

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2003

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.

**Appeal No. 02-2454
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-2509

**IN COURT OF APPEALS
DISTRICT II**

**SUNBURST IV LIMITED PARTNERSHIP,

PLAINTIFF-RESPONDENT,**

v.

**WISCONSIN DEPARTMENT OF REVENUE,

DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed and cause remanded.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. The Wisconsin Department of Revenue appeals a circuit court order awarding costs to Sunburst IV Limited Partnership as the prevailing party in a proceeding before the Wisconsin Tax Appeals Commission. We affirm for the reasons discussed below and remand for a determination of the amount of costs and attorney's fees.

BACKGROUND

¶2 According to facts stipulated to by the parties during the administrative proceedings, Sunburst acquired land in 1988 for an apartment development project. The project was financed by tax-exempt municipal bonds that were due in 1998. Refinancing was arranged in 1996 to take advantage of low interest rates. As part of the refinancing effort, to take advantage of certain applicable federal regulations, Sunburst created a new limited liability partnership to hold record title of the common areas of the development “solely in its capacity as agent of and nominee for Sunburst.”

¶3 Sunburst filed a Wisconsin Real Estate Transfer Return to document the transaction, claiming an exemption from real estate transfer taxes on the ground that the transfer had been one between principal and agent. The Department of Revenue nonetheless issued a real estate transfer fee assessment of \$66,969.29, on the ground that Sunburst and the newly formed partnership were separate entities rather than principal and agent. Sunburst appealed the assessment, and the Wisconsin Tax Appeals Commission reversed, concluding that an agent and principal relationship did exist.

¶4 Sunburst then moved for costs. The commission denied costs because it concluded that the Department’s position, though ultimately erroneous, was substantially justified. Sunburst appealed the cost determination to the circuit court, and the circuit court reversed. The Department now appeals the circuit court’s order.

STANDARD OF REVIEW

¶5 Our review of administrative agency decisions under WIS. STAT. ch. 227 is ordinarily deferential. *See, e.g., UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). The issue on appeal here, however, is not the commission’s decision with regard to the merits of the real estate transfer tax, but only the circuit court’s decision on costs. Under WIS. STAT. § 227.485(6) (2001-02),¹ the circuit court has authority to make a *de novo* determination regarding costs when reviewing an administrative agency decision, applying the criteria set forth in WIS. STAT. § 814.245. This court then reviews the circuit court’s decision on costs under the erroneous exercise of discretion standard. *Stern v. DHFS*, 212 Wis. 2d 393, 397, 569 N.W.2d 79 (Ct. App. 1997). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

ANALYSIS

¶6 WISCONSIN STAT. § 814.245, commonly known as the Equal Access to Justice Act, provides in relevant part that a small business that prevails in an action against a state agency shall be entitled to costs, “unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.” WIS. STAT. § 814.245(3). To establish that its position was substantially justified, an agency must show: “(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.” *Sheely v. DHSS*, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989) (citation omitted); *see also* WIS. STAT. § 814.245(2)(e).

¶7 Here, the circuit court determined that the Department had no basis in fact to contest that the new partnership entity was an agent of Sunburst because the Department had been provided with a copy of a nominee agreement which plainly stated that an agency relationship was being created, and the Department acknowledged the terms of that agreement in its stipulation of facts. The circuit court further determined that the Department had no reasonable basis to claim that there was consideration given for the transaction that would disallow use of the agent/principal exemption, because the agreement specified that Sunburst would remain liable for all debts, and any benefit to Sunburst from lower interest rates would be provided by a third party, not the new partnership entity. Finally, the court noted that there was no legal basis for the Department to claim that the instrument had to be recorded to be effective.

¶8 In sum, the circuit court applied the proper legal standard to the facts of record to reach a reasonable conclusion that the Department’s position had not been substantially justified. We therefore affirm the circuit court’s award of costs. In addition, to fulfill the legislative intent of the Equal Access to Justice Act, we award Sunburst costs and reasonable attorney’s fees incurred on this appeal. *See Sheely*, 150 Wis. 2d at 340. We remand to the circuit court to determine the amount of the award.

By the Court.—Order affirmed and cause remanded.

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

