STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | WALWORTH COUNTY

NEJA GROUP, LLC,

Petitioner,

vs.

Case No. 2014-CV-0131

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

FILED
CIRCUIT COURT
AUG 2 2 2014
Clerk of Courts-Walworth Co.
By: Kristi Schiller Deputy Clerk

DECISION

BACKGROUND

The Wisconsin Department of Revenue (hereafter "the Department") conducted an audit of the NEJA Group, LLC (hereafter "NEJA Group") for the period of January 1, 2001 through December 31, 2004. (Pet'r Br. 3; Resp't Br. 2). During the audit period, NEJA Group operated Alpine Valley Music Theatre (hereafter "Alpine Valley"), located in the Village of East Troy, Walworth County, Wisconsin. (Pet'r Br. 1; Resp't Br. 2). SFX Entertainment, Inc. (hereafter "SFX") owned NEJA Group during the audit period.[1] (P-App 6). During the audit period, Ticketmaster Corporation (hereafter "Ticketmaster") sold tickets to Alpine Valley events pursuant to an agreement giving Ticketmaster "the exclusive right...to sell, as SFX's agent, all Tickets made available generally to the public through any and all means, including but not limited to at Outlets and/or by Telephone Sales, for any Attraction scheduled or presented by SFX at any Facility". (P-App 13 Ex. A No. 2). However, as part of the agreement, SFX retained "the right to conduct box office, season, subscription, affinity, and club programs, box seats and group sales of Tickets, but [could] not use the services of any third party computerized or electronic ticketing service or entity to conduct such sales." (P-App 13 Ex. A No. 2).

[1] During the audit period, SFX was a subsidiary of Clear Channel Communications, Inc. (P-App 6 No. 3).

The agreement between Ticketmaster and SFX also included a revenue sharing agreement whereby SFX and Ticketmaster agreed "to share the 'per ticket' Customer-Convenience Charges, and the 'per order' handling fees with respect to the services provided by both Ticketmaster and SFX". (P-App 13 Ex. A No. 4). The Customer Convenience Charges and handling fees are collectively referred to as "service charges" by both parties. (Resp't Br. 3; P-App 5 Ex. F General Resp. No. 3). SFX and Ticketmaster mutually determined the amount of the service charges assigned to each ticket sold by Ticketmaster. (P-App 5 Ex. E No. 10). SFX received approximately 50% of the "service charges" collected by Ticketmaster. (P-App 5 Ex. E No. 3). SFX allocated all of the payments it received from Ticketmaster for Alpine Valley events to NEJA Group. (Pet'r Br. 3; Resp't Br. 3; P-App 12 ¶10).

NEJA Group paid sales tax on the face value of the tickets, maintenance fees, parking fees, and delivery fees for tickets sold by Ticketmaster during the audit period. (Pet'r Br. 2; Resp't Br. 2). NEJA Group did not pay sales tax on the Customer Convenience Charges or the handling fees charged by Ticketmaster.

As a result of the audit, the Department determined that NEJA Group had failed to pay $489,219.70 (inclusive of interest and penalties) in sales and use tax on the total Customer Convenience Charges and handling fees charged by Ticketmaster during the audit period. (Pet'r Br. 3; Resp't Br. 3). NEJA Group filed a timely Petition for Redetermination with the Department, which was denied. (Pet'r. Br. 4). NEJA Group then filed a timely Petition for Review with the Wisconsin Tax Appeals Commission (hereafter "the Commission"). (Pet'r Br. 4; Resp't Br. 3). Both parties moved for summary judgment. (P-App 1). In a ruling and order dated January 13th, 2014, with a correction issued on February 5, 2014, the Commission granted the Respondent's Motion for Summary Judgment and dismissed the Petition for Review. (P-App 1). The Commission held that Ticketmaster was an agent of NEJA Group for the purpose of selling tickets to Alpine Valley shows. (P-App 1). The Commission further held that the Customer Convenience Charges and handling fees charged by Ticketmaster were part of the gross receipts from the sale of admissions. (P-App 1). The Commission held that the Ticketmaster service charges were taxable because they were part of the total sale price of the tickets and were related to the sale. (P-App 1).

The petitioner now seeks judicial review of the Commission's Ruling and Order pursuant to Wis. Stat. § 227.53.[2]

STANDARD OF REVIEW

The parties dispute the standard of review that is to be applied in this case. The petitioner argues that the court should apply a de novo standard of review while the respondent argues that the court should give great weight deference to the Commission's statutory interpretations and controlling weight deference to the Commission's interpretations of Wis. Admin. Code Tax. (Pet'r Br. 9-11; Resp't Br. 6-12; Pet'r Reply Br. 1-11). For the reasons stated below, this court will apply due weight deference to the Commission's statutory interpretations and controlling weight deference to the Commissions interpretations of Wis. Admin. Code Tax.

Wis. Stat. § 227.57 describes the scope of review that the court must apply. The relevant portions of Wis. Stat. § 227.57 are as follows:

> **227.57 Scope of review. (1)** The review shall be conducted by the court without a jury and shall be confined to the record...
>
> **(2)** Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
>
> **(3)** The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.
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> ...
>
> **(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.

[2] All statute references are to Wisconsin Statutes (2001-2002) unless otherwise noted.

. . .

> **(10)** Upon such 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. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit, or privilege under such act.

"This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to 'great weight.' The second level of review provides that if the agency decision is 'very nearly' one of first impression it is entitled to 'due weight' or 'great bearing.' The lowest level of review, the de novo standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented." *Jicha v. DILHR*, 169 Wis. 2d 284, 290, 485 N.W.2d 256 (1992); citing *Sauk County v. WERC*, 165 Wis. 2d 406, 477 N.W.2d 267 (1991).

The court begins by finding that de novo review is not appropriate in this case. "De novo review is appropriate only when the issue is one of first impression, or the agency's position on the issue has been so inconsistent so as to provide no real guidance." *ITW Deltar v. LIRC*, 226 Wis. 2d 11, 17, 593 N.W.2d 908 (Ct. App. 1999). An agency need not have considered identical or even substantially similar facts before, only the particular statutory scheme. *Id.* "The Commission is charged with interpreting and administering the tax code and adjudicating taxpayer claims, Wis. Stat. § 73.01(4), and this is not the first case in which the Commission has utilized its expertise and experience to interpret Wis. Stat. § 77.52(2)(a)2." *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue*, 2010 WI 33, ¶38, 324 Wis. 2d 68, 781 N.W.2d 674. Because the court finds that the Wisconsin Department of Revenue has experience consistently interpreting Wis. Stats. §§ 77.51 and 77.52 and this is not a case of first impression, a de novo review of the Commission's decision is not appropriate. Therefore, the court must decide whether to the Commission's decision is entitled to great weight deference or due weight deference.

"[C]ourts give great weight deference when: '(1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.'" *Dep't of Revenue v. A. Gagliano Co.*, 2005 WI App 170, ¶26, 284 Wis. 2d 741, 702 N.W.2d 834; citing *Zip Sort, Inc. v. Wis. Dep't of Revenue*, 2001 WI App 185, ¶12, 247 Wis. 2d 295, 634 N.W.2d 99. The court has no difficulty finding that the first, third, and forth prongs have been satisfied. The Commission has been charged with administering the tax code. *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue*, 2010 WI 33, ¶38, 324 Wis. 2d 68, 781 N.W.2d 674. The Commission employed its expertise of Wisconsin tax code when interpreting Wis. Stats. §§ 77.51 and 77.52 and the Commission's interpretation would provide uniformity and consistency in the application of those statutes. However, the court is unable to find that the Commission's interpretations of Wis. Stats. §§ 77.51 and 77.52 are interpretations of long standing as they relate to the service charges discussed in this case. Although the respondent cites cases showing that the Commission has previously interpreted Wis. Stats. §§ 77.51 and 77.52, those cases do not discuss fees that are similar to the Customer Convenience Charges and handling fees at issue here. (Resp't Br. 8). Therefore, this court will apply due weight deference to the Commission's statutory interpretations.

"Courts give lesser, 'due weight' deference when the agency is charged by the legislature with enforcement of the statute and has experience in the area, but has not developed expertise that necessarily places the agency in a better position than the court to interpret the statute. Courts applying 'due weight' deference will sustain an agency's statutory interpretation if it is not contrary to the clear meaning of the statute and no more reasonable interpretation exists. Applying 'due weight' deference, a reviewing court will not set aside the agency's interpretation in favor of another equally reasonable interpretation, but will replace it with a more reasonable interpretation if one exists." *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue*, 2010 WI 33, ¶36, 324 Wis. 2d 68, 781 N.W.2d 674.

This case also involves the Commission's interpretation of Wis. Admin. Code Tax § 11.32. "An administrative agency's interpretation of its own rules or regulations is controlling unless 'plainly erroneous or inconsistent with the regulations.'" *Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶53, 311 Wis. 2d 579, 754 N.W.2d 95. Therefore, this court must

give controlling weight deference to the Commission's interpretation of Wis. Admin. Code Tax § 11.32. "Despite the different terminology, 'controlling weight deference is similar to great weight deference,' the latter associated with deference given to an agency when interpreting a statute as opposed to a rule interpretation. Thus, we may consider that standard's language; as such, under controlling weight deference, a court should 'refrain from substituting its view of the law for that of an agency charged with administration of the law, and will sustain the agency's conclusions of the law if they are reasonable. We will sustain an agency's conclusions of law even if an alternative view of the law is just as reasonable or even more reasonable. Accordingly, if the Commission's interpretation is reasonable and consistent with the meaning or purpose of the rule, then we uphold the Commission's decision rather than substitute our judgment for that of the Commission's." *Id.* at ¶54 (citations omitted).

DECISION

Factual Findings

The Commission's factual findings are listed in paragraphs 1 through 24 in its ruling and order dated January 13, 2014 and correction dated February 5, 2014. Although the petitioner claims that some findings are missing or incomplete, both parties filed motions for summary judgment. "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 there was no dispute as to any material fact and that any objections to the factual findings raised by the petitioner were objections dealing with "interpretation and style." (Commission's Ruling and Order 10). This court will not set aside any of the Commission's factual findings because the Commission's factual findings are supported by substantial evidence in the record.

The Service Charges are Taxable

The Commission held that Wis. Stat. § 77.52 (2001-2002) imposes sales tax on the gross receipts from the sales of admission to amusement events. (Ruling and Order 13). Wis. Stat. § 77.52 states in pertinent part:

77.52 Imposition of retail sales tax.

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the ***gross receipts*** from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

2. The ***sale of admissions*** to amusement, athletic, entertainment or recreational events or places…

(emphasis added). The petitioner argues that the Customer Convenience Charges and handling fees charged by Ticketmaster are not part of the gross receipts from the sale of admissions to Alpine Valley events. The petitioner alleges that these "convenience services" are somehow separate services that are distinct from sale of admission. (Pet'r Br. 12-15). In support of its argument, the petitioner states that because a person could purchase a ticket at the Alpine Valley venue without paying a Customer Convenience Charge or handling fee, that the service charges of Ticketmaster must be separate. The petitioner is wrong. Ticketmaster is not selling "convenience" and tickets; it is only selling tickets. Therefore, the "convenience services" being sold by Ticketmaster are part of the sale of admission to Alpine Valley entertainment events. The "convenience services" cannot be purchased separately and they merely provide a different method of purchasing the same item – admission to Alpine Valley entertainment events.

The Commission also found that the Customer Convenience Charges and handling fees charged by Ticketmaster were part of the "gross receipts" from the sale of Alpine Valley admissions. (Ruling and Order 12). In making this determination, the Commission considered the definitions of "gross receipts" discussed in Wis. Stat. § 77.51(4) and Wis. Admin. Code Tax 11.32. Their relevant portions are:

77.51

(4)(a) Except as provided in par. (cm), ***"gross receipts" means the total amount of the sale, lease or rental price, as the case may be, from sales at retail of tangible personal property, or taxable services***, valued in money, whether received in money or otherwise, without any deduction on account of the following:

1. The cost of the property sold;

2. The cost of the materials used, labor or service cost, interest paid, losses or any other expense;

3. The cost of transportation of the property prior to its sale to the purchaser;

4. Any tax included in or added to the purchase price...

...

(c) ***"Gross receipts" includes***:

1. All receipts, cash, credits and property except as provided in par. (b)3.

2. ***Any services that are a part of the sale of tangible personal property, including any fee, service charge, labor charge*** or other addition to the price charged a customer by the retailer which represents or is in lieu of a tip or gratuity.

(emphasis added).

Tax 11.32 "Gross receipts" and "sales price"
(1) GENERAL. The amount to which the sales and use tax rate is applied is "gross receipts" for sales tax and "sales price" for use tax. Both "gross receipts" and "sales price" mean the total amount of the sale, lease or rental from retail sales of tangible personal property or taxable services, valued in money, whether received in money or otherwise.
(2) HANDLING AND SERVICE CHARGES. ***A retailer's gross receipts from charges for customer alterations, handling services, small orders, returned merchandise, restocking, split shipments and similar charges for services related to retails sales are included in gross receipts derived from the sale of taxable tangible personal property or taxable services.***

(emphasis added).

The Commission correctly considered these provisions and found that gross receipts from the sale of admissions include handling and service charges like the Customer Convenience Charges and handling fees presented in this case. (Ruling and Order 12). The petitioner attempts, but fails, to distinguish the Customer Convenience Charges and handling fees from the charges and fees that are unambiguously included in "gross receipts" for admissions. Because the Customer Convenience Charges and handling fees are part of the sale of the tickets for admission to Alpine Valley events, the charges and fees are also part of the gross receipts for the tickets. The above definitions of "gross receipts" are designed to prevent retailers from doing exactly what the petitioner is attempting to do – from creating a service charge or fee that is part of a sale to avoid paying taxes on the total amount of the sale.

The petitioner spends a great deal of time discussing several non-Wisconsin cases regarding "customer convenience charges." However, those cases do not provide an analysis of Wisconsin Tax Statutes or the Wisconsin Administrative Code Tax and therefore the court finds that those cases are not binding or persuasive to the issues presented.

NEJA Group is Subject to the Sales Tax

The Commission held that NEJA Group can be taxed for the gross receipts of Ticketmaster's sales of Alpine Valley admissions. The petitioner argues that the Commission did not provide any analysis to reach this conclusion. However, the Commission provided ample analysis. The Commission found that NEJA Group and Ticketmaster were both "retailers" as defined by Wis. Stat. § 77.51(13)(c) and that NEJA Group contracted with Ticketmaster (through NEJA Group's owner – SFX) to allow Ticketmaster to act as a ticketing agent. NEJA Group granted Ticketmaster the exclusive right to sell tickets to Alpine Valley events. (Ruling and Order 11, 13). SFX, which owned NEJA Group and forwarded service charges collected by Ticketmaster to NEJA Group, mutually agreed (exercised control) on the amount of service charges that would be collected by Ticketmaster. Therefore, the Commission correctly concluded that NEJA Group can be taxed for the gross receipts for Alpine Valley admissions sales made by NEJA Group and by Ticketmaster.

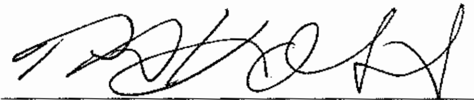
CONCLUSION

Applying the due weight and controlling weight deference to the Commission's statutory an administrative code interpretations, respectively, this court finds that the Commission's statutory interpretations are not contrary to the clear meaning of the statute and more reasonable interpretations do not exist. The court further finds that the Commission's interpretation of the administrative code is consistent with the meaning or purpose of the rule. Even if this court were to apply the de novo standard of review proposed by the petitioner, the court would still uphold the determinations of the Commission because the Commission correctly interpreted the statutes and administrative code.

For the above-stated reasons, the Ruling and Order of the Wisconsin Tax Appeals Commission is affirmed. The Commission correctly interpreted the law and administrative code in determining that the petitioner is responsible for sales tax on the Customer Convenience

Charges and handling fees that were part of the gross receipts from the sale of admissions to Alpine Valley events. Therefore, the petition is dismissed. The court directs counsel for the Department of Revenue to prepare an order consistent with this decision within two weeks.

Dated this 22d day of August, 2014.



Honorable Phillip A. Koss
Walworth County Circuit Court Judge
Branch I