COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP445 **Cir. Ct. No. 2008CV1394**

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

AMERITECH PUBLISHING, INC.,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. At issue in this case is the amount of franchise tax owed by Ameritech Publishing, Inc. (API) on income from local telephone directory advertising for tax years 1994 to 1997. API appeals a circuit court order affirming a decision of the Tax Appeals Commission, which concluded

that all income generated during these years from API's sales of its Wisconsin local phone directory advertising was allocable to Wisconsin for purposes of determining API's franchise tax assessment. API argues that, because a significant portion of its income-producing advertising services were performed outside of Wisconsin, and thus should not have been attributed to Wisconsin in allocating its state tax under WIS. STAT. § 71.25(9)(d) (1993-97)[1], the Commission's interpretation of § 71.25(9)(d) as applied to the facts of this case was unreasonable. We disagree and affirm the circuit court's order affirming the Commission's decision.

BACKGROUND

¶2 API timely filed a Wisconsin Corporation Franchise/Income Tax Return for tax years 1994-1996, using an apportionment method that sourced sales income based on the geographic distribution of phone directories. In December 1998, API filed an amended Franchise/Income Tax Return for tax years 1994-1996 in which API claimed its tax liability to be lower than the amount originally paid. The amended return calculated API's tax owed for the period based on the cost of performing the advertising services ("cost of performance"), instead of the

[1] The versions of the statutes in effect at the time of the tax assessments in this case were 1993-94, 1995-96 and 1997-98. The statutory provisions at issue in this case are identical in each of these versions of the statutes. Unless otherwise noted, the statutory references in this opinion are to the versions of the statutes in effect from 1993 to 1997.

Effective January 1, 2005, WIS. STAT. § 71.25(9) now provides that if the benefit of a service is received in Wisconsin, the income from that service is fully allocable to Wisconsin, if "[t]he service relates to … tangible personal property that is delivered directly or indirectly to customers in this state," or "[t]he service is provided to a person engaged in a trade or business in this state and relates to that person's business in this state." 2005 Wisconsin Act 25, sec. 1349, creating WIS. STAT. § 71.25(9)(dh)2.b. and d. The parties agree that income generated after January 1, 2005, from the advertising services at issue in this case would be allocable to Wisconsin under the revised version of § 71.25(9).

geographic distribution of phone directories. Using the cost of performance method, API determined its income subject to taxation in Wisconsin by sourcing receipts from the sale of advertising services based on the cost of performing those services. API also filed a Franchise/Income Tax Return for tax year 1997 using the cost of performance method.

¶3 In December 2000, the Wisconsin Department of Revenue (DOR) issued a Notice of Field Audit Action informing API of the denial of its claims for refund of franchise taxes, and rejecting API's use of the cost of performance method of calculating the tax. API filed a petition for a redetermination of the Field Audit Action, which was denied by DOR. API sought review of DOR's decision with the Tax Appeals Commission.

¶4 The matter came to the Commission on a Stipulation of Facts filed by the parties. The Commission bifurcated the issues to be decided in the case, declaring that the issue to be decided in Phase I of the proceeding was whether API was allowed to use the cost of performance method in determining its sales factor for apportionment purposes.[2] API moved for partial summary judgment on this issue. After a conference with the parties, the Commission narrowed the scope of this first issue to whether API's sale of phone directory advertising was the sale of a service under WIS. STAT. § 71.25(9)(d) and not the sale of tangible personal property. API contended that its sale of phone directory advertising was

[2] As we explain later in this opinion, the "sales factor" was defined in WIS. STAT. § 71.25(9)(a) as "a fraction," consisting of "[a] numerator … which is the total sales of the taxpayer in this state during the tax period, and [a] denominator … which is the total sales of the taxpayer everywhere during the tax period."

the sale of a service under § 71.25(9)(d). The Commission agreed, granting API partial summary judgment in Phase I.

¶5 In Phase II, the Commission then directed the parties to brief the issue of whether the performance of API's directory advertising services for advertisements placed in Wisconsin telephone directories was the performance of income-producing activities in Wisconsin under WIS. STAT. § 71.25(9)(d) and WIS. ADMIN. CODE § TAX 2.39(6)(c)5. API contended that, because many of the tasks associated with the provision of its advertising services were rendered by employees working in offices outside of Wisconsin, its performance of directory advertising services was the performance of income-producing activities in not only Wisconsin but in multiple states, and moved for partial summary judgment. The Commission rejected API's motion, and granted the Department partial summary judgment in Phase II, concluding that all income from the performance of API's directory advertising services constituted income-producing activities in Wisconsin under the statute and the rule. API sought certiorari review of the Phase II decision in the circuit court, which affirmed the decision of the Commission. API appeals the circuit court's order affirming the Commission's decision in Phase II.

DISCUSSION

¶6 The issues presented in this case are whether the Commission reasonably concluded that API's provision of directory advertising services was income-producing activity performed within the state of Wisconsin under WIS. STAT. § 71.25(9)(d), and whether API's competing interpretation of the statute is more reasonable than the Commission's. For reasons provided later, we conclude that the Commission's interpretation of § 71.25(9)(d) is entitled to due weight

deference, and, reviewing the Commission's interpretation under that level of deference, we affirm the circuit court's order affirming the Commission's decision.

¶7 In the discussion that follows, we first set forth the Commission's factual findings. Second, we recite the applicable law, including the language of WIS. STAT. § 71.25(9)(d), and summarize the Commission's legal analysis. Third, we determine the proper standard of review applicable to the Commission's interpretation of § 71.25(9)(d). Fourth, we examine the Commission's decision applying that standard of review.

The Commission's Findings of Fact

¶8 The parties stipulated to the following pertinent facts, which were restated in the Commission's Findings of Fact. API is a Delaware corporation with its principal place of business in Troy, Michigan, for the tax years 1994-1997. During this time, API was in the business of selling advertising for placement in telephone directories. API generated advertising income from local accounts and national accounts. Local accounts generally consisted of Wisconsin-based businesses. For the tax years at issue, local advertising was solicited by API sales representatives out of offices in Indiana, Michigan, Ohio and Wisconsin. From 1994-1996, API's only national account sales office was located in Michigan. In 1997, API added a second national account office in Illinois.

¶9 The sales representatives in the Wisconsin locations solicited advertising orders for API, as did the sales representatives at call centers located in other states. The sales representatives from the national sales offices in Michigan and Illinois solicited advertising from organizations with operations throughout the United States, including Wisconsin. API had production support centers in

Michigan and Ohio which received orders, administered billing, and verified the accuracy of local advertisements and accounts during the years at issue. API also had a graphics center in Michigan that executed the layout for local advertisements and the pagination of the directories.

¶10 API executed agreements with its customers to provide advertising and listings to be inserted into specific directories. The customers did not purchase space and had no right to select the placement of their advertisement, except that they could purchase space on the cover of the directory.

¶11 The directories for which API solicited advertising included the Yellow Pages, White Pages and Internet Yellow Pages. The familiar Yellow Pages directories are organized by categories, and advertisements are in a variety of formats, including display ads, leader ads and coupons. The Yellow Pages also offer "image" and "reach" advertising in the form of cover, spine and tab ads. White Pages advertisements consist of enhancements to an existing telephone listing, such as bold or feature type or the addition of a company logo. The Internet Yellow Pages provide online advertising in various formats. API estimates that, for the years 1994-97, Yellow Pages advertising accounted for 88-92% of its annual income, White Pages advertising made up a 3-6% share of income, while interest and all other income (including, presumably, Internet advertising) totaled 2-7% of annual income.

¶12 Sales representatives generated API's income by contacting customers for placement of advertising in upcoming directories. The cost of an ad in the Yellow Pages directories was based in part on the circulation of the directory. Directories are distributed free of charge to all Wisconsin Bell, Inc. (WBI) subscribers and other Wisconsin residents and businesses in the directory

coverage area. WBI is a telecommunications company that is required by law to provide a White Pages directory to its subscribers. Substantially all of the directories for the Wisconsin directory coverage area were distributed in the state of Wisconsin.

¶13 During the years at issue, API entered into agreements with WBI in which API agreed to publish the White Pages and Yellow Pages directories on WBI's behalf. Under the agreements, API paid WBI an annual fee for the exclusive right to solicit advertising in Yellow Pages directories. API contracted with R.R. Donnelly & Sons Company to print and bind telephone directories. API contracted with Product Development Corporation (PDC) to distribute and deliver telephone directories. Additional facts stipulated to by the parties are provided in the discussion section.

Applicable Law and the Commission's Analysis

¶14 A state may tax only that portion of a corporation's value that is earned within its borders. ***Container Corp. v. Franchise Tax Bd.***, 463 U.S. 159, 164 (1983). To meet the requirements of the Commerce and Due Process Clauses of the United States Constitution, a state tax applied to interstate commerce must be fairly apportioned. ***United Parcel Serv. Co. v. DOR***, 204 Wis. 2d 63, 72, 553 N.W.2d 861 (Ct. App. 1996) (citing ***Complete Auto Transit, Inc. v. Brady***, 430 U.S. 274, 279 (1977)). "To be fairly apportioned, the tax may only be imposed on income earned from business conducted within Wisconsin." ***United Parcel Serv.***, 204 Wis. 2d at 73. "[S]tates have wide latitude in the selection of a formula used to apportion the income of an interstate business." ***Id.***

¶15 For tax years 1994-1997, Wisconsin used a three-factor formula based on sales, payroll and property holdings for determining that portion of a

multistate or international corporation's nationwide income subject to state tax.[3] WIS. STAT. § 71.25(6) (1993-97). Under this formula, 50% of the tax was based on the fraction of the company's total sales that are made in Wisconsin, 25% on its fraction of payroll that is paid in Wisconsin, and 25% on its fraction of property holdings that are within Wisconsin's borders. ***Id.*** The dispute in this case centers on the calculation of the sales factor portion of this formula.

¶16 The version of WIS. STAT. § 71.25(9)(a) in effect during tax years 1994-1997 defined the "sales factor" as "a fraction," consisting of "[a] numerator … which is the total sales of the taxpayer in this state during the tax period, and [a] denominator … which is the total sales of the taxpayer everywhere during the tax period." Sales of tangible personal property within the state of Wisconsin were, as a general rule, taxable as in-state sales. *See* § 71.25(9)(b). The statute provided that sales of things other than tangible personal property, such as services, "are in this state if the income-producing activity is performed in this state." Sec. 71.25(9)(d). Under § 71.25(9)(d), sales of services and other non-tangible property performed both within and outside of Wisconsin were subject to the "cost of performance" method of allocation. *See* § 71.25(9)(d) (1993-97) ("If the income-producing activity is performed both in and outside this state the sales shall be divided between those states having jurisdiction to tax such businesses in proportion to the direct costs of performance incurred in each such state in rendering this service.").

[3] Beginning in the 2008 tax year, Wisconsin abandoned the multi-factor apportionment formula in favor of a single-factor apportionment formula based on the business's in-state sales (the sales factor) as calculated under WIS. STAT. § 71.25(9) (2007-08). *See* § 71.25(6)(d) (2007-08).

¶17 As noted, the Commission concluded in its Phase I decision that the sale of phone directory advertising was the sale of a service, and was therefore not taxable under paragraph (b) of WIS. STAT. § 71.25(9) as the sale of tangible personal property. In its Phase II decision, the Commission addressed the issue of whether the sale of directory advertising services was nonetheless fully taxable under paragraph (d) of § 71.25(9) as "income-producing activity performed within the state of Wisconsin." This question required the Commission to consider whether API's sales of advertising services were performed within Wisconsin or both within and without Wisconsin.

¶18 After determining that there were no disputed issues of material fact and that the matter of the allocation for tax purposes of the income from API's directory advertising services could be decided on summary judgment, the Commission granted summary judgment on the issue to the Department. The Commission's decision relied on its prior interpretation of WIS. STAT. § 71.25(9)(d) in ***The Hearst Corporation v. DOR***, Wis. Tax Rptr (CCH) ¶203-149 (WTAC May 15, 1990). The Commission noted that, in ***Hearst***, it had considered whether advertising income Hearst, the operator of WISN-TV in Milwaukee, received from the sale of national advertising time on the station was "properly includable in the numerator of the sales factor of its Wisconsin apportionment formula." The Commission described the facts and holding of ***Hearst*** as follows:

> Like API, WISN generated advertising revenue in Wisconsin from both local advertising and national advertising. Local advertising was solicited by a sales staff located in Milwaukee. National advertising was placed by national sales representatives located outside Wisconsin who generated business from national advertisers and advertising agencies located primarily in New York, Chicago and Los Angeles. National advertising commercials were all produced independently of WISN and were transmitted to WISN by satellite feed or by courier. WISN incurred costs to broadcast these

> commercials, and also paid national sales commissions for such commercials.
>
> The Commission found that 'the network and national advertising revenues are based upon the showing or broadcasting thereof. Without broadcasting there is no income.' The Commission further found that 'advertisers choose spots based upon the demographic profile of the audience viewing the particular programming during which the spots occur or are available, and that the advertisers are buying the spots due to the programming and its demographic makeup.' In its findings of fact, the Commission concluded 'the income producing activity is the actual broadcasting of the programming desired by the advertiser and the commercial spots during that programming and, thus, is in Wisconsin.'
>
> On these facts, the Commission held: 'The national advertising income is a result of the income-producing activity of broadcasting in Wisconsin, and, thus, the income is includable in full in the sales factor numerator.' Id. Without further explanation, the Commission then adopted 'the specific reasoning' outlined in the Department's brief and affirmed the assessment at issue with respect to national advertising revenue. Id., Order, Opinion, Issue #5.

The Commission then turned to the concurring discussion of Commissioner Bartley about the issue of whether the income from national advertising was includable in full in determining the sales factor. The Commission described Commissioner Bartley's opinion as "directly address[ing] the issue" in the API case, and noted his conclusion that WISN's "income-producing activity [for national advertising] occurs entirely in Wisconsin" because "[i]t is in Wisconsin that the advertisements are aired and where the services promised are performed."

¶19 The Commission concluded that, as in ***Hearst***, the "income-producing activity" of advertising services associated with advertisements run in Wisconsin was performed in Wisconsin when the advertisement reached its intended, Wisconsin audience. The Commission found persuasive the Department's argument that "what matters to the advertisers … is getting the

Directories, with their advertising, in front of the people at whom that particular Directory is aimed." The Commission noted that, under the API's advertising agreements, "if API failed to include an advertiser's ad in the proper directory, the advertiser would receive a full refund, regardless of any [out-of-state] services provided by API employees … in arranging, creating, developing, designing, assembling and producing the advertisement." While API had contracted for the printing and distribution of directories with R. R. Donnelly & Sons and PDC, the Commission concluded that these facts did not disturb its conclusion that the "income-producing activity" occurred when Wisconsin users received their advertising directories because API had complete control over the content of the directories, and because PDC's distribution of the directories in Wisconsin was determined by a pre-set schedule. Citing cases from other jurisdictions, the Commission noted that the general rule appears to be that advertising or broadcast services are performed where the advertisements are displayed or transmitted. The Commission acknowledged, however, that these out-of-state cases involved statutes that are distinguishable from WIS. STAT. § 71.25(9)(d).

Standard of Review

¶20 The issue presented in this case was decided by the Commission on summary judgment. Summary judgment is appropriate if there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. ***Vohs v. Donovan***, 2009 WI 181, ¶7, 322 Wis. 2d 721, 777 N.W.2d 915. The parties agree that there are no disputed factual issues, and that the issue presented may be properly decided on summary judgment.

¶21 We review the Commission's decision, not the circuit court's. *See* ***DOR v. Menasha Corp.***, 2008 WI 88, ¶46, 311 Wis. 2d 579, 754 N.W.2d 95. This

case turns on the interpretation and application of WIS. STAT. § 71.25(9)(d) to undisputed facts. Statutory interpretation is a question of law that, as a general rule, we review de novo.[4] When reviewing an agency's interpretation of a statute, however, we may apply a deferential standard of review—either "great weight" or "due weight" deference—instead of de novo review. "[T]he level of deference we apply is largely determined by reference to the decision-making agency's expertise and experience in applying the statute at issue." ***DOR v. A. Gagliano Co., Inc.***, 2005 WI App 170, ¶22, 284 Wis. 2d 741, 702 N.W.2d 834.

¶22 Under the great weight standard, we will uphold an agency's interpretation as long as it is reasonable and not contrary to the statute's clear meaning, even if we find a different interpretation to be more reasonable. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996). Great weight deference applies when all four of the following conditions are met: "(1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute." ***Gagliano***, 284 Wis. 2d 741, ¶24 (citation omitted).

¶23 When applying due weight deference, we will uphold the agency's interpretation of a statute if it comports with the purpose of the statute, and no alternative interpretation is more reasonable than the agency's. *See* ***id.*** (citation omitted). Due weight deference is appropriate "when the agency has some

[4] The oft-cited principles of statutory interpretation set forth in ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶43-51, 271 Wis. 2d 633, 681 N.W.2d 110, are familiar and need not be repeated here.

experience in an area, but has not developed the expertise that necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." ***Id.*** (citation omitted). "The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question." ***Weston v. DWD***, 2007 WI App 167, ¶13, 304 Wis. 2d 418, 737 N.W.2d 74 (citation omitted). Finally, "[d]e novo review is appropriate if any of the following are true: (1) the issue before the agency is clearly one of first impression; (2) a legal question is presented and there is no evidence of any special agency expertise or experience; or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance." ***Gagliano***, 284 Wis. 2d 741, ¶24.

¶24 API contends that we should review the Commission's interpretation of WIS. STAT. § 71.25(9)(d) de novo because, in API's view, the Commission has virtually no experience interpreting the statute.[5] While acknowledging that the

[5] API also argues that de novo review is appropriate because, in API's view, the statutory language at issue in this case—"income-producing activity performed in this state," WIS. STAT. § 71.25(9)(d)—is unambiguous, and courts give no deference to an agency interpretation of an unambiguous statute. *See* ***DOR v. Caterpillar, Inc.***, 2001 WI App 35, ¶6, 241 Wis. 2d 282, 625 N.W.2d 338. API appears to treat the rule that no deference is to be accorded an agency interpretation of a statute that is unambiguous as separate from the well-established, three-tiered system for reviewing agency interpretations. It is not. This rule, as stated in ***Caterpillar***, and as more fully explained in ***Lincoln Savings Bank, S.A. v. DOR***, 215 Wis. 2d 430, 443, 573 N.W.2d 522 (1998), and ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 282 n.2, 548 N.W.2d 57 (1996), is merely a restatement of the principle that, even under the most deferential standard of agency review, courts will not uphold an agency's interpretation of a statute if that interpretation is contrary to the unambiguous meaning of the statute. The passage ***Caterpillar*** cited from ***Lincoln***, which was itself quoted from ***UFE***, states as follows:

> The plain meaning of a statute takes precedence over all extrinsic sources and rules of construction, including agency interpretations … [E]ven if an agency interpretation is accorded the highest level of deference by a court, great weight, it will not

(continued)

Commission has construed § 71.25(9)(d) once before in ***Hearst***, API argues that one prior interpretation of a statute by an agency is not sufficient to accord a deferential standard of review to a subsequent interpretation of the statute, citing ***La Crosse Queen, Inc. v. DOR***, 208 Wis. 2d 439, 446, 561 N.W.2d 686 (1997) (applying de novo review when the Commission had interpreted the statute at issue on one prior occasion). The Commission argues that it is entitled to at least due weight deference. For the reasons that follow, we conclude that the Commission's interpretation and application of § 71.25(9)(d) to the facts of this case is entitled to due weight deference.

¶25 First, API's reliance on ***La Crosse Queen*** is misplaced. Case law does not support a general rule that de novo review is appropriate when the agency has interpreted the statute in only one prior case. *See, e.g.* ***Gilbert v. LIRC***, 2008 WI App 173, ¶10, 315 Wis. 2d 726, 762 N.W.2d 671 (applying due weight deference where LIRC had interpreted the statute in one prior case, and the agency was charged with administering the statute); ***Thomas More High Sch. v. Burmaster***, 2005 WI App 204, ¶14, 287 Wis. 2d 220, 704 N.W.2d 349 (applying due weight deference to Department of Public Instruction's (DPI) interpretation of the statute codifying the Milwaukee School Choice Program despite the fact that DPI had "no experience" with the issue in the case); ***Madison Newspapers, Inc. v. DOR***, 228 Wis. 2d 745, 759, 599 N.W.2d 51 (Ct. App. 1999) (applying due weight deference where agency had interpreted a particular statutory exemption in only one prior case).

> be upheld if the interpretation directly contravenes the clear meaning of the statute.

Lincoln Savings, 215 Wis. 2d at 443 (quoting ***UFE***, 201 Wis. 2d at 282 n.2.).

¶26 Second, we observe that de novo review was appropriate in ***La Crosse Queen*** as much for the nature of the particular interpretive task in that case as for the Commission's relative inexperience with the statute. That case turned on the meaning of the constitutional phrase "interstate commerce" as used in WIS. STAT. § 77.54(13) (1989-90), which the parties to the case agreed had the same meaning as the phrase "commerce ... among the several States" in the Commerce Clause of the federal Constitution, U.S. Const. art I, § 8, cl. 3. *See* ***La Crosse Queen***, 208 Wis. 2d at 453 (Abrahamson, C.J. dissenting). The court in ***La Crosse Queen*** was at least as competent as the Commission to engage in the constitutional analysis required to ascertain the statute's meaning.

¶27 We conclude that the Commission's interpretation of WIS. STAT. § 71.25(9)(d) is entitled to due weight deference. The legislature has charged the agency with administration of the allocation and apportionment provisions of WIS. STAT. § 71.25(9), a fact that, in most cases, results in a court affording the agency's interpretation at least due weight deference. *See, e.g.*, ***City of Oak Creek v. PSC***, 2006 WI App 83, ¶20, 292 Wis. 2d 119, 716 N.W.2d 152 (applying due weight standard to agency's interpretation even though the circumstances of the case were "unprecedented" because PSC was charged with executing the statutory scheme at issue); ***Epic Staff Mgmt., Inc. v. LIRC***, 2003 WI App 143, ¶17, 266 Wis. 2d 369, 667 N.W.2d 765 (applying due weight deference where agency had never applied statute to a particular circumstance because LIRC was charged with administering the statute in question, and was required to make significant policy judgments relating to the implementation and administration of the statute). As noted, moreover, the Commission has interpreted the statutory provisions at issue here in the ***Hearst*** case under facts that, while not identical to those of the present case, are similar enough for the agency to have acquired at least some expertise

pertinent to the task at hand. *See* ***Gilbert***, 315 Wis. 2d 726, ¶10; *see also* ***William Wrigley, Jr., Co. v. DOR***, 176 Wis. 2d 795, 801, 500 N.W.2d 667 (Ct. App. 1993) (citation omitted) (due weight deference is appropriate where agency interpretation was "very nearly" an issue of first impression).

Reasonableness of the Commission's and API's Interpretations of WIS. STAT. § 71.25(9)(d)

¶28 API contends that the Commission's interpretation of WIS. STAT. § 71.25(9) in its Phase II decision ignores the basic structure of the statute, which provides different sourcing rules for the sale of tangible personal property under paragraph (b) of § 71.25(9) than for the sale of services under paragraph (d) of the subsection. API argues that, once the Commission concluded in Phase I that the sale of directory advertising was the sale of a service and not tangible personal property, it should have made the sales factor allocation according to actual costs of performance, which, in this case, would include the various activities performed by API within and without Wisconsin. API notes that the stipulated facts show that its directory advertising income is dependent on a series of integrated activities, beginning with solicitation of the sale, ad layout and production, and delivery of directory ad copy to the printer. API notes that these activities are performed by the use of facilities and staff in Michigan, primarily, with some services performed in Indiana, Ohio and Illinois, as well as Wisconsin. These services, asserts API, are reflected in the customer's monthly advertising fee.

¶29 API further argues that the Commission erred by basing its assessment solely on the last activity in its chain of service activities, the distribution of directories, to the exclusion of the vast majority of its activities. API notes that it is undisputed that the distribution of the directories was not performed by API, but by a third party, PDC. API argues that the Commission's

determination was contrary to WIS. ADMIN. CODE § Tax 2.39(6)(c)3. (1994-1997),[6] which explicitly stated that the activity of a third party cannot be taken into account as an "income-producing activity" for tax allocation purposes.

¶30 DOR contends that the Commission reasonably concluded that all income from API's sales of local directory advertising was allocable to Wisconsin as "income-producing activity … performed in this state" under WIS. STAT. § 71.25(9)(d). DOR argues that, while API had significant Wisconsin sales from 1994 to 1997, under its interpretation of § 71.25(9)(d), it would pay no Wisconsin franchise tax for 1994, while reducing its tax by nearly $2 million for 1995 and 1996. DOR argues that API's construction of the statute is unreasonable because it allows large amounts of income-producing activity to virtually escape taxation in Wisconsin, where all of the advertising occurred. DOR contends that the Commission's view that the service API provided was furnishing its customers access to a Wisconsin audience was reasonable, and consistent with the Commission's decision in the ***Hearst*** case. Finally, DOR argues that API's view that sales solicitation and ad production activities constituted its advertising services is belied by the fact that these activities were not specified in the contract,

[6] During the tax years at issue, WIS. ADMIN. CODE § Tax 2.39(6)(c)3., removed by Register November 2006, No. 611, provided in relevant part:

> For purposes of this paragraph, "income producing activity" means the act or acts directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profit. This activity does not include activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor. Accordingly, the income producing activity includes … [t]he rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service.

and it is undisputed that not all customers used all of these services, such as ad design.

¶31 API responds that it is not unusual for a service provider not to specify in a contract each activity constituting the provision of a service. Implicit in the agreement, API argues, is the promise that API will take all steps necessary to provide the service. API contends that these activities were essential to customers receiving the service for which they contracted, and that without each of these activities, API would have no income from its directory advertising service. ***Hearst***, API maintains, is of negligible value here for the following reasons: it concerned allocation of national TV advertising, where income is generated by the broadcast of the advertisement, not telephone directory sales, where income, in API's view, is generated by the sale of the service; WISN was a wholly Wisconsin-based business, whereas API is a multistate operation; Hearst/WISN was not involved in production of the advertising, whereas API is directly involved in the production of the ads at its sales offices in the five states, at its graphic design center in Michigan, and production offices in Ohio and Michigan; and, finally, the ***Hearst*** Commission merely adopted the reasoning of the Department in addressing the allocation issue, and failed to engage its own independent analysis.

¶32 In the analysis of WIS. STAT. § 71.25(9)(d) that follows, we conclude, applying due weight deference, that the Commission's interpretation of the version of the statute in effect for tax years 1994-1997 is reasonable, and that API's interpretation of the statute is also reasonable but not more reasonable than the Commission's interpretation.

¶33 As noted, the Commission determined in its Phase I decision that API's sale of directory advertising was the sale of a service and not tangible personal property under the former WIS. STAT. § 71.25(9)(b). The version of WIS. STAT. § 71.25(9)(d) effective during the period at issue provided that sales of things other than tangible personal property, such as services, "are in this state if the income-producing activity is performed in this state." The issue in this case is whether the "income-producing activity" associated with the telephone directory advertising services provided by API was performed in Wisconsin, or performed both within and without Wisconsin.

¶34 We are persuaded of the reasonableness of the Commission's and DOR's view that the "income-producing activity" associated with API's service from 1994 to 1997 was, at bottom, the provision of access to a Wisconsin audience. Advertisers paid API to reach Wisconsin consumers through this familiar and well-established advertising medium. It is undisputed that, in the course of providing this service, API employees working in offices outside of Wisconsin executed tasks related to the sale and production of the ads. But API's customers did not pay primarily for API to service their accounts, design their advertisements, or send their ad copy with the completed directory to the printer. They paid for the broad access API could provide to a Wisconsin audience.

¶35 Moreover, the Commission reasonably concluded that this service of providing access to Wisconsin consumers is income-producing activity performed within the state of Wisconsin under WIS. STAT. § 71.25(9)(d). During the relevant period, API acted as a gatekeeper for its advertisers to the Wisconsin market; API's customers paid a monthly toll to reach that market via a venerable advertising medium. API's income was dependent primarily upon its status as a telephone directory publisher, and its ability to offer advertisers access to a pool of

local consumers (Wisconsin consumers in this case) through this medium. Thus, regardless which state API's sales persons and advertising production staff were located, API's primary service of providing access to a Wisconsin audience was performed in the state of Wisconsin.

¶36 We also think that the Commission correctly discounted the fact that the actual distribution of the printed directories was performed by a third-party, PDC. First, as the Commission noted, API controlled the distribution of the directories following a schedule established by its agreement with PDC and, by entering into an agreement with Wisconsin Bell, assumed full responsibility for publishing and delivering the Yellow Pages directory in Wisconsin. PDC's role was simply to distribute the directories at API's direction. More importantly, PDC's distribution of the printed directories—while necessary to the provision of API's service—was not the income-producing activity itself. Again, the income-producing activity associated with the service API offered its customers was access to a Wisconsin audience. PDC's distribution of directories was a necessary activity to the provision of the service, as was purchasing the paper for the directories or designing the ads themselves. But it was not the income-producing activity itself, which was the furnishing of access to a Wisconsin audience. Thus, even if PDC's distribution of the directories is third-party activity that cannot be counted as an "income-producing activity" for tax allocation purposes under WIS. ADMIN. CODE § Tax 2.39(6)(c)3. (1994-1997), this fact would not significantly alter the analysis.

¶37 Finally, we conclude that the Commission reasonably relied on its prior interpretation of WIS. STAT. § 71.25(9)(d) in ***Hearst***. As in the present case, the service provided by the taxpayer in ***Hearst*** (WISN) was the furnishing of access to a local market; in that case, a Milwaukee-area television audience.

WISN contended that certain activities leading up to the airing of the advertisements were performed out-of-state, and therefore not all of its tax could be allocated to Wisconsin under § 71.25(9)(d). The Commission rejected WISN's arguments, concluding that the income-producing activity was the broadcast of the commercial spots in Wisconsin. Here, the Commission reasonably relied upon ***Hearst*** in concluding that API's income-producing activity occurred in Wisconsin.

¶38 API's attempts to distinguish ***Hearst*** are unavailing. The fact that API provides some advertising production services, while WISN did not, does not alter the analysis. API and WISN provide essentially the same service central to this case: access to Wisconsin consumers. API's customers may appreciate API's assistance in producing their advertisement(s), or in providing other services, but they pay for the unique access to a local market that advertising in its Ameritech Yellow Pages offers.

¶39 Turning to API's interpretation of WIS. STAT. § 71.25(9)(d), we conclude that its view that part of its income-producing activity was performed outside of the state is reasonable. It is undisputed that salespersons and graphic designers working in several Midwestern states (including Wisconsin) executed tasks that were necessary to the provision of API's directory advertising services. Accordingly, API makes a reasonable case that the Commission should have determined how much of its activities were performed in state and how much were performed out-of-state, employing the cost-of-performance method of allocation under the former WIS. STAT. § 71.25(9)(b). *See* § 71.25(9)(b) (when income-producing activity is performed both in and outside Wisconsin, sales "are divided between those states having jurisdiction to tax such businesses in proportion to the direct costs of performance incurred in each such state in rendering this service.").

¶40 However, we cannot conclude that API's proposed interpretation of WIS. STAT. § 71.25(9)(b) is more reasonable than the Commission's because it fails to account for the fact that API's primary income-producing activity is furnishing access to a Wisconsin audience. Under API's proposed interpretation of WIS. STAT. § 71.25(9)(d), as argued here and made manifest in its amended tax filings, its tax for 1994 to 1996 based on Wisconsin telephone directory advertising sales for the tax years at issue in this case would be a fraction of the amount reflected in its original filings. For example, API's original 1994 corporation franchise/income return shows that it apportioned approximately 16.38% of its national sales to Wisconsin. API's amended 1994 return revised this figure to approximately 2.05% of its national sales. This decrease was not a result of a downward revision of the actual Wisconsin share of its total directory sales nationally. It was the product of API's apparent view that its income-producing activity under § 71.25(9)(d) consisted only of activities associated with the sales and production of its advertisements, and did not include the primary activity that its customers pay for—the furnishing of access to a local directory market.[7]

CONCLUSION

¶41 In sum, we conclude, applying due weight deference, that the Commission reasonably defined API's income-producing activity under the version of WIS. STAT. § 71.25(9)(d) in effect from 1994 to 1997 as the furnishing

[7] Nor does API make the alternative argument that, even if providing access to a Wisconsin audience were its primary income-producing activity, the Commission erred in its interpretation of WIS. STAT. § 71.25(9)(d) because it failed to add to its Wisconsin tax other, secondary income-producing activities, such as the creation of the advertisement and page placement in the directory, that occurred outside of Wisconsin. We observe that API's tax for the years at issue might well be greater under this interpretation of WIS. STAT. § 71.25(9)(d) than under even the Commission's interpretation of the statute.

of access to a Wisconsin audience via advertisements placed in its local telephone directories. We also conclude that the Commission reasonably concluded that this income-producing activity is allocable to Wisconsin for purposes of determining API's tax under § 71.25(9)(d). Further, we conclude that, while API's competing interpretation of § 71.25(9)(d) is reasonable, it is not more reasonable than the Commission's and DOR's interpretation of the statute. Accordingly, we affirm the circuit court's decision affirming the Commission's decision.

By the Court.—Order affirmed.

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