

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ASAP CRUISES, INC.,

DOCKET NO. 19-I-258

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

ELIZABETH KESSLER, CHAIR:

This case comes before the Commission for decision on competing Motions for Summary Judgment. The Petitioner, ASAP Cruises, Inc. ("ASAP"), a Florida corporation, is represented by Attorneys¹ Michael J. Bowen and Peter O. Larsen. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Mark S. Zimmer and Chief Counsel Dana J. Erlandsen. Both parties have filed with the Commission briefs and documents in support of their respective positions. For the reasons stated below, we find for the Respondent.

PROCEDURAL BACKGROUND

On or about December 12, 2018, the Department issued estimated assessments against ASAP for the tax years ending December 31, 2012, 2013, 2014, 2015,

¹ Attorneys Bowen and Larsen are licensed to practice in the State of Florida, not the State of Wisconsin.

2016 and 2017 (“Audit Period”).

On or about January 28, 2019, Petitioner timely appealed the Notice of Assessment by filing a Petition for Redetermination.

On or about August 26, 2019, Respondent denied the Petition for Redetermination in a Notice of Action.

Petitioner filed a timely Petition for Review with the Commission. The Petition for Review was sent via certified mail and date stamped October 24, 2019.

FACTS

1. Petitioner, ASAP, is a Florida corporation with its headquarters and principal place of business in Jacksonville, FL (Jt. Stip. ¶ 1).

2. Petitioner is in the business of selling travel services utilizing Independent Travel Consultants (ITCs) nationwide who provide those services to businesses and individuals. The transactions between ASAP and the ITCs occurred via “Independent Travel Consultant Agreements” (ITC Agreements). These ITC Agreements required ITCs to “perform [] the following work: Sales of cruises, tours or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc, as provided by vendors designated by the Company.” (Jt. Stip. Ex. A-F).²

3. In exchange for selling ASAP’s travel services, ASAP paid the ITCs commissions, which increased in percentage if the ITC sold travel services over various thresholds. ASAP paid those commissions on a monthly basis. ASAP did not withhold

² Some of the later ITC Agreements end that sentence with the addition of the phrase, “(the ‘Travel Services’).”

any taxes on those commissions, but issued the ITCs Federal 1099 forms, and specifically noted in several of the ITC Agreements, that the ITC was responsible for declaring income and/or paying taxes. (Jt. Stip. Ex. A-F).

4. During the Audit Period, ASAP was a party to at least 100 ITC Agreements with individuals who resided or had business locations, in the State of Wisconsin (the "ITCs"). (Jt. Stip. ¶ 2)

5. ASAP received income from the sales of services by ITCs to customers located throughout the United States, including Wisconsin, because it retained a percentage of the income from those service sales to customers. (Jt. Stip. ¶ 6).

6. Six representative samples of the Wisconsin ITC Agreements, one for each year of the Audit Period, were filed as part of the Joint Stipulation. (Jt. Stip. ¶ 4).

7. None of the six ITC Agreements reference software, software licensing, or the sale of tangible personal property. (Jt. Stip. Ex. A-F).

8. In correspondence with the Wisconsin Department of Revenue dated January 28, 2019, Chris Farmand identified himself as a CPA representing ASAP and stated that ASAP's primary business activity is the development of software for the travel industry. He also indicated that the ITCs were the customers of ASAP. (Jt. Stip. Ex. M).

9. ASAP did not file Wisconsin income or franchise tax returns during any year of the Audit Period. (Jt. Stip. ¶ 7).

10. ASAP has never paid any Wisconsin income or franchise taxes. (Jt. Stip. ¶ 8).

11. During the Audit Period, the Department issued estimated assessments against ASAP as follows:

2012: \$500 tax, plus interest, penalty, and late filing fees
2013: \$500 tax, plus interest, penalty, and late filing fees
2014: \$500 tax, plus interest, penalty, and late filing fees
2015: \$500 tax, plus interest, penalty, and late filing fees
2016: \$1000 tax, plus interest, penalty, and late filing fees
2017: \$1000 tax, plus interest, penalty, and late filing fees

(Jt. Stip. ¶ 9).

MOTION FOR SUMMARY JUDGEMENT

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of simultaneous motions for summary judgment is an assertion that the facts presented are not in dispute and only questions of law remain for determination. The parties filed a Joint Stipulation of Facts, supported by a number of related documents. Summary judgment is thus appropriate. *Healthcare Services, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-085 (WTAC 2016).

ISSUE

The fundamental question before the Commission is whether Petitioner ASAP, a Florida corporation, was subject to Wisconsin income or franchise taxes during 2012, 2013, 2014, 2015, 2016, or 2017 based upon its sales of travel services to individuals and businesses within Wisconsin.

APPLICABLE LAW

15 U.S.C. § 381, also known as P.L. 86-272:

(a) Minimum standards. No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Wis. Stat. § 71.22(1r): "Doing business in this state" includes, except as prohibited under P.L. 86-272, issuing credit, debit, or travel and entertainment cards to customers in this state; regularly selling products or services of any kind or nature to customers in this state that receive the product or service in this state; regularly soliciting business from potential customers in this state; regularly performing services outside this state for which the benefits are received in this state; regularly engaging in transactions with customers in this state that involve intangible property and result in receipts flowing to the taxpayer from within this state; holding loans secured by real or tangible personal property located in this state; owning, directly or indirectly, a general or limited partnership interest in a partnership that does business in this state, regardless of the percentage of ownership; and owning, directly or indirectly, an interest in a limited liability company that does business in this state, regardless of the percentage of ownership, if the limited liability company is treated as a partnership for federal income tax purposes. A taxpayer

doing business in this state for any part of the taxable year is considered to be doing business in this state for the entire taxable year.

Wis. Stat. § 71.23(2): FRANCHISE TAX. For the privilege of exercising its franchise...or doing business in this state in a corporate capacity, except as provided under sub. (3), every domestic or foreign corporation, except corporations specified in § 71.26(1), and every nuclear decommissioning trust or reserve fund shall annually pay a franchise tax according to or measured by its entire Wisconsin net income of the preceding taxable year...All provisions of this chapter and chapter 73 relating to income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise....

Wis. Admin. Code Tax § 2.82(4)(a)(10):

(4) WHAT CONSTITUTES NEXUS. If a foreign corporation undertakes one or more of the following activities, it is considered to have nexus and shall be subject to Wisconsin franchise or income taxes:

(a) General. Any of the following constitute nexus....

(10) The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.

ANALYSIS

Petitioner claims it was not subject to Wisconsin income or franchise taxes, because Wisconsin is barred from imposing a net income tax on the income from a foreign corporation engaged in interstate commerce by P.L. 86-272. The Department responds that P.L. 86-272 does not apply to ASAP, because ASAP's income from Wisconsin was from sources that are not governed by P.L. 86-272, and under Wisconsin law, for the privilege of doing business in the state, ASAP was required to pay income tax to the state.

Determinations the Department makes are presumed to be correct, and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). In addition, to be entitled to a tax exemption, the taxpayer must bring themselves within the exact terms of the exemption statute. *Sisters of Saint Mary v. City of Madison*, 89 Wis. 2d 372, 379, 278 N.W.2d 814 (1979). Finally, statutes conferring tax exemptions are to be strictly construed. Wis. Stat. § 70.109; *Columbus Park Housing Corp. v. City of Kenosha*, 267 Wis. 2d 59, 671 N.W.2d 633 (2003); *Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee*, 181 Wis. 2d 207, 219, 511 N.W.2d 345, 350 (Ct. App. 1993) (*pet. den'd*). An exemption statute need not be given the narrowest possible construction. *Id.* While the statute must be given a strict construction in favor of taxation, the modern rule is that the statute must be given a "strict but reasonable" construction. *Wauwatosa Avenue United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, 321 Wis. 2d 796, 776 N.W.2d 280.

Petitioner presents three arguments. First, it asserts that P.L. 86-272 protects certain in-state activities of a foreign corporation - *i.e.*, the sale of tangible personal property, intangible property, or services - irrespective of the source of the income received by the foreign corporation. However, the plain language of the statute says that the protected activities of foreign corporations are "sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State." (P.L. 86-272(a)(1)). Travel services are not tangible personal property.

Second, although Petitioner claims to be in the business of selling Software as a Service ("SaaS"), none of the documentary evidence in the Joint Stipulation of Facts, or the included exhibits, supports this assertion. In his sworn affidavit, ASAP co-owner Chad Burt provided no documentation in support of this assertion, nor any other corroborating evidence. The Commission has long held that "a taxpayer's self-serving testimony must generally be substantiated by other proof." *Dvorak v. Wisconsin Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 4/30/2002), *aff'd* ¶ 400-603 (Milwaukee Co. Cir. Ct., 11/25/2002). "Testimony by interested parties which is not corroborated by other evidence will not overcome the presumption of correctness of respondent's assessment." *Id.*, citing *Havas v. Comm'r.*, 73-2 USTC ¶ 9561 (9th Cir. 1973). There is no evidence in the record that corroborates Mr. Burt's statement. Petitioner's repetition of the claim does not make it so.

None of the six agreements between ASAP and the ITCs included as Exhibits referred to SaaS, software licensing, software requirements, or the sale of tangible or intangible personal property. Instead, they each referred to the sale of *travel services*, such as "cruises, tour or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc. as provided by vendors designated by [ASAP]." (Jt. Stip. Ex. A-F). The claim that ASAP Cruises is in the business of selling software, or "software as a service," - in spite of there being no mention of sales or licensing of software in any of Petitioner's proffered documentary evidence, and not travel services, which are explicitly the subject of its representative agreements - is thus utterly lacking in credibility. Because we find that Petitioner was not engaged in the business of selling

software or "software as a service," we do not need to address the question of whether such software sales produce income taxable in the State of Wisconsin.

Third, Petitioner claims to lack nexus with Wisconsin because the only activity it conducts is electronic solicitation of sales from its headquarters in Florida. The documentary evidence attached to the Joint Stipulation of Facts indicate otherwise. Petitioner had contracts with more than 100 ITCs located in Wisconsin, who were paid a commission by ASAP for sales of travel services. Those ITCs sold travel services to customers inside and outside of Wisconsin. In addition, there is no evidence in the record suggesting that the ITCs with addresses in Wisconsin did the work for which they were paid by ASAP from outside of Wisconsin.

Under Wis. Stat. § 71.22(1r), "Doing business in this state includes...regularly selling products or services of any kind or nature to customers in this state that receive the product or service in this state; [and] regularly soliciting business from potential customers in this state...." This is further clarified by the Wisconsin Administrative Code, which reads, in relevant part, "If a foreign corporation undertakes one or more of the following activities, it is considered to have nexus and shall be subject to Wisconsin franchise or income taxes: (10) The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin." (Wis. Admin. Code Tax § 2.82(4)(a)(10)).

ASAP's ITCs in Wisconsin regularly solicited business from potential customers in Wisconsin, and sold travel services to customers in Wisconsin, who received those

services in Wisconsin. Under Wisconsin law, ASAP was doing business in Wisconsin during each of the years at issue.

Wis. Stat. § 71.23(2) provides that “for the privilege of exercising its franchise...or doing business in this state...every domestic or foreign corporation...shall annually pay a franchise tax according to or measured by its entire Wisconsin net income of the preceding taxable year....” In other words, for the privilege of doing business in Wisconsin, ASAP must annually pay a franchise tax.

CONCLUSIONS OF LAW

1. Petitioner was engaged in the sales of travel services, by way of contracted Independent Travel Consultants located in Wisconsin, to residents of Wisconsin, which is not protected by P.L. 86-272.

2. During the Audit Period, Petitioner was doing business in Wisconsin under Wis. Stat. § 71.22(1r).

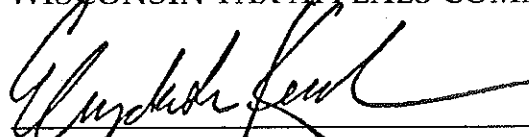
3. For the privilege of doing business in Wisconsin, Petitioner must annually pay the franchise tax under Wis. Stat. § 71.23(2).

ORDER

Based on the foregoing, it is the order of this Commission that the Petitioner’s Motion for Summary Judgment is denied, and Respondent’s Motion for Summary Judgment is granted. The assessment is affirmed.

Dated at Madison, Wisconsin, this 23rd day of May, 2022.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner



Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
101 E Wilson St, 5th Floor
Madison, Wisconsin 53703

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.