY, PRINCIPALLY." (Webster's Third New Int'l Dictionary 1800 (2002)); *see also Malat v. Riddell*, 383 U.S. 569, 572 (1966) (stating that the word "primarily" in relation to a taxing statute means "'of first importance' or 'principally.'"). The focus of these definitions is on the fundamental "activity" of a business. There is no indication that a cold calculation of how the majority of a business's revenues are generated is the sole or even most important factor when determining the primary "activity" for purposes of the rental vehicle fee.
>
> Wisconsin judicial interpretations of "primarily engaged" also do not use the "50% or more of a company's income" test adopted by the Commission. Instead, case law directs courts to examine the totality of a business's activities to determine the activity in which it is "primarily engaged." *See Wis. Dep't of Revenue v. A. Gagliano Co.*, 2005 WI App 170, ¶¶ 19, 41, 284 Wis. 2d 741, 702 N.W.2d 834 (noting that the phrase "primarily engaged" involves an analysis of a business's "activities"); *Zip Sort, Inc. v. Wis. Dep't. of Revenue*, 2001 WI App 185, ¶ 25, 247 Wis. 2d 295, 634 N.W.2d 99 (implying that the phrase "primarily engaged" involves an analysis of business activities); *Nat'l Amusement Co. v. Wis. Dep't. of Tax'n*, 41 Wis. 2d 261, 270-71, 163 N.W.2d 625 (1969) (courts look to the entirety of a business's activities to determine whether a business is primarily or incidentally engaged in a particular activity).

Dkt. 19 at 16-17.

C. The Commission correctly found that Green Cab is primarily engaged in the short-term rental of vehicles.

Turning to the stipulated facts, the Commission not only noted that most of Green Cab's revenue comes from renting out vehicles, but also discussed at length that Green Cab's activities were all performed to further the primary business of renting out vehicles. I agree with the Commission's interpretation and application of the law here. The stipulated facts make clear that Green Cab's business primarily revolves around the rental of its taxicab fleet to qualified drivers for the drivers to use to operate as taxicabs for their own benefit.

The relevant stipulated facts are as follows. Green Cab owned a fleet of vehicles outfitted and decorated for use as taxicabs. Green Cab did not employ any staff to drive any of these vehicles as taxis. Rather, Green Cab leased its vehicles to independent contractors for their use as a taxicab. Green Cab provided advertising and hosted services for potential taxicab customers to reserve rides. These included: (1) its website, http://www.greencabmadison.com/; (2) a call center dispatching service staffed by Green Cab employees who then passed on the customer details to the independent contractors who rented vehicles from Green Cab; and (3) a software application that customers could use on smart phones and other mobile devices to secure a ride from an independent contractor renting a Green Cab vehicle from Green Cab. Green Cab did not require the drivers who leased its vehicles to perform any marketing for taxi customers, but did charge the drivers a fee for the marketing Green Cab performed.

As for the relationship between Green Cab and the independent contractor drivers, Green Cab leased vehicles to the drivers along with specific equipment for shifts. Green Cab's relationship with drivers was pursuant to a written contract titled the "Independent Contractor Taxicab Lease Agreement." (The "Agreement.") Each Agreement was identical in all material respects during the relevant time. The Agreement entitled the driver to lease a taxicab and other equipment from Green Cab on a shift-by-shift basis. No driver had any right to use any particular vehicle Green Cab owned. A driver's shift generally lasted between 6 and 12 hours and Green Cab maintained a daily schedule of shifts. Green Cab had pre- and post-trip checklists drivers needed to comply with at pick up and drop off of a taxicab. Green Cab also provided an iPad for each taxicab and required that each driver use the iPad in connection with providing taxicab services. The iPad allowed drivers to communicate with Green Cab dispatchers, navigate routes for pick up and drop off, process credit-card payments, view airport flight schedules and events where customers may be located, and do other activities related to providing taxi rides. However, each driver was responsible to provide her or his own Square credit-card-reader hardware for customers to use to pay for taxi rides.

For any scheduled shift, the driver would pick up a taxicab and an iPad from Green Cab's business location, register the iPad under the driver's Square credit-card-reader account to allow all customer payments made during a shift to go to the

driver's bank account, and upon completing the shift returned the taxicab and iPad to Green Cab's business location. A driver picking up a taxicab would fill out a pre-trip checklist noting the car number, the date and time of pickup, the amount of fuel, condition of the vehicle, and payment of the driver's lease fee. Green Cab's dispatch would then acknowledge the pickup and payment of the lease fee. When the driver returned a taxicab to Green Cab, he or she filled out a post-trip checklist, noting the date and time of the return and that the vehicle had been washed and refueled. Green Cab's dispatch would then verify the return and condition of the vehicle and return of the iPad, keys, and other equipment.

Green Cab secured a taxicab company license from the City of Madison. Both it and the City required all drivers who rented Green Cab vehicles to hold a public-passenger vehicle driver's permit from the Madison police chief as required by City ordinance. Green Cab ensured each vehicle was inspected by the City and permitted. Green Cab required all drivers to hold a valid driver's permit. Green Cab also paid an annual fee to Dane County called an airport-taxicab fee, as a regulated taxicab company.

Green Cab received all of its revenue from the taxicab drivers who leased its vehicles to use as taxis. This revenue came in the form of three fees: (1) lease fees drivers paid Green Cab under the Agreement; (2) "Green Fees;" and (3) administrative fees. Green Cab did not receive any fares customers paid for taxicab rides. The drivers retained all money they collected from customers during their shifts for taxicab rides.

Looking at each revenue sources in more depth, the largest source of revenue was the lease-rate fee designated under the Agreement and paid by a driver at the start of each shift. This is the price paid to lease the vehicle for that shift. These lease-rate fees represented the majority of Green Cab's annual gross receipts. The lease-rate fee drivers paid varied based upon the day of the week, time of day, and special events, such as University of Wisconsin football games. In other words, renting a taxicab from Green Cab during a high use shift required a higher lease-rate fee payment from the driver. Green Cab and its drivers renegotiated the lease rate frequently.

Green Cab also received revenue from "Green Fees" it charged the drivers to cover marketing and software costs Green Cab paid. Drivers paid Green Cab a fixed fee multiplied by the number of rides completed during each shift: 50 cents per completed shared ride and 75 cents per completed direct ride. In other words, though Green Cab did not require drivers to do any marketing of the taxicab service, Green Cab charged the drivers for the marketing services it provided and for the other expenses such as Google maps provided through the iPad required in each rented vehicle.

Third, Green Cab received revenue from administrative fees charged to drivers that ranged from one to three dollars per ride. These fees applied to rides from

repeat customers like the Madison Metropolitan School District and Epic Systems Corporation. Per the Agreement, Green Cab collected ride fares from these repeat customers on behalf of drivers and then credited the amount of the fares for those rides to each driver, less the administrative fee. Green Cab had no right to keep any of these fares received from the customers and was merely the administrative conduit through which these flowed from customer to driver. Green Cab charged the drivers for that administrative burden of collecting and transferring the fares to the drivers.

Green Cab wanted the Commission and wants this Court to focus most heavily on what it chose to call its business. It declared itself a taxicab company, and, therefore, it is a taxicab company, not a vehicle rental company. Nonsense. What a business declares as its primary focus does not make it so. There is no question that Green Cab took some actions a taxicab company would. Namely, it obtained the municipal permits and licenses required for taxicab companies, marketed taxi services and owned taxicabs. That is the end of its taxicab activities.

Green Cab made all of its money from fees charged to the independent contractor drivers for their use of Green Cab's vehicles. Green Cab received no money for cab services provided to any customer. Green Cab's main revenue source, the lease-rate fee, bears no relationship to provided taxi rides. A driver owed and paid this fee just to take a vehicle from Green Cab's lot. The driver did not receive any refund if he or she provided no customers rides and received no fares.

Though true that the money Green Cab spent on taxicab permits and licenses are fees a true taxicab company must spend, Green Cab did this not to allow it to serve customers with taxi rides, but to entice drivers to rent vehicles from Green Cab to then use as taxis. Securing the City and County licenses and permits allowed drivers to use Green Cab's vehicles to provide taxi services to customers without each driver having to individually obtain those licenses and permits. In other words, it made it easier for a driver to use Green Cab's vehicle as a taxi. This made the rental from Green Cab more appealing to potential driver customers.

The costs Green Cab invested in marketing and in the electronics the drivers and customers used were likewise an incentive to convince drivers to rent vehicles from Green Cab. Those expenditures increased the likelihood that drivers would have customers in any given shift, increasing their potential earnings. Without these investments by Green Cab drivers presumably either would pay Green Cab a lower lease-rate or would not rent from Green Cab at all. In other words, though these activities by Green Cab did increase the taxicab services the independent contractor drivers provided, this allowed Green Cab to secure more money by attracting drivers to lease its vehicles. The additional green fees Green Cab received for these additional customers are, per the stipulated facts, not the major revenue source. Green Cab ran a vehicle rental business focused on renting to licensed taxi drivers as its customers.

D. The Commission correctly looked at each driver's shift as the rental period, which was always less than 30 days.

I also agree with the Commission's conclusion that Green Cab primarily leased its vehicles for less than 30 days. Each driver entered into an Agreement with Green Cab that entitled the driver to sign up for shifts of generally 6 to 12 hours. Though the Agreement could last well over 30 days, the right to use any specific vehicle apparently rarely or never lasted more than 12 hours in length. Each shift was a new right to rent and use a vehicle. There was no right to use a specific vehicle for any shift, much less for repeated shifts. I therefore agree with the Commission that each shift is the applicable rental period – it was the time period for which the driver had the right to use the vehicle and for which the driver paid a fee specific to that rental period.

That Green Cab's Agreement with any specific driver lasted well over 30 days does not affect the reality that each driver only ever rented any vehicle for well under 30 days at a time. Green Cab does not assert that any driver ever rented any vehicle for more than 30 days. Nothing in the statute suggests that any business can aggregate all of the rentals to any specific customer to try to get past the 30 day period referenced in the statute.

III. Green Cab's Remaining Arguments Show No Error by the Commission.

The remainder of Green Cab's arguments fail to show any basis to overturn the Commission. Green Cab argues that the Commission erred by relying on the classification of the vehicle drivers as independent contractors when the statute does not say anything about employees versus independent contractors. This is nonsense. Section 77.995 is not an employment statute. It does not relate to how any business employs or contracts with any person. It is a sales tax statute. Why would it discuss details regarding how any specific business arranges its staffing or business model?

How Green Cab and the drivers arranged their business does affect the Commission and this Court's review whether the sales tax applies, though. That the Agreement made the drivers independent contractors who leased a vehicle from Green Cab creates a sale to tax – the rental of vehicles to these drivers. Green Cab does not make any sales to taxicab customers. Each driver's charge to those customers for taxi services is not a taxable sale under §77.995, as it is not the rental of a vehicle without a driver. Had Green Cab elected to use employees to drive the vehicles and thus received payments for taxi services directly from customers, Green Cab would not owe this rental vehicle sales tax. It would not be renting out vehicles. It would be selling taxi rides.

But what Green Cab could have done is irrelevant. It does not use employees to sell taxi services to customers. It does not receive money paid for taxi services. It

makes money from the rental fee. The reasons behind why Green Cab decided to use this business model are irrelevant to the issue before the Commission and do not change the reality that Green Cab leased vehicles to drivers for less than 30 days and thus must pay the tax imposed under §77.995 on those rentals. The tax imposed under that statute is clear and unambiguous.

ORDER

For all these reasons, I affirm the decision of the Commission.

This is a final order for purposes of appeal.