No. 26-

IN THE

Supreme Court of the United States

ASAP CRUISES, INC.,

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1959, Congress enacted Public Law 86-272, 15 U.S.C. §§ 381-384 (hereinafter "Public Law 86-272"), in response to concerns raised by the business community regarding the level of activity required to be subject to a state's corporate income tax. Public Law 86-272 helped alleviate these concerns and provides that a state may not impose tax where the only instate business activity of the taxpayer is the solicitation of sales.

In the first case to interpret P.L. 86-272, this Court made clear that the federal law demarcated a "lower limit" of instate activity that is protected from state taxation. *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972). This Court in *Heublein* emphasized that through the establishment of this lower limit Congress determined that a state's interest in taxing in-state business activity below that limit was weaker than the national interest in promoting a national economy.

The question presented is: Do the protections of P.L. 86-272 extend only to taxpayers that solicit sales of tangible personal property or—as held in *Heublein*—is the federal law concerned with the level of in-state business activity regardless of how the taxpayer earns its income?

PARTIES TO THE PROCEEDINGS

Petitioner ASAP Cruises, Inc. was the petitioner in the Wisconsin Tax Appeals Commission, petitioner at the Dane County Circuit Court, petitioner-respondent-cross appellant petitioner at the Wisconsin Court of Appeals, and petitioner in the Wisconsin Supreme Court.

Respondent Wisconsin Department of Revenue was the respondent in the Wisconsin Tax Appeals Commission, respondent at the Dane County Circuit Court, respondent-appellant-cross respondent-respondent at the Wisconsin Court of Appeals, and respondent in the Wisconsin Supreme Court.

RULE 29.6 STATEMENT

ASAP Cruises is a privately held company, and no parent or publicly held company owns 10% or more of its stock. ASAP Cruises does not have a stock ticker symbol.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *ASAP Cruises, Inc. v. Wisconsin Department of Revenue*, No. 2023AP001251 (Wis.). Review denied on February 12, 2026;

- *ASAP Cruises, Inc. v. Wisconsin Department of Revenue*, No. 2023AP001251 (Wis. Ct. App.). Judgment entered June 3, 2025; and

- *ASAP Cruises, Inc. v. Wisconsin Department of Revenue*, No. 2022CV1975 (Dane Cty. Cir. Ct.). Judgment entered May 31, 2023.

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JURISDICTION

The Wisconsin Supreme Court denied review on February 12, 2026. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). On May 6, 2026, the Court granted an extension of time until July 12, 2026 to file this petition. Rule 30.1 extends that deadline to July 13, 2026.

STATUTORY PROVISION INVOLVED

15 U.S.C. §§ 381-384 imposes limitations on a state's authority to impose a net income tax on out-of-state taxpayer. 15 U.S.C. §§ 381(a) provides:

> No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, that a state is permitted to impose 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; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

INTRODUCTION

The intended purpose of Public Law 86-272 was to allay concerns that plagued the business community relating to state taxation. Specifically, multistate businesses were unable to determine with any degree of certainty the level of in-state business activity triggering an obligation to pay state taxes. A series of decisions handed down in 1959 further stocked this ambiguity. *See e.g.*, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). By today's standards, Congress responded almost immediately when it proposed, debated, negotiated, and enacted Public Law 86-272 within the span of just seven months.

The goal of the federal law was to outline a threshold level of in-state business activity that would be protected from state taxation. The preceding statement is not mere speculation. In *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972), the first case to address the scope of Public Law 86-272, the Court opined on the legislative intent of the federal law. The Court explained that Public Law 86-272 was intended to circumscribe a state's power to tax and "was designed to define clearly a lower limit for the exercise of that power." *Id*. at 280.

The Court in *Heublein* provided unambiguous instruction regarding the application of Public Law 86-272 by reference to the principles of federalism undergirding the federal law. The Court reasoned that by establishing the lower limit of in-state business activity, Congress concluded that the national interest in promoting the national economy was greater than a state's interest in exercising its power to tax. *Id*.

In the decision of the Wisconsin Court of Appeals below, the court concluded that Public Law 86-272 applied only to the solicitation of sales of tangible personal property. In so doing, the court mooted the clear meaning of "lower limit" as outlined by this Court in *Heublein*. This error demands the Court's immediate review.

The structure of the United States economy today bears little resemblance to that which existed at the time Congress considered Public Law 86-272. In the years leading up to the enactment of the federal law, as a share of GDP, the sale of tangible goods and the sale of services were roughly equal.[1] By contrast, today,

1. https://www.stlouisfed.org/open-vault/2026/feb/how-important-is-the-services-sector-to-the-us-economy (retrieved July 12, 2026).

the share of GDP attributable to the sale of services is almost 80%.[2]

As stated in *Heublein*, Congress intended Public Law 86-272 to delineate a level of business activity sufficient to cause a taxpayer to become liable for state corporate income tax. The identification of exactly what the taxpayer is selling to cause that required level of business activity is wholly irrelevant to the determination. The ruling below would afford the protections of the federal law to a seller of tangible personal property with thousands of salesmen traversing a state, but deny the those same protections to a remote seller of services having no in-state business presence or activity whatsoever. Which seller has less in-state business activity, the seller of tangible personal property or services? This rhetorical question simultaneously emphasizes the substance of the Court's holding in *Heublein* and highlights the error of the ruling below.

The purpose of the federal law was to engender predictability for taxpayers engaged in interstate commerce. This need for predictability has grown with the shift in the U.S. toward a service-based economy. Public Law 86-272 is the sole tool Congress provided to assist with combating the attendant uncertainty of state taxation. This Court's intervention is urgently needed to reassert the continued viability of Public Law 86-272 in the new U.S. economy.

2. "Contributions to U.S. Gross Domestic Product (GDP): Selected Industries". *U.S. Department of Commerce* (Dec. 31, 2024). (retrieved July 12, 2026).

STATEMENT

A. Legal Background

1. Over the course of two years, this Court and state high courts handed down a series of decisions addressing when a business engaged in sufficient business activity in a state to justify imposition of that state's corporate income tax. *See 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).

Northwestern States involved Minnesota's attempt to impose corporate income tax on the activity of soliciting sales of cement in the state. At issue in *Brown-Forman* was a Kentucky corporate income tax on the solicitation of sales of whiskey. In *ET & WNC Transportation*, by contrast, the dispute centered on North Carolina's imposition of its corporate income tax on a business providing freight services to customers in the state. In each case, the courts determined that the state had the power to levy its income tax because the "local activities within the taxing State form[ed] sufficient nexus to support the same." *Northwestern States*. 358 U.S. at 452.

The fallout from these decisions cannot be understated. There was "serious apprehension in the commercial community"[3] regarding what level of "local activities"

3. H.R.Rep. No. 936, 86th Cong., 1st Sess., 1.

caused a business to have "sufficient nexus" to support the imposition of tax. This "considerable concern and uncertainty"[4] of the business community culminated in a demand that Congress act pursuant to its authority under the commerce clause of the United States Constitution. In just seven months, Congress did just that. The result was Public Law 86-272.

2. Titled "Minimum Standards," Public Law 86-272 sought to provide certainty by outlining one tax standard applicable to all states. 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; and

4. S.Rep. No. 658, 86th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 1959, p. 2548.

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Through this federal law, Congress attempted to assuage the concerns of "businessmen that 'mere solicitation' would subject them to state taxation." *Heublein*, 409 U.S. at 280. Since its enactment, this Court has on two separate occasions opined on the scope of Public Law 86-272.

3. This Court's first case interpreting Public Law 86-272 was *Heublein*. At issue in *Heublein* was a South Carolina law regulating the sale of liquor in the state. *See 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 business activities that were not protected under Public Law 86-272. *Id*. at 277-278. 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 construe Public Law 86-272.

After recounting the many concerns of the business community that led to the enactment of Public Law 86-272, the Court turned to the legislative purpose for the federal law. The Court in *Heublein* made clear that Public Law 86-272 "was designed to define clearly a lower limit for the exercise of [a state's taxing] power." *Id.* at 280. The Court explained that the ultimate goal of Congress was to provide clarity through the federal law. The Court further explained that by establishing a lower limit of in-state business activity Congress "implicitly determine[d] that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." *Id.* Through this statement, the Court expressly acknowledged that there were categories of both protected activities—below the lower limit—and unprotected activities—above the lower limit.

4. Both this Court and state high courts have reemphasized the "lower limit" interpretation of Public Law 86-272 since first made in *Heublein*. In *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992), this Court was again asked to construe Public Law 86-272. The dispute in *Wrigley* was whether the in-state business activities of an out-of-state chewing gum manufacturer were protected activities under the federal law. After reviewing the legislative history leading 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. The Court in *Wrigley* then again restated that Public Law 86-272 "define[d] clearly a 'lower limit' for the exercise of state taxing power." *Id.* at 223. Although *Wrigley* was this Court's most recent case to address Public Law 86-272, many state courts have adopted the "lower limit" interpretation of the federal law.

In *Stanislaus Food Products Co. v. Dir. Div. of Tax'n*, 2021 WL 1589319 (N.J. Tax Ct.), 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 and cited *Heublein* for the proposition that Public Law 86-272 established minimum standards—or, lower limit—of instate business activities that were protected from state taxation. The court agreed with this Court that the rationale for the federal law "recognize[d] the concerns of the business community as to the uncertainty in dealing with multiple taxing regimes." *Id*. at *7.

In *Blue Buffalo Co., Ltd. v. Comptroller of Treasury*, 221 A.3d 1130 (Md. App. 2019), the appeals court was asked whether certain instate activities of the taxpayer were outside the scope of Public Law 86-272. Citing to this Court's decision in *Wrigley*, the court reasoned that "Congress enacted [Public Law 86-272] to define a "'lower limit' for the exercise of the state taxing power." *Id*. at 1135-36.

The case of *Kimberly-Clark Corp. v. Comm'r of Revenue*, 2015 WL 3843986 (Min. Tax Ct., Reg. Div.), likewise concerned the scope of Public Law 86-272. The court cited the federal law as an example of the balancing between the national interest and a state's power to tax. The court explained the balancing inherent in Public Law 86-272 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).

Despite this apparent universal understanding that Public Law 86-272 was directed at demarcating a lower limit of business activity that is protected from state taxation, each of *Heublein*, *Wrigley*, *Stanislaus*, *Blue Buffalo*, and *Kimberly-Clark* dealt with solicitation for sales of what was indisputably tangible personal property.

B. Proceedings Below

ASAP Cruises, headquartered in Florida, has its principal place of business in Jacksonville, Florida. App. 32a. In the ordinary course of business, ASAP Cruises entered into agreements with independent travel consultants ("ITCs") located through the United States, including Wisconsin. App. 32a–33a. Through these agreements ASAP Cruises offered software as a service ("SaaS") to be utilized by ITCs. App. 24a. The software was hosted on its website. *Id.*

The Wisconsin ITCs used the SaaS offered by ASAP Cruises to provide travel services to customers of the ITCs. *Id.* The Wisconsin ITCs used the software to directly book travel packages for their customers. *Id.* ASAP Cruises' SaaS also offered access to online business management and marketing tools to help Wisconsin ITCs grow their independent travel business. App. 6a.

1. In 2018, the Wisconsin Department of Revenue issued corporate franchise tax assessments to ASAP Cruises based on the commissions earned by ASAP Cruises from the sale of travel services by Wisconsin ITCs. App. 32a. After unsuccessfully pursuing informal administrative appeals, ASAP Cruises filed a Petition for Review with the Wisconsin Tax Appeals Commission. *Id.*

2. At the Wisconsin Tax Appeals Commission ASAP Cruises argued that Public Law 86-272 prevented Wisconsin from imposing its corporate franchise tax. Two separate and distinct arguments in support were made to the Commission. First, ASAP Cruises contended that it was entitled to the protections of Public Law 86-272 irrespective of how its business activities were characterized. App. 39a. ASAP Cruises argued in the alternative that the SaaS that it offered to Wisconsin ITCs through its software platform was tangible personal property under Wisconsin law. App. 40a. The parties filed cross motions for summary judgment.

The Commission disagreed with ASAP Cruises on both points. The Commission reasoned that Public Law 86-272 applied only to the solicitation of sales of tangible personal property. *Id.* In addition, the Commission determined that ASAP Cruises was in the business of providing travel services and not offering SaaS.[5] *Id.* This ruling mooted ASAP Cruises' argument that it was protected by Public Law 86-272 because SaaS is tangible personal property. The Commission granted the Department's motion for summary judgment. App. 43a.

3. ASAP Cruises appealed the decision of the Commission to the Dane County Circuit Court. The circuit court limited its ruling to the issue of whether the Commission properly excluded Mr. Burt's affidavit from the evidentiary record. App. 17a–18a. The court

5. In so doing, the Commission excluded the affidavit of Mr Chad Burt, the co-owner and vice president of ASAP Cruises, from the evidentiary record. Mr. Burt's affidavit presented facts relating to the characterization of ASAP Cruises' software platform as SaaS.

highlighted the statements in Mr. Burt's affidavit that raised an issue of fact regarding whether ASAP Cruises offered SaaS to Wisconsin ITCs. App. 24a. The court agreed with ASAP Cruises that the Commission erred by excluding Mr. Burt's affidavit and reversed the Commission's ruling, granting the Department's motion for summary judgment. App. 28a.

4. Both parties appealed the ruling of the circuit court to the Wisconsin Court of Appeals. ASAP Cruises argued that the circuit court erred by failing to make a substantive ruling regarding the protections of Public Law 86-272. App. 4a. The Department contended that the circuit court improperly ruled that the Commission should have considered Mr. Burt's affidavit. *Id*. The appeals court reversed the circuit court holding and concluded that the Commission's exclusion of Mr. Burt's affidavit was harmless error. App. 16a.

On the application of Public Law 86-272, the appeals court agreed with the Commission that the federal law applies only to solicitation of sales of tangible personal property. App. 11a. Directly addressing the "lower limit" quote of this Court in *Heublein*, the appeals court declined to interpret Public Law 86-272 as demarcating a proverbial line in the sand where business activities below the lower limit were protected. Instead, the appeals court reasoned that the lower limit of business activity is exactly as described in the federal law—sales of tangible personal property. App. 11a–12a. As a result, the appeals court interpreted Public Law 86-272 as providing a bullseye on a dartboard. The only business activity meeting the "lower limit" standard was the solicitation of sales of tangible personal property.

5. ASAP Cruises appealed the decision of the appeals court to the Wisconsin Supreme Court which declined review over a dissent. App. 2a.

REASONS FOR GRANTING THE PETITION

The decision of the Wisconsin Court of Appeals below contravened the instruction of this Court in *Heublein* and, more troubling, fundamental precepts of corporate income taxation. It is inarguable that, to date, the only judicial decisions relating to the scope of Public Law 86-272 involve solicitation of sales of tangible personal property. However, as the United States economy becomes increasingly more dependent on services for GDP growth, that jurisprudential fact will undeniably change. Moreover, as the technological means of providing those services blurs the line between what is tangible personal property versus a service, it is critical that the contours of the protections of Public Law 86-272 become more discernible. Without the immediate assistance of this Court, the predictable consequence will be interstate confusion in an area of the law where stability and predictability are crucial. Only this Court's intervention can restore both the integrity of its precedents and the certainty that tax collectors and taxpayers need.

I. THE DECISION BELOW WRONGLY INTERPRETED THIS COURT'S INSTRUCTION IN *HEUBLEIN* RELATING TO THE SCOPE OF PUBLIC LAW 86-272.

A. Constitutional Underpinnings of Tax Nexus

The U.S. Constitution places limits on a state's power to tax out-of-state businesses under both the due process and commerce clauses of the United States Constitution. The due process clause requires "some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992).[6] For purposes of the required minimum connection under the due process clause, a court inquires "whether a defendant had minimum contacts with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 307 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1943)).

The commerce clause delegates to Congress the power "to regulate Commerce . . . among the several states." Under the commerce clause, a state tax will withstand scrutiny as long as it (1) is applied to an activity with a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). For many years, the substantial nexus requirement was met only if the taxpayer had a physical presence in the taxing state. *See Quill*, 504 U.S. at 317. More recently, however, this Court has clarified that substantial nexus is found where the taxpayer "'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Wayfair*, 585 U.S. at 188 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). A taxpayer's economic and virtual contacts with the taxing state determines the scope of this availment requirement. . *See id.*

6. *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018), overruled *Quill* solely with respect to its holding under the commerce clause. *Quill*'s holding under the due process clause remains valid law.

Even a cursory review of this Court's precedent makes clear that tax nexus under both the due process and commerce clauses is predicated on the quantity and quality of a taxpayer's instate business activities in a state.

B. Public Law 86-272: Congress's Attempt to Provide Certainty Relating a State's Power to Tax

In the mid-20th century, as more-and-more businesses expanded their reach into multiple states, courts decided a series of tax nexus cases that caused great uncertainty regarding when the in-state activities of an out-of-state business caused it to be subject to state tax. The tipping point was reached in 1959 following the decisions in *Northwestern States*, *Brown-Forman*, and *ET & WNC Transportation Co.*

In *Northwestern States*, this Court sustained a Minnesota income tax imposed on an Iowa manufacturer where the only in-state activity of the manufacturer was the solicitation of orders for tangible personal property. In *Brown-Forman*, a case where this Court dismissed the appeal and denied certiorari review, the Louisiana Supreme Court upheld an assessment of tax on an out-of-state manufacturer that used representatives to call on wholesalers in Louisiana, but did not solicit orders for tangible personal property. Finally, in *ET & WNC Transportation Co.*, the North Carolina Supreme Court sustained an assessment of tax issued to a out-of-state provider of freight services. The court's decision was supported by, *inter alia*, the fact that the business rented and used freight terminals in the state.

The broad sweep of the tax nexus conclusions in *Northwestern States*, *Brown-Forman*, and *ET & WNC Transportation Co.* caused business leaders to turn to Congress for a solution. *See* Charles A. Trost and Paul J. Hartman, *Federal Limitations on State and Local Taxation*, section 10:8 (2025-2026 ed.) (discussing the genesis of Public Law 86-272). Congress was asked to "establish clear guidelines as to the amount of activity within a State that was necessary to expose (out-of-state businesses) to liability for net income taxes." *Id.*

Congress responded swiftly to the "considerable concern and uncertainty" created by the holdings in *Northwestern States*, *Brown-Forman*, and *ET & WNC Transportation Co.*[7] Both the House and Senate proposed bills to limit the power of states to impose income taxes. Both competing bills contained "a minimum activities approach to the problem of state taxation of income from interstate commerce."[8] Ultimately, the House agreed to the Senate version of the proposed law which excluded income from interstate commerce from taxation as long as in-state business activity did not exceed a minimum level. The Senate bill contained the added limitation, however, that the protections of the law would extend to the in-state solicitation of orders for tangible personal property.[9]

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7. S.Rep. No. 658, 86th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 1959, p. 2548.

8. Statement of the Managers of the Managers on the part of the House, Conf. Rep. No. 86-1103 (1959).

9. *Id.*

C. This Court Interprets Public Law 86-272 in *Heublein*

In *Heublein*, this Court provided instruction on the proper scope of Public Law 86-272. The Court thoroughly reviewed the legislative history of the federal law and confirmed that the legislative purpose was "to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation." 409 U.S. at 280. Expressly noting Congress's intent to provide clarity for the business community, the Court in *Heublein* confirmed that the federal law "was designed to define clearly a lower limit for the exercise of [a state's power to tax]." *Id.*

The Court, however, went further to explain the balancing of interests represented by Public Law 86-272. The Court instructed that by setting the lower limit in the federal law "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.*

The Court's language in *Heublein* could not be more clear. There are in-state business activities that exceed the protections of Public Law 86-272 and there are in-state activities below the lower limit where a state's power to tax must yield to the interests of an open, interstate economy. Twenty years after *Heublein*, the Court reemphasized its lower limit interpretation of the federal law in *Wrigley*. 505 U.S. at 222 (stating 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").

D. The Appeals Court Below Erred by Ignoring This Court's Instruction in *Heublein*

The Wisconsin Court of Appeals construction of Public Law 86-272 fails on two counts. First, the appeals court wrongly concluded that the federal law's protections extend only to solicitations of sales for tangible personal property. This Court has made clear that the intent of Congress can be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In *Heublein*, this Court expressly opined on Congress's intent relating to the enactment of Public Law 86-272. To wit, through the federal law, Congress set a defined lower limit of activities that are protected from state taxation. That limit is the solicitation of sales of tangible personal property. In-state business activities falling below that lower limit are protected as the "national interest in promoting an open economy" trumps the state's power to tax. *Heublein*, 409 U.S. at 280. In sum, Public Law 86-272 is not concerned with the object of the sales solicitation activities. To the contrary, and consistent with the "lower limit" instruction from this Court, the goal of the federal law is to draw a line in the sand regarding the level of a business's in-state business activities. The level of that in-state activity dictates which side of the lower limit a business falls.

The appeals court below also erred when it interpreted this Court's "lower limit" holding in *Heublein*. The court reasoned that "the solicitation of sales of tangible personal property is the 'lower limit' activity that a State is prohibited from taxing, and it is the only activity protected from state tax by Public Law 86-272." cite This holding, however, is indisputably inconsistent with this Court's statements in *Heublein* interpreting the federal law. As stated by this Court, Public Law 86-272 implicitly drew a line in the sand as it relates to in-state business activities. The *Heublein* Court definitively stated that there are business activities below the lower limit where a state's power to tax must give way to "the national interest in promoting an open economy." 409 U.S. at 280.

The touchstone of a state's power to tax under the due process and commerce clause is a careful review of the quality and quantity of a business's in-state business activities. *See e.g.*, *Wayfair*, 585 U.S. at 188. This Court's interpretation of Public Law 86-272 as containing a lower limit for a business's in-state business activities adopts this same approach. The appeals court's narrow construal of the federal law is inapposite to the very constitutional principles otherwise commonly understood by both taxpayers and states alike.

The appeals court's ruling raises a confounding result. Company A, located in State X, manufactures and sells widgets. Company A employs 1,000 independent sales representative to traverse State Y to solicit sales. These sales representatives use company cars, carry an inventory of sample widgets to assist with sales solicitations, and call on retailers in State Y. According to the appeals court below, the protections of Public Law 86-272 would apply to Company A.

Company B, also located in State X, offers SaaS services to businesses in State Y over the internet. Company B does not use employees or sales representatives to solicit sales of SaaS in State Y. All transactions are accomplished electronically. Using the reasoning of the appeals court below, Company B is subject to State Y's corporate income tax. This is true despite the fact that Company B's in-state business activity is nonexistent as compared to that of Company A. While Company A used State Y's resources and benefited from in-state services, Company B never set foot in the state. Such a result cannot maintain in light of this Court's jurisprudence.

II. The Question Presented Merits Review in this Case.

A. This Court's Intervention is Needed Now

In recent years there is an undeniable trend by states to curtail the protections of Public Law 86-272. *See e.g.*, *American Catalog Mailers Association v. Dep't of Taxation and Finance*, ___ N.Y.S.3d ___, 249 A.D.3d 1298, 2026 WL 1250610; *American Catalog Mailers Association v. Franchise Tax Board*, No. A169904, 2025 WL 1184319 (Cal. Ct. App. Feb. 11, 2025); *Uline, Inc. v. Comm'r of Revenue*, 10 N.W.3d 170 (Minn. 2024); and *Santa Fe Natural Tobacco Co. v. Dep't of Revenue*, 372 Or. 509 (2024), *cert denied*, No. 24-551, 2024 WL 5304918 (U.S. Dec. 16, 2024). Public Law 86-272 is the sole remaining bastion of constitutional protection available to multistate taxpayers. Persistent whittling away of these safeguards otherwise afforded by the federal law risks marginalizing the importance of the commerce clause in state taxation.

As the United States continues its shift to a service-based economy, the central issue regarding the scope of Public Law 86-272 will repeatedly be centerstage in state courts. At the time of *Northwestern States*, the split between goods and services was roughly 50/50. As more-and-more manufacturing is being done overseas, the United States is rapidly approaching a time where services comprise 90% of GDP. Absent immediate intervention by this Court, the controversy relating to the scope of Public Law 86-272 will rapidly approach a fever pitch.

In addition, as the gamut of intangible service offerings grows, there is inherent difficulty in the categorization of these offerings as tangible or intangible property under state law. This dilemma raises further concerns for the ongoing viability of Public Law 86-272. Consider, as at issue in this case, sales of SaaS.[10] Certain states, for example, New York[11] and Pennsylvania,[12] consider SaaS to be tangible personal property for tax purposes. Other states, for example, Florida[13] and Virginia,[14] do not consider SaaS to be tangible personal property. There is a third—not insignificant—tranche of states where there

10. This exact scenario played out in the courts below. One of the disputes between ASAP Cruises and the Department was how to characterize ASAP Cruises' business activities in Wisconsin. ASAP Cruises contended that it sold SaaS that was treated as tangible personal property under Wisconsin law. The Department maintained that ASAP Cruises sold intangible travel services.

11. New York Sales Tax Bulletin No. TB-ST-128 (Aug. 5, 2014).

12. Pennsylvania Sales and Use Tax Ruling No. SUT-12-001 (May 31, 2012).

13. Florida Technical Assistance Advisement No. 16A-014 (Aug. 8, 2016).

14. Virginia Public Document Ruling No. 14-42 (Mar. 20, 2014).

remains an open question about the characterization of SaaS for tax purposes. These states include Michigan, Colorado, and North Carolina.

These classification differences between states has significant implications for the scope of the protections provided by Public Law 86-272. A business selling SaaS into New York would avoid a corporate net income tax while the sales of SaaS by the same business into Virginia would be outside the protections of the federal law. Worse yet, a taxpayer selling SaaS into Michigan would be saddled with uncertainty regarding whether it has a corporate net income tax liability. The end result is that the application of Public Law 86-272 turns on the subtle distinctions of state law.

Congress exercised its authority under the commerce clause through the enactment of Public Law 86-272. There is only one commerce clause. There is not a separate commerce clause for Texas and another for Georgia. The inherent uncertainty in state's classifying Saas—or infrastructure as a service ("IaaS"), platform as a service ("PaaS"), etc.—give rise to the exact same concerns of the business community that led to the passage of Public Law 86-272.

Prior to the enactment of Public Law 86-272, the business community was confounded as to the level of business activity that exposed a taxpayer to a state's corporate tax. Through Public Law 86-272, Congress was determined to clear up this confusion and set a lower limit of in-state business activity that is immune from tax. Confusion as to taxability is now again at the forefront as the U.S. economy becomes more and more dependent on tech-based services such as SaaS. This Court's intervention is urgently needed to stem the tide of perplexity by reasserting that Public Law 86-272 defines a lower limit of business activity beneath which the national interest in promoting interstate commerce trumps a state's taxing authority.

B. This Case is the Ideal Vehicle

First, the relevant facts of this case are ubiquitous and are replicated by innumerable businesses. Businesses provide SaaS remotely to their customers. Unlike sales of tangible personal property, there is no physical product to be presented and displayed via a sales solicitation. There is no need for a provider of SaaS to travel to customer locations to provide the requested services.[15]

The importance of SaaS to the United States economy cannot be overstated. The results of one recent study provide that over half of the businesses in the United States use some from of cloud-based service such as SaaS, PaaS, or IaaS.[16] That same study noted that 74% of startups claimed that their businesses would fail without the use of cloud services.

Second, there is no dispute that the dispositive issue in this case relates to the scope of Public Law 86-272. Specifically, whether the federal law applies to more than the solicitation of sales of tangible personal property. App. 8a (stating that the parties "dispute whether ASAP

15. https://www.ibm.com/think/topics/saas (retrieved July 12, 2026).

16. https://awsus.publicfirst.co/#top (retrieved July 12, 2026).

is subject to Wisconsin's corporate income and franchise tax as a result of Public Law 86-272").

CONCLUSION

ASAP Cruises requests that the Court grant this petition.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER DENYING REVIEW OF THE SUPREME COURT OF WISCONSIN FOR THE OFFICE OF THE CLERK, FILED FEBRUARY 12, 2026

OFFICE OF THE CLERK
SUPREME COURT OF WISCONSIN

February 12, 2026

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Michael J. Bowen
Electronic Notice

Brian Keenan
Electronic Notice

Don M. Millis
Electronic Notice

Sara Stellpflug Rapkin
Electronic Notice

Kristina E. Somers
Electronic Notice

You are hereby notified that the Court has entered the following order:

No. 2023AP1251 *ASAP Cruises, Inc. v. Wisconsin Department of Revenue*, L.C. #2022CV1975

Appendix A

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of petitioner-respondent-cross-appellant-petitioner, ASAP Cruises, Inc., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

REBECCA GRASSL BRADLEY, J., dissents.

Samuel A. Christensen
Clerk of Supreme Court

APPENDIX B — OPINION OF THE STATE OF WISCONSIN FOR THE COURT OF APPEALS, DISTRICT I, FILED JUNE 3, 2025

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

Appeal No. 2023AP1251
Cir. Ct. No. 2022CV1975

ASAP CRUISES, INC.,

Petitioner-Respondent-Cross-Appellant,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Appellant-Cross-Respondent.

Filed June 3, 2025

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County, Cir. Ct. No. 2022CV1975: STEPHEN E. EHLKE, Judge. *Reversed and cause remanded with directions.*

Before Donald, P.J., Geenen, and Colón, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The Wisconsin Department of Revenue (DOR) appeals and ASAP Cruises, Inc. (ASAP) cross-appeals from an order of the circuit court remanding a decision of the Tax Appeals Commission (Commission) in which the Commission found ASAP subject to Wisconsin's corporate income and franchise tax, *see* Wis. Stat. § 71.23 (2023-24).[1] On appeal, the parties argue about whether the Commission properly considered an affidavit submitted by ASAP's co-owner and vice president, and they further argue about whether ASAP is exempt from the corporate income and franchise tax as a result of the operation of Public Law 86-272, *see* 15 U.S.C. § 381(a).

¶2 For the reasons set forth below, we conclude that, even considering the affidavit submitted by ASAP's co-owner and vice president, the Commission was ultimately correct in finding that ASAP falls outside the protection of Public Law 86-272 and, therefore, is subject to Wisconsin's corporate income and franchise tax. Thus, we reverse the circuit court's order remanding this matter to the Commission for consideration of the affidavit of ASAP's co-owner and vice president, and we remand with directions to enter an order consistent with this opinion.

BACKGROUND

¶3 The following is taken from a set of facts to which the parties stipulated: ASAP is a Florida corporation with its headquarters and principal place of business in

1. All references to the Wisconsin Statutes are to the 2023-24 version.

Jacksonville, Florida.[2] During the relevant time period (January 1, 2012, to December 31, 2017), ASAP had at least 100 "Independent Travel Consultant Agreements" with travel agents in Wisconsin.[3] ASAP prepared the agreements and made them available to travel agents across the United States through its website, outsideagents.com. To enter into the agreement with ASAP, travel agents downloaded and completed the agreements and then returned them to ASAP in Florida for approval. Once approved by ASAP, the travel agents gained access to ASAP's website for selling cruises, tours, and vacation packages. As the agreements provided, travel agents "perform[ed] the following work: Sales of cruises, tours or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc., as provided by vendors designated by [ASAP] (the 'Travel Services')." The agreements also required travel agents to identify themselves as outside agents of ASAP. On average, ASAP received 15% of all sales of travel services sold by the travel agents as income, and the travel agents received the remaining 85% of the sale as commissions. ASAP paid the travel agents their commissions on a monthly basis. ASAP did not withhold any taxes, and instead, ASAP treated the travel agents as independent contractors and issued 1099 tax forms for travel agents to report their own income.

2. Records from the State of Florida indicate that ASAP is licensed as a full-service travel agent, doing business as Cruises & Tours Unlimited and Outsideagents.com.

3. We note that the record contains a sample of six of the agreements that ASAP had with the travel agents.

¶4 In December 2018, DOR issued estimated assessments against ASAP for January 1, 2012, to December 31, 2017. ASAP filed a petition for redetermination, and DOR denied ASAP's petition. ASAP petitioned the Commission for review, and both parties moved for summary judgment before the Commission.

¶5 ASAP argued that it was not subject to taxation in Wisconsin by operation of a federal law that shields business from state tax known as Public Law 86-272. In support of its argument and in addition to the stipulated facts noted above, ASAP submitted an affidavit from Chad Burt, ASAP's co-owner and vice president. In his affidavit, Burt averred that ASAP was "a multivendor aggregator" that provided travel agents with "one-stop access to third party travel vendors for purposes of booking travel packages." ASAP further allowed travel agents to "gain access to special pricing of certain travel packages and consumer benefits" that were "not generally available" and provided access to online business management and marketing tools and online technical support. ASAP recruited travel agents primarily using "email blasts" through an independent third-party service, but ASAP also marketed itself through "pay-by-click" advertising, online webinars, and speaking engagements. Burt states that, at no time, did ASAP specifically target marketing efforts at travel agents located in Wisconsin.

¶6 Burt averred that ASAP "signed up" travel agents through an "application process," and he described the process as follows. Travel agents accessed the application on ASAP's website and completed and returned the application to ASAP by fax or email. Once the application was received, ASAP reviewed the application, and if the application was accepted and approved, ASAP sent an email confirmation to the travel agent finalizing the agreement. For a monthly membership fee, travel agents then had access to ASAP's "online platform." For an additional fee, ASAP also offered Errors & Omissions Insurance to its travel agents. ASAP additionally provided "online business management tools" to help the travel agents "grow their businesses."

¶7 The Commission disagreed that Public Law 86-272 protected ASAP, and it found (1) ASAP sold travel services and (2) travel services are not tangible personal property within the meaning of the law. In regards to Burt's affidavit, the Commission stated that "none of the documentary evidence . . . supports this assertion" and Burt's affidavit was "utterly lacking in credibility." Rather, the Commission relied on the language of the agreements that ASAP had with the travel agents, and found that the agreements "referred to the sale of *travel services*" and "[n]one of the six [agreements] reference software, software licensing, or the sale of tangible personal property." The Commission further found that ASAP had a sufficient nexus with Wisconsin to tax ASAP because ASAP had "more than 100" agreements with travel agents located and doing business in Wisconsin.[4] *See* Wis. Stat.

4. The parties do not develop an argument on appeal about the Commission's finding that ASAP had a sufficient nexus with Wisconsin. Consequently, we do not address this point further, and rather, we assume that ASAP has a sufficient nexus with Wisconsin for purposes of being subject to taxation in the state.

§ 71.22(1r). Thus, the Commission found that ASAP was subject to taxation. *See* Wis. Stat. § 71.23.

¶8 ASAP petitioned the circuit court for review, and ASAP specifically alleged that the Commission improperly disregarded Burt's affidavit in granting summary judgment and also improperly found that ASAP was not eligible for protection from taxation under Public Law 86-272. The circuit court agreed with ASAP that the Commission failed to properly consider Burt's affidavit and remanded the case to the Commission for consideration of the affidavit. The circuit court did not make any findings as to whether Public Law 86-272 applied to protect ASAP from Wisconsin's corporate income and franchise tax.

¶9 DOR appeals, and ASAP cross-appeals.

DISCUSSION

¶10 On appeal, the parties dispute whether the circuit court properly reversed the Commission's grant of summary judgment and remanded this matter for consideration of Burt's affidavit. They additionally dispute whether ASAP is subject to Wisconsin's corporate income and franchise tax as a result of Public Law 86-272. We conclude that, even considering Burt's affidavit, ASAP is subject to Wisconsin's corporate income and franchise tax. As explained further below, we conclude that ASAP sells travel services and the plain language of Public Law 86-272 applies only to tangible personal property, thereby excluding ASAP from Public Law 86-272's protection from Wisconsin's corporate income and franchise tax.

¶11 "When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court." *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶25, 335 Wis. 2d 47, 799 N.W.2d 73 (citation omitted). We "shall not substitute [our] judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat. § 227.57(6). "[D]ue weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved." Sec. 227.57(10). However, we "shall accord no deference to the agency's interpretation of law." Sec. 227.57(11).

¶12 In this case, we review the Commission's grant of summary judgment in favor of DOR and finding ASAP subject to the corporate income and franchise tax. Summary judgment "shall be rendered 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 a judgment as a matter of law." Wis. Stat. § 802.08(2). We review a decision granting summary judgment independently. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751.

¶13 Additionally, in reviewing the Commission's grant of summary judgment in favor of DOR, we must also interpret Public Law 86-272 to determine whether it protects ASAP from Wisconsin's corporate income and franchise tax. "The interpretation of a statute is a question of law that we review de novo." *E-Z Roll Off,* *LLC v. County of Oneida*, 2011 WI 71, ¶16, 335 Wis. 2d 720, 800 N.W.2d 421. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). We give statutory language "its common, ordinary, and accepted meaning." *Id.*

¶14 The main dispute on appeal focuses on whether a federal law, Public Law 86-272, protects ASAP from Wisconsin's corporate income and franchise tax. Public Law 86-272 states in relevant part:

> No [s]tate, 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 [s]tate by any person from interstate commerce if the only business activities within such [s]tate 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 [or her] representative, in such [s]tate for sales of tangible personal property, which orders are sent outside the [s]tate for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the [s]tate[.]

¶15 DOR argues that Public Law 86-272 does not apply to ASAP because ASAP does not engage in "sales of tangible personal property" within the meaning of Public Law 86-272. DOR contends that, under any interpretation of the facts, ASAP sells a service, whether it is travel services or software as a service (SaaS),[5] and therefore, DOR argues ASAP does not qualify for the protection of Public Law 86-272 because Public Law 86-272 applies only to tangible personal property.

¶16 On the other hand, ASAP argues that Public Law 86-272 is not limited to sellers of tangible personal property and instead provides a "lower limit" where any activities falling below the limit set by Public Law 86-272 are not subject to state taxation. ASAP argues that, should we determine that it sells travel services, its business activities fall below the limit set by Public Law 86-272, thereby qualifying ASAP for protection from state taxation. Alternatively, ASAP argues that it sells SaaS, and SaaS qualifies as tangible personal property within the meaning of Public Law 86-272.

¶17 We agree with DOR. To begin, the plain language of Public Law 86-272 states that it applies in cases of "the solicitation of orders by such person, or his [or her] representative, in such [s]tate for sales of tangible personal property." We will not extend the protection of Public Law 86-272 to activities other than the solicitation of sales of tangible personal property as expressly and clearly provided in the law itself.

5. SaaS is "a software distribution model in which a cloud provider hosts applications and makes them available to end users over the internet." https://www.techtarget.com/searchcloudcomputing/definition/Software-as-a-Service (last visited May 27, 2024).

¶18 In support of its position that Public Law 86-272 is not so limited, ASAP provides several cases in which it argues that the courts speak of Public Law 86-272 as setting a "lower limit" and that somehow this language creates a "line in the sand" where any activities less than the solicitation of sales of tangible personal property cannot be taxed and any activities more than the solicitation of sales of tangible personal property can be taxed. *See, e.g.*, *Stanislaus Food Prods. Co. v. Director, Div. of Tax'n*, No. 011050-2017, 2021 WL 1589319 (N.J. Tax Ct. Apr. 22, 2021); *Blue Buffalo Co., Ltd. v. Comptroller of Treasury*, 221 A.3d 1130 (Md. Ct. Spec. App. 2019); *Kimberly-Clark Corp. & Subsidiaries v. Commissioner of Revenue*, No. 8670-R, 2015 WL 3843986 (Minn. Tax Ct. June 19, 2015); *Arizona Dep't of Revenue v. Central Newspapers, Inc.*, 218 P.3d 1083 (Ariz. Ct. App. 2009); *National Private Truck Council, Inc. v. Commissioner of Revenue*, 688 N.E.2d 936 (Mass. 1997).

¶19 ASAP also cites to two cases from the Supreme Court of the United States as the origin of this proposition. In the first, *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972), the Court stated that Public Law 86-272 "was designed to define clearly a lower limit for the exercise of that 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." In the second, *DOR v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992), the Court harkened back to *Heublein* and described that Public Law 86-272 was " 'designed to define clearly a lower limit' for the exercise of state tax power."

¶20 While ASAP correctly identifies language in the case law describing Public Law 86-272 as setting a "lower limit," we fail to see how this language requires accepting ASAP's interpretation as creating a line in the sand where a set of unspecified activities somehow considered less than the solicitation of sales of tangible personal property cannot be taxed and another set of unspecified activities rising above the solicitation of sales of tangible personal property are subject to taxation. Public Law 86-272 makes no mention of what activities fall below or rise above any line in the sand. Moreover, while the cases cited by ASAP use this "lower limit" language, none of them extend Public Law 86-272's application beyond tangible personal property.

¶21 Rather, we consider to be a more workable standard that the "lower limit" protected from state taxation is precisely the activity described by the plain language of Public Law 86-272. In other words, the solicitation of sales of tangible personal property is the "lower limit" activity that a State is prohibited from taxing, and it is only this activity that is protected from state tax by Public Law 86-272.[6] *See William Wrigley, Jr., Co.*, 505 U.S. at 216 (stating that Public Law 86-272 "prohibits a State from taxing the income of a corporation whose only business activities within the State consist of

6. The parties discuss several legal articles and secondary sources offering interpretations of Public Law 86-272. *See, e.g.*, 1 Hellerstein, et al., State Taxation § 6.18 (3d ed. 2024) (stating that "[t]he statute is carefully circumscribed" and "limited" to "selling tangible personal property"). Ultimately, our analysis is guided by the text of Public Law 86-272, and we need look no further.

'solicitation of orders' for tangible goods"); *see also Blue Buffalo Co., Ltd.*, 221 A.3d at 1133 ("Federal law provides immunity from state taxation to interstate corporations whose sole business in the taxing state is the solicitation of orders."). Thus, we conclude that Public Law 86-272 applies only to tangible personal property, and anything other than tangible personal property, e.g., intangible property and services, are not protected by Public Law 86-272.

¶22 Having determined that Public Law 86-272 applies only to the solicitation of sales of tangible personal property, we must necessarily turn to the remaining question and determine whether ASAP is in the business of selling tangible personal property and, therefore, eligible for protection from state tax under Public Law 86-272. To answer this question, we turn to the agreements between ASAP and the travel agents, and we conclude, similar to the Commission, that the agreements clearly define that the travel agents are selling travel services, i.e., not tangible personal property, on ASAP's behalf. Therefore, ASAP is not protected by Public Law 86-272, and ASAP is subject to Wisconsin's corporate income and franchise tax.

¶23 As the Commission noted, the agreements that ASAP had with the travel agents in Wisconsin refer to the sale of travel services, including cruises, tour packages, hotels, and air arrangements, and the agreements further provide that the travel agents will represent themselves as ASAP's agents and sell these travel services on ASAP's behalf. Additionally, to access ASAP's services, ASAP required the travel agents to submit applications for ASAP's approval, and once the agreements were in place, ASAP paid commissions to the travel agents and issued 1099 forms to the travel agents to report their own income. There is no reference anywhere to SaaS or any indication that ASAP was only providing a software license to the travel agents. Rather, the agreements and relationship between ASAP and the travel agents establish that the travel agents were selling travel services on ASAP's behalf for a commission that the travel agents split with ASAP, much as a salesman for a company would.

¶24 ASAP argues that Burt's affidavit is evidence that ASAP provided SaaS to the travel agents. However, Burt's affidavit does nothing to negate the agreements that ASAP had with the travel agents in Wisconsin wherein it is clearly stated that the travel agents are to sell travel services on ASAP's behalf. Thus, we conclude that, even considering Burt's affidavit, ASAP sells travel services.[7]

¶25 As noted above, Public Law 86-272 protects a business from state tax if the business is engaged in the sale of tangible personal property. Simply put, travel services are not tangible personal property, and therefore, ASAP, being engaged in the business of providing travel services through the travel agents, is not protected from state tax by way of Public Law 86-272.

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7. Consequently, we further conclude that any improper consideration of Burt's affidavit by the Commission is harmless, and we do not address the issue further. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

CONCLUSION

¶26 In sum, we conclude that the plain language of Public Law 86-272 applies only to the solicitation of sales of tangible personal property, and having determined that ASAP is not in the business of selling tangible personal property, ASAP is not protected from state tax by Public Law 86-272. Therefore, the Commission correctly found ASAP subject to Wisconsin's corporate income and franchise tax and properly granted summary judgment in favor of DOR. Accordingly, we reverse the order of the circuit court, and we remand with directions to enter an order consistent with this opinion. No costs awarded on the cross-appeal.

By the Court.—Order reversed and cause remanded with directions.

APPENDIX C — DECISION AND ORDER OF THE STATE OF WISCONSIN CIRCUIT COURT FOR THE DANE COUNTY, BRANCH 15, FILED MAY 31, 2023

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY
BRANCH 15

Case No. 22-CV-1975

ASAP CRUISES, INC.,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER

INTRODUCTION

ASAP Cruises, Inc. ("ASAP") seeks review under Wis. Stat. ch. 227 of two decisions of the Wisconsin Tax Commission ("the Commission"). Although both parties spend considerable portions of their briefs discussing the proper interpretation of 15 U.S.C. § 381, which "prohibits a State from taxing the income of a corporation whose only business activities within the state consist of 'solicitation of orders' for tangible goods . . . ", I do not reach that legal issue because I conclude the Commission improperly granted summary judgment in favor of the Wisconsin Department of Revenue ("DOR") when it ignored an affidavit submitted by ASAP.[1]

BACKGROUND

A. ASAP's business activities leading up to the tax audit.

ASAP is a Florida corporation with a principal place of business in Jacksonville. Stipulated Facts, dkt. 35, ¶ 1.[2] Between January 1, 2012 and December 31, 2017—the time period for DOR's tax audit—ASAP entered into at least 100 "Independent Travel Consultant Agreements" with Wisconsin residents. *Id.* ¶ 2. In relevant part, those agreements looked something like this:

> IN CONSIDERATION of the promises and mutual covenants and agreements contained herein, the parties agree as follows:

1. I considered issuing a decision on the legal merits (given ASAP's alternative argument that it should prevail even if the Commission's finding that it provided services is accepted), but decided not to do so because, in general, I believe it is best practice for a court to limit its decision to the narrowest grounds possible.

2. The Commission's clerk has certified and filed a copy of the record in this matter as docket entries 7-36. *See* Certification of Record, dkt. 6. For clarity, I cite to the record using docket number:page number, rather than cross-referencing each document with the Commission's certification to identify a record number.

> Word to Be Performed by Independent Travel Consultant:
>
> COMPANY desires that the Independent Travel Consultant perform, and the Independent Travel Consultant agrees to perform, the following work: Sales of cruises, tours or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc. as provided by vendors designated by the Company.

Id. Ex. A; *See also id.* Exs. B-F (other form agreements). Under these agreements, ASAP's independent travel agents ("ITAs") "sold cruises, tours and vacation packages . . . " *Id.* ¶ 5. From the revenue this generated, "ASAP retained a percentage of the income . . . paying the [ITAs] commissions on those sales." *Id.* ¶ 6.

ASAP never paid any Wisconsin income or franchise taxes on this income. *Id.* ¶ 8. On December 12, 2018, DOR estimated that ASAP owed approximately $4,000 plus interest and fees for the six-year audit period. *Id.* ¶ 9. ASAP petitioned for a redetermination of those assessments, but DOR denied that petition. *Id.* ¶¶ 10-11.

B. The Wisconsin Tax Commission's decisions.

1. The Commission grants summary judgment in favor of DOR.

On October 24, 2019, ASAP appealed DOR's decision to the Commission. *Id.* ¶ 12. In its appeal, ASAP made three arguments. First, DOR's assessments violated the Due Process Clause of the United States Constitution "because ASAP lacked 'minimum contacts' with Wisconsin and it did not 'purposefully avail itself' of Wisconsin's economic market." Pet. for Rev., dkt. 7, ¶ 21. Second, ASAP "lacked 'substantial nexus' with Wisconsin . . . ," a prerequisite for taxes under the Commerce Clause. Pet. for Rev., dkt. 7, ¶ 30. Third, ASAP's software was "tangible personal property." *Id.* ¶36 (relying on the definition in Wis. Stat. § 77.51(20)). Then, applying the rule set forth in 15 U.S.C. § 381 that a business cannot be taxed for the "solicitations of orders for the sale of tangible personal property," ASAP argued that it did not owe taxes because it "did not exceed the protections of [15 U.S.C. § 381]." Pet. for Rev., dkt. 7, ¶ 37.

Nearly two years later,[3] on October 8, 2021, both parties moved for summary judgment. Dkt. 19; Dkt. 36. The Commission issued its final decision on May 23, 2022. Dkt. 27. In its decision the Commission rejected each of ASAP's three arguments. Pertinent here, the Commission rejected ASAP's claim "to be in the business of selling Software as a Service . . . " Dkt. 27:9. The Commission instead found that ASAP's contracts with its ITAs "referred to the sale of *travel services* . . . " so ASAP must also have sold a service and not any tangible good. Dkt. 27:9 (emphasis in original). The Commission found that the only evidence supporting ASAP's claim to sell software—arguably a tangible property—came

3. DOR has supplied a comprehensive timeline explaining why this case took two years. DOR Letter to the Commission (Nov. 18, 2021), dkt. 24.

from ASAP's co-owner Chad Burt, which the Commission believed it could disregard because "a taxpayer's self-serving testimony must generally be substantiated by other proof." Dkt. 27:9 (quoting a previous Wisconsin Tax Commission decision).

2. The Commission denies ASAP's motion for a rehearing.

On June 13, 2022, ASAP sought a rehearing under Wis. Stat. § 227.49 so that the summary judgment order could be set aside and the matter fully tried. Dkt. 28. ASAP argued that the Commission erred when it "gave no weight at all to the sworn affidavit of Mr. Burt [describing, in ASAP's view, its business model as selling tangible property]." Dkt. 28:7.

DOR responded in a June 30, 2022, letter brief, arguing that the Commission properly disregarded Burt's affidavit for two reasons. First, Burt's affidavit "contradicts the stipulated contracts . . . " each of which "specifically provide that the [ITA]s are selling travel services on behalf of ASAP Cruises." Dkt. 30:2. Second, according to DOR, "[s]pinning of facts without supporting documentation is not evidence." Dkt. 30:3. DOR's letter brief cited no authority to support either explanation for why it believed the Commission could disregard sworn testimony on summary judgment.

On July 6, 2022, the Commission denied ASAP's motion for rehearing in a one-page order. Dkt. 31. The Commission concluded that ASAP "has shown no material error of law or fact nor the discovery of new evidence sufficiently strong to reverse or modify its decision and which could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3).” Dkt. 31.

C. ASAP’s petition for judicial review.

On August 5, 2022, ASAP petitioned for judicial review of the Commission’s decisions under Wis. Stat. ch. 227. Dkt. 2. On August 12, 2022, the Commission filed a certified copy of its record. Dkt. 6. Following oral argument on March 30, 2023, the Court invited limited and supplemental briefing on the application of 15 U.S.C. § 381 to this matter. The parties have since fully completed briefing.

LEGAL STANDARD FOR CH. 227 REVIEW

Chapter 227 of the Wisconsin statutes governs judicial review of administrative decisions. Wis. Stat. § 227.52. Ordinarily, a court’s review “shall be confined to the record . . . ” Wis. Stat. § 227.57(1). A court shall affirm an agency’s action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). In doing so, courts gives “no deference to the agency’s interpretation of law.” Wis. Stat. § 227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3 n. 1, 382 Wis. 2d 496, 914 N.W.2d 21.

“The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action.” *City of La Crosse v. DNR*, 120

Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). A plaintiff may satisfy this burden in several ways. *See* Wis. Stat. §§ 227.57(4)-(8). As relevant here, a court "shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure." Wis. Stat. § 227.57(4).

DISCUSSION

ASAP contends that the Commission should not have made any decision about the characterization of its business activity on summary judgment. I agree with ASAP that the Commission improperly granted summary judgment.

The summary judgment methodology is well-known. Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). A dispute is "genuine" if "a reasonable jury could return a verdict for the nonmoving party.'" *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 658 (Ct. App. 199 1) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).). "A material fact is one that impacts the resolution of the controversy." *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142 (quoted source omitted). "In analyzing whether there are genuine issues of material fact, we draw all reasonable inferences in favor of the nonmoving party." *Id.* (citation omitted).

Applied here, ASAP contends Chad Burt's affidavit created a genuine dispute of material fact regarding the issue of whether ASAP sold tangible goods. In relevant part, Chad Burt averred as follows:

> 2. I am the co-owner and Vice President of ASAP Cruises, Inc . . . I am jointly responsible for the day-to-day operations of ASAP Cruises. . . .
>
> 4. ASAP Cruises provides an online platform that independent travel agents ("ITAs") use to grow their businesses.
>
> 5. The online platform provided by ASAP Cruises is outsideagents.com.
>
> . . .
>
> 24. During the [audit] Period, Wisconsin-based ITAs used third party online booking tools available through – but not directly offered by – outsideagents.com to book travel packages for the customers of the Wisconsin-based ITAs.
>
> . . .
>
> 27. When a Wisconsin-based ITA booked travel for a customer during the Period, the booking was facilitated through the online travel platform accessible through outsideagents.com.
>
> . . .

> 31. ASAP Cruises charged Wisconsin-based ITAs a monthly membership fee for access to the resources available on and through outsideagents.com. The membership fees were paid by the Wisconsin-based ITAs to ASAP Cruises via credit card. ASAP Cruises charged the membership fee to recover its costs associated with developing and maintaining its online platform at outsideagents.com
>
> 32. Commissions were paid by third party travel vendors to ASAP Cruises with respect to the travel hooked through outsideagents.com by Wisconsin-based ITAs during the Period (the "ITA Commissions"). The commissions received by ASAP Cruises from the third party travel vendors were matched by ASAP Cruises to the bookings of each Wisconsin-based ITA.
>
> 33. ASAP Cruises paid a percentage—85% on average—of the ITA Commissions to each Wisconsin-based ITA. These payments to Wisconsin-based ITAs were made at the direction of employees of ASAP Cruises located in Jacksonville, Florida. The balance of the ITA Commissions not paid to the Wisconsin-based ITAs was retained by ASAP Cruises as a fee for the services provided through its online platform – outsideagents.com.

Burt Aff., dkt. 36:94-98.

ASAP argues that the Commission should not have granted summary judgment because Burt's testimony shows that ASAP sold software—arguably tangible property—and not any services. ASAP contends that Mr. Burt's affidavit explains the course of performance between ASAP and the Wisconsin ITAs. According to ASAP this course of performance is crucial to understanding exactly what ASAP provided under the terms of the agreements. Having reviewed the submitted materials, I agree that, viewed in the light most favorable to ASAP, a reasonable person could infer from Burt's affidavit that ASAP's business activity was not to sell services but was instead to sell the software contained on its online platform. Specifically, Burt testified that ASAP "provides an online platform" for accessing software then "charged Wisconsin-based ITAs a monthly membership fee for access" to that software. Burt Aff. ¶¶4, 31. This testimony is material because if ASAP limited its business activity to solicitations for sales of tangible personal property, then 15 U.S.C. § 381 will apply, and the material dispute created by Burt's testimony is genuine because ASAP's corporate officers have good reason to understand ASAP's business model. Burt Aff. ¶2.

The Commission disregarded this testimony because it was "self-serving" and because "no evidence in the record . . . corroborates Mr. Burt's statement." Dkt. 27:9. This was wrong. The summary judgment procedure contemplates no such inquiry. *See Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003) (discussing the misconception that evidence presented in a "self-serving" affidavit is never sufficient to thwart a summary judgment motion, provided that the evidence meets the usual requirements for evidence submitted on summary judgment). Neither the Commission nor DOR have cited any authority that says otherwise.[4]

In sum, DOR failed to "show that there is no genuine issue as to any material fact . . . " Wis. Stat. § 802.08(2). The Commission therefore committed a procedural error when it granted summary judgment. Of course, "[s]ummary judgment procedure is a drastic remedy because it deprives the losing party of a trial or even an evidentiary hearing." *Strasser v. Transtech Mobile Fleet Service*, 2000 WI 87, ¶29, 236 Wis. 2d 435. As such, this procedural error impaired the fairness of the proceedings and constitutes a ground for remand to the Commission. Wis. Stat. § 227.57(4). Accordingly, I remand this matter to the Commission for further proceedings consistent with this decision.[5]

4. The only "authority" the Commission cited on this point was its own prior decision, *Dvorak v. DOR*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 4/30/2002), *aff'd* ¶ 400-603 (Milwaukee Co. Cir. Ct., 11/25/2002). That case does not discuss summary judgment. In *Dvorak*, the Commission held a trial on tax issues, then appears to have relied on an inapposite federal treasury regulation to reject trial testimony as uncorroborated.

5. Because I remand this matter for further action I need not decide whether the Commission also erred by denying ASAP's motion for a rehearing under Wis. Stat. § 227.49.

ORDER

IT IS ORDERED that the Wisconsin Tax Appeals Commission committed a material error in procedure when it granted summary judgment in favor of the Wisconsin Department of Revenue. The Tax Appeals Commission's May 23, 2022 decision in the matter of docket no. 19-I-258 is therefore remanded for further action consistent with this decision.

This is a final judgment for purposes of appeal. Wis. Stat. § 808.03(1).

APPENDIX D — ORDER OF THE STATE OF WISCONSIN FOR THE TAX APPEALS COMMISSION, FILED JULY 6, 2022

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DOCKET NO. 19-I-258

ASAP CRUISES, INC.,

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ORDER

On June 13, 2022, Petitioner's representative, Attorney Michael J. Bowen, filed with the Commission a Petition for Rehearing of the May 23, 2022 Ruling and Order issued by the Commission. On July 1, 2022, Attorney Mark S. Zimmer filed a letter in opposition to rehearing on behalf of Respondent.

The full Commission has considered Petitioner's Petition for Rehearing. The Commission finds that Petitioner has shown no material error of law or fact nor the discovery of new evidence sufficiently strong to reverse or modify its decision and which could not have been previously discovered by due diligence. Wis. Stat. § 227.49(3).

THEREFORE, **IT IS ORDERED** that Petitioner's Petition for Rehearing in this matter is hereby denied.

Dated at Madison, Wisconsin, this 6th day of July, 2022.

WISCONSIN TAX APPEALS COMMISSION

s/ Elizabeth Kessler
Elizabeth Kessler, Chair

s/ Jessica Roulette
Jessica Roulette, Commissioner

s/ Kenneth P. Adler
Kenneth P. Adler, Commissioner

APPENDIX E — RULING AND ORDER OF THE STATE OF WISCONSIN FOR THE TAX APPEALS COMMISSION, DATED MAY 23, 2022

STATE OF WISCONSIN
TAX APPEALS COMMISSION

DOCKET NO. 19-I-258

ASAP CRUISES, INC.,

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

ELIZABETH KESSLER, CHAIR:

This case comes before the Commission for decision on competing Motions for Summary Judgment. The Petitioner, ASAP Cruises, Inc. ("ASAP"), a Florida corporation, is represented by Attorneys[1] Michael J. Bowen and Peter O. Larsen. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Mark S. Zimmer and Chief

1. Attorneys Bowen and Larsen are licensed to practice in the State of Florida, not the State of Wisconsin.

Counsel Dana J. Erlandsen. Both parties have filed with the Commission briefs and documents in support of their respective positions. For the reasons stated below, we find for the Respondent.

PROCEDURAL BACKGROUND

On or about December 12, 2018, the Department issued estimated assessments against ASAP for the tax years ending December 31, 2012, 2013, 2014, 2015, 2016 and 2017 ("Audit Period").

On or about January 28, 2019, Petitioner timely appealed the Notice of Assessment by filing a Petition for Redetermination.

On or about August 26, 2019, Respondent denied the Petition for Redetermination in a Notice of Action.

Petitioner filed a timely Petition for Review with the Commission. The Petition for Review was sent via certified mail and date stamped October 24, 2019.

FACTS

1. Petitioner, ASAP, is a Florida corporation with its headquarters and principal place of business in Jacksonville, FL (Jt. Stip. ¶ 1).

2. Petitioner is in the business of selling travel services utilizing Independent Travel Consultants (ITCs) nationwide who provide those services to businesses

and individuals. The transactions between ASAP and the ITCs occurred via "Independent Travel Consultant Agreements" (ITC Agreements). These ITC Agreements required ITCs to "perform [] the following work: Sales of cruises, tours or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc, as provided by vendors designated by the Company." (Jt. Stip. Ex. A-F).[2]

3. In exchange for selling ASAP's travel services, ASAP paid the ITCs commissions, which increased in percentage if the ITC sold travel services over various thresholds. ASAP paid those commissions on a monthly basis. ASAP did not withhold any taxes on those commissions, but issued the ITCs Federal 1099 forms, and specifically noted in several of the ITC Agreements, that the ITC was responsible for declaring income and/or paying taxes. (Jt. Stip. Ex. A-F).

4. During the Audit Period, ASAP was a party to at least 100 ITC Agreements with individuals who resided or had business locations, in the State of Wisconsin (the "ITCs"). (Jt. Stip. ¶ 2)

5. ASAP received income from the sales of services by ITCs to customers located throughout the United States, including Wisconsin, because it retained a percentage of the income from those service sales to customers. (Jt. Stip. ¶ 6).

2. Some of the later ITC Agreements end that sentence with the addition of the phrase, "(the 'Travel Services')."

6. Six representative samples of the Wisconsin ITC Agreements, one for each year of the Audit Period, were filed as part of the Joint Stipulation. (Jt. Stip. ¶ 4).

7. None of the six ITC Agreements reference software, software licensing, or the sale of tangible personal property. (Jt. Stip. Ex. A-F).

8. In correspondence with the Wisconsin Department of Revenue dated January 28, 2019, Chris Farmand identified himself as a CPA representing ASAP and stated that ASAP's primary business activity is the development of software for the travel industry. He also indicated that the ITCs were the customers of ASAP. (Jt. Stip. Ex. M).

9. ASAP did not file Wisconsin income or franchise tax returns during any year of the Audit Period. (Jt. Stip. ¶ 7).

10. ASAP has never paid any Wisconsin income or franchise taxes. (Jt. Stip. ¶ 8).

11. During the Audit Period, the Department issued estimated assessments against ASAP as follows:

2012: $500 tax, plus interest, penalty, and late filing fees
2013: $500 tax, plus interest, penalty, and late filing fees
2014: $500 tax, plus interest, penalty, and late filing fees
2015: $500 tax, plus interest, penalty, and late filing fees

2016: $1000 tax, plus interest, penalty, and late filing fees
2017: $1000 tax, plus interest, penalty, and late filing fees

(Jt. Stip. ¶ 9).

MOTION FOR SUMMARY JUDGEMENT

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, 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. Wis. Stat. § 802.08(2). The effect of simultaneous motions for summary judgment is an assertion that the facts presented are not in dispute and only questions of law remain for determination. The parties filed a Joint Stipulation of Facts, supported by a number of related documents. Summary judgment is thus appropriate. *Healthcare Services, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-085 (WTAC 2016).

ISSUE

The fundamental question before the Commission is whether Petitioner ASAP, a Florida corporation, was subject to Wisconsin income or franchise taxes during 2012, 2013, 2014, 2015, 2016, or 2017 based upon its sales of travel services to individuals and businesses within Wisconsin.

APPLICABLE LAW

15 U.S.C. § 381, also known as P.L. 86-272:
(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; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Wis. Stat. § 71.22(1r): "Doing business in this state" includes, except as prohibited under

P.L. 86-272, issuing credit, debit, or travel and entertainment cards to customers in this state; regularly selling products or services of any kind or nature to customers in this state that receive the product or service in this state; regularly soliciting business from potential customers in this state; regularly performing services outside this state for which the benefits are received in this state; regularly engaging in transactions with customers in this state that involve intangible property and result in receipts flowing to the taxpayer from within this state; holding loans secured by real or tangible personal property located in this state; owning, directly or indirectly, a general or limited partnership interest in a partnership that does business in this state, regardless of the percentage of ownership; and owning, directly or indirectly, an interest in a limited liability company that does business in this state, regardless of the percentage of ownership, if the limited liability company is treated as a partnership for federal income tax purposes. A taxpayer doing business in this state for any part of the taxable year is considered to be doing business in this state for the entire taxable year.

Wis. Stat. § 71.23(2): FRANCHISE TAX. For the privilege of exercising its franchise . . . or doing business in this state in a corporate capacity, except as provided under sub. (3),

> every domestic or foreign corporation, except corporations specified in § 71.26(1), and every nuclear decommissioning trust or reserve fund shall annually pay a franchise tax according to or measured by its entire Wisconsin net income of the preceding taxable year . . . All provisions of this chapter and chapter 73 relating to income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. . . .
>
> Wis. Admin. Code Tax § 2.82(4)(a)(10):
> (4) WHAT CONSTITUTES NEXUS. If a foreign corporation undertakes one or more of the following activities, it is considered to have nexus and shall be subject to Wisconsin franchise or income taxes:
> (a) General. Any of the following constitute nexus. . . .
> (10) The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.

ANALYSIS

Petitioner claims it was not subject to Wisconsin income or franchise taxes, because Wisconsin is barred from imposing a net income tax on the income from a foreign corporation engaged in interstate commerce by P.L. 86-272. The Department responds that P.L. 86-272 does not apply to ASAP, because ASAP's income from Wisconsin was from sources that are not governed by

P.L. 86-272, and under Wisconsin law, for the privilege of doing business in the state, ASAP was required to pay income tax to the state.

Determinations the Department makes are presumed to be correct, and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred. *Edwin J. Puissant, Jr. v. Wis. Dept of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). In addition, to be entitled to a tax exemption, the taxpayer must bring themselves within the exact terms of the exemption statute. *Sisters of Saint Mary v. City of Madison*, 89 Wis. 2d 372, 379, 278 N.W.2d 814 (1979). Finally, statutes conferring tax exemptions are to be strictly construed. Wis. Stat. § 70.109; *Columbus Park Housing Corp. v. City of Kenosha*, 267 Wis. 2d 59, 671 N.W.2d 633 (2003); *Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee*, 181 Wis. 2d 207, 219, 511 N.W.2d 345, 350 (Ct. App. 1993) (*pet. den'd*). An exemption statute need not be given the narrowest possible construction. *Id.* While the statute must be given a strict construction in favor of taxation, the modern rule is that the statute must be given a "strict but reasonable" construction. *Wauwatosa Avenue United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, 321 Wis. 2d 796, 776 N.W.2d 280.

Petitioner presents three arguments. First, it asserts that P.L. 86-272 protects certain in-state activities of a foreign corporation – *i.e.*, the sale of tangible personal property, intangible property, or services – irrespective of the source of the income received by the foreign corporation. However, the plain language of the statute says that the protected activities of foreign corporations are "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." (P.L. 86-272(a)(1)). Travel services are not tangible personal property.

Second, although Petitioner claims to be in the business of selling Software as a Service ("SaaS"), none of the documentary evidence in the Joint Stipulation of Facts, or the included exhibits, supports this assertion. In his sworn affidavit, ASAP co-owner Chad Burt provided no documentation in support of this assertion, nor any other corroborating evidence. The Commission has long held that "a taxpayer's self-serving testimony must generally be substantiated by other proof." *Dvorak v. Wisconsin Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-600 (WTAC 4/30/2002), *aff'd* ¶ 400-603 (Milwaukee Co. Cir. Ct., 11/25/2002). "Testimony by interested parties which is not corroborated by other evidence will not overcome the presumption of correctness of respondent's assessment." *Id.*, *citing Havas v. Comm'r.*, 73-2 USTC ¶ 9561 (9th Cir. 1973). There is no evidence in the record that corroborates Mr. Burt's statement. Petitioner's repetition of the claim does not make it so.

None of the six agreements between ASAP and the ITCs included as Exhibits referred to SaaS, software licensing, software requirements, or the sale of tangible or intangible personal property. Instead, they each referred to the sale of *travel services*, such as "cruises, tour or vacation packages, including ancillary, related products, such as hotels, air arrangements, etc. as provided by vendors designated by [ASAP]." (Jt. Stip. Ex. A-F). The claim that ASAP Cruises is in the business of selling software, or "software as a service," – in spite of there being no mention of sales or licensing of software in any of Petitioner's proffered documentary evidence, and not travel services, which are explicitly the subject of its representative agreements – is thus utterly lacking in credibility. Because we find that Petitioner was not engaged in the business of selling software or "software as a service," we do not need to address the question of whether such software sales produce income taxable in the State of Wisconsin.

Third, Petitioner claims to lack nexus with Wisconsin because the only activity it conducts is electronic solicitation of sales from its headquarters in Florida. The documentary evidence attached to the Joint Stipulation of Facts indicate otherwise. Petitioner had contracts with more than 100 ITCs located in Wisconsin, who were paid a commission by ASAP for sales of travel services. Those ITCs sold travel services to customers inside and outside of Wisconsin. In addition, there is no evidence in the record suggesting that the ITCs with addresses in Wisconsin did the work for which they were paid by ASAP from outside of Wisconsin.

Under Wis. Stat. § 71,22(1r), "Doing business in this state includes . . . regularly selling products or services of any kind or nature to customers in this state that receive the product or service in this state; [and]

regularly soliciting business from potential customers in this state. . . .” This is further clarified by the Wisconsin Administrative Code, which reads, in relevant part, “If a foreign corporation undertakes one or more of the following activities, it is considered to have nexus and shall be subject to Wisconsin franchise or income taxes: (10) The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.” (Wis. Admin. Code Tax § 2.82(4)(a)(10)).

ASAP’s ITCs in Wisconsin regularly solicited business from potential customers in Wisconsin, and sold travel services to customers in Wisconsin, who received those services in Wisconsin. Under Wisconsin law, ASAP was doing business in Wisconsin during each of the years at issue.

Wis. Stat. § 71.23(2) provides that “for the privilege of exercising its franchise . . . or doing business in this state . . . every domestic or foreign corporation . . . shall annually pay a franchise tax according to or measured by its entire Wisconsin net income of the preceding taxable year. . . .” In other words, for the privilege of doing business in Wisconsin, ASAP must annually pay a franchise tax.

CONCLUSIONS OF LAW

1. Petitioner was engaged in the sales of travel services, by way of contracted Independent Travel Consultants located in Wisconsin, to residents of Wisconsin, which is not protected by P.L. 86-272.

2. During the Audit Period, Petitioner was doing business in Wisconsin under Wis. Stat. § 71.22(1r).

3. For the privilege of doing business in Wisconsin, Petitioner must annually pay the franchise tax under Wis. Stat. § 71.23(2).

ORDER

Based on the foregoing, it is the order of this Commission that the Petitioner's Motion for Summary Judgment is denied, and Respondent's Motion for Summary Judgment is granted. The assessment is affirmed.

Dated at Madison, Wisconsin, this 23rd day of May, 2022.

WISCONSIN TAX APPEALS COMMISSION

s/ Elizabeth Kessler
Elizabeth Kessler, Chair

s/ Jessica Roulette
Jessica Roulette, Commissioner

s/ Kenneth P. Adler
Kenneth P. Adler, Commissioner

APPENDIX F — PETITION FOR REVIEW EXCERPTS OF THE STATE OF WISCONSIN SUPREME COURT, FILED JULY 3, 2025

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 23-AP-1251

ASAP CRUISES, INC.,

Petitioner-Respondent-
Cross-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Appellant-
Cross-Respondent-Respondent.

REQUEST FOR REVIEW OF DECISION BY COURT OF APPEALS, DISTRICT I, ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF DANE COUNTY CASE NO. 22-CV-1975
THE HONORABLE STEVEN E. EHLKE PRESIDING

PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. P.L. 86-272 was enacted to restrict state taxing power of states under the Commerce Clause. P.L. 86-272 is clear that a state may not impose a net income tax on a taxpayer whose only activity in the taxing state is the solicitation of sales of tangible personal property. In *Heublein*, the U.S. Supreme Court construed P.L. 86-272 as defining a "lower limit" of activity shielded from state taxation. In-state business activity falling below this lower limit, the *Heublein* Court stated, is also protected because the state's authority to tax in-state business activity below

this lower limit must give way to "the national interest in promoting an open economy." *See id.*, 409 U.S. at 280.

In light of the Court's instruction in *Heublein*, did the Court of Appeals in affirming the Tax Appeals Commission err by holding that the solicitation of sales of tangible personal property is the only activity protected by P.L. 86-272?

> **Tax Appeals Commission Answer:** P.L. 86-272 only applies to the solicitation of sales of tangible personal property.
>
> **Circuit Court Answer:** The Circuit Court did not address this issue.
>
> **Court of Appeals Answer:** P.L. 86-272 only applies to the solicitation of sales of tangible personal property. The solicitation of sales of tangible personal property is the "lower limit" activity protected from state tax by the federal law.

* * * *