

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3050

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

AMUSEMENT DEVICES, INC.,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Amusement Devices, Inc., appeals from a judgment affirming a decision of the Tax Appeals Commission (commission). The issues are whether the commission properly held that Amusement Devices was required to pay a use tax on certain purchases of machines, and whether the commission properly assessed a penalty for neglect. We affirm.

¶2 This case concerns whether Amusement Devices is obligated to pay a use tax on coin-operated machines it purchased out of state without paying a local sales tax. The general facts are not in dispute. Amusement Devices eventually installed the machines, pursuant to contracts, at various establishments. At those establishments, persons would insert coins to operate the machines for their amusement or other purposes. Amusement Devices argues that it is not obligated to pay the use tax because its purchases were made for “resale” to the persons who inserted coins and operated the machines.

¶3 Specifically, the argument is that Amusement Devices’ purchases of the machines were not taxable because they did not meet the definition of “sale” provided in WIS. STAT. § 77.51(14) (1993-94)¹:

“Sale”, “sale, lease or rental”, “retail sale”, “sale at retail”, or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services

Amusement Devices argues that when persons inserted coins to operate its machines, Amusement Devices was reselling the machine to that person, because Amusement Devices was transferring “possession” or “enjoyment” of the property to the person.

¶4 The parties differ over our standard of review. Amusement Devices argues that we should review the issue de novo because of what it believes is the commission’s limited experience with the specific statute at issue, while the State

¹ All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

argues that we should defer to the commission because of its experience and expertise in sales and use taxes. Based on case law that is well-established and cited in the State’s brief, we are satisfied that deference is appropriate because of the commission’s experience construing and applying the sales and use tax statutes, even if the commission has not applied a specific subsection or faced precisely these facts. As a practical matter, however, it makes little difference in this case because we would reach the same result using a *de novo* standard.

¶5 We conclude that the commission’s application of WIS. STAT. § 77.51(14) to these facts is reasonable. It cannot reasonably be said that Amusement Devices “transferred” any property interest to the persons who used its machines. During use of the machines by those persons, Amusement Devices retained all of its rights to possession and enjoyment of the machines. It simply defies common sense to say that when a person placed coins in the machine, a “sale” of the machine occurred. The term “enjoyment” in the statute does not mean the pleasure that the person obtained from using the machine, of course, but instead carries the more traditional legal meaning of “enjoy”—“to occupy *or have the benefit of (property).*” BLACK’S LAW DICTIONARY 550 (7th ed. 1999) (emphasis added). Amusement Devices retained the economic benefit of the property as a revenue source at all times.

¶6 Because we have held that it was reasonable for the commission to conclude that no transfer occurred here, we need not address Amusement Devices’ argument that the operation of the machines by the paying customers was a transfer by a service provider in conjunction with, but not incidental to, the selling, performing, or furnishing of any service. *See* WIS. STAT. § 77.51(14)(L).

¶7 Finally, Amusement Devices argues that the commission erred by assessing a penalty for neglect under WIS. STAT. § 77.60(3). Under the terms of that statute, the burden is on the taxpayer to prove that the error “was due to good cause and not due to neglect.” The State argues that we should review this determination under a deferential standard of review. Amusement Devices does not address the standard of review for this issue, or otherwise dispute the State’s assertion. We apply a deferential standard.

¶8 The commission, in deciding that Amusement Devices did not show good cause, noted that Amusement Devices had paid the appropriate tax on similar purchases that it made within Wisconsin. The commission noted that Amusement Devices had been in business for many years, had a certified public accountant as its controller, and therefore knew or should have known that sales or use taxes were payable on all of the purchases, not just those made from in-state vendors. “The fact that petitioner paid sales taxes on its in-state purchases, while ignoring the use tax due on the out-of-state purchases at issue, belies its contention concerning the use taxes assessed, which involved similar purchases of amusement devices.”

¶9 On appeal, Amusement Devices argues that its failure to pay the tax was based on its belief that its legal position, as described in this appeal, was reasonable. The company argues that the commission was incorrect in saying that it ignored the use tax on out-of-state purchases. The question of why Amusement Devices did not pay the tax is a factual one. On this issue, the argument in Amusement Devices’ brief does not discuss or cite to any facts of record. Therefore, we have been given no reason to believe the commission’s finding was incorrect. Amusement Devices also argues that its payment of the in-state tax, while not paying the out-of-state tax, should not be used to infer that it acted with

neglect. However, the company does not explain why this inference should not be drawn. The inference is a reasonable one. Therefore, we affirm the commission's assessment of a penalty.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

