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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

ASAP CRUISES, INC.,
Petitioner-Respondent-
Cross-Appellant,

v. Appeal No. 23-AP-1251

WISCONSIN DEPARTMENT OF REVENUE,
Respondent-Appellant-
Cross-Respondent.

Appeal from a Decision and Order of the
Dane County Circuit Court, Case No. 22-CV-1975,
The Honorable Stephen E. Ehlke, Presiding

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT ASAP CRUISES, INC.

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INTRODUCTION

This matter is on appeal from cross-motions for summary judgment with the Wisconsin Tax Appeals Commission (the "Commission"). In support of its motion for summary judgment, ASAP provided an affidavit of the co-owner and Vice President of ASAP, Mr. Chad Burt. The Commission disregarded the affidavit, which it characterized as "self-serving testimony" and without other corroborating evidence in the record. The Commission denied ASAP's motion for summary judgment and granted the Department's motion for summary judgment.

On review, the Circuit Court held that the Commission committed a procedural error when it refused to consider Mr. Burt's affidavit. As a result, the Circuit Court found the Commission improperly granted summary judgment in favor of the Department and remanded the case back to the Commission. The Circuit Court limited its decision to this procedural error, expressly stated that it was not opining on the legal issue of the scope and application of Public Law 86-272.[1] In its brief before this Court, the Department concedes the Commission erred, describing the Commission's error as harmless.

The Circuit Court correctly ruled on the procedural error committed by the Commission. Mr. Burt's affidavit should not have been disregarded. Rather, the affidavit should have been viewed in the light most favorable to ASAP. As described in the Cross-Appellant's brief being filed herewith, under this correct standard, the Commission

[1] The legal scope and application of Public Law 86-272 will be addressed in full in the Cross-Appellant's Brief.

should not have granted summary judgment to the Department and should have granted summary judgment to ASAP.

STATEMENT OF THE ISSUE

Respondent's Issue No. 1

Wis. Stat. § 802.08(2) requires that a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, 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." Under Wisconsin law, can an affidavit submitted in support of a motion for summary judgment be disregarded on the basis that the Commission characterizes it as "self-serving" or requires corroboration by other evidence in the record?

The Commission answered: The Commission wrongly disregarded material affidavit testimony from a corporate officer for ASAP on the grounds that it was self-serving and without corroboration.

The Circuit Court answered: Recognizing there is no authority under which the Commission can reject sworn affidavit testimony for the reasons stated, the Circuit Court reversed the Commission's grant of summary judgment, finding that the Commission erred as a matter of law disregarding material evidence.

This Court should answer: The Commission unlawfully rejected material sworn affidavit testimony from ASAP's

corporate officer. Therefore, the Commission's grant of summary judgment in favor of the Department of Revenue should be reversed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION[2]

ASAP respectfully requests oral argument in this case. While the procedural issue described in the Respondent portion of this appeal is relatively straightforward, the issue on cross-appeal regarding Public Law 86-272 is a case of first impression addressing technical state tax issues. ASAP believes oral argument could benefit the Court.

ASAP believes publication is warranted to clarify the proper standard for affidavits filed in support of summary judgment motions. In addition, as discussed in the cross-appeal, there is no published precedent in Wisconsin addressing the specific legal issues raised in this dispute. *See* Wis. Stat. § 809.23(1)(a)1. The federal law at issue, Public Law 86-272, also applies to potentially countless out-of-state taxpayers doing business in Wisconsin. As such, publication is warranted to define the scope and application of Public Law 86-272, which is of substantial and continuing public interest. *See* Wis. Stat. § 809.23(1)(a)5.

[2] The statement on oral argument and publication is provided here and omitted in Cross-Appellant's Brief, consistent with Wis. Stat. § 809.19(6)(b)2.

STATEMENT OF THE CASE[3]

I. Federal and State Tax Rules

The United States Constitution provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Despite this express grant of power to Congress, the U.S. Supreme Court has long-held that states are permitted to regulate interstate commerce so long as such state regulation does not otherwise conflict with federal constitutional or statutory law. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824). However, if state law conflicts with federal law, the Supremacy Clause of the United States Constitution establishes that federal law takes precedence. U.S. Const. art. VI, para. 2.

A state is permitted to impose tax on an out-of-state taxpayer under the U.S. Constitution only if the taxpayer has "nexus," or sufficient contacts, with a taxing state. These in-state contacts can be physical or economic in nature. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

Wisconsin imposes tax on corporations under a two-pronged approach. For the privilege of exercising a franchise or doing business in the state, Wisconsin imposes a franchise tax, which was the basis for the assessments imposed by the Department here. Wis. Stat. § 71.23(2). Where the franchise tax does not apply, Wisconsin imposes an income tax on corporations that "own property within this state; that derive income from sources within this state or from activities that

[3] For context, a full statement of the case will be provided here and omitted in Cross-Appellant's Brief, consistent with Wis. Stat. § 809.19(6)(b)2.

are attributable to this state; or whose business within this state . . . consists exclusively of foreign commerce, interstate commerce, or both . . . ." Wis. Stat. § 71.23(1).

Consistent with the authority granted under the United States Constitution to regulate interstate commerce Congress enacted Public Law 86-272 in 1959. Public Law 86-272 was passed in response to "apprehension in the business community" regarding the level of business activity in a state necessary to subject an out-of-state business to corporate income tax. S.Rep. No. 658, 86th Cong., 1st Sess., 2-3. As enacted, 15 U.S.C. § 381 provides in pertinent part:

> **(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[.]

Through the operation of the Supremacy Clause, Public Law 86-272 prevents the imposition of Wisconsin's income and franchise taxes where the conditions of the federal law are met.

II. Factual Background

The record evidence in this case consists of the joint partial stipulation of facts executed by the parties and Mr. Burt's affidavit submitted in support of ASAP's motion for summary judgment.

A. Stipulated Facts

ASAP, incorporated in the state of Florida, has its headquarters and principal place of business in Jacksonville, Florida. (R. 35:2 ¶ 1.) In the ordinary course of its business, ASAP entered into agreements with ITCs, including Wisconsin ITCs, through an "Independent Travel Consultant Agreement" (the "Agreement"). (R. 35:2 ¶ 2.)

The Wisconsin ITCs sold travel services to their customers located throughout the United States, including Wisconsin. (R. 35:2 ¶ 2.) When a Wisconsin ITC chose to use ASAP's Software Platform to acquire such travel services from a Travel Vendor, the Wisconsin ITC received a commission. (Id.) The commission was initially transmitted to ASAP who then remitted nearly all of the commission to the Wisconsin ITCs. (R. 35:2 ¶ 6.) ASAP retained a small portion in compensation for its sale to the Wisconsin ITC. (*Id.*)

B. Mr. Burt's Affidavit

ASAP provided the affidavit of Mr. Burt in support of its motion for summary judgment, describing ASAP's business operations and its financial arrangements.

ASAP owned no real or tangible personal property in Wisconsin during the relevant periods. (R. 36:95 ¶ 14.) In addition, no employee

of ASAP has resided in or visited the state. (R. 36:95 ¶ 15.) Through its website – www.outsideagents.com – ASAP provided a Software Platform the ITCs could choose to utilize for their businesses. (R. 36:94 ¶¶ 5-8.) The Software Platform is a multivendor aggregator that provided ITCs, who chose to use such Software Platform, with one-stop access to third party travel vendors (*i.e.*, airlines, cruise lines, hotels, etc.). (R. 36:94 ¶¶ 6-7.) The ITCs used the Software Platform to directly book travel packages for the ITC's customers. (*Id.*)

Through the Software Platform, ITCs were also offered access to online business management and marketing tools to help grow their independent travel business. (R. 36:94 ¶ 8.) The computer servers "holding" or "hosting" the software for the Software Platform were located outside Wisconsin. (R. 36:95 ¶ 16.)

ASAP marketed its Software Platform in multiple ways. (R. 36:95 ¶¶ 11-13.) These marketing efforts, primarily consisting of "email blasts," were not directed specifically to Wisconsin-based ITCs. (R. 36:95 ¶¶ 11-12.) The email addresses for the "email blasts" were purchased from an independent third party. (R. 36:95 ¶ 12.) In addition to "email blasts," ASAP's marketing efforts included: (1) "pay-by-click" advertising through Google, (2) online webinars, and (3) speaking engagements (none of which took place in Wisconsin). (R. 36:95 ¶ 13.)

A Wisconsin-based ITC wanting access to the Software Platform completed an application form downloadable from ASAP's website. (R. 36:95 ¶¶ 17-18.) Once executed by the ITC, the application form was returned to ASAP by fax or email/PDF scan. (R. 36:95 ¶ 19.) The application forms were not accepted and approved until ASAP

completed its internal validation and verification processes at its offices in Jacksonville, Florida. (R. 36:95 ¶ 20.) When ASAP accepted an application, it responded with an email confirmation sent to the ITC finalizing the agreement. (R. 36:95 ¶ 21.)

Wisconsin-based ITCs used the Software Platform to access and directly book travel packages with the Travel Vendors for ITC Customers located throughout the United States, including Wisconsin. (R. 36:96 ¶ 27.) ITCs, including those in Wisconsin, also used the Software Platform to gain access to online business management and marketing tools to help grow their businesses. (R. 36:96 ¶¶ 25-26.) ASAP derived revenue from two independent sources. ASAP's primary sources of revenue were from membership fees and fees relating to commissions generated ("the ITC Commissions") when an ITC used ASAP's Software Platform to directly book travel from a Travel Vendor. (R. 36:96 ¶ 30.) The monthly membership fee was charged for access to the resources available through the Software Platform. (R. 36:96 ¶ 31.) ASAP charged the membership fee in order to recover its costs associated with developing and maintaining the Software Platform accessible at www.outsideagents.com. (*Id.*)

When an ITC booked travel for ITC Customers through the Software Platform, it made payment directly to the Travel Vendor. (R. 36:96 ¶ 29.) The ITC was also required to notify the Travel Vendor of its contractual relationship with ASAP. (R. 36:96 ¶ 28.) The Travel Vendors remitted the ITC Commissions to ASAP for travel booked by the ITCs through the Software Platform by the ITCs. (R. 36:96 ¶ 32.) The ITC Commissions received by ASAP from the Travel Vendors were reconciled to the bookings of each ITC. (*Id.*) ASAP remitted nearly all

– 85% on average – of the ITC Commissions to each ITC. (R. 36:97 ¶ 33.) These payments to Wisconsin-based ITCs were made at the direction of the employees of ASAP located in Jacksonville, Florida. (*Id.*) The nominal balance of the ITC Commissions not paid to the Wisconsin-based ITCs was retained by ASAP as a fee for the various services provided through the Software Platform. (*Id.*)

III. Procedural History

On or about December 12, 2018, the Department issued estimated corporate franchise tax assessments to ASAP for the tax years ending December 31, 2012 through December 31, 2017 ("the Audit Period"). (R. 35:4 ¶ 9.) ASAP filed a timely Petition for Redetermination appealing the assessments by letter dated January 28, 2019. (R. 35:4 ¶ 10.) By letter dated August 26, 2019, the Department issued a Notice of Action denying ASAP's Petition for Redetermination. (R. 35:4 ¶ 11.) On or about October 24, 2019, ASAP filed a Petition for Review with the Commission appealing the assessments. (R. 35:4 ¶ 12.)

A. Proceedings Before the Commission

The parties filed cross motions for summary judgment before the Commission. (R. 19, 20, 21, 23, 30, 36.) Other than the partial stipulation of facts, the only other evidence offered to the Commission was the affidavit of Mr. Burt in support of ASAP's motion. (R. 36.) Mr. Burt's affidavit was necessary because, *inter alia*, the parties could not agree to a stipulation regarding the nature of ASAP's business activities, including any in Wisconsin, or how ASAP earned income during the relevant periods. (*See* R. 35.) The Commission did not provide for oral argument by the parties.

The Commission granted the Department's motion and denied ASAP's motion. (R. 27.) The Commission disagreed with ASAP's position that Public Law 86-272 applied to invalidate the assessments irrespective of whether ASAP sold tangible personal property or services, concluding that Public Law 86-272 was limited to sales of tangible personal property. (R. 27:8.)[4] Because the Commission characterized ASAP as selling services, the Commission concluded that Public Law 86-272 did not apply to ASAP. (*Id.*)

The Commission next addressed ASAP's position that it sold software as a service ("SaaS") to Wisconsin ITCs and, because SaaS is tangible personal property under applicable law, Public Law 86-272 shielded ASAP from taxation. (R. 27:9.) Acknowledging that the affidavit of Mr. Burt was offered for this purpose, the Commission rejected ASAP's evidence. (*Id.*) The Commission supported this decision by stating that Mr. Burt's affidavit was "self-serving testimony" that was not corroborated by evidence in the record. (*Id.*)

ASAP filed a motion for reconsideration asserting that the Commission committed a procedural error by disregarding Mr. Burt's affidavit. (R. 28.) The Commission denied ASAP's motion for reconsideration. (R. 31.)

B. Proceedings Before the Circuit Court

ASAP filed a Petition for Review with the Circuit Court. (R. 2.) The parties briefed the case and the court heard oral argument. (R. 58.) Following oral argument, the court permitted the parties to file

[4] This legal issue regarding whether Public Law 86-272 applies to the sale of services (as opposed to tangible personal property) is squarely addressed in the Cross-Appellant's Brief.

supplemental briefing. (R. 58:34-35.) Each of the parties filed a supplemental brief with the court. (R. 59, 60.)

The Circuit Court held that the Commission committed a procedural error by rejecting Mr. Burt's affidavit and, therefore, the decision to grant the Department's motion for summary judgment was improper. (R. 61:8.) Having found that the Tax Commission committed procedural error, the court remanded the case to the Commission for further proceedings. (*Id.*)

The Circuit Court expressly stated it had no opinion on the overarching issue of whether Public Law 86-272 applied outside the sale of tangible personal property. (R. 61:1.)

STANDARD OF REVIEW

When a party seeks review "'from a circuit court order reviewing an agency decision,' the appellate court reviews the decision of the agency, not the decision of the circuit court." *Rock-Koshkonong Lake Dist. v. State Dep't of Nat. Resources*, 2013 WI 74, ¶ 53, 350 Wis. 2d 45, 833 N.W.2d 800 (internal citation omitted).

Wis. Stat. § 227.57(11) states that in a "review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law." The courts of Wisconsin have likewise "end[ed] [the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

This case involves the interpretation of a federal statute. The courts of Wisconsin have made clear that "statutory interpretation is a question of law which courts decide *de novo*." *Harnischfeger Corp. v.*

Labor and Industry Review Comm'n, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995).

ARGUMENT

I. The Commission Acted Contrary to Law When it Disregarded Mr. Burt's Affidavit.

Wisconsin law is clear regarding the use of affidavits filed in support of motions for summary judgment. Wis. Stat. § 802.08(2) provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, *together with the affidavits*, if any, 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." (emphasis added).

With respect to such affidavits, Wisconsin courts have stated that "[t]he affidavits and other proof submitted by the parties are viewed in a light most favorable to the opposing party." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434, 439 (1997). Courts are further instructed that "[a]ny reasonable doubts as to the existence of a factual issue must be resolved against the moving party." *Maynard v. Port Publ'ns, Inc.*, 98 Wis. 2d 555, 563, 297 N.W.2d 500, 505 (1980).

The Commission disregarded these unambiguous tenets of Wisconsin law. The Commission defended its decision to disregard Mr. Burt's affidavit by characterizing the sworn statements therein as "self-serving" and otherwise unsupported by any documentary evidence in the record. Yet, and as correctly noted by the Circuit Court, these inquiries are not contemplated under summary judgment procedures. *See e.g., Payne v. Pauley*, 337 F.3d 767, 772. The Circuit Court cited to this case as "discussing the misconception that evidence presented in a

'self-serving' affidavit is never sufficient to thwart a summary judgment motion . . . ." In *Payne*, the court noted that "[a]fter all, most affidavits submitted for these purposes are self-serving." 337 F.3d at 772.

It is also improper to reject an affidavit because the sworn statements are purportedly uncorroborated by other evidence in the record. *Id*. The critical factor is whether the affidavit is based on the personal knowledge of the affiant. *Id*. (citing F.R.C.P. 56(e)). In this case, there can be no question that Mr. Burt, as co-owner and Vice President of ASAP responsible for the day-to-day operations of the business, had personal knowledge of the facts outlined in his affidavit. (R. 36:94 ¶ 10.)

In the Appellant's Brief, the Department makes no effort to defend the Commission's rejection of the affidavit under Wisconsin law. Moreover, the Department does not claim that the Circuit Court's recitation of Wisconsin's summary judgment procedure was in any way erroneous. The Department's sole argument is that the Commission's decision to disregard Mr. Burt's affidavit was harmless error. (App. Br. at 23.) Thus, there is no dispute that the Commission's determination to disregard Mr. Burt's affidavit was in error.

CONCLUSION

For the reasons set forth above, consistent with the decision of the Circuit Court in this matter, this Court should hold that the Wisconsin Tax Appeals Commission committed a material error when it granted summary judgment in favor of the Wisconsin Department of Revenue and reverse.

Dated this 20th day of December, 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,549 words.

CERTIFICATION OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of December, 2023.

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INTRODUCTION

In this portion of the combined brief, ASAP Cruises, Inc. ("ASAP") addresses the issue raised by its cross-appeal regarding the scope and application of 15 U.S.C. § 381 (hereinafter referred to as "Public Law 86-272").

In its Decision and Order, the Circuit Court reversed the Wisconsin Tax Appeals Commission (the "Commission") on procedural grounds. (R. 61.) The Circuit Court therefore explained that it was not addressing the legal issue of the proper interpretation of Public Law 86-272. (R. 61-1.)

Public Law 86-272 draws a proverbial line in the sand. If any in-state activities by a taxpayer fall below the line, federal law makes clear that the taxpayer is shielded from the state's corporate income tax.

Before the Commission, ASAP explained that the protections of Public Law 86-272 applied irrespective of how the Wisconsin Department of Revenue (the "Department") characterized the source of ASAP's income. The Department argued that the protections of Public Law 86-272 are limited to sellers of tangible personal property. The Department further contended that ASAP provided services–not tangible personal property–to independent travel consultants ("ITCs"), including in Wisconsin, and therefore the protections of the federal law did not apply.

The Commission found that the protections afforded by Public Law 86-272 only apply to sellers of tangible personal property. Characterizing ASAP as being in the business of selling travel services,

the Commission concluded that Public Law 86-272 did not apply and granted the Department's motion for summary judgment.

ASAP appealed the Commission's decision to the Circuit Court. The Circuit Court held that the Commission committed a procedural error by failing to consider sworn affidavit testimony provided by ASAP regarding the nature of its business activities. The Circuit Court therefore remanded the case back to the Commission without addressing the issue of the scope of Public Law 86-272.

This Court should reverse the Commission. The United States Supreme Court, charged with interpreting federal law, has made clear that Public Law 86-272 defines a lower limit of in-state business activity that is protected from state income tax. This lower limit is defined by the nature of a taxpayer's in state activity and not by the source of the taxpayer's income (*i.e.*, whether the taxpayer made sales of tangible or intangible property). Numerous state courts, including the Supreme Court of Wisconsin, are in accord with this understanding of Public Law 86-272.

STATEMENT OF THE ISSUES

Cross-Appellant Issue No. 1

Public Law 86-272 outlines minimum standards for the imposition of state corporate income tax. At the urging of the business community, the federal law sets forth a lower limit of in-state business activity that determines whether an out-of-state taxpayer is subject to state corporate income tax. Congress defined that lower limit by reference to the sale of tangible personal property to customers located in the taxing state. Does Public Law 86-272 mandate that only

taxpayers selling tangible personal property in the taxing state are shielded from state corporate income tax?

The Commission answered: Yes.

The Circuit Court did not directly address this issue remanding on other grounds.[1]

This Court should answer: No.

Cross-Appellant Issue No. 2

ASAP provided an online software platform ("Software Platform") that ITCs used to book travel services for their customers. The ITCs paid ASAP a fee for the use of the Software Platform. Under applicable law, is the sale of SaaS properly characterized as the sale of tangible personal property for purposes of Public Law 86-272?

The Commission did not address this issue.

The Circuit Court did not directly address this issue remanding on other grounds.

This Court should answer: Yes.

STANDARD OF REVIEW

This case involves the interpretation of a federal statute. Wisconsin courts have made clear that "statutory interpretation is a question of law which courts decide de novo." *Harnischfeger Corp. v. Labor and Industry Review Comm'n*, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995).

[1] In the Appellant's Brief ("App. Br."), the Department misstates the ruling of the circuit court. As stated by the Honorable Judge Ehlke in his Decision and Order, "I do not reach the legal issue because I conclude the Commission improperly granted summary judgment in favor of the Wisconsin Department of Revenue[.]" (R. 61:1; *see also* R. 61:2 n.1.)

Wis. Stat. § 227.57(11) states that in a "review of an agency action or decision, the court shall accord no deference to the agency's interpretations of law." Wisconsin courts have likewise "end[ed] [the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

ARGUMENT

I. Public Law 86-272 Was Enacted to Address Concerns Regarding the Level of In-State Activity Necessary to Subject an Out-of-State Taxpayer to State Corporate Income Tax.

In the late 1950s, several state court decisions addressed when an out-of-state taxpayer had a sufficient connection with a taxing state to justify imposition of state corporate income tax. These decisions were *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *appeal dismissed*, *cert. denied*, 359 U.S. 28 (1959); and *ET & WNC Transportation Co. v. Currie*, 248 N.C. 560 (1958), 104 S.E.2d 403, *aff'd*, 359 U.S. 28 (1959). The holdings in these cases called into question when an out-of-state taxpayer's in-state business activities cause the taxpayer to be subject to state tax.

The business community feared the broad sweep of the decisions in these cases and petitioned Congress for assistance. The business community asked Congress to "establish[ ] clear guidelines as to the amount of activity within a State that was necessary to expose them to

liability for net income taxes."[2] Congress responded to this call to action with lighting speed. The result was the enactment of Public Law 86-272. This law, codified as 15 U.S.C. § 381, states in pertinent part:

> **(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[.]

Congress clearly stated that the legislative purpose of Public Law 86-272 was "to specifically exempt, from state taxation, income derived from interstate commerce where the only business activity within the state by the out-of-state company was solicitation."[3]

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[2] Charles A. Trost, *Federal Limitations on State and Local Taxation*, § 10:8 (2nd ed. 2020).

[3] Conf. Rep. No. 86-1103 (1959).

II. The Plain Language of Public Law 86-272 is Indisputably Concerned with Setting a Lower Limit of Business Activity Necessary for Taxation and Not With How an Out-of-State Taxpayer Derives Income from the Taxing State.

Wisconsin courts have long recognized that statutory interpretation looks to the words of the statute under review. *See State v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997) (stating that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985) (internal quotation marks omitted)).

The relevant sections of Public Law 86-272 are in two separate clauses. The fundamental distinctions between these two clauses are crucial to the overall meaning of the federal law. The first clause provides that "[n]o State, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived . . . from interstate commerce . . . ." 15 U.S.C. § 381. This language is clear. Congress was not concerned with how the out-of-state taxpayer earned income, only that the income was earned by the taxpayer from interstate commerce. Therefore, it is of no consequence whether a taxpayer earns income from the sale of tangible personal property or intangible personal property – only that the income is derived from sale across state lines.

The second clause of Public Law 86-272 refers to the minimum standard of in-state activities required to subject an out-of-state taxpayer to tax. This clause states that a taxpayer is protected from state taxation if its business activities in the taxing state are limited to

"the solicitation of orders . . . for sales of tangible personal property . . . ." *Id.* The clear purpose of this clause was to define the lower limit of in-state business activities needed to impose tax on an out-of-state taxpayer.

Despite extensive briefing on this issue, the Commission dedicated one sentence to its analysis of the scope of Public Law 86-272. The Commission stated that the plain language of Public Law 86-272 limited the protected activities of foreign corporations to sales of tangible personal property. (R. 27:8.) Because the Commission characterized ASAP as selling travel services and not tangible personal property, it concluded Public Law 86-272 did not apply to ASAP. (*Id.*) However, this conclusion is at odds with the minimum standards approach taken in the second clause of Public Law 86-272 and flatly inconsistent with congressional intent as evidenced in the statute.

III. The United States Supreme Court has Interpreted Public Law 86-272 as Setting a "Lower Limit" of In-State Business Activity Without Regard to How the Taxpayer Derived Income in the Taxing State.

The first case decided by the United States Supreme Court addressing the scope of Public Law 86-272 was *Heublein v. South Carolina State Tax Comm'n*, 409 U.S. 275 (1972). At issue in *Heublein* was a South Carolina law regulating the sale of liquor in the state. *Id.* at 277. The taxpayer was an out-of-state retailer of liquor with an in-state representative responsible for soliciting sales. *Id.* The disputed law required the taxpayer's in-state representative to engage in unprotected business activities under Public Law 86-272. *Id.* at 277-78. The taxpayer contended that the South Carolina law was invalid

because it evaded the intent of the federal law. *Id*. at 278. In order to address this question, the Court was required to define the scope of Public Law 86-272.

The United States Supreme Court began its analysis by recognizing that the impetus for Public Law 86-272 stemmed from its holdings in cases such as *Northwestern States*. The business community had raised questions following these decisions regarding exactly what in-state business activities triggered an obligation to pay state corporate income tax. *Id*. at 280 n.5. The Court reasoned that, through Public Law 86-272, Congress sought to accommodate local and national interests. *Id*. at 281. Ultimately, the Court explained, the federal law operates to limit a state's sovereign power to tax. The Court articulated the scope of Public Law 86-272 thusly:

> [Public Law 86-272] was designed to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal. By establishing such a limit, Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy.

Id. at 280.

The *Heublein* Court's use of the term "lower limit" to define the scope of Public Law 86-272 protection is critical to this case. Thus, Public Law 86-272 defines the <u>maximum</u> level of in-state business activity that will be shielded from state taxation. At that maximum level of activity, the state's sovereign power to tax and the national interest in promoting an open economy are equally balanced. As stated by the Court in *Heublein*, however, Congress determined that the

national interest in promoting an open economy outweighed a state's power to tax where in-state business activity falls below the level defined by the federal law.

In sum, and as understood through the holding in *Heublein*, Public Law 86-272 is correctly understood as drawing a proverbial line in the sand. If an out-of-state taxpayer's in-state business activities exceed the maximum permitted by Public Law 86-272, the protections of the federal law are unavailable. By contrast, as in this case, if an out-of-state taxpayer's in-state business activities fall below the line, the state's sovereign power to tax must give way to the national interest of promoting an open economy. There is simply no other way to interpret the Court's use of the term "lower limit" in *Heublein*.

IV. The Interpretation of Public Law 86-272 as Defining a Lower Limit of In-State Business Activity Has Been Unqualifiedly Accepted by the United States Supreme Court, the Supreme Court of Wisconsin and Numerous State Courts.

The Court's reasoning in *Heublein* explaining the scope of Public Law 86-272 by reference to a lower limit of protected in-state business activity is indisputably the law of the land.

In *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992), the United States Supreme Court was again asked to define the scope of Public Law 86-272. The dispute in *Wrigley* addressed whether the in-state business activities of an out-of-state chewing gum manufacturer exceeded the lower limit permitted under the federal law. After reviewing the relevant history leading up to the enactment of Public Law 86-272, the Court stated that the federal law "established what the relevant section heading referred to as a

'minimum standard' for imposition of a state net-income tax based on solicitation of interstate sales." *Id*. at 222.

Turning to the thorny issue of the scope of Public Law 86-272 at issue in the case, the Court next cited favorably to its prior holding in *Heublein* stating:

> Although we have stated that [Public Law 86-272] was "designed to define clearly a lower limit" for the exercise of state taxing power, and that "Congress' primary goal" was to provide "[c]larity that would remove [the] uncertainty" created by *Northwestern States*, [citing *Heublein*, 409 U.S. at 280] experience has proved [Public Law 86-272's] "minimum standard" to be somewhat less than entirely clear.

Id. at 223. The focus of the Court in *Wrigley* was defining the meaning of the term "solicitation of orders" referenced in the federal law. *See id*.

The Supreme Court of Wisconsin also passed on the issue in dispute in *Wrigley*. *See William Wrigley, Jr., Co., v. Wisconsin Dep't of Revenue*, 160 Wis. 2d 53, 465 N.W.2d 800 (1991). The Court stated that the purpose of Public Law 86-272 was to address "the uncertainty of interstate tax liability and inevitable new reporting, accounting and tax costs presented a real threat which was inducing retreat of business from the free markets . . . ." *Id*. at 74 (citing *International Shoe Co. v. Cocreham*, 164 So.2d 314, 321, *cert. denied*, 379 U.S. 902 (1964)). The Court further explained that in order to relieve these burdens on interstate commerce, Congress enacted Public Law 86-272 "which takes a 'minimum activities' type of approach in determining when a company is subject to a state's income tax." *Id*. at 75 (citing S. Rep. No. 658, at 2548 (1959) (internal quotation marks omitted)). The Court

concluded its discussion of the scope of Public Law 86-272 by noting that the federal law "was designed to define clearly a lower limit for the exercise of that power [a state's power to tax]." *Id.* (citing *Heublein*, 409 U.S. at 280).

Several states courts have expressed their agreement with this interpretation of Public Law 86-272. These cases include *Stanislaus Food Products Co. v. Dir. Div. of Tax'n*, 2021 WL 1589319 (N.J. Tax Ct.) (unpublished), *Blue Buffalo Co., Ltd. v. Comptroller of Treasury*, 221 A.3d 1130 (Md. App. 2019), *Kimberly-Clark Corp. v. Comm'r of Revenue*, 2015 WL 3843986 (Min. Tax Ct., Reg. Div.), *Arizona Dep't of Revenue v. Central Newspapers, Inc.*, 218 P.3d 1083 (Ariz. Ct. App. 2009), and *National Private Truck Council, Inc. v. Comm'r of Revenue*, 688 N.E.2d 936 (Mass. 1997).

In *Stanislaus*, the issue before the court was whether an out-of-state corporation concededly protected by Public Law 86-272 could be liable for an alternative minimum corporate tax as provided by state law. 2021 WL 1589319, *1. The court reviewed the scope of the federal law stating:

> The United States Supreme Court has explained that the rational basis expressed by Congress for the "minimum standards" of P.L. 86-272 was to provide clarity to the perceived uncertainty arising from the Supreme Court's decision in *Northwestern. Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279-280 (1972). "By establishing such a limit, [*i.e.*, minimum standards,] Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Id.* at 280. The rationale recognizes the

> concerns of the business community as to the uncertainty in dealing with multiple taxing regimes.

Id. at *7.

In *Blue Buffalo*, the appellate court considered whether the activities of certain in-state employees caused an out-of-state taxpayer to lose the protections of Public Law 86-272. 221 A.3d at 1133-1134. Referring to the federal law, the court explained:

> Congress enacted this provision to define a "'lower limit' for the exercise of the state taxing power" after the Supreme Court upheld state income taxes imposed on interstate corporations based on the activities of their travelling salespeople. *Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992); *see Comptroller of Treasury v. World Book Childcraft Int'l, Inc.*, 67 Md. App. 424, 432, 508 A.2d 148 (1986) (Section 381 bars taxation unless company's activities "meet certain minimum standards").

Id. at 1135-36.

In *Kimberly-Clark*, the issue before the court related to Minnesota's compliance with the Multistate Tax Compact and, more generally, the restrictions placed on a state's sovereign power of taxation. 2015 WL 3843986, *7. The court cited Public Law 86-272 as an example of the balancing between the national interest and a state's power to tax. The court explained the balancing inherent in that federal law by noting that it "was designed to define clearly a lower limit for the exercise of [a state's taxing power]." *Id*. at *20 (citing *Heublein*, 409 U.S. at 280).

The issue in dispute in *Central Newspapers* was whether Public Law 86-272 prevented Arizona from including the revenues of an out-of-state partnership in the numerator of the corporate income tax apportionment formula of a consolidated group of taxpayers. 218 P.3d at 1084. In its discussion of the scope of Public Law 86-272, the appellate court stated:

> The purpose of Public Law 86–272 was to set a "lower limit" on state taxation, *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280, 93 S.Ct. 483, 34 L.Ed.2d 472 (1972), and to establish a "minimum standard" for imposition of a state net-income tax based upon the solicitation of interstate sales. *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 222, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992). By setting this limit, Congress " implicitly determin[ed] that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Heublein*, 409 U.S. at 279–84, 93 S.Ct. 483[.]

Id. at 1088-1099.

Finally, in *National Private Truck Council*, the Supreme Judicial Court of Massachusetts was asked to address a conflict between Public Law 86-272 and a state regulation. The state law in dispute made clear that if an out-of-state taxpayer transported goods into the state using their own trucks – as opposed to common carrier – such taxpayer fell outside the protections of the federal law. 688 N.E.2d at 939. The taxpayer argued that the state regulation was preempted by Public Law 86-272. *Id*. The court explained that a federal law will not be

deemed to preempt a state's power to tax unless "Congress expresses its purpose clearly." *Id*. The court noted that:

> Here Congress has made its purpose clear. "Section 381 was designed to define clearly a lower limit for the exercise of [State taxing] power.... By establishing such a limit, Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." [*Heublein*, 409 U.S. at 280].

Id. Ruling in favor of the taxpayer, the court found that Public Law 86-272 preempted the challenged state regulation. *Id*. at 941.

The universal understanding of these state courts is that Public Law 86-272 draws a line in the sand by setting a lower limit of in-state business activity that is protected from state taxation. In-state business activity that falls below that defined limit is likewise protected because Congress determined that in those instances "the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Heublein*, 409 U.S. at 280.

V. The Lower Limit Approach Outlined in *Heublein* is the Correct Interpretation of the Scope of Public Law 86-272.

The Commission stated that Public Law 86-272 did not apply in this case because it characterized ASAP as selling travel services, rather than tangible personal property. According to the Commission, only sellers of tangible personal property can qualify for the protections of the federal law. This conclusion, however, is undeniably erroneous in light of the scope of Public Law 86-272 as explained by the United

States Supreme Court, the Supreme Court of Wisconsin, and several state courts.

The legislative purpose of Public Law 86-272 was to define a minimum standard or lower limit of in-state business activity that is shielded from state taxation. While it is certainly true that the lower limit was defined by the solicitation of sales for tangible personal property in the taxing state, it would be incorrect to assume that only sales of tangible personal property are protected.

In *Heublein*, the Court explained the delicate balance that Congress sought to achieve through Public Law 86-272. On the one hand, Congress has the unfettered authority to regulate interstate commerce under the Commerce Clause. On the other hand, states enjoy the sovereign power to tax business activities conducted in the state. As explained by the United States Supreme Court, by establishing the lower limit of in-state business activity in Public Law 86-272, "Congress did of course implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." 409 U.S. at 280.

It stands to reason, therefore, that if an out-of-state taxpayer's in-state business activity is below the lower limit outlined in Public Law 86-272, the state's taxing power must yield to the national interest in encouraging interstate commerce unburden by state regulation. There is simply no other reasonable interpretation of the instruction provided by the Court in *Heublein*. The use of the term "lower limit" in the case necessarily implies a level of in-state business activity below which is protected from state corporate income taxation by Public Law 86-272.

While it is certainly true that in *Heublein* the Court did not provide an explanation of the types of in-state business activities that would fall below the lower limit of Public Law 86-272, the case before this Court presents a set of facts that makes the issue of line drawing moot.

VI. ASAP's Business Activities in Wisconsin Fell Below the Lower Limit Defined by Public Law 86-272.

Irrespective of the characterization of what ASAP sold during the relevant periods, there is a marked distinction between the in-state business activities contemplated by Public Law 86-272's lower limit and those engaged in by ASAP in Wisconsin. Public Law 86-272's lower limit presumes that the out-of-state taxpayer is physically present in the taxing state – through employees or independent sales representatives – soliciting sales of tangible personal property. This in-state physical presence comes with the obvious use of state resources, and yet Congress chose to protect those in-state solicitation activities.

Here, ASAP operated entirely outside Wisconsin. (R. 36:94-95.) ASAP never had any employees reside in or travel to Wisconsin to solicit sales. (*Id.*) ASAP owned no real or tangible personal property in the state. (*Id.*) ASAP's marketing, such as "pay-by-click" marketing on the internet through third parties, conducting online webinars to promote its brand, and using email blasts to reach potential customers, was also conducted remotely. (*Id.*)

For these reasons, and even assuming it would be accurate to characterize ASAP as selling services, ASAP did not have any in-state physical presence akin to soliciting sales in the state and therefore ASAP's activities clearly fell below the lower limit provided by Public

Law 86-272. Because this is true, Wisconsin's power to tax must give way to the national interest to promote an open economy. *See Heublein*, 409 U.S. at 280.

VII. The Department's Counterarguments Relating to *Heublein* are Unavailing.

The Department's primary contention relating to *Heublein* is that the Court's reference to a "lower limit" of in-state business activity was mere dicta. The Department's argument must be rejected because the Court's instruction on the scope of Public Law 86-272 was necessary to decide the dispute in *Heublein*.

As explained by the Supreme Court of Wisconsin, "[a] dictum is a statement not addressed to the question before the court or necessary for its decision." *American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565 (1984). In addition, the court explained that when an appellate court "intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *State v. Kruse*, 101 Wis. 2d 387, 392 (1981) (citation and internal quotation marks omitted). Based on this directive from the court, it is clear that the statements in *Heublein* relating to the scope of Public Law 86-272 were not dictum.

The Court's instruction in *Heublein* was not dicta because the question presented to the Court by the taxpayer was whether the challenged South Carolina law "evade[d] the purpose of [P.L. 86-272]." 409 U.S. at 279. Because the purpose of the federal law was squarely before the Court, it was necessary to the Court's decision that it

determine the legislative intent of P.L. 86-272. Even if there were a question on this point, and there is not, the Court's comments in *Heublein* were not dicta because the purpose and intent of P.L. 86-272 was "germane to . . . the controversy."

Twenty years after *Heublein*, both the U.S. Supreme Court and the Supreme Court of Wisconsin again cited *Heublein* for the proposition that the purpose and intent of P.L. 86-272 was to impose a "lower limit" on a state's authority to tax interstate commerce. *See William Wrigley, Jr. Co. v. Wisconsin Dep't of Revenue*, 505 U.S. 214, 223 (1992) and *William Wrigley, Jr. Co. v. Wisconsin Dep't of Revenue*, 160 Wis. 2d 53, 75 (1991). In further support of ASAP's position, several state courts have also cited *Heublein* agreeing that scope of P.L. 86-272 is best understood as defining a "lower limit." *See e.g.*, *Blue Buffalo Company, Ltd v. Comptroller of Treasury*, 221 A.3d 1130, 1135-36 (Md. Ct. App. 2019); *Kimberly-Clark Corp. v. Comm'r of Revenue*, 2015 WL 3843986, *20 (Minn. Tax Ct.); *National Private Truck Council, Inc. v. Comm'r of Revenue*, 688 N.E.2d 936, 939 (Mass. 1997). For these several reasons, the Court's discussion of Public Law 86-272 as setting a lower limit of in-state business activity necessary to permit state corporate taxation was not dicta.

The Department further argues that there are several authorities that purportedly confirm that the protections of Public Law 86-272 are limited to in-state sales of tangible personal property. The Department first relies on *Wrigley* and cites to language of the Court stating that Public Law 86-272 precludes state taxation where the out-of-state taxpayer's "only business activities within the State consist of 'solicitation of orders" for tangible goods[.]" (App. Br. at 15, citing

Wrigley, 505 U.S. at 216.) The Department ignores, however, the Court's later in depth analysis of the federal law where it confirmed that Public Law 86-272 was "'designed to define clearly a lower limit' for the exercise of state taxing power." *Wrigley*, 505 U.S. at 223 (citing *Heublein*, 409 U.S. at 280). The Department's reliance on *Wrigley* is misplaced.

The Department also claims that the author of a leading state and local tax treatise supports the view that Public Law 86-272 only applies to sales of tangible personal property. (App. Br. at 17, citing *Hellerstein*, State Taxation, General Analysis of Public Law 86-272, § 6.18 (3rd ed. 2022).) Again, the Department's position is refuted by reference to the same cited resource. In the identical section of the treatise referenced by the Department, the author discusses the application of Public Law 86-272 to service providers. *See Hellerstein*, § 6.18[1]. In this section, the author accepts that there is an ongoing discussion about the application of Public Law 86-272 to out-of-state service providers but states "it is not our purpose here to weigh in on the spirited debate[.]" The author notes that "[o]ur more limited objective is simply to identify the issue . . . to inform readers to the current 'state of play' in this domain." *Id.* Contrary to the Department's contentions, the cited treatise clearly does not support its argument.

The Department also relies on guidance from the Multistate Tax Commission (the "MTC") for the proposition that sales of services and intangibles are outside the scope of Public Law 86-272. (App. Br. at 17.) As an initial matter, the MTC is a body comprised of the heads of

state departments of revenue.[4] The MTC routinely intervenes on behalf of its member states in litigation brought by private taxpayers.[5] From this, it is hardly surprising that the MTC's position would be to limit the scope of Public Law 86-272.

Moreover, and as the Department certainly knows, Wisconsin is not a "Compact" member of the MTC, which has enacted the Multistate Tax Compact into its state laws.[6] Nor is Wisconsin a "Sovereignty" member, which is a state that supports "the purposes of the Multistate Tax Compact through regular participation in, and financial support for, the general activities of the Commission. These states join in shaping and supporting the Commission's efforts to preserve state taxing authority . . . ." *Id.* Rather, Wisconsin's role is limited to that of an Associate member, which may participate in meetings, consult with the Commission, or participate in Commission programs or projects. *Id.*

Finally, the Department claims that the Supremacy Clause of the U.S. Constitution requires a narrow interpretation of Public Law 86-272. (App. Br. at 16.) According to the Department, the instruction of the United States Supreme Court is that state laws are not to be superseded by federal law "unless that [is] the clear and manifest purpose of Congress." (*Id.*, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (internal citation omitted).) While this is certainly true, a

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[4] *See* https://www.mtc.gov/the-commission/officers-executive-committee-members/ (last visited December 20, 2023).

[5] *See* https://www.mtc.gov/resources/amicus-briefs/ (last visited December 20, 2023).

[6] *See* https://www.mtc.gov/the-commission/member-states/ (last visited December 20, 2023).

state law will be superseded if the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 (1978) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

As it relates to Public Law 86-272, the United States Supreme Court has already determined "the full purposes and objectives of Congress" in enacting the federal law. *See Heublein*, 409 U.S. at 280. Public Law 86-272 was designed to reflect a balance between a state's power to tax and the national interest in a promoting interstate commerce. As explained by the *Heublein* Court, this balancing reflects a line in the sand or lower limit of in-state business activity that is protected from state taxation. *Id*. By setting this lower limit, Congress determined that "the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Id*. Because the Court in *Heublein* held that the "full purposes and objectives of Congress" were that Public Law 86-272 set a lower limit of in-state business activity, the Department's Supremacy Clause argument must be rejected.

VIII. The Commission Mischaracterized the Nature of ASAP's Business Activities.

The Burt affidavit that was disregarded by the Commission is important because it outlines the facts necessary to conclude that ASAP sold software as a service or "SaaS" to Wisconsin ITCs during the relevant periods. Because SaaS is properly classified as tangible personal property for purposes of Public Law 86-272, ASAP is shielded from the imposition of the Wisconsin franchise tax.

A. The Wisconsin ITCs -- Not ASAP -- Purchased and Sold Travel Services to the ITC Customers.

The term "SaaS" is commonly understood to mean "software [ ] hosted by a third-party provider and delivered to customers over the internet as a service."[7] Another industry source defines SaaS similarly as "a software distribution model in which a cloud provider hosts applications and makes them available to end users over the internet."[8] The Commission characterized ASAP as selling travel services and not SaaS. As a result, the Commission expressly stated that it did not address the issue of whether SaaS is tangible personal property under Public Law 86-272. (R. 27:9-10.)

Despite repeatedly asserting that ASAP sold travel services in Wisconsin, the Commission's decision is devoid of any reasoning on exactly how it came to that conclusion. In fact, the Commission begins its decision by framing the issue for decision on the assumption that ASAP sold travel services. (R. 27:5.)

The Burt affidavit makes clear that ASAP functioned as a multivendor aggregator. (R. 36:94 ¶ 6.) ASAP's online platform aggregated travel offerings from many vendors – such as Delta, Marriott, and Carnival Cruise Line – via a portal accessible by ITCs, including those in Wisconsin. (R. 36:94 ¶¶ 6-7.) Wisconsin ITCs pay to use ASAP's online platform booked travel for their customers. In other

[7] https://www.infoworld.com/article/3226386/what-is-saas-software-as-a-service-defined.html (last visited December 20, 2023).

[8] https://www.techtarget.com/searchcloudcomputing/definition/Software-as-a-Service (last visited December 20, 2023).

words, Wisconsin ITCs – not ASAP – sold travel services in Wisconsin to their customers on their own behalf, not as agents of ASAP.

Wisconsin courts recently addressed the substance of these business relationships in *Orbitz, LLC v. Wisconsin Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶ 401-844 (WTAC May 14, 2014), *aff'd*, Wis. Tax Rep. (CCH) ¶ 401-896 (Cir. Ct. Dec. 15, 2014), *aff'd*, 2016 WI App 22, 367 Wis. 2d 593, 877 N.W.2d 372 (Cross-Appellant App. 1-24). The issue in dispute in *Orbitz* was whether an online travel company was liable for sales tax on amounts received from customers to rent hotel rooms in Wisconsin. The taxpayer operated a website offering various travel experiences including hotel reservations. 2016 WI App 22, ¶ 3. When a customer visited the taxpayer's website and booked a hotel room, the customer paid the taxpayer for the hotel room in advance. *Id.* ¶ 5. The taxpayer paid over the amounts to the booked hotel minus its fee for acting as the intermediary. *Id.; Orbitz*, Wis. Tax Rep. (CCH) ¶ 401-844 at 7, 9, 11, and 12 (Cross-Appellant App. 2-3).

The Department asserted that the taxpayer was responsible for Wisconsin sales tax on the amounts received for reserving hotel rooms in the state. The Commission disagreed and held that the taxpayer was merely the "conduit through which consumers can make a reservation with the hotel, pay for the lodging in advance, and avail themselves of the accommodation . . . in the future." 2016 WI App. 22, ¶ 6. The Commission concluded that it was the Wisconsin hotels, not the taxpayer, that were in the business or owning and renting lodging in the state. Wis. Tax Rep. (CCH) ¶ 401-844 at 7 (Cross-Appellant App. 10).

The substantive facts of this case are nearly identical to those in *Orbitz*.[9] ASAP was not in the business of providing travel services, it acted as a conduit through which Wisconsin ITCs could purchase and sell travel services to their customers. The statements in the Burt affidavit confirm this conclusion.

B. The Burt Affidavit Establishes that ASAP Sold SaaS to Wisconsin ITCs, Not Travel Services.

The facts outlined in the Burt affidavit make clear that ASAP sold SaaS in Wisconsin during the relevant periods.[10]

Here, ASAP hosted the software relating to its online platform on servers outside Wisconsin. (R. 36:95 ¶16.) Access to ASAP's software platform was provided over the internet. (R. 36:94 ¶¶ 6-7.) The Department has not disputed any of these facts as outlined in the Burt affidavit. In sum, ASAP's sales to Wisconsin ITCs are consistent with the commonly accepted industry definition of SaaS.

C. SaaS is Properly Characterized as Tangible Personal Property Under Federal Law for Purposes of Public Law 86-272.

In the event that this Court determines that only sales of tangible personal property fall within the purview of Public Law 86-

[9] The fact that *Orbitz* involved the Wisconsin sales tax – and not the corporate income or franchise tax – is irrelevant. Before the sales tax laws could be applied in *Orbitz*, it was first necessary to define the business activity of the taxpayer. In the case, the determination that the taxpayer was not in the business of owning or renting hotel rooms in Wisconsin was not made by reference to Wisconsin's sales tax laws.

[10] The term "SaaS" is not defined for purposes of the Wisconsin income and franchise tax laws.

272, ASAP's sales of SaaS meet the definition of tangible personal property for this purpose.

Although Congress did not expressly define the term tangible personal property in Public Law 86-272, it is clear that SaaS is classified as tangible personal property under federal tax law. Treasury Regulation § 1.861-18, titled "Classification of transactions involving computer programs," outlines a series of rules for determining whether a transaction is a sale or exchange of tangible or intangible property or license/lease relating to intangible personal property for federal tax purposes. Treasury Regulation § 1.861-18(b)(ii) provides that the transfer of a computer program is the sale or exchange of transfer of tangible personal property (rather than an intangible). Moreover, Treasury Regulation § 1.861-18(g)(2) notes that the means of transfer of the computer program from buyer to seller is irrelevant as to the characterization as tangible or intangible property.

Treasury Regulation § 1.861-18(h), Ex. 2 speaks to the facts of this appeal. In the example, the seller, for a fee, makes available software to a buyer over the internet. The regulation concludes that the buyer acquired tangible personal property from the seller and, consistent with Treasury Regulation § 1.861-18(g)(2), it is irrelevant to this determination that the seller provided the software over the internet as opposed to through a tangible medium.

In *AccuZIP, Inc. v. Director, Div. of Taxation*, 25 N.J. Tax 158 (2009), the New Jersey Tax Court considered whether the protections of Public Law 86-272 applied to an out-of-state taxpayer selling prewritten software to customers in New Jersey. The court relied in part on Treasury Regulation § 1.861-18 for the conclusion that the

taxpayer was selling tangible personal property and therefore protected by the federal law from state corporate income taxation. *See id*. at 170-72. The court explained that the federal law provided "useful guidelines" for the court. *Id*. at 172. This Court should likewise follow federal law and conclude that the SaaS offered by ASAP to Wisconsin ITCs is tangible personal property for purposes of Public Law 86-272.

D. The Department's Arguments that SaaS is Intangible Property Under Public Law 86-272 Must be Rejected.

The Department contends that under Wisconsin law SaaS is intangible property and therefore ASAP is not protected by Public Law 86-272. However, relying on state law in this instance is inconsistent with the stated purposes and goals of Congress when it passed the federal law.

Public Law 86-272 was enacted pursuant to Congress's to regulate interstate commerce under the Commerce Clause. It is universally understood that the genesis of the federal law was uncertainty in the business community regarding when an out-of-state business is subject to state corporate income tax. This uncertainty stemmed from several state court decisions including *Northwestern States Portland Cement Co.*, 358 U.S. 450 (1959); *Brown-Forman Distillers Corp.*, 234 La. 651, 101 So.2d 70 (1958), *appeal dismissed*, *cert. denied*, 359 U.S. 28 (1959); and *ET & WNC Transportation Co.*, 248 N.C. 560 (1958), 104 S.E.2d 403, *aff'd*, 359 U.S. 28 (1959). The business community feared the broad sweep of these decisions and requested that Congress "establish[ ] clear guidelines as to the amount of activity within a State that was necessary to expose them to liability

for net income taxes."[11] By enacting Public Law 86-272 Congress sought to draw a predictable line in the sand regarding the conditions necessary for a state to impose its corporate income tax.

If, as the Department would have the Court do in this case, state law is relied on to define tangible personal property for purposes of Public Law 86-272, Congress's stated goal of providing certainty to out-of-state businesses would be jeopardized. To avoid the application of the federal law a state need only rework its definition of tangible personal property. The result on a nationwide basis would be a veritable minefield for multistate corporate taxpayers – the same minefield that led to the enactment of Public Law 86-272 in the first instance. Relying on federal law, as advocated by ASAP, is the preferred approach because it uses one definition applicable to all states thereby ensuring certainty for taxpayers conducting business across state lines.[12]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Commission and grant summary judgment to ASAP.

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[11] Charles A. Trost, *Federal Limitations on State and Local Taxation*, § 10:8 (2nd ed. 2020).

[12] The Department additionally contends that Treasury Regulation § 1.263(a)-4(c)(1)(xiv) states that computer software is intangible personal property for depreciation purposes. From this, the Department claims that SaaS is intangible personal property under Public Law 86-272. This case involves the taxation of income earned from the sale of property. Treasury Regulation § 1.861-18 speaks directly to this issue by defining tangible and intangible property in the sale or exchange context. Further, Treasury Regulation § 1.861-18 was promulgated to specifically address the sale of computer programs. By contrast, the Treasury Regulation upon which the Department relies, § 1.263(a), is a general statute addressing how and when the costs to acquire tangible personal property can be capitalized. For these reasons, the Department's argument must be rejected.

Dated this 20th day of December, 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,448 words.

CERTIFICATION OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of December, 2023.

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