TRIERWEILER CONST AND SUPPLY 945290 043097 TAC

3 of 3

1865

STATE OF WISCONSIN

TAX APPEALS COMMISSION

TRIERWEILER CONSTRUCTION AND SUPPLY CO. INC.
406 East 29th Street
Marshfield, WI 54449,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,

Respondent.

Docket No. 94-S-290

RULING AND ORDER GRANTING SUMMARY JUDGMENT

DON M. MILLIS, COMMISSIONER, JOINED BY MARK E. MUSOLF, CHAIRPERSON, AND DAVID PROSSER, JR., COMMISSIONER:

This matter comes before the Commission on cross-motions for summary judgment. Both parties have submitted briefs and supporting papers in behalf of their respective positions on the cross-motions for summary judgment. The Wisconsin Road Builders Association has submitted an *amicus curiae* brief in support of petitioner's position. Petitioner is represented by Michael, Best & Friedrich, by Attorneys Timothy G. Schally, David J. Winkler, and Joseph A. Pickart. Respondent is represented by Attorney Linda M. Mintener. *Amicus curiae* are represented by Quarles & Brady, by Attorneys David D. Wilmoth and Patricia A. Hintz.

For the reasons stated below, we grant petitioner's motion for summary judgment.

SUMMARY OF UNDISPUTED FACTS

Stipulation of Facts

The parties stipulated to the following substantive facts that have been edited only for form and consistency:

1. During the years 1989 through 1992 ("the audit period"), petitioner was a corporation organized and existing under the laws of Wisconsin. It was engaged primarily in the business of constructing roads, highways, and other improvements. Beginning in 1990 and throughout the balance of the audit period, petitioner also manufactured ready-mix concrete at a plant in Marshfield, Wisconsin. Some of the concrete manufactured at the Marshfield plant was used by petitioner in its construction activities; the majority of the concrete petitioner manufactured at its plant was sold to other parties. Petitioner's principal place of business and commercial domicile were located in Marshfield, Wisconsin, during the audit period.

2. On June 9, 1993, the respondent issued to petitioner a notice of assessment which contained several adjustments to petitioner's sales and use tax liability for the audit period. One adjustment was to include in the measure of use tax certain charges paid by petitioner to certain trucking companies for transporting cement used in its construction activities from the suppliers' terminals and silos to petitioner's construction sites and to its manufacturing plant. The adjustment was listed among the adjustments to the measure of the use tax as "trucking fees" and in the explanation for the adjustment as "transportation charges." The total assessment for all adjustments, with interest calculated to August 8, 1993, was $111,822.21, consisting of $90,942.67 in tax, $15,951.89 in interest, and penalty of $4,927,65. Respondent did not assess any penalty on the adjustment for transportation charges.

3. By a timely petition for redetermination dated August 6, 1993, petitioner petitioned respondent for a redetermination of such assessment, objecting to the imposition of use tax on the transportation charges and objecting to any interest charges relating to such liability. On July 15, 1994, respondent issued to petitioner a notice of action denying the petition for redetermination. On September 13, 1994, petitioner timely filed a petition for review with the Commission.

4. During the audit period, petitioner purchased cement from various suppliers located in Wisconsin that was hauled by various trucking companies ("carriers") to petitioner's road construction sites located throughout Wisconsin or to petitioner's Marshfield manufacturing plant to be incorporated into concrete for later use at petitioner's construction sites (collectively "the subject cement"). Petitioner has paid sales/use tax on its purchase and/or use of the subject cement.

5. Petitioner's suppliers had no obligation to deliver the cement to petitioner's construction sites or to its manufacturing plant. Petitioner did not hire the suppliers to provide such transportation. The subject cement was not transported to petitioner's construction sites or manufacturing plant by vehicles owned or leased by the suppliers, and the suppliers did not retain the carriers to transport the subject cement to such locations. The suppliers made the cement available for pickup at and loaded the subject cement into the carriers' vehicles at the suppliers' terminals and silos ("suppliers' facilities").

6. The amount that the suppliers charged petitioner and that petitioner paid to its suppliers for the subject cement did not include transportation charges from the suppliers' facilities to petitioner's construction sites or to its manufacturing plant. The suppliers did add Wisconsin sales tax to the

amount they charged petitioner for the subject cement.

7. Petitioner arranged for the carriers to provide the service of transporting the subject cement from the suppliers' facilities to petitioner's construction sites and manufacturing plant. Petitioner was free to select, and did select, the carriers to be used for these transportation services. The carriers hired by petitioner were not engaged in the sale of cement, but were only engaged in the business of hauling property for others.

8. The carriers invoiced petitioner directly for their transportation services, and petitioner paid the carriers for their services by checks drawn on petitioner's account and remitted directly to the carrier. The carriers did not charge petitioner--and petitioner did not pay the carriers--the Wisconsin sales tax on the charges for transportation services on the hauling of petitioner's cement from the suppliers' facilities to petitioner's construction sites and manufacturing plant.

9. Almost all of the construction projects performed by petitioner during the audit period lasted for a full construction season, approximately May to December. If the cost of transportation of the subject cement to petitioner's construction sites and manufacturing plant increased after petitioner purchased the cement, this increased cost would be borne by petitioner or absorbed by the carriers; the cement suppliers never bore the expense of such a rate increase. Similarly, if the cost of transportation of the subject cement to petitioner's construction sites and manufacturing plant decreased after the time petitioner purchased the cement, the benefit of this reduced cost would be enjoyed by petitioner (through a reduction in the rates charged by the carriers) or by the carriers; no direct savings from reduced transportation costs for the subject cement inured to the cement suppliers.

10. During the audit period, petitioner stored, used and consumed in Wisconsin the subject cement it purchased from its suppliers. The suppliers were retailers of the subject cement they sold to petitioner. Neither the suppliers nor the carriers have given to petitioner receipts for the payment of the transportation services with the Wisconsin sales tax separately stated and shown to have been paid. Wisconsin sales tax has not been paid to respondent by either the suppliers or the carriers on the subject transportation charges. During the audit period, all of the suppliers who sold cement to petitioner and all of the carriers who hauled the subject cement for petitioner were engaged in business in Wisconsin. Petitioner has not paid to respondent use tax on the transportation charges it paid to the carriers who hauled the subject cement from the suppliers to petitioner's construction sites and manufacturing plant.

11. On June 11, 1990, petitioner purchased a conveyor system from Dan-Dee Equipment, Inc., of Honey Creek, Wisconsin, and paid sales tax totaling $5,386.50 with respect to the purchase. The conveyor system has been used by petitioner exclusively and directly in the manufacturing of concrete, and constitutes exempt manufacturing machinery and equipment under § 77.54(6), Stats., in effect during the audit period. Respondent did not give petitioner credit for the sales tax paid with respect to the purchase of the conveyor system in either the notice or assessment or in respondent's action on petitioner's petition for redetermination. Petitioner and respondent agree that petitioner is entitled to offset against any sales and use tax that may be owing to respondent for the year 1990 the $5,386.50 in sales tax paid to Dan-Dee Equipment, Inc., with respect to the purchase of the conveyor system.

Affidavits and Exhibits

The following additional undisputed facts are summarized from the affidavits and exhibits submitted by the parties and the record in this matter:

12. During the audit period, none of petitioner's suppliers had any ownership interest in the carriers.

13. During the audit period petitioner, not petitioner's suppliers, bore the risk of loss as the cement was transported by carriers and bore the risk of any increase in price charged by the carriers.

14. The only objections contained in the petition for review were (1) the imposition of use tax (and associated interest and penalties) on charges paid by petitioner to carriers for transporting cement used in its construction activities from its suppliers' facilities to its construction sites and manufacturing plant, and (2) petitioner's sales tax liability associated with the purchase of a conveyor system from Dan-Dee Equipment, Inc. (see Undisputed Fact No. 11).

Procedural Stipulations

The parties stipulated to the following procedural facts:

Petitioner concedes all of respondent's adjustments except (1) the $5,386.50 credit owing to petitioner for 1990 sales tax (see Undisputed Fact No. 11) and (2) use tax liability on charges paid by petitioner to carriers for transporting cement used in its construction activities from its suppliers' facilities to its construction sites and manufacturing plant, and any interest relating to this liability.

The parties stipulate that the only issues to be decided by the Commission are (1) whether the transportation charges paid by petitioner to the

carriers for transporting the subject cement from suppliers' facilities to petitioner's construction sites and manufacturing plant are part of the "sales price" of the cement within the meaning of § 77.51(15), Stats., and are therefore subject to the use tax; and, if so, (2) whether the imposition of use tax on such charges violates the Equal Protection Clauses of the Unites States and Wisconsin Constitutions. The cross-motions for summary judgment concern only the first issue.

The parties agree that petitioner's transportation charges on which use tax has been assessed are not subject to the use tax in any instance where the carriers were "contract carriers." For purposes of the cross-motions only, the parties stipulate that the carriers were "common carriers."[1]

APPLICABLE WISCONSIN STATUTES[2]

> **77.51 Definitions.** Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.
>
> * * *
>
> **(14r)** A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or his agent to the purchaser or his agent, except that for purposes of this subsection a common carrier or the U.S. postal service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.[3]

---

[1] The parties agree that in the event petitioner's motion for summary judgment is denied, the parties will have the opportunity to litigate the constitutional issue and whether the carriers involved were, in fact, contract carriers or common carriers.

[2] All references, unless otherwise noted, are to the 1989-90 Statutes.

[3] Effective in June 1992, gender references in this subsection were amended. *See*, 1991 Wisconsin Act 316, § 776. These are not relevant to this matter.

(15) (a) "Sales price" means the total amount for which tangible personal property is sold, leased or rented, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

* * *

3. The cost of transportation of the property prior to its purchase;

77.53 Imposition of use tax.

(1) An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer at the rate of 5% of the sales price of the property or taxable service.

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact and this matter is appropriate for summary judgment as a matter of law.

2. Transportation charges paid separately to common carriers by petitioner for hauling cement purchased by petitioner from petitioner's suppliers are not included in or added to the cement's "sales price," as that term is defined in § 77.51(15)(a), *Stats.*, and, therefore, not subject to the use tax under § 77.53(1), *Stats.*

RULING

Petitioner generally bears the burden of showing that respondent's action on the petition for redetermination is incorrect. *Woller v. Department of Taxation*, 35 Wis. 2d 227, 232 (1967). Because this matter is before the Commission on cross-motions for summary judgment, neither party will prevail

unless it shows that it is entitled to summary judgment as a matter of law. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980).

Because this matter involves a tax imposition statute, ambiguities, if any, must be construed against respondent. *Kearney & Trecker Corp. v. Department of Revenue*, 91 Wis. 2d 746, 753 (1979).

At the time the parties briefed this case, they correctly pointed out that this was a case of first impression. However, subsequent to the final brief in this case, the Commission decided *Rhinelander Paper Company, Inc. v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-270 (WTAC Dec. 19, 1996). Our decision in *Rhinelander Paper* is dispositive of this case.

Both *Rhinelander Paper* and this case turn on § 77.51(15)(a)3, *Stats.* Both parties agree that this statute provides that transportation charges incurred prior to purchase are *not deducted* from the sales price of the cement. As we discuss below, in this case the transportation charges were arguably incurred prior to the purchase of cement because the carriers involved were common carriers.

As in *Rhinelander Paper*, respondent argues that when transportation costs are paid separately by the purchaser and incurred prior to transfer of possession, § 77.51(15)(a)3, *Stats.*, requires that these costs be *added* to the price paid to the vendor by the purchaser of the property. For the same reasons set forth in *Rhinelander Paper*, we reject this argument as unsupported by the plain language of the statute. The words "without deduction" do not mean "add." *Rhinelander Paper*, at p. 30,903.

Respondent concedes that support for its reading of this statute is not found in any particular statute but in the overall statutory scheme. By suggesting the Commission construe the statute in the light of an overall statutory scheme, respondent would have us employ one of the rules of statutory construction. *See, Continental Casualty Co. v. Milwaukee Metropolitan Sewerage Dist.*, 175 Wis. 2d 527, 532 (Ct. App. 1993). The Commission is prohibited from employing rules of statutory construction unless the statute is ambiguous. *Kellner v. Christian*, 188 Wis. 2d 525, 529 (Ct. App.1994); *Gowan v. McGlure*, 185 Wis. 2d 903, 912 (Ct. App. 1994). We find § 77.51(15)(a)3, *Stats.*, plain and unambiguous. Respondent has not pointed to anything that would render the statute ambiguous. Even if the statute were ambiguous, any ambiguity would be decided in favor of petitioner. *Woller,* 35 Wis. 2d at 232.

Respondent's argument also ignores the plain language of the statute. The definition of "sales price" starts with the "total amount for which the tangible personal property is sold." § 77.51(15)(a), *Stats.* Respondent argues this amount for which the property was sold includes amounts paid separately by the purchaser. The plain language of paragraph (15)(a) simply does not support respondent's reading.

Respondent's position is not bolstered by § 77.51(14r), *Stats.* This subsection determines when a purchase has been completed for purposes of subchapter III of chapter 77. On the surface, subsection (14r) may appear to affect the outcome of this case. In relevant part, subsection (14r) provides that a "sale or purchase ... shall be deemed to have been completed at the time ... when ... possession is transferred by the seller or his agent to the purchaser ..., except that for purposes of this subsection a common carrier ... shall be deemed the

agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight ... is paid." Respondent argues that this statute deems the common carriers in this case to be agents of the cement suppliers and, thus, the sales of the cement were deemed to be complete when the cement was delivered to petitioner. Assuming respondent is correct, and if the cost of transporting the cement was part of the sales price paid by petitioner to the cement suppliers, there is no doubt that these costs would be subject to the use tax. This is because these transportation costs would have been deemed to occur prior to the time of purchase and could not be deducted from the sale price due to subdivision (15)(a)3.

But in this case, the cost of transporting the cement was not part of the sales price. As we concluded above, nothing in the statutes supports respondent's position that separately paid transportation costs can be added to the sales price. Subsection (14r) may determine when a sale is completed, but says nothing about what is included in the "sales price" as that term is defined by paragraph (15)(a).

Therefore,

IT IS ORDERED

That petitioner's motion for summary judgment is granted, and respondent's action on the petition for redetermination is reversed with regard to the issues raised in the petition for review.

Dated at Madison, Wisconsin, this 30th day of April, 1997.

WISCONSIN TAX APPEALS COMMISSION

Mark E. Musolf, Chairperson

Don M. Millis, Commissioner

David Prosser, Jr., Commissioner
(Concurring Opinion Attached)

ATTACHMENT: **"Notice of Appeal Information"**

DAVID PROSSER, JR., CONCURRING:

This case raises recurrent questions about the meaning and implications of Wis. Stats. § 77.51(14r). While I join in the opinion of the Commission and concur wholeheartedly in its result, I believe more should be said about subsection (14r) as it relates to this dispute.

Subchapter III of Chapter 77 of the 1989-1990 Wisconsin Statutes contains 13 sections dealing with "General Sales and Use Tax." The first of these sections, § 77.51, sets out a series of 30 definitions which govern the construction of terms in the subchapter. These definitions include "gross receipts" in subsection (4); "purchase" in subsection (12); "sale", "sale, lease or rental", "retail sale", and "sale at retail" in subsection (14); and "sales price" in subsection (15). Subsection (14g) complements subsection (14) as it provides what a "sale" does not include.

Subsection (14r) follows the two subsections defining "sale". It reads:

> A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or his agent to the purchaser or his agent, except that for purposes of this subsection a common carrier or the U.S. postal service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

Examining this subsection in the broad context of the entire section shows that the purpose of the subsection is not to define what a "sale" is or what the "sales price" is. The purpose of the subsection is to establish when a "sale" or "purchase" is complete, irrespective of the "sales price." The Commission is correct when it concludes that subsection (14r) may determine when a sale is complete but that determination does not necessarily affect the sales price. And it is the "sales price" which is the basis for the use tax under Wis. Stats. § 77.53.

While this discussion serves to break the link between subsection (14r) and subsection (15), it does not explain what subsection (14r) means.

In this case, the petitioner is a company which builds roads and manufactures concrete. For its business, the petitioner needs cement. In the period under review, 1989-1992, petitioner bought cement from Wisconsin suppliers and paid the requisite sales tax on the sales price of the cement. It paid the sales tax to the suppliers. The cement had to be transported from the suppliers' hands (in terminals and silos) to the petitioner's hands (at job sites and at its manufacturing plant). The suppliers had no responsibility and took no action to facilitate the transport, and they did not charge for it. They did not select the common carriers. They had no authority to veto the common carriers. They had no knowledge of the costs of transportation charged by the common carriers. All the arrangements for pickup and transport of the cement were made by the petitioner, which paid the common carriers separately. In reality, the common carriers were in every respect agents of the petitioner, and no sales tax was charged by the common carriers to the petitioner because transportation services are exempt from sales tax.

The respondent stakes out the position that subsection (14r) makes these facts entirely irrelevant. The respondent argues: "The fact that Petitioner, the purchaser of the cement, arranged for the transportation and paid its costs directly to truckers is of no relevance to the use tax issue.... Section 77.51(14r) contains no exclusion for situations where the purchaser selects, hires, and/or pays the carriers directly, or where the trucker bills the purchaser for the hauling." Respondent's Brief, at 4-5 (June 28, 1996).

History and Purpose of Subsection (14r)

The substance of subsection (14r) was created by Chapter 154, Laws of 1969, which was the executive budget bill. Section 220 of the budget bill created a new subsection (4r) in § 77.51, which read:

> A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or his agent to the purchaser or his agent.

This language makes sense, but it does not clarify whose agent a "common carrier" is or whose agent the "U.S. postal service" is. These questions certainly came up when the purchaser was paying the seller to provide transportation,

because of § 402.401(2)(a), which is part of the Uniform Commercial Code.[4] Hence, the Department of Revenue sought to modify the language in order to capture additional tax.

Senator Robert Knowles, the President Pro Tem of the Senate, introduced a bill at the request of the Department of Revenue "relating to a tax exemption for tractor fuel and nuclear material converted to gas or steam." The bill was introduced with several Senate co-authors on October 1, 1969. On October 30, 1969, Senator Knowles, by himself, at the request of the Department of Revenue, introduced Amendment 2, which added this language to subsection (4r):

> ... except that for purposes of this subsection a common carrier or the U.S. postal service shall by deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

This amendment had no discernible relationship to the title of the bill. Nonetheless, it was approved by the Senate Transportation Committee, 4 to 1, although it apparently had not been discussed earlier when the bill was before the Joint Committee on Tax Exemptions. There was a voice vote on the amendment in the Senate. Then there was a unanimous vote on the bill. In the

---

[4] Wisconsin adopted the Uniform Commercial Code in the 1963 session of the legislature. By 1969, when the substance of Wis. Stats. § 77.51(14r) was enacted, the Commercial Code provided its own definitions and established regimen for commercial sales. According to Wis. Stats. 402.106(1), "A 'sale' consists in the passing of title from the seller to the buyer for a price (s. 402.401)". Wisconsin Statutes § 402.401(2) helped to establish the rules for passage of title: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.... (a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment, but (b) If the contract requires delivery at destination, title passes on tender there." Section 402.401(2)(a) appears to permit the buyer to pay the seller for making all arrangements for the transportation of goods but to avoid liability for a sales tax on transportation expenses.

Assembly, there was no hearing. With very little discussion, the bill passed and became law.

From this review, there is scant evidence that subsection (14r) was given careful legislative scrutiny at the time it was enacted or that its ramifications were fully explored.

Ambiguity of "Common Carrier"

The subsection was ambiguous when it was written, and it is even more ambiguous now. The Department of Revenue itself has had trouble interpreting the language. For instance, in the Administrative Rules for the Department, TAX 11.94, **Wisconsin sales and taxable transportation charges**, in subsection (1)(c), the Department has provided:

> When property is transferred from a seller to a purchaser via a common carrier or by the United States postal service, the property shall be deemed in the possession of the purchaser when it is turned over to the purchaser or its agent by the common carrier or postal service at the destination regardless of the f.o.b. point and regardless of the method by which the freight or postage is paid.

Yet, in Wisconsin Tax Bulletin, #65, CCH Wis. Tax Rptr. ¶ 203-122 (January 1990), p. 14,507, the Department gives some examples that appear to contradict the language above. The Bulletin gives this example:

> Mary goes to a store in Wisconsin and buys a pair of candlesticks with a price of $100. [The candlesticks are for her niece in New York who is getting married.] ... Mary takes them from the store to the nearest post office and mails the candlesticks to New York at a cost of $10.
>
> The sale of candlesticks ($100) is subject to Wisconsin sales tax because possession transfers at the time the store gives Mary the candlesticks in Wisconsin. Because Mary arranged for the mailing of the candlesticks, the U.S. postal service is no longer an agent of the seller (store). The $10 charge for mailing is not subject to Wisconsin sales tax because transportation, by itself, is a nontaxable service if it occurs after the sale.

[Emphasis supplied]

In this example, the actions of the purchaser are acknowledged to supersede the means for transporting the goods: e.g., the postal service. Because of the actions of the purchaser, the postal service becomes the agent of the purchaser, not the agent of the seller. The explanation of when possession transfers appears to be at odds with a literal reading of the subsection, and with the rule.

Even more relevant is this example from the same publication:

> Sue lives in Illinois. She goes to a Wisconsin appliance store and purchases a big screen television for $1,400.... Sue, for $30, *contracts with a private delivery* company to pick up the TV in Wisconsin at the appliance store and deliver the TV to Illinois.
>
> The sale of $1,400 is subject to Wisconsin sales tax because possession of the TV is transferred by the appliance store to Sue in Wisconsin at the time the private delivery company picks up the TV. The delivery company is an agent of Sue (the purchaser). The $30 charge for delivery is not subject to Wisconsin sales tax as it is a nontaxable service being provided. [Emphasis supplied]

This example is close to the facts at hand. The transportation company is viewed as the agent of the purchaser because the purchaser has made all the arrangements for transport, including separate payment.

In *Arnott Trucking, Inc. v. Wisconsin Department of Revenue,* 11 WTAC 641, CCH Wis. Tax Rptr. ¶ 202-496 (December 11, 1984), the Commission faced a situation in which the petitioner, a trucking company, was engaged by Owens-Illinois to transport bark refuse from refuse suppliers to Owens-Illinois, which used the bark refuse to produce steam. The period under review was February 1, 1976, to July 31, 1979. Arnott Trucking was a "licensed contract carrier." The bark refuse was waste product and was conveyed by the

suppliers to Owens-Illinois for no consideration or remuneration. The Commission found that "ownership and possession of, and title to, the bark refuse transferred to Owens-Illinois directly from the bark suppliers at the time the bark was loaded on petitioner's trucks. Petitioner hauled bark refuse to Owens-Illinois in its capacity as a contract carrier and independent delivery agent.... Petitioner's charges for hauling bark refuse were compensation for transportation services...." [and thus not subject to tax].

The *Arnott Trucking* case and the Department's example about the Illinois woman who purchased a big screen television may be distinguished from this case on grounds that they involved "contract carriers," not "common carriers," and that the rule for "common carriers" is different. The carriers in this case are stipulated to be "common carriers." But nowadays it is very hard to pinpoint the difference between a "common carrier" and a "contract carrier" inasmuch as the transportation industry has been substantially deregulated.

In 1969, when the substance of subsection (14r) was enacted, the Wisconsin Statutes defined "common motor carrier" and "contract motor carrier" as follows:

> 194.01 Definitions.
>
> * * *
>
> (5) "Common motor carrier" means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle between fixed termini or over a regular route upon the public highways, passengers or property other than livestock, fluid milk or other farm products or farm supplies transported to or from farms. The transportation of passengers in taxicab service shall not be construed as being that of a common motor carrier. [Emphasis supplied]
>
> * * *
>
> (11) "Contract motor carrier" means any person engaged

> in the transportation of property for hire and not included in the term "common motor carrier of property."

In the period between 1976 and 1979 (the period under review in the *Arnott Trucking* case), the law had not substantially changed.

But in Chapter 347, Laws of 1981, the legislature radically changed the law to eliminate economic regulation of the motor industry. The revised definitions read as follows:

> 194.01 Definitions....
>
> * * *
>
> (5) "Common motor carrier" means any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public highways. The transportation of passengers in taxicab service or in commuter car pool or van pool vehicles with a passenger-carrying capacity of less than 16 persons or on a school bus under s. 120.13(27) shall not be construed as being that of a common motor carrier. [Emphasis supplied]
>
> * * *
>
> (11) "Contract motor carrier" means any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire.

There is a clear difference between a "common motor carrier" and a "contract motor carrier" in the 1969 statutes. But it is hard to perceive a difference between a "person who holds himself or herself out to the public as willing to undertake for hire to transport ... property over regular or irregular routes upon the public highway" and a "person engaged in the transportation ... over a regular or irregular route upon the public highways of property for hire" in the current statutes.

These changes from the 1981 session were in place during the period under review in this case. They add to other ambiguities in the subsection — namely, (a) the phrase "for purposes of this subsection," (b) the word "deemed," and (c) the word "method".

Ambiguity of "for purposes of this subsection"

Subsection (14r) includes this language: "... except that for purposes of this subsection a common carrier ... shall be deemed the agent of the seller...." [Emphasis supplied]. It is not clear what "for purposes of this subsection" means. In *Harold Fuchs Agency, Inc. v. Department of Revenue*, 91 Wis. 2d 283, 290 (Ct. App. 1979), the court said:

> That argument that subsection (4r) [(14r)] is inapplicable to subsection (11) [(4)] is based on the relative locations of the subsections within sec. 77.51, Stats. It is unreasonable to conclude that a definition in one subsection is inapplicable to the same term in other subsections of the same statute which provides that "the definitions given in this section govern the construction of terms in" the sale and use tax law. A dictionary containing definitions which would not apply to words defining other words in the same dictionary would be useless. The same is true of a statute defining statutory terms.

In *Harold Fuchs Agency, Inc.*, the petitioner was a business which sold and rented photocopy machines and copy machine paper and equipment. It was assessed sales tax by the Department on moneys collected from customers in Green Bay for freight charges on merchandise shipped to those customers from Milwaukee. The petitioner arranged for the shippers, paid the shippers, and billed the customers, noting the freight charges separate from the merchandise charges and sales tax. The Court held that, under those circumstances, the freight charges were not exempt from the sales tax because the transportation of goods had not occurred after the sale. "The provisions of

the Uniform Commecial Code as to the time title passes do not fix the time of sale for purposes of sales tax law." *Harold W. Fuchs Agency, Inc.*, 91 Wis. 2d at 289.

The facts of the case supported the Court's decision. The application of § 77.51(14r) yielded a result consistent with the facts. The Court did not, however, explain why the subsection itself uses the term "for purposes of this subsection" as opposed to "for purposes of this section" or "for purposes of this subchapter."

Ambiguity of "shall be deemed"

Subsection (14r) uses the phrase "a common carrier or the U.S. postal service shall be deemed the agent of the seller...." [Emphasis supplied]. It is not clear what "shall be deemed" means.

The words "deem" and "deemed" when used in statutes have been construed to establish a conclusive presumption in some instances but only a rebuttable presumption in other cases, depending largely upon context. *Brimm v. Cache Valley Banking Co.*, 2 Utah 2d 93, 269 P.2d 859, 863 (1954); *Kleppe v. Odin Tp., McHenry County*, 40 N.D. 595, 169 N.W. 313, 314 (1918); *Miller v. Commonwealth*, 172 Va 639, 2 S.E.2d 343 (1939); *Zimmerman v. Zimerman*, 175 Or. 585, 155 P.2d 293 (1945); *Rayle v. Rayle*, 20 N.C. App 594, 202 S.E.2d 286, 289 (1974).

In *Will of Harnischfeger*, 208 Wis. 317, 242 N.W. 153, 243 N.W. 453 (1932), the Wisconsin Supreme Court considered a statute which provided in part: "Every transfer by deed, grant ... or gift, made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate ... without adequate valuable consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death...." [Emphasis supplied]. While the

statute contains the phrase "unless shown to the contrary," the Court did not appear to rely on that, stating at 326-327:

> It is conceded that the language "be deemed to have been in contemplation of death" gives rise simply to a presumption which may be rebutted by facts showing the contrary. When a grantor, within two years prior to his death, gives away a material part of his estate ... without an adequate valuable consideration, a presumption that such gift was made in contemplation of death arises which, in the absence of credible evidence to the contrary, permits the conclusion that such gift was made in contemplation of death. Its effect is to place upon the donee the burden of showing that such gift was not made "in contemplation of death." Such presumption has no probative weight as against evidence to the contrary, but does create a *prima facie* case for the party in whose favor it exists.... In *U.S. v. Wells*, 283 U.S. 102 ..., construing a statute in all respects similar to sec. 72.01(3), Stats., the court, speaking through Mr. Chief Justice HUGHES, stated:
>
> "The presumption created by the statute that the transfers in question were made in contemplation of death cannot stand against ascertained and proven facts showing the contrary to be true."

Ambiguity of "method" of payment

Subsection (14r) uses the phrase "regardless of the method by which freight ... is paid." [Emphasis supplied]. It is not clear what "method" means. The American Heritage Dictionary of the English Language (1981) defines "method" as a "means or manner of procedure; especially, a regular and systematic way of accomplishing anything.... Orderly and systematic arrangement.... The procedures and techniques characteristic of a particular discipline or field of knowledge...." In discussing "method" and its synonyms, the dictionary noted that "method emphasizes procedures according to a detailed, logically ordered plan."

The term "method" undermines the respondent's position, unless respondent is prepared to assert that the language in subsection (14r) really

means "regardless of who pays the freight, regardless of how the freight is paid, regardless of where the freight is paid, and regardless of when the freight is paid" — a position at odds with the sensible examples respondent gives in Wisconsin Tax Bulletin, #65, *supra*.

To sum up, subsection (14r) is laced with ambiguity. Construing the statute in the manner proposed by the respondent would put it in sharp conflict with the facts, common sense, and other subsections of § 77.51, namely, (4) and (15). The statute is ripe for reasonable construction.

In my view, subsection (14r) creates a strong presumption that when an independent transportation company or the U.S. postal service is used to transport merchandise from a seller to a buyer, the transportation company is the agent of the seller, and the sale is not complete until the merchandise arrives at the destination determined by the purchaser. Under these circumstances, when the seller pays the transportation company or the U.S. postal service and bills the purchaser for transportation charges, the transportation charges are subject to sales tax. However, this presumption can be overcome by evidence that other arrangements have been made by the purchaser, particularly evidence that the seller has completed its performance with respect to delivery by turning over the merchandise to an agent of the purchaser and has not received payment for transportation costs.

Applying these principles to this case, the petitioner is not subject to sales tax on the charges for transporting the cement because the shippers were agents of the petitioner, and when the shippers took possession of the cement from the suppliers, the sales were complete.

Respectfully submitted,

David Prosser Jr.

David Prosser, Jr., Commissioner