

STATE OF WISCONSIN
TAX APPEALS COMMISSION

WISCONSIN ASSOCIATION OF
CAMPGROUND OWNERS, INCORPORATED,

DOCKET NO. 17-J-060

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

Per Curiam.

This case comes before the Commission for decision on motions for summary judgment. The Petitioner, the Wisconsin Association of Campground Owners, Incorporated ("WACO"), of Ettrick, Wisconsin, is represented in this matter by Attorney Don M. Millis of Reinhart Boerner Van Deuren, s.c. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Kelly A. Altschul. We conclude that we lack subject matter jurisdiction and, therefore, we dismiss the Petition for Review.

FACTS

The Department submitted Proposed Findings of Fact, dated August 31, 2017, which were taken largely from the Petitioner's Petition for Review. In its initial brief filed with the Commission on December 20, 2017, the Petitioner stated that it had no objection to

the Department's Proposed Findings of Fact. The Commission adopts those portions of the Proposed Findings of Fact it considers relevant as the facts in this case.

1. WACO is a Wisconsin non-stock corporation whose members own recreational mobile homes. (Proposed Findings of Fact ("PFF") ¶ 1.)

2. The Department is charged with, among other things, administering and enforcing Chapter 70 of the Wisconsin Statutes and, as part of its responsibility to administer and enforce Chapter 70, has provided guidance to assessors and taxpayers regarding the elements of the exemption for recreational mobile homes found in Wis. Stat. § 70.111(19). (PFF ¶ 2.)

3. On September 22, 2016, WACO submitted to the Department a Petition for Declaratory Ruling Regarding the Applicability of Wis. Stat. § 70.111(19). (PFF ¶ 13.)

4. The Department issued a Declaratory Ruling on January 13, 2017. (PFF ¶ 15.)

5. The Department's Declaratory Ruling takes the position that property meeting the definition of a recreational mobile home, as defined by Wis. Stat. § 66.0435(1)(hm), must be classified as personal property in order to qualify for the property tax exemption under Wis. Stat. § 77.111(19). (PFF ¶ 16.)

6. WACO filed a timely Petition for Review of Declaratory Ruling, dated March 10, 2017, which was received by the Wisconsin Tax Appeals Commission on that date. (PFF ¶ 17, Commission file.)

7. The parties filed cross-motions for summary judgment in this matter, along with supporting briefs. After reviewing the parties' briefs, the Commission scheduled

a telephone conference with the parties to discuss the Commission's concerns that it may not have subject-matter jurisdiction. (Commission file.)

8. During that telephone conference, the Commission spoke with the parties about its jurisdictional concerns, and the parties expressed their view that the Commission did have statutory jurisdiction over the matter. The parties agreed that they would file a joint brief on the issue of jurisdiction. (Commission file.)

9. On September 24, 2018, WACO filed a brief supporting its contention that the Commission had subject-matter jurisdiction over the controversy raised by its Petition for Review. (Commission file.)

10. By email message sent by Attorney Altschul to the Commission on September 28, 2018, the Department informed the Commission that it agreed with the position taken by the Petitioner in its brief and had nothing more to add. (Commission file.)

APPLICABLE LAW

Wis. Stat. § 73.01(4)(a)

(4) Powers and duties defined.

(a) Subject to the provisions for judicial review contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and s. 72.86 (4), 1985 stats., and ss. 70.38 (4) (a), 70.397, 70.64, and 70.995 (8), s. 76.38 (12) (a), 1993 stats., ss. 76.39 (4) (c), 76.48 (6), 77.26 (3), 77.59 (5m) and (6) (b), 78.01, 78.22, 78.40, 78.555, 139.02, 139.03, 139.06, 139.31, 139.315, 139.33, 139.76, 139.78, 341.405, and 341.45, subch. XIV of ch. 71, and subch. VII of ch. 77.

Wis. Stat. § 73.01(5)(a)

(5) Appeals to commission.

(a) Any person who is aggrieved by a determination of the state board of assessors under s. 70.995 (8) or who has filed a petition for redetermination with the department of revenue and who

is aggrieved by the redetermination of the department of revenue may, within 60 days of the determination of the state board of assessors or of the department of revenue or, in all other cases, within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue and the number of copies of the petition required by rule adopted by the commission.

Wis. Stats. §§ 74.35(2) and (2m)

(2) Claim against taxation district.

(a) A person aggrieved by the levy and collection of an unlawful tax assessed against his or her property may file a claim to recover the unlawful tax against the taxation district which collected the tax.

(b) A claim filed under this section shall meet all of the following conditions:

1. Be in writing.
2. State the alleged circumstances giving rise to the claim, including the basis for the claim as specified in s. 74.33 (1) (a) to (e).
3. State as accurately as possible the amount of the claim.
4. Be signed by the claimant or his or her agent.
5. Be served on the clerk of the taxation district in the manner prescribed in s. 801.11 (4).

(2m) Exclusive procedure. A claim that property is exempt, other than a claim that property is exempt under s. 70.11 (21) or (27), may be made only in an action under this section. Such a claim may not be made by means of an action under s. 74.33 or an action for a declaratory judgment under s. 806.04.

Wis. Stat. § 227.41(1)

Declaratory rulings.

(1) Except as provided in sub. (5), any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

Wis. Stat. § 227.41(5)(a)

(a) The department of revenue shall, on petition by any interested person, or any group or association of interested persons, issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforced by it. The department of revenue may issue a declaratory ruling on the facts contained in the petition. If the department of revenue does not deny the petition or issue a declaratory ruling on the facts contained in the petition, the department of revenue shall hold a hearing, as provided under s. 227.44, and shall afford all interested parties an opportunity to participate in the hearing. A declaratory ruling shall bind the department and all parties to the proceedings on the statement of facts contained in the ruling, unless it is altered or set aside by the tax appeals commission or a court or the applicable rule or statute is repealed or materially amended. A ruling, including the denial of the petition, shall be subject to review by the tax appeals commission as provided in ch. 73.

ANALYSIS

The Petitioner is seeking the Commission's review of the Department's declaratory ruling that property meeting the definition of "recreational mobile home," as defined by Wis. Stat. § 66.0435(1)(hm), must be classified as personal property under Wis. Stat. § 70.043 to qualify for the property tax exemption under Wis. Stat. § 70.111(19). After the Commission had received and reviewed the parties' briefs on the underlying issues, the Commission questioned whether it had subject matter jurisdiction over the case. Both the Petitioner and the Department believe the Commission does indeed have jurisdiction and the Petitioner filed a brief arguing its point. The Department stated that it agreed with the arguments made in the Petitioner's brief, and that it had nothing to add. For the reasons stated below, we determine that the Commission lacks jurisdiction over the subject matter of the Petitioner's appeal.

Section 227.41(5) of the Wisconsin Statutes governs the issuance of declaratory rulings by the Department. It was enacted as part of 2011 Wis. Act 68, which made a number of changes related to “various duties of the department of revenue,” and became effective on March 1, 2012.¹ This case is the first appeal brought to the Commission under the statute.

Prior to the enactment of Wis. Stat. § 227.41(5), Wis. Stat. § 227.41, generally, provided for the issuance of declaratory rulings by administrative agencies. Section 227.41(1) stated that “Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. ... A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.” Section 227.41(1) now starts with the words “Except as provided in sub. (5)...” Section 227.41(5)(a) provides, in part, “The department of revenue shall, on petition by any interested person, or any group or association of interested persons, issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforced by it. ... A ruling, including the denial of the petition, shall be subject to review by the tax appeals commission as provided in ch. 73.”

The Commission is an administrative agency whose powers and jurisdiction are defined and limited by Chapter 73 of the Wisconsin Statutes. Wisconsin Statute Section 73.01(4)(a) states, “Subject to the provisions for judicial review contained in s. 73.015, the

¹ We have looked through the online legislative history for 2011 Wis. Act 68, but we did not find anything helpful concerning the declaratory ruling provisions.

commission shall be the final authority for the hearing and determination of all questions of law and fact arising under [specifically enumerated provisions of the Wisconsin statutes].” While, under Wis. Stat. § 73.01(4)(a), the Commission has broad jurisdiction over Wisconsin income, franchise, sales, use, and excise taxes, the Commission has very limited jurisdiction over property taxes. In general, the Commission has jurisdiction only over appeals related to the valuation or exemption of manufacturing property. Wis. Stat. § 70.995. Appeals of other personal or real property tax matters generally go to local boards of review and then on to circuit court. Wis. Stat. § 70.47. The tax and exemption issues which are the subject of the Department’s declaratory ruling the Petitioner is appealing are not ones over which the Commission has jurisdiction under Wis. Stat. § 73.01(4)(a). Nevertheless, both the Petitioner and the Department claim the Commission has jurisdiction to review the Department’s declaratory ruling because Wis. Stat. § 227.41(5), in their view, grants the Commission the power to review all declaratory rulings issued by the Department under the statute, regardless of whether the Commission would otherwise have jurisdiction over the subject matter of the ruling.

In contrast to the Commission’s limited jurisdiction, the Department’s powers and responsibilities are broad and varied. In addition to administering (or, in the case of many property tax matters, participating with municipalities in administering) nearly every Wisconsin tax,² the Department is also tasked with the administration of the Wisconsin lottery³ and the Wisconsin unclaimed property act.⁴ The question ultimately is, given the

² Generally, Wisconsin Statutes Chapters 70 through 79.

³ Wis. Stat. § 565.01(1) and (2)

⁴ Wis. Stat. § 177.01(1)

broad authority of the Department and the relatively limited jurisdiction of the Commission, is the Commission truly tasked by the legislature with reviewing declaratory rulings issued by the Department on topics outside the Commission's statutory jurisdiction, such as the lottery, residential property tax, or unclaimed property issues?

For example, should the Commission be deciding whether the Department properly ruled on whether an expunged felony conviction in another state should preclude someone from being allowed to sell lottery tickets in Wisconsin? Or whether a room without a closet can ever be considered a bedroom? Or, for unclaimed property purposes, whether a felon can reclaim his own firearm? These are all questions upon which the Department could issue declaratory rulings. By providing in Wis. Stat. § 227.41(5) that declaratory rulings of the Department would be reviewed by the Commission "as provided in ch. 73," did the legislature really intend that the Commission would or should review a ruling on an issue that would never come before it absent a declaratory ruling and, in many instances, over which it has no particular expertise or experience? We think not.

In *DOR v. Hogan*, 198 Wis. 2d 792, 543 N.W.2d 825 (Ct. App. 1995), the Wisconsin court of appeals held that the Commission did not have the authority to entertain a class action proceeding seeking refunds of state income taxes collected on federal pensions. The *Hogan* court stated,

Few principles of law are as well established as the proposition that administrative agencies, ... have only such powers as are expressly granted to them by the legislature, or as may be necessarily implied from the applicable statutes.... In determining the nature and scope of an agency's powers, its enabling statutes are to be "strictly construed to preclude the exercise of a power not expressly granted," and "any

reasonable doubt as to the existence of an implied power should be resolved against the agency.”

Id., at 816.

We do not believe that in drafting Wis. Stat. § 227.41(5) the Wisconsin legislature intended to grant the Commission power and authority over matters not otherwise within the power and authority granted under Chapter 73. There were no amendments made by 2011 Wis. Act 68 to Wis. Stat. § 73.01(4) describing the powers and duties of the Commission, for example, adding language like “review declaratory rulings of the department of revenue.” Further, Wis. Stat. § 73.01(5)(a) provides, “Any person who is aggrieved by a determination of the state board of assessors under s. 70.995 (8) or who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department of revenue may, within 60 days of the determination of the state board of assessors or of the department of revenue or, in all other cases, within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue....” There is no mention of declaratory rulings, especially on issues outside of the Commission’s jurisdiction under Section 73.01(4)(a). There were no amendments made by 2011 Wis. Act 68 to 73.01(5) describing who can appeal to the Commission, for example, adding language like “any person aggrieved by a declaratory ruling of the department of revenue.” We are not comfortable making a power grab that is not more clearly justified by the express language of the statutes.

The parties offer three principal arguments to support their view that Wis. Stat. § 227.41(5) confers on the Commission exclusive jurisdiction to review *all* declaratory

rulings of the Department. First, the parties state that the express language confers that exclusive jurisdiction. This conclusion, however, simply ignores the implications of the specific reference to Chapter 73 of the statutes which, as we have noted, outlines the limited power and jurisdiction of the Commission.

Next, the parties argue that, if the Commission does not accept jurisdiction over this matter, the Petitioner has no ability to obtain a review of the Department's declaratory ruling. This is, they say, an absurd result and the statute should be construed to avoid it. This argument is a *non sequitur*. It assumes the Commission has exclusive jurisdiction over the review of all Department declaratory rulings in order to conclude the Commission has such jurisdiction. However, Wis. Stat. § 227.41(1) begins with the phrase "Except as provided in sub. (5)" and goes on to provide that "any agency may ... issue a declaratory ruling," and that "A ruling shall be subject to review in the circuit court" Subsection (5) provides for the issuance of declaratory rulings by the Department and states that a ruling by the Department "shall be subject to review by the tax appeals commission as provided in ch. 73." As we read Wis. Stat. § 227.41(1), "Except as provided in sub. (5)" applies to both the issuance and review of declaratory rulings. Consequently, if the Commission does not have statutory jurisdiction over the subject matter of the ruling, the circuit court has jurisdiction to review it. This construction of the statute avoids both the absurd result of the ruling being unreviewable, as well as the absurd result of the Commission exercising jurisdiction over subject matter for which it has no jurisdiction under Chapter 73.

Finally, the parties assert that the jurisdiction of the Commission to review the Department's declaratory rulings is not limited by Chapter 73, because, as stated in the Petitioner's brief, "It is clear that the reference to 'ch. 73' in the last sentence of Wis. Stat. § 227.41(5)(a) refers to the procedural provisions of chapter 73." What they claim, however, is far from clear. There is nothing in the reference to Chapter 73 that would exclude application of the jurisdictional provisions of the Chapter. Moreover, there is hardly a concept more fundamental to procedure than jurisdiction. While jurisdictional provisions are spread through the Wisconsin Statutes, Chapter 801, the very first chapter in Wisconsin's civil procedure law, contains numerous sections related to the jurisdiction of various courts and agencies, referring to the term "jurisdiction" no fewer than 129 times. The notion that the reference to Chapter 73 in Wis. Stat. § 227.41(5)(a) is intended to exclude the extensive jurisdictional provisions of the Chapter and grant the Commission powers not otherwise granted by the Chapter is unsupported by either the language of the statute or reason.

There is another potential jurisdictional issue raised by the language of Wis. Stat. § 74.35(2), which provides a procedure for challenging the imposition of tax, and Wis. Stat. § 74.35(2m) which states: "A claim that property is exempt ... may be made only in an action under this section. Such a claim may not be made by means of an action under s. 74.33 or an action for a declaratory judgment under s. 806.04." These statutes create some doubt as to whether a claim that real property, which otherwise meets the definition of a recreational mobile home, is exempt under Wis. Stat. § 70.111(19), can be pursued through a declaratory ruling under Wis. Stat. § 227.41(5). Because we conclude that the circuit court, not the Commission, has jurisdiction over this matter, we leave this issue to the court.

CONCLUSIONS OF LAW

1. The Commission's power to review declaratory rulings issued by the Department under Wis. Stat. § 227.41(5) is limited to matters within the Commission's jurisdiction under Chapter 73.

2. The subject of the declaratory ruling issued by the Department in this case involves the construction and application of Wis. Stat. § 70.111(19), which is outside of the Commission's jurisdiction under Chapter 73.

3. The Commission lacks subject matter jurisdiction over the Petitioner's appeal.

ORDER

The Petitioner's Petition for Review is hereby dismissed.

Dated at Madison, Wisconsin, this 14th day of March, 2019.

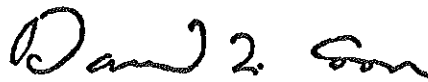
WISCONSIN TAX APPEALS COMMISSION

(DID NOT PARTICIPATE)

Elizabeth Kessler, Chair



Lorna Hemp Boll, Commissioner



David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.