

COPY

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

KING'S ENTERPRISES
OF WAUSAU, WI,

Petitioner,

v.

Case No. 12 CV 3880

STATE OF WISCONSIN
DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER ON JUDICIAL REVIEW

STATEMENT OF THE CASE

King's Enterprises of Wausau, WI ("taxpayer") petitions this court under Chapter 227, Stats., for review of a decision by the Wisconsin Tax Appeals Commission ("Commission") affirming a sales tax liability against it approximating \$132,000 for years 2004 through 2007.

The taxpayer contends that the respondent State of Wisconsin Department of Revenue ("DOR") is equitably estopped from collecting the back taxes because it advised the taxpayer on numerous occasions during the early to mid-1990s that sales of the taxpayer's products at issue (non-motorized, towable trailers) were exempt from tax, upon which advice the taxpayer reasonably relied to its detriment.

The Commission rejected equitable estoppel upon finding that the taxpayer failed to carry its burden of proof to establish by clear, satisfactory and convincing evidence that the DOR advised taxpayer that the trailers were nontaxable.¹ This ultimate finding, and the factual findings underpinning it, are the focus of the taxpayer's attack in this judicial review.

¹ Because it rejected the taxpayer's claim based on failure to prove the first element of equitable estoppel, the Commission did not evaluate the evidence relating to the second or third elements of the doctrine, i.e. reasonable reliance and detriment. Accordingly, although the taxpayer's petition seeks an order reversing the Commission's Decision and Order and abating the sales

The certified administrative record has been received from the Commission, and the issues have been fully briefed by the parties. No oral argument has been requested nor is it needed, and accordingly this judicial review is ripe for decision.

For the following reasons, the Commission's May 11, 2012 Decision and Order is AFFIRMED.

ANALYSIS AND DECISION

The taxpayer concedes that it did not collect the taxes at issue, and that failing to do so violated Wisconsin tax law in effect during the years in question. Its defense rests exclusively on the doctrine of equitable estoppel, the elements of which, as pertinent to the taxpayer's claims, are these: (1) action by the DOR, (2) inducing reasonable reliance by the taxpayer, (3) to its detriment.

Equitable estoppel is not as freely granted against a governmental agency as it is against private parties, and the taxpayer has the burden of proving each of these three elements by clear, satisfactory, and convincing evidence.

The taxpayer contends that the Commission's Decision and Order must be reversed under § 227.57 (6), Stats., which provides:

(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 a finding of fact that is not supported by substantial evidence in the record.

(Underlining added.) In short, the taxpayer asserts that the Commission's findings are unsupported by substantial evidence in the record.²

This court's role on judicial review is to search for credible and substantial evidence supporting the Commission's decision, rather than to search for or weigh opposing evidence. Indeed, the Commission's factual findings are conclusive if they are supported by substantial evidence, which is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. Where so supported, the Commission's factual

taxes, the only remedy available to petitioner had it been successful in this judicial review is a remand to the Commission to decide the remaining two elements of petitioner's estoppel defense.

² Interestingly, while contending the Commission's decision lacks substantial evidentiary support, the taxpayer devotes the opening argument in its initial brief to a section entitled "There is substantial evidence that Petitioner received advice concerning sales tax collection and reporting from Department of Revenue employees", which, of course, is beside the point of this judicial review.

findings must be upheld even if they are against the great weight and clear preponderance of the evidence.

Substantial evidence is lacking only where the Commission "acting reasonably, *could not* have reached the decision from the evidence and its inferences [.]'" *Copland v. Department of Taxation*, 16 Wis. 2d 543, 554 (1962) (emphasis in original; citation omitted). Where credible evidence supporting the Commission's decision is sufficient to exclude speculation or conjecture, this court may not vacate that decision. *General Casualty Co. of Wisconsin v. LIRC*, 165 Wis. 2d 174, 179 (Ct. App. 1991).

Moreover, both the credibility of the witnesses and the persuasiveness of their testimony is for the Commission to determine, rather than this court. The weight to be accorded any particular item of evidence is a matter that lies exclusively within the province of the Commission; this court may not second-guess or overturn a Commission determination as to evidentiary weight. When there is conflicting evidence, the evidence is to be construed most favorably to the Commission's findings. This court does not weigh conflicting evidence to determine which of it should be believed, and must search for credible and substantial evidence supporting the Commission's decision, not evidence opposing it.

In the case at bar, after a fairly extensive sifting and weighing of the evidence, the Commission's essential holding is this:

In sum, what the Petitioner put before us does not in its entirety have the ring of truth, and certainly does not reach the level of clear and convincing evidence.... In our view, the Petitioner has failed to prove the first element of equitable estoppel, and thus we need not address the other two elements.

(Decision and Order, pp. 19-20, adding, by footnote, that the petitioner's two witnesses testified truthfully, but had unclear and imprecise memory of the pivotal events, which occurred some 20 years ago).

The record substantially supports the Commission's ultimate conclusion for at least these reasons.

First, no DOR employee who allegedly gave the advice that the taxpayer's trailers were exempt from sales tax was called as a witness.

Second, the taxpayer presented no written documentation of any nature corroborating its case, including any communications from DOR employees stating the items were exempt.³

³ The taxpayer particularly targets as unsupported by the record the Commission's finding that "[l]ast but not least, there was no corroboration or substantiation offered by the taxpayer for any part of the taxpayer's version of what took place." (Decision and Order, p. 19). The taxpayer

Third, the alleged representations by DOR occurred some 20 years ago, and the Commission correctly viewed the testimony of the taxpayer's two witnesses as rife with credibility issues due to faulty memories.

Fourth, the testimony of petitioner's owner Gajewski did the petitioner's case more harm than good. He was strongly impeached by prior inconsistent testimony, especially regarding the identity of the DOR employee who gave the allegedly faulty advice. There were multiple inconsistencies in his testimony and he changed his testimony at least once based upon what his lawyers told him. (Transcript, p. 31) He was fuzzy about the frequency of meetings, the dates that conversations took place, and who all was present at the conversations. He swore he previously had written documentation that supported his rather incredible testimony that taxes were paid to other states in "every one" of the sales in which he claimed exemption in Wisconsin, yet none was produced. He is an interested witness who stands to lose \$132,000, and still believes his position on taxability is right and the DOR's position is wrong.

Fifth, the accountant VandenHeuvel's testimony was not much better. While his interest in the outcome of the proceedings was not as strong as Mr. Gajewski's, his own professional advice and work product – not to mention a long-term client relationship – were factors bearing on his credibility. In one surprising exchange during cross-examination, he was presented with several DOR publications and adjudicated cases that clearly established, long before 2004, that the taxpayer's trailer sales were taxable. Yet surprisingly, he professed he routinely did not read such state tax publications – an unbelievable admission for any tax adviser/accountant to make. Moreover, his testimony contradicted Mr. Gajewski's in number of respects, although admittedly in other respects his testimony was congruent with his client's.

Sixth, the record established that the employee who first planted the seed that the trailers were tax exempt was a Department of Motor Vehicles employee, not an employee of DOR. Indeed, the form used by the taxpayer to claim the exemptions was a DMV form, not a DOR form.

Seventh, given the long-time *published* position of the DOR that the trailers were taxable, it is not credible to conclude that two or three DOR employees (depending on which testimony is believed) advised the taxpayer repeatedly to the contrary.

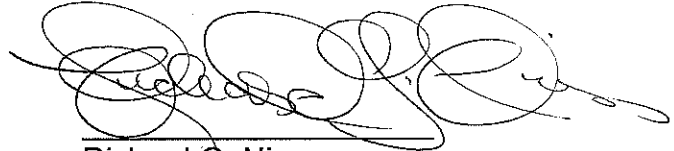
contends that the testimony of accountant Vanden Heuvel constitutes corroboration, and thus the Commission's decision must be reversed as unsupported on this point. However, read in context, the "corroboration or substantiation" discussed by the Commission was intended to reference written documentation, although admittedly the decision is a bit vague in this respect. Read in this manner, however, the Commission's point is entirely correct.

In its reply brief, the taxpayer urges this court to evaluate the Commission's ultimate decision in light of the evidence as a whole, not simply that which supports the Commission's findings. Even viewed thus, however, the Commission's Decision and Order must be affirmed. The Commission reasonably concluded that the DOR was not equitably estopped from collecting the taxes at issue, because the taxpayer fell fatally short of presenting clear, satisfactory, and convincing evidence that the DOR advised the taxpayer some 20 years ago that sales of its non-motorized trailers to nonresidents were exempt from taxation.

This order is FINAL for purposes of appeal.

Dated this 16th day of January, 2013.

BY THE COURT:



Richard G. Niess
Circuit Judge

CC: Counsel of record

Mailed to parties
1-16-13 UB