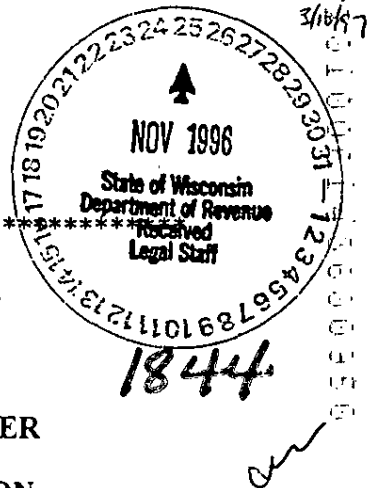


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VACATION OWNERS ASSOC INC 9551513 112196 TAC

STATE OF WISCONSIN
TAX APPEALS COMMISSION



VACATION OWNER'S ASSOCIATION, INC.	*	Docket No. 95-S-1513
Petitioner,	*	
vs.	*	RULING AND ORDER
WISCONSIN DEPARTMENT OF REVENUE	*	GRANTING MOTION
Respondent.	*	

MARK E. MUSOLF, COMMISSION CHAIRPERSON, JOINED BY DON M. MILLIS, COMMISSIONER:

The petitioner has moved this commission, pursuant to § 804.11(2), Stats., for an order allowing withdrawal of an admission. Having reviewed the record, including the affidavits, briefs, and letters submitted by the parties, we rule and order as follows:

RULING

The admissions which petitioner seeks to withdraw were made in a response dated February 28, 1996 to Request Nos. 35(a) and (b) of respondent's First Request for Admissions. When asked to admit or deny that the units petitioner sold during the period under review are "time-share property" as that term is used in §§ 707.02(32) and 77.52(2)(a)1, Stats., petitioner objected on the grounds that the requests called for legal conclusions and then, "without waiving this objection," admitted the requests.

Petitioner's attorney first learned that Nos. 35(a) and (b) had been inadvertently admitted on June 5, 1996, as he was preparing a draft of stipulated facts, which he faxed to respondent's attorney on June 5 and 6, 1996. On June 7, 1996, the respondent filed a motion for summary judgment with this commission, based in part on petitioner's admission of Nos. 35(a) and (b). On June 11, 1996, two days before a scheduled June 13 telephone conference before this commission, petitioner's attorney faxed to respondent's attorney an amended response to Nos. 35(a) and (b), wherein petitioner changed its admissions to denials.

At the scheduling conference on June 13, 1996, it was determined that petitioner would submit its motion to withdraw the admissions, and that the respondent's summary judgment motion would be held in abeyance pending our ruling on petitioner's motion.

Section 804.11(2), Stats. provides as follows:

(2) EFFECT OF ADMISSION. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits will be served thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits ...

Our decision in this regard is discretionary. *Schmid v. Olsen*, 111 Wis.2d 228, 237 (1983). We must consider both whether the requested withdrawal will serve the presentation of the merits of the case and whether the withdrawal will be prejudicial to respondent in maintaining its position on the merits.

As a preliminary matter, the petitioner has satisfied us that the admission of Nos. 35(a) and (b) was, as explained in two affidavits by petitioner's attorney, inadvertent. We believe the respondent's finger-pointing with respect to petitioner's delay in drafting a proposed stipulation of facts has been satisfactorily rebutted by petitioner's showing that it waited months before receiving certain information requested from respondent and then promptly began work on the stipulation, at which time the inadvertent admission was discovered.

Will the withdrawal advance presentation of the merits?

The merits of this appeal relate to whether § 77.52, Stats., applies to petitioner's sales of time-share/flexible use condominiums and to certain related conveyance and maintenance fees received by petitioner. Because the resolution of this case on the merits may hinge on Nos. 35(a) and (b), we think presentation of the merits will be advanced by allowing the withdrawal.

On the other hand, if we deny the withdrawal, the Commission will lose the benefit of the fullest presentation and discussion of a critical legal issue involved in resolving the merits of

the appeal. viz., the applicability of § 77.52 and related statutes. Indeed, the respondent's extensive argument on this legal issue in its brief opposing the withdrawal motion suggests to us that granting the motion is appropriate so that we can fully consider the merits, either via respondent's pending summary judgment motion or at a hearing to resolve any factual issues, if necessary.

Respondent insists that allowing withdrawal of the admission would be contrary to the record of the case, citing *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97 (D.Del. 1988) and *Branch Banking and Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655 (E.D.N.C. 1988). We disagree. Petitioner's proposed withdrawal is consistent with the position taken in its petition for review. Further, neither *Coca-Cola* nor *Branch Banking* involved *inadvertent* admissions.

Accordingly, we conclude that the merits will be served by granting petitioner's motion.

Will the withdrawal prejudice the respondent in defending its position?

Generally, courts have defined this prejudice as relating "to the difficulty a party may face in proving its case because of the sudden need to obtain evidence required to prove the matter that had been admitted." *Coca-Cola Bottling Co.*, *supra*, at 106, quoting from *Gutting v. Falstaff*, 710 F.2d 1309, 1314 (8th Cir. 1983).

Respondent has shown no such difficulty here, where, contrary to respondent's suggestion in its brief, the pretrial phase of litigation has not passed. Indeed, no trial date has even been set. There is nothing "sudden" here which will hamper the respondent in presenting its case on the merits. To the contrary, it appears that respondent is well prepared to present its proof and legal argument on the merits because it did so extensively in its argument on the withdrawal motion.

Respondent's other arguments that it will be prejudiced by our granting the motion are unconvincing. The record shows no actionable lack of diligence by petitioner. If respondent

Bill - Possible
Quotable Quote -
Indeed... appropriate!
in other words, since
we are fighting so hard
to keep it from being
void - we should w/ it.

needs further discovery in light of the withdrawal, we are prepared to grant it as suggested by petitioner in its motion brief.

We are therefore satisfied that the withdrawal and amendment of Admission Nos. 35(a) and (b) will not prejudice the respondent in maintaining its position on the merits of the appeal before us.

Respondent's request for costs.

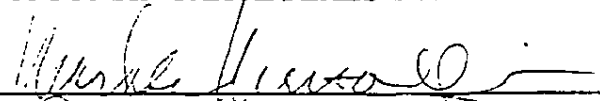
Nor do we find appropriate an award of costs to respondent for its extensive briefing on this motion, much of which can be more appropriately applied to arguing its summary judgment motion. When respondent refused to allow, as was its prerogative, petitioner's requested withdrawal of the inadvertent admission, a formal motion with its attendant briefing was inevitable, as sometimes happens during contentious litigation. We decline to award costs, either to reward or penalize such advocacy, without a showing of dereliction or other egregious conduct by a party. No such conduct is present here.

ORDER


1. The petitioner's motion to withdraw and amend Admission Nos. 35 (a) and (b) is granted.
2. The commission will contact the parties to arrange a scheduling conference to extend discovery, if desired by the parties, and to establish a briefing schedule on respondent's pending motion for summary judgment.

Dated at Madison, Wisconsin, this 21 st day of November, 1996.

WISCONSIN TAX APPEALS COMMISSION



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner