COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0765

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SPICKLER ENTERPRISES, LTD.,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. Spickler Enterprises, Ltd., appeals a circuit court order which affirmed the Tax Appeals Commission's decision to uphold a Department of Revenue (DOR) assessment against Spickler for delinquent sales taxes. The Commission concluded that Spickler had not reasonably relied on any action by the DOR in failing to pay the taxes assessed, and it therefore denied

Spickler's defense of estoppel against the DOR's assessment. Spickler argues that the record supports its estoppel claim. We disagree and affirm the circuit court's order.

BACKGROUND

Spickler and the DOR stipulated to most of the facts considered relevant by the Commission in its determination upholding the DOR's sales tax assessment. Spickler is a registered motor vehicle dealer which sells motorized recreational vehicles, non-motorized trailers and campers, pickup truck toppers, and associated accessories. Spickler has held a state sales tax permit since 1976.

On July 29, 1992, after a field audit, the DOR issued a sales tax assessment amounting to over $63,000 against Spickler for the period April 1, 1987, through March 31, 1991. The assessment involved mainly sales tax on Spickler's sales in Wisconsin of motor vehicles and non-motorized trailers and pickup toppers to out-of-state residents. Following the assessment and some adjustments by the DOR, Spickler conceded liability for several of the items of assessment. The only matter at issue in the proceedings before the Commission was the sales tax assessed by the DOR on non-motorized trailers, and related items of tangible personal property and services, for which Spickler had not charged its customers or paid any Wisconsin sales tax to the DOR. Spickler did not dispute the amount of the assessment or the correctness of the DOR's calculations, but it claimed that the DOR should be estopped from assessing a tax on these sales. With respect to Spickler's estoppel defense, the parties stipulated to the following:

> In deciding not to collect the subject Wisconsin sales tax on its sales of nonmotorized recreational campers, trailers and/or toppers to out-of-state residents, Spickler relied on an oral statement or statements from the Department of Transportation.

> During the audit period, [Spickler] never contacted [the DOR], or any of its employees, to inquire whether its various sales at issue herein were subject to Wisconsin sales tax.

As a retailer and a registered motor vehicle dealer, Spickler was required to file sales tax returns directly with the DOR and to pay to the department any sales tax that was due. During the audited period, Spickler filed returns monthly and paid the DOR amounts shown as due on those returns. In June of 1977, the DOR sent to all Wisconsin sales tax permit holders a publication which explained the application of Wisconsin sales tax laws and regulations to the sale of non-motorized campers and trailers. The publication explained that these items are subject to Wisconsin sales tax if sold and delivered in Wisconsin, even if the purchaser does not reside in the state. In December 1987, another publication containing similar information was also sent to Spickler.

Since the Department of Transportation (DOT) does not register non-motorized campers or trailers purchased by nonresidents, the DOT is not involved in collecting sales tax on such vehicles. Dealers are to pay these taxes directly to the DOR, and it is uncontested that Spickler did not do so. During the proceedings before the Commission, two of Spickler's employees testified regarding oral statements by clerical employees of the DOT that sales tax on the items in question should be paid to the purchaser's state of residence. The Commission found that neither of the Spickler employees who testified had any responsibilities with respect to tax return preparation or filing, and neither had read the sales tax publications sent to Spickler by the DOR.

The DOR and the DOT are separate state agencies. In October of 1991, following the audited period, the DOR and the DOT entered into an agreement whereby the DOR agreed to assist in training DOT employees with

respect to the collection of sales tax as it pertains to motor vehicles and trailers which are required to be licensed in Wisconsin. The two agencies also exchange and share information with respect to the collection of sales tax on licensed motor vehicles and licensed trailers. However, the Commission concluded that there was no principal-agent relationship between the two agencies, either express or implied, relating to the determination of sales tax liability or the provision of specific tax information to the public, including vehicle dealers like Spickler.

The Commission affirmed the DOR's assessment of sales tax on Spickler's sale of non-motorized trailers and campers to out-of-state residents. It denied Spickler's claim for estoppel on several grounds, including a lack of "reasonable reliance" by Spickler:

> [Spickler] is an apparently successful dealer in motorized and non-motorized vehicles and accessories, with annual sales in the millions of dollars during each of its four fiscal years in the period under review. [Spickler] regularly receives the [DOR's] sales and use tax publications which explain the proper sales tax treatment of the transactions under review, and [Spickler] files monthly sales tax returns with the [DOR]. We find it is not reasonable for such an experienced and sizeable business, which has an established tax filing relationship with [the DOR], to rely for its tax advice on oral statements to its clerical employees by clerical employees of the Department of Transportation, where thousands of dollars in potential sales tax liability are implicated.

Spickler petitioned the circuit court for a review of the Commission's adverse decision and order. The trial court affirmed the Commission, and Spickler appeals.

ANALYSIS

We review the Commission's decision and order de novo, applying the same standard of review as the trial court, but owing no deference to the trial court's conclusions. *See* ***Advance Pipe & Supply Co., Inc. v. DOR***, 128 Wis.2d 431, 434, 383 N.W.2d 502, 503 (Ct. App. 1986). Most of the facts relevant to this dispute are stipulated, but to the extent the Commission made factual findings, we may not substitute our judgment for that of the Commission as to the weight of the evidence, and we will disturb a factual finding only if it "is not supported by substantial evidence in the record." Section 227.57(6), STATS.

Whether, on a given set of factual findings, a taxpayer has established the elements necessary to estop the DOR from asserting a tax liability requires an analysis of whether the found facts fulfill a particular legal standard. Thus, a question of law is presented. ***DOR v. Milwaukee Refining Corp.***, 80 Wis.2d 44, 48, 257 N.W.2d 855, 857-58 (1977). If a reviewing court determines that an agency has "erroneously interpreted a provision of law," it may set aside or modify the agency action, or remand the matter for further proceedings. Section 227.57(5), STATS. When reviewing an agency's legal conclusion, a court may apply one of three levels of deference to the agency's interpretation of the law:

> First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the [law], the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the de novo standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

Jicha v. DILHR, 169 Wis.2d 284, 290-91, 485 N.W.2d 256, 258-59 (1992) (citations omitted).

The parties disagree as to which level of deference this court should accord the Commission's legal conclusion that an estoppel will not lie on this record. Spickler argues that we are as competent as the Commission to decide the purely legal issue of whether or not the elements of estoppel have been established, and thus, that our review should proceed de novo. The DOR, on the other hand, argues that we must accord the Commission's conclusion on the question "great weight" deference because it has been delegated the authority to determine "all questions of law and fact arising under [the tax laws]," *see* § 73.01(4)(a), STATS., and because it has decided estoppel issues before. *See, e.g.,* ***Sanfelippo v. DOR***, 170 Wis.2d 381, 390, 490 N.W.2d 530, 534 (Ct. App. 1992). (The trial court concluded that either "due weight" or "great weight" deference should apply to the Commission's ruling, and that its decision would be affirmed under either standard.)

While the outcome of some appeals from agency determinations may depend in large measure on the level of deference accorded by the reviewing court, that is not true of the present appeal. Even upon a de novo consideration of the facts found by the Commission, we would conclude that Spickler has not established that it was reasonable for it to rely on oral advice from DOT employees, while ignoring the DOR's tax publications on the topic, when it failed to collect sales tax on certain sales to out-of-state residents.

This court has summarized the elements of equitable estoppel, and the considerations which apply when the doctrine is invoked against government entities and officers, as follows:

> The elements of estoppel are (1) action or nonaction, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his

> detriment. ***DOR v. Moebius Printing Co.***, 89 Wis.2d 610, 634, 279 N.W.2d 213, 224 (1979).
>
> Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position. ***DOR v. Family Hosp., Inc.***, 105 Wis.2d 250, 254, 313 N.W.2d 828, 830 (1982). We determine on a case-by-case basis whether justice requires the application of estoppel. ***Id***. Estoppel is not applied as freely against governmental agencies as it is against private persons. ***Id***. at 258, 313 N.W.2d at 832.

Sanfelippo, 170 Wis.2d at 390-91, 490 N.W.2d at 534. A party asserting estoppel as a defense has the burden to establish each of the four elements by clear, convincing and satisfactory evidence. ***Advance Pipe & Supply,*** 128 Wis.2d at 439, 383 N.W.2d at 506. Thus, a failure by Spickler to establish any of the four elements of equitable estoppel is fatal to its defense, and we need not address each of the four.

Spickler argues that it was reasonable for it to rely on oral statements from DOT clerical employees in failing to remit sales tax on its sales of non-motorized trailers and campers to out-of-state residents. The Commission found that the testimony from Spickler's employees regarding what DOT personnel had told them was vague and lacked specifics. For the present analysis, however, we will accept as fact that clerical employees of the DOT told clerical employees of Spickler on one or more occasions that sales tax was not payable on Spickler's sale of non-motorized trailers to out-of-state residents.

The Commission concluded that, during the relevant time period, the DOT and its personnel were not authorized to act as the DOR's agents in advising the public, including vehicle dealers such as Spickler, regarding sales tax information and liability. Spickler, however, argues that the DOT had "apparent authority" to disseminate sales tax advice regarding vehicle transactions, a claim

that also requires Spickler to establish its reasonable reliance on that advice, that is, its "reasonable belief" that DOT employees had the authority to make sales tax liability determinations. *See* ***Rivera v. Eisenberg***, 95 Wis.2d 384, 393, 290 N.W.2d 539, 544 (Ct. App. 1980). The parties, for the most part, present their arguments on the DOT agency/authority issue in terms of the second element of estoppel, whether the action was "on the part of one against whom estoppel is asserted." The Commission concluded that Spickler failed to establish that element. While we do not disagree with the Commission's analysis, we conclude that Spickler's assertion of the DOT's "apparent authority" blends into the "reasonable reliance" inquiry, and we will so treat it. *Cf.* ***Ryan v. DOR***, 68 Wis.2d 467, 470-71, 228 N.W.2d 357, 358-59 (1975) (taxpayer "attempting to assert the acts of an employee of one governmental agency as a basis for estoppel against a different governmental agency" fails to establish "justifiable reliance" unless taxpayer has acted with due diligence).

Spickler cites ***DOR v. Moebius Printing Co.***, 89 Wis.2d 610, 279 N.W.2d 213 (1979), and ***Libby, McNeill & Libby v. Department of Taxation***, 260 Wis. 551, 51 N.W.2d 796 (1952), for the proposition that "[i]t is not necessary that the advice was given by [DOR] itself" in order for a court to conclude that there was reasonable reliance by the taxpayer on the advice it received. ***Moebius*** and ***Libby*** are of no assistance to Spickler on the present facts. In ***Moebius***, the advice relied on by the taxpayer was given by "a tax representative of the [DOR]," who visited the taxpayer's business premises for a two-day spot check of its sales records, and thereafter wrote the taxpayer a letter confirming that its customer sales tax exemption certificates for exempt sales were "valid" and "proper." ***Moebius,*** 89 Wis.2d at 617, 279 N.W.2d at 215-16. The court noted that the DOR representative had presented the taxpayer a business card identifying himself as

being with the DOR's Income, Sales and Excise Tax Division, and concluded that it was reasonable for Moebius to rely on the employee's representations, since the employee "appeared to have the authority to make" them. ***Id.*** at 636, 279 N.W.2d at 225. In ***Libby,*** the taxpayer had relied upon a Wisconsin Supreme Court ruling, later overruled, in which "the taxing authorities" had acquiesced. ***Libby***, 260 Wis. at 556, 51 N.W.2d at 798. The court concluded that the reliance by the taxpayer on "the previous conduct of the department [of Taxation, now DOR], motivated if not compelled by the pronouncement of the state's highest court" justified an estoppel. ***Id.*** at 559, 51 N.W.2d at 800.

In short, ***Moebius*** and ***Libby*** do not in any way support the notion that it is reasonable to believe that employees of any agency other than the DOR may be relied upon for advice regarding sales tax liability. Here, the parties stipulated that Spickler filed monthly Wisconsin sales tax returns and paid the sales tax reported due to the DOR; that the DOR has consistently taken the position that the sales in question are taxable; and that Spickler never contacted the DOR, or any of its employees, to inquire whether the sales in question were subject to Wisconsin sales tax. The Commission found that the Spickler employees who testified had not "read the tax publications sent to the petitioner by [the DOR] which contained the proper tax payment information pertaining to the transactions under review."

Thus, Spickler had the means readily available, through its regular contact with the DOR by way of its monthly filing of returns and its receipt of DOR tax information publications, to ascertain the taxability of the sales in question. A taxpayer may reasonably rely on the tax information publications of the DOR. ***DOR v. Family Hosp., Inc.***, 105 Wis.2d 250, 256, 313 N.W.2d 828, 831 (1982). Had Spickler done so in failing to pay over sales taxes on its sales to

out-of-state residents, the DOR could be estopped from assessing past due taxes. ***Id.*** at 259, 313 N.W.2d at 832. We conclude that in choosing to rely, instead, on the oral statements of clerical employees of a state agency other than the DOR, Spickler did not act reasonably. It was not reasonable for Spickler to believe that DOT vehicle licensing personnel were empowered to render authoritative sales tax liability determinations that would be binding on the DOR, the agency to which Spickler regularly reported its sales and paid its taxes. Thus, Spickler's reliance on the advice of the DOT employees was not reasonable, and the DOR should not be estopped from assessing liability for the sales in question. *See* ***Sanfelippo***, 170 Wis.2d at 391, 490 N.W.2d at 534 (taxpayer's reliance on determination by Department of Industry, Labor and Human Relations will not estop tax assessment by the DOR); and ***Advance Pipe & Supply***, 128 Wis.2d at 440-41, 383 N.W.2d at 506 (where taxpayer does not rely on statements by the DOR, elements of estoppel not established).

Since we conclude that Spickler has not met its burden to establish the elements of estoppel on this record, we need not address the additional inquiry required when a party seeks to claim estoppel against the government, that is, whether "it would be unconscionable" on these facts "to allow the state to revise an earlier position." ***Moebius***, 89 Wis.2d at 641, 279 N.W.2d at 226 (citation omitted).

CONCLUSION

The Commission correctly determined that it was not reasonable for Spickler to rely upon oral statements of DOT clerical employees in failing to pay sales taxes on its sales of motorized trailers to out-of-state residents. Spickler has thus not met its burden to establish the elements of estoppel against the DOR.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.