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Wisconsin Tax Appeals Commission
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STATE OF WISCONSIN
TAX APPEALS COMMISSION

LA CROSSE QUEEN, INC.
P.O. Box 1805
La Crosse, WI 54602

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708

Respondent.

- * DOCKET NO. 93-S-621
- * RULING AND ORDER
- * GRANTING RESPONDENT'S
- * MOTION FOR SUMMARY
- * JUDGMENT

W

THOMAS R. TIMKEN, COMMISSIONER, JOINED BY MARK E. MUSOLF,
COMMISSION CHAIRPERSON:

The above-entitled matter came before this commission pursuant to a MOTION FOR SUMMARY JUDGMENT with supporting affidavit, exhibits, and briefs filed by the respondent, Wisconsin Department of Revenue, by its attorney, Kevin B. Cronin.

The respondent's motion is based on its allegation that there is no genuine issue as to any material facts and, therefore, it is entitled to a judgment affirming its action on petitioner's petition for redetermination as a matter of law.

The petitioner, La Crosse Queen, Inc., has appeared by its counsel, Paul J. Munson, who in PETITIONER'S REPLY MEMORANDUM stated:

"Petitioner agrees with Respondent that there are no disputes about any material facts and that summary judgment is appropriate without the need for further fact finding by the Commission."

This commission agrees. This matter is ripe for summary judgment pursuant to the provisions of § 802.08 of the Wisconsin Statutes and § TA 1.31 of the Wisconsin Administrative Code.

After reviewing the record before it, this commission finds, decides, and rules as follows:

During the years involved in this appeal, namely 1989, 1990, and 1991, the petitioner operated a seasonal (May through October) excursion vessel named The La Crosse Queen on the Mississippi River under ICC License WC-1172.

The petitioner advertised its excursion trips as 1½-hour sightseeing and dinner cruises. Its vessel carried only passengers, with no other merchandise, on round trip sightseeing and dinner cruises originating and returning to its wharf in La Crosse, with no intermediate stops. Its passengers/customers came from Wisconsin, Minnesota, and other locations.

On its trip north, The La Crosse Queen loaded at its wharf in La Crosse, traveled up river several miles, and then returned. On its trip south, the boat traveled several miles, turned around, and returned.

During the years involved, the petitioner operated in substantially the same manner and in the same location as its predecessor, La Crosse Queen, operated by Roy Franz's Big Indian Boat Lines until its purchase by the petitioner.

On October 14, 1992, the respondent, Wisconsin Department of Revenue, issued a sales tax assessment against the petitioner, La Crosse Queen, Inc., on gross receipts covering various periods

of 1989, 1990, and 1991. The dollar amount of this assessment is not disputed; its taxability is.

Under date of October 21, 1992, the petitioner filed a timely petition for redetermination with the respondent claiming the exemption from tax contained in § 77.54(13) of the Wisconsin Statutes.

On October 21, 1993, the respondent acted on petitioner's petition for redetermination, granting it in part and denying it in part. Petitioner's appeal to this commission ensued.

Section 77.54(13) of the Wisconsin Statutes exempts from sales tax:

"The gross receipts from the sales of and the storage, use or other consumption in this state of commercial vessels and barges of 50-ton burden or over primarily engaged in interstate or foreign commerce or commercial fishing, and the accessories, attachments, parts and fuel therefor."

The respondent concedes that The La Crosse Queen is a commercial vessel of 50-ton burden or over, but challenges that it is primarily engaged in interstate commerce.

The respondent relies in large part on the 1977 decision of this commission in *Roy A. Franz, d/b/a The Big Indian Boat Lines v. Wisconsin Department of Revenue*, 10 WTAC 208. The petitioner/taxpayer in that case was the direct predecessor in interest of the current appellant. It operated in the same manner and location during earlier years.

Franz's operations presented a constitutional issue that this commission, in denying his appeal, concluded (at that time)

that it lacked authority to decide, resulting in an appeal to Dane County Circuit Court [Case #159-122 (1979)].

The constitutional issue presented was whether the sales tax in question imposed an unconstitutional burden on interstate commerce. The Dane County Circuit Court, via its presiding judge, The Honorable George R. Currie (a former Wisconsin Supreme Court Justice) adopted the finding in *Mayor and Board of Alderman v. Streckfus Steamers*, 167 Miss. 856, 150 So. 215 (1933), which states:

"The point is that, notwithstanding the movement of appellee's boat was interstate, there was no commerce involved; there was no interstate business. The term interstate commerce means, as its language imports, not only interstate movement, but interstate business. There was none here involved."

The respondent's reliance on this case is well placed. As it was in 1977, so it also applies to 1989-1991. If there is no commerce, there can be no interstate commerce.

In *Washington Island Ferry Line, Inc. v. Wisconsin Department of Revenue*, CCH Wis. Tax Rep. ¶ 203-398 (WTAC 1993), aff'd Dane County Circuit Court, December 4, 1993, CCH Wis. Tax Rep. ¶ 400-029, we cited the "integral step in interstate movement" criterion in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) to award the interstate commerce tax exemption where "a substantial amount of the goods and a substantial number of the persons transported" originated from or were destined for points outside the state of Wisconsin and, as the

Dane County Circuit Court's affirming opinion noted, the ferry's transportation was "an essential part of their interstate travel."

Here, there is no such "integral step in interstate movement" or "essential part" of any interstate journey for petitioner's passengers, who embark and disembark at the same location in La Crosse. Their travel to and from interstate destinations is wholly independent of whether they ride petitioner's boat. Theirs is purely a recreational ride, the nature of which is amusement rather than "an essential part of their interstate travel."

Therefore, this commission finds that during the years at issue the petitioner was not primarily engaged in interstate commerce and is not entitled to the exemption from sales tax contained in § 77.54(13) of the Wisconsin Statutes.


Therefore,

IT IS ORDERED

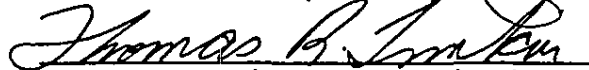
That the respondent's motion for summary judgment is hereby granted and its action on petitioner's petition for redetermination affirmed.

Dated at Madison, Wisconsin, this 11th day of January, 1995.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Thomas R. Timken, Commissioner

(Dissenting)

Joseph P. Mettner, Commissioner

ATTACHMENT: "Notice
of Appeal Information"

METTNER, COMMISSIONER, DISSENTING:

I respectfully disagree with the majority decision of the Commission concerning the foregoing order. This matter should be decided for the petitioner on the basis that the transactions at issue are exempt under § 77.54(13), Stats., on the basis that the petitioner's excursions primarily comprise the use of a commercial vessel in interstate commerce. To the extent that the vessel is used in Wisconsin waters, the gross receipts from the use of the vessel should be exempt from sales or use tax.

Three reasons inform my view that the transactions concerning the taxpayer in this case should be considered exempt under § 77.54(13), Stats.

First, the carriage of passengers is commerce, in spite of what the late Justice George R. Currie may have found in any action preceding this case.¹ The second definition of "commerce"

¹ No disrespect is intended by this remark to either the late Justice Currie or his memory. A cursory review of the case cited by the respondent, *Roy A. Franz, d/b/a The Big Indian Boat Lines v. Wisconsin Department of Revenue*, WTAC Docket No. S-5110, August 18, 1977, reported in 10 WTAC 208, aff'd Case No. 159-122, Dane County Circuit Court, July 30, 1979, tends to indicate that Justice Currie, then reviewing a Commission decision as a reserve judge, decided the matter with the assistance of briefs which were sparse at best.

The statute at issue in this case, § 77.54(13), was never discussed in the disposition of *Franz* either at the Commission level or upon judicial review, in spite of facts nearly identical to those in this case. This is a bit anomalous, given the enactment of the commercial vessel exemption nearly a decade earlier. See, Ch. 154, Laws of 1969, §§ 260, 382(5). Then, as now, the relevant tension at issue concerned the sales tax imposition language of § 77.52(2)(a)2., Stats., which deals with the taxation of admissions to entertainment or recreation facilities, and § 77.54(13), Stats., which exempts from sales tax gross receipts from the sales or use in this state of certain commercial vessels primarily engaged in interstate commerce.

offered in Black's Law Dictionary is "the transportation of persons and property by land, water and air." See, Black's Law Dictionary 244 (5th ed. 1979). This is precisely what the petitioner does in exchange for admission fees.

Secondly, there is very recent precedent supporting a more expansive definition of "interstate commerce" in a taxation context than that applied by the Court in the *Franz* case cited by the respondent and in the majority's ruling in this case. In *Town of La Pointe v. Madeline Island Ferry Line, Inc.*, 179 Wis. 2d 726 (Ct. App. 1993), the Court of Appeals construed a definition of "interstate commerce" in the context of § 70.111(3), Stats., a property tax exemption statute. According to the Court's definition, interstate

In spite of the availability of the exemption statute argument, the petitioner chose to press his cause on other, mostly constitutional grounds, including the alleged burden of the sales tax on interstate commerce. (So-called "negative commerce clause" concerns found in the case law of the day was likely a reason for the 1969 enactment of the commercial vessel exemption in the first place.)

Justice Currie decided the interstate commerce issue in *Franz* by citing *Mayor and Board of Alderman v. Streckfus Steamers*, 167 Miss. 856, 150 So. 215 (1933), for the proposition that no "commerce" was implicated in an excursion boat's business, therefore interstate commerce burdens were of no concern. Had the petitioner chosen to overcome the less onerous burden of proving qualification for the § 77.54(13) exemption, as opposed to tilting at constitutional windmills, the result in *Franz* might not have been any different in 1979, but it would--and should--be different today.

As an analysis of Wisconsin's ferry line cases reveals, *infra*, the judicial definition of "interstate commerce" has broadened considerably in the years since the *Franz* decision, to include the in-state transportation of persons and goods whose initial origin or eventual destination was out-of-state. The ferry line cases would most certainly have been considered persuasive authority if *Franz* were decided today. The deciding courts in those cases were, after all, much closer to home than the Mississippi Supreme Court.

commerce applied to exclusive in-state passenger carriage (i.e., Wisconsin ports of departure and arrival with no foreign state disembarkation) of persons and goods whose journeys either began or would ultimately end out-of-state. Id., at 737.

More recently, this commission was affirmed in the case of *Washington Island Ferry Line, Inc. v. Wisconsin Department of Revenue*, WTAC Docket Nos. 91-S-126 and 91-S-385, March 16, 1993, reported in CCH Wis. Tax Rptr. ¶203-398, aff'd Case No. 93 CV 1442, Dane County Circuit Court, December 4, 1993, reported in CCH Wis. Tax Rptr. ¶400-029. According to the Dane County Circuit Court, the *Madeline Island Ferry Line, Inc.* definition of "interstate commerce" applied with equal vigor to the use of that phrase in § 77.54(13), Stats. Applying the reasoning of that case to both passenger and cargo carriage, the Court found the essential necessity of the segment of travel examined (maritime passenger excursions) to be the crucial factor in characterizing the segment as "interstate," where many of the ferry passengers' journeys either began or would end at an out-of-state location.

In the present case, the petitioner has alleged--and the respondent does not dispute--that 75% of its receipts from passenger excursions are derived from persons whose travel originated outside of the state of Wisconsin.² Whether or not a

² Just how the petitioner would prove this fact at a hearing is an interesting question in and of itself. But, for summary judgment purposes, uncontroverted facts do not produce "genuine issues" of fact, and doubts are to be resolved against the moving party, here, the respondent. *Silingo v. Village of Mukwonago*, 156 Wis. 2d

boat trip of several miles on the Mississippi River may be considered an "absolute necessity," required for "completion" of the out-of-state travellers' journeys, is difficult to say. See, *Washington Island Ferry Line, Inc.*, *supra*. It is equally difficult, however, to distinguish the present facts from those of *Madeline Island Ferry Line, Inc.* or *Washington Island Ferry Line, Inc.* in any meaningful respect relating to the "interstate" nature of the transportation at issue.

Finally, there are facts in the present case which were absent in the ferry line cases and which support a finding that the transportation provided by the petitioner primarily comprised interstate commerce. The petitioner in this case operates in interstate waters, because Minnesota and Wisconsin share equal portions of the Mississippi River's width at any given point.³ The petitioner also holds a water carrier permit issued by the Interstate Commerce Commission. See, 49 U.S.C §§ 10501(a)(2) and 10922, *et seq.* Regardless of the origins or destinations of its passengers, the petitioner's vessel clearly operated in an interstate setting.

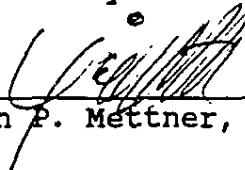
For the above reasons, I would grant summary judgment to the non-moving petitioner under § 802.08(6), Stats., having found that there is no genuine issue of material fact in this case, and that the transactions at issue primarily comprise gross receipts

536, 545 (Ct. App. 1990)

³ See, Art. II, § 1, Wisconsin Constitution, and *Franzini v. Layland*, 120 Wis. 72 (1903).

from the use of a qualifying vessel primarily in interstate commerce and are therefore exempt under § 77.54(13), Stats.

Respectfully submitted,



Joseph P. Mettner, Commissioner