

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP516
STATE OF WISCONSIN

Cir. Ct. No. 2012CV3880

**IN COURT OF APPEALS
DISTRICT IV**

KING’S ENTERPRISES OF WAUSAU, INC.,

PETITIONER-APPELLANT,

v.

STATE OF WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. King’s Enterprises of Wausau, Inc. appeals a circuit court order that affirmed, upon judicial review under Chapter 227 (2011-12) of the Wisconsin Statutes, a tax liability decision of the Wisconsin Tax Appeals Commission. The sole issue on appeal is whether the commission’s factual findings regarding estoppel were supported by substantial evidence in the record. We affirm for the reasons discussed below.

[1]

BACKGROUND

¶2 The Wisconsin Department of Revenue (DOR) sought to collect from King's Enterprises \$132,000 in back taxes and penalties for the company's sales of nonmotorized recreational vehicle trailers or "towables" to nonresidents between 2004 and 2007. King's Enterprises ultimately acknowledged that the transactions were taxable [2] and that it had not paid the taxes, but claimed that the department should be equitably estopped from collecting because department employees had provided the company with false information about the taxability of the transactions.

¶3 Ronald Gajewski testified that when he bought King's Enterprises in 1990, the company was having cash flow problems and difficulty meeting its tax obligations. In 1991, Gajewski began meeting regularly with DOR employees—first John Barnett, then Bruce Klocke, and later Barnett again—to discuss plans to bring the company into compliance and to have the company's tax filings reviewed. Gajewski claimed that during this period in the early 1990s, one or more DOR employees advised him that he could use a Department of Transportation (DOT) license application form, MV-11, to claim a tax exemption for the sales of towables to nonresident purchasers who had paid out-of-state taxes.

¶4 Gajewski acknowledged that the MV-11 form itself explicitly stated that it applied to "motor vehicles" but he explained that, since the exact same form needed to be filled out for towables, he believed—as did other dealers he had spoken with—that the same rules applied to them. He acknowledged that he had never read a tax publication on the issue that had been sent to him by the DOR, and had never sought formal advice on the issue. However, Gajewski believed that if his interpretation was wrong, someone should have told him so in the years during which all of his tax filings were being reviewed by Barnett and Klocke.

¶5 Gajewski had previously stated in an affidavit that Jim Brennan was the DOR employee who had worked with King's Enterprises from 1991 to 1995 to help the company correct sales tax liability underpayments, and that it was Brennan who first advised Gajewski

about the MV-11 form. That was still Gajewski's actual recollection at the time of the hearing. He acknowledged, however, that his "recollection, obviously, is not correct" and not "the most fantastic" after twenty years, since DOR records showed that Brennan had retired before Gajewski even bought the company. Gajewski explained that he had known Brennan since 1959 through various business contacts and would occasionally call him for tax advice, and that Brennan would also stop by to visit Gajewski even after he had retired, so Gajewski may have mixed up the time frame. Gajewski also acknowledged that he had spoken with Barnett during discovery, and Barnett could not recall having given Gajewski the advice Gajewski claimed Barnett had provided. Gajewski concluded that "the only statement that I can swear is absolutely correct is the fact that one of those three gentleman or all three of them gave me the advice that I started using and used from then on "

¶6 Although Gajewski could not recall the dates of any of his meetings with DOR employees and no longer had any notes or documents from them, he was certain that King's Enterprises' accountant, William Vanden Heuvel, was present at several meetings when the topic of sales tax exemptions for towables was discussed. Vanden Heuvel similarly testified that Barnett was the DOR employee who originally reviewed the company's tax filings in the early 1990s, that both Vanden Heuvel and Gajewski were present at several meetings with Barnett where they discussed sales tax exemptions for towables, and that Barnett had advised them that the company would be at a competitive disadvantage if it did not claim an exemption for sales of nonmotorized vehicles to nonresidents.

¶7 Vanden Heuvel further testified that it was a DOT employee, Mary Kay Dodge, who actually oversaw the filing of MV-11 forms. Vanden Heuvel said that he and Gajewski went through the procedures for filling out the MV-11 form with both Barnett and Dodge on one occasion when both happened to be at the King's Enterprises offices at the same time, and that was the first time Vanden Heuvel recalled the sales tax issue for towables coming up. Vanden Heuvel subsequently went to see Klocke at the DOR office to confirm the proper use of the MV-11 to claim tax exempt status for the sale of towables to nonresidents. Pursuant to a seven-year

retention policy, Vanden Heuvel's firm no longer had any records of any of the meetings.

¶8 Dennis Clark, who had supervised Brennan, Barnett, and Klocke in his role as the head of a DOR compliance bureau, testified that all three men were revenue agents in charge of collecting delinquent taxes, not auditors. That meant that their review of King's Enterprises' tax filings would not have gone beyond what was provided on the forms to look at underlying documents. Clark stated that there was no need to fill out an MV-11 form unless the purchaser was applying for a Wisconsin license. He said he had never seen the MV-11 used to report towables sold to nonresidents as exempt from sales tax, and did not train his agents to direct taxpayers to that form. Given the complexity of the tax treatment of nonmotorized trailers, revenue agents would ordinarily direct a taxpayer with questions on that topic to request a written opinion from the DOR.

¶9 Finally, DOR employee Michelle Biermeier was the resolution officer who reviewed the field audit of King's Enterprises. She confirmed that motorized vehicles sold to nonresidents who pay out-of-state taxes are eligible for an exemption, while nonmotorized trailers are not, unless delivery is also made out-of-state, and noted that the DOR had issued multiple publications so stating.

STANDARD OF REVIEW

¶10 Judicial review of administrative proceedings pursuant to Chapter 227 is akin to common law certiorari review. See *Williams v. Housing Authority of the City of Milwaukee*, 2010 WI App 14, ¶10, 323 Wis. 2d 179, 779 N.W.2d 185. We review the decision of the administrative agency rather than that of the circuit court, applying the same standards of review set forth in WIS. STAT. § 227.57. See *Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997).

¶11 We may not substitute our judgment for that of the administrative agency as to the weight or credibility of the evidence on a finding of fact. WIS. STAT. § 227.57(6); *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). Rather, we must

examine the record for any substantial evidence that supports the agency's determination. Section 227.57(6); *Currie*, 210 Wis. 2d at 387. The substantial evidence test does not require a preponderance of the evidence, merely that "reasonable minds could arrive at the same conclusion as the agency" based on the record before the agency. *Kitten v. DWD*, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649.

DISCUSSION

¶12 King's Enterprises bore the burden of establishing its estoppel claim by clear and convincing evidence. *Advance Pipe & Supply Co., Inc. v. DOR*, 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986). The standard elements of an estoppel claim are that: (1) some action or omission by the party against whom estoppel is sought (2) induced reasonable reliance by the party asserting estoppel (3) to the detriment of the party asserting estoppel. *DOR v. Moebius Printing Co.*, 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979). When the party against whom estoppel is sought is a governmental entity, the decisionmaker must further balance the public interests at stake if the governmental action were estopped against the injustice that would be caused if the action were not estopped. *Id.* at 639.

¶13 The commission stated that it believed the testimony of Gajewski and Vanden Heuvel to be truthful. However, the commission nonetheless determined that the testimony was not of sufficient weight to clearly and convincingly prove that any DOR or DOT official had actually provided mistaken advice because: (1) the witnesses' memory of events was not clear or precise; (2) their testimony conflicted as to whether it was a DOR or DOT employee who first brought up the MV-11 form; (3) there was no corroboration or substantiation of their testimony; and (4) it was inherently improbable that multiple State employees from two different agencies would have erroneously advised King's Enterprises not to collect any sales taxes from its nonresident customers. The commission considered it more likely that Gajewski and Vanden Heuvel had confused the treatment of motorized and nonmotorized vehicles, or had heard what they wanted to hear so as to minimize any competitive disadvantage with dealers located closer to state lines. King's Enterprises claims that there was no substantial evidence in the record to

support the commission's second and third determinations.

¶14 King's Enterprises first argues that the testimony of Gajewski and Vanden Heuvel was not inconsistent as to who first told them about the MV-11 form because Gajewski did not make any definitive assertion as to who first told him about it. Gajewski did, however, testify that he was certain he had been provided the information by one of three gentlemen from the DOR—Brennan, Barnett, or Klocke—and he did not even mention the possibility that it could have been Doyle from DOT, as Vanden Heuvel testified. Therefore, the commission's statement that the testimony conflicted was an interpretation of the evidence, not a misstatement of it.

¶15 Next, King's Enterprises argues that Gajewski's testimony and Vanden Heuvel's testimony corroborated each other. We disagree with that contention for two reasons. First, as we have just noted, the commission reasonably concluded that Gajewski's and Vanden Heuvel's accounts conflicted on a key point, rather than corroborating each other. Second, taking the commission's comment in the context of its entire decision, we understand the commission to have been focusing on the fact that there was no corroborating testimony from any of the State employees who were alleged to have provided the erroneous advice, and no written documents substantiating what if any advice had been provided.

¶16 In sum, we are satisfied that there was substantial evidence in the record to support the factual findings underlying the commission's decision that the testimony by King's Enterprises' witnesses was insufficient to clearly and convincingly prove estoppel.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

[1]

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2]

There is a tax exemption for the sale of motorized vehicles to nonresidents who have paid out-of-state taxes, but it does not apply to nonmotorized towables. WIS. STAT. § 77.54(5)(a).