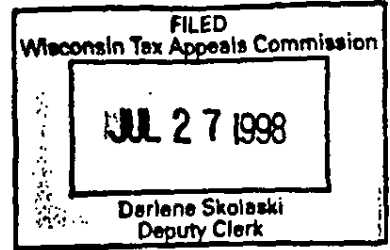


AMERICAN BAPTIST ASSEM 97S240 072798 TAC

STATE OF WISCONSIN  
TAX APPEALS COMMISSION



AMERICAN BAPTIST ASSEMBLY, INC. \*  
Rural Route 1  
Green Lake, WI 54941

Petitioner, \*

vs. \*

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

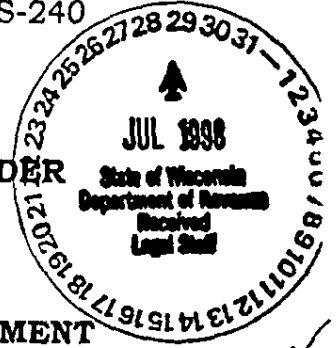
Respondent. \*

DOCKET NO. 97-S-240

RULING AND ORDER

AWARDING

SUMMARY JUDGMENT



**MARK E. MUSOLF, CHAIRPERSON:**

We consider this matter on the respondent's motion for summary judgment. Both parties have filed affidavits and briefs, and the petitioner has moved to strike an affidavit submitted with the respondent's reply brief.

On briefs for the petitioner are Attorneys Daniel T. Hardy and Steven A. Brezinski; for the respondent is Attorney Robert C. Stellick, Jr.

Having considered the entire record, the Commission finds, concludes, rules, and orders as follows:

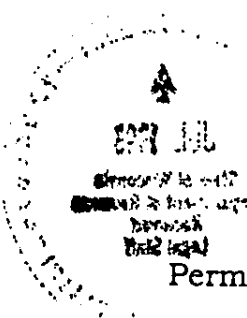
**SUMMARY OF UNDISPUTED FACTS<sup>1</sup>**

- 1. Petitioner is a non-stock, non-profit corporation, qualifying

<sup>1</sup> Unless otherwise indicated, all facts stated pertain to the period at issue, January 1 through December 31, 1989.

for tax exempt status under Internal Revenue Code § 501(c)(3). Its purpose, as stated in its Articles of Incorporation, is:

... to provide, for American Baptists and others, a comprehensive program of Christian education, training, and inspiration by means of conferences, institutes, research projects, classes, schools, college extension courses, camps, assemblies, and all other appropriate means for the nurture and training of leadership for the cause of evangelical Christianity and of the world mission of the churches.



2. Petitioner held and was required to hold a Wisconsin Seller's Permit, which was issued in 1963, in conjunction with its facilities at Green Lake, Wisconsin, known as Green Lake Conference Center (the "center" or "conference center") and Lawsonia Golf Course (the "golf course").

3. Under date of August 11, 1993, petitioner filed a claim for refund for the period January 1 through December 31, 1989, seeking return, among other items, of \$26,858.15 of sales taxes previously collected and paid to the respondent on \$537,163 in meals provided by petitioner to conference participants and others at the conference center.

4. Respondent denied the claim for refund and petitioner's subsequent petition for redetermination, and the petitioner timely appealed the denial to this commission.

5. Petitioner filed monthly sales tax returns with respondent for 1989 showing gross sales totaling approximately \$4.8 million and taxable sales of \$2 million from all of its facilities at Green Lake, including the conference

center and golf course. The golf course was conveyed to a for-profit subsidiary of petitioner in 1994 and has since operated as a separate business entity.

6. In 1989, petitioner served 144,509 guest meals at its conference center,<sup>2</sup> which were catered by an outside catering service. It is these guest meals which are in dispute, with petitioner claiming they are not taxable. Over 95% of meals served in 1989 were to conference participants, which included a variety of religious and non-religious organizations and groups. These included wedding receptions, family reunions, ski clubs, and government groups.

7. Petitioner advertised its conference center and golf course in a publication called Green Lake '89, distributed by the Green Lake Chamber of Commerce. In addition to the center's conference facilities "for large or small groups," it was also touted for its all-season family recreation (including an indoor pool, golf, tennis, bikes, boating, and cross-country skiing) and its campgrounds, cabins, lakeside inn, lakeshore homes, bookstore, and arts and crafts center. The conference center was also listed in the business pages of the Ripon/Green Lake telephone directory.

#### **APPLICABLE STATUTES (1989-90)**

**77.51 Definitions.** Except where the context requires otherwise, the definitions in this section govern the construction of terms in this subchapter.

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<sup>2</sup> This total does not include meals to non-conference participants and at the golf course, which are not at issue.

(1) "Business" includes any activity engaged in by any person or caused to be engaged in by any person with the object of gain, benefit or advantage, either direct or indirect, and includes the furnishing and distributing of tangible personal property or taxable services for a consideration by social clubs and fraternal organizations to their members or others.

\* \* \*

(13) "Retailer" includes:

(a) Every seller who makes any sale of tangible personal property or taxable service.

\* \* \*

(b) Every person engaged in the business of making sales of tangible personal property for storage, use or consumption....

\* \* \*

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

\* \* \*

(b) The furnishing or distributing of tangible personal property or taxable services for a consideration by social clubs and fraternal organizations to their members or others.

\* \* \*

(f) The furnishing, preparing or serving for consideration of food, meals, confections or drinks.

\* \* \*

(17) "Seller" includes every person selling, leasing or renting tangible personal property or selling, performing or furnishing services of a kind the gross receipts from the sale, lease, rental, performance or furnishing of which are required to be included in the measure of the sales tax.

\* \* \*

**77.52 Imposition of retail sales tax.**

(1) For the privilege of selling, leasing or renting tangible personal property ... at retail a tax is imposed upon all retailers at the rate of 5% of the gross receipts from the sale, lease or rental of tangible personal property ... sold, leased or rented at retail in this state.

\* \* \*

(7) Every person desiring to operate as a seller within this state shall file with the department an application for a permit for each place of operations. Every application for a permit shall be made upon a form prescribed by the department and shall set forth the name under which the applicant intends to operate, the location of his place of operations, and such information as the department requires.... A nonprofit organization that has gross receipts taxable under s. 77.54(7m) shall obtain a seller's permit and pay taxes under this subchapter on all taxable gross receipts received after it is required to obtain that permit. If that organization becomes eligible later for the exemption under s. 77.54(7m) except for its possession of a seller's permit, it may surrender that permit.

**APPLICABLE ADMINISTRATIVE CODE**

**Tax 11.87 Meals, food, food products and beverages.**

\* \* \*

**(2) TAXABLE SALES.**

(a) *General.* Generally, the gross receipts from sales of food or beverages shall be taxable when sold by restaurants, cafeterias, lunch counters, coffee shops, snack bars, eating houses, hotels, motels, lodging houses, sororities, fraternities, drug stores, diners, taverns, vending machines, drive-ins, mobile sales units, clubs, young men's christian associations, young women's christian associations and similar businesses, organizations or establishments.

\* \* \*

(k) *Organizations and their members.*

1. When members of an exempt or nonexempt organization meet at a hotel, restaurant or other place of business where food or drinks are sold and the members pay for the items, the place of business shall be considered selling directly to the members and not to the organization except as provided in subds. 2 and 3. The sales shall, therefore, be subject to the tax, even if the organization collects from the members, pays the seller, and retains a portion of the collections for its own purposes. In these situations, the organization shall be deemed acting for its members' convenience and not purchasing and reselling meals.

2. When an exempt organization as described in s. 77.54(9a)(f), Stats., pays for food and beverages out of its own funds and provides the items to members or others without charge, the sale of the items by a retailer to the organization is not subject to the tax. If the exempt organization holds a certificate of exempt status issued by the department, it shall give the retailer the certificate number to claim the exemption.

3. Sales of food and beverages are not subject to tax even though the employe of an exempt organization as described in s. 77.54(9a)(f), Stats., pays for the sale of the food or beverages provided all of the following are met:

a. The retailer issues the billing or invoice for the food and beverages in the name of the exempt organization.

b. The certificate of exempt status number of the exempt organization is entered on the retailer's copy of the invoice or billing document.

c. The retailer keeps a copy of the documents described in subd. 3. a. and b.

#### **CONCLUSIONS OF LAW**

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

2. The respondent properly determined that the petitioner was a "retailer" within the meaning of § 77.51(13), *Stats.* (1989-90), with respect to meals served to conference participants for purposes of imposition of the retail sales tax under § 77.52(1), *Stats.* (1989-90).

### **RULING**

As the party moving for summary judgment, respondent must demonstrate its entitlement to such judgment as a matter of law and the absence of a genuine issue as to any material fact. § 802.08(2), *Stats.* A factual dispute will not require denial of a motion for summary judgment unless the trier of fact could reasonably find for the nonmoving party. *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224 (Ct. App. 1994).

Both parties have submitted affidavits in support of their positions, and the respondent has included exhibits with its affidavits. As to the petitioner's motion to strike the affidavit of Randal Lovell with its attached Exhibit 13, we deny it as lacking a basis in law. Section 802.08(3) specifically allows affidavits "to be supplemented or opposed...by further affidavits." Exhibit 13 is of considerable value in showing the wide variety of organizations and groups who purchased the disputed meals.

The parties have no disagreement with respect to the material facts summarized above. The petitioner asserts they are insufficient to support summary judgment for the respondent, particularly considering the holding of *Kollasch v. Adamany*, 104 Wis. 2d 552 (1981), where the Supreme Court held



that meals served by the Sisters of St. Benedict to guests at their conference center were not subject to the sales tax.

The parties also agree that the substantive issue here is whether the petitioner was a "retailer" of the meals served to guests at its conference center. This is virtually identical to the issue decided in *Kollasch*.

The respondent argues that, unlike the Sisters in *Kollasch*, the petitioner self-identified as a "retailer" by obtaining and holding a seller's permit, and that it cannot separate the sale of meals from its other taxable activities without pointing to a specific exemption.

While it is obvious that the petitioner self-identified as a retailer, case law does not support the proposition that a charitable nonprofit organization cannot separate certain transactions from others without a specific exemption. In *Kollasch*, the Supreme Court found ambiguity in the statute<sup>3</sup> defining "retailer" and "seller," upon which respondent relies:

The juxtaposition of the statutory definitions creates a circularity. Sec. 77.52(1), Stats., imposes a tax on "retailers." "Retailers" are defined in sec. 77.51(7)(a) [now 77.51(13)(a)] as "sellers." "Sellers" are then defined in sec. 77.51(9) [now 77.51(17)] as "persons" who collect receipts for an activity which is included in the measure of the sales tax pursuant to sec. 77.52(1).

This circularity makes the scope of the statute ambiguous.

*Id.* at 562.

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<sup>3</sup> The definitions of "retailer" and "seller" have remained the same since *Kollasch*.

The court then held that the taxability of a sale depends on the "specific circumstances of the transaction to which it relates rather than of the parties to it," *id.* at 564, and that "[t]he type of transactions which make one a...retailer are mercantile ones." *Id.* at 568. The court went on to conclude that the Sisters' "complete lack of mercantilism" in their meal serving activities separated them from "any definition of 'retailer' contemplated by our sales tax statute." *Id.* at 572.

The court then explained in some detail the application of this transactional analysis to non-profit groups which engage in both "profit" and "no profit" transactions:

A nonprofit group, to finance its generally eleemosynary activities, may enter into specific transactions or undertakings with the hope of deriving a profit therefrom. *These nonprofit groups may be "retailers" for the purpose of those profit seeking transactions and therefore liable for the sales tax on receipts derived therefrom unless they can claim some specific exemption from the tax.* However, concluding that nonprofit groups are not exempt from the sales tax on gross receipts derived from all transactions which they enter into does not ipso facto require that such groups are liable for tax on receipts derived from every transaction in which they engage.

Nonprofit organizations may engage in transactions from which no profit is sought. Provision of meals on "skid row" by missions is an example of such an activity. The fact that the organization is recompensed somewhat by the beneficiaries of such activities does not change the fundamentally nonmercantile nature of the transaction.

*Id.* at 567-68 (emphasis supplied).

It is clear, therefore, that a nonprofit organization can be a "retailer" when engaging in "profit seeking" transactions but not necessarily so when engaging in "fundamentally nonmercantile" transactions. The Sisters in *Kollasch* were determined to be outside the definition of "retailer" because serving meals was "a religious act"---not just "a means of supporting their ministry," but "an integral part of their ministry." *Id.* at 572.

Just recently, in *American Heart Association/Wisconsin Affiliate, Inc. v. WDOR*, Docket No. 95-S-1047, Slip Op. (WTAC July 24, 1998), we applied this transactional analysis in concluding that the Heart Association was not a retailer with respect to its sales of literature because the literature and its contents were "an integral part of petitioner's charitable mission," *id.* at 17, and "a fundamentally nonmercantile activity." *Id.* at 18.

The undisputed facts here, however, show that the meals served and sold by the petitioner were not nonmercantile transactions undertaken as an integral part of their charitable purpose but as a means of supporting it, unlike the meals served by the Sisters in *Kollasch* and the literature sold in *American Heart Association*.

The disputed sales of meals by petitioner were a significant part of a mercantile undertaking which grossed \$4.8 million in 1989, including \$537,163 from the disputed meals alone. The petitioner engaged in commercial advertising of both its conference center, which included the meals provided in connection therewith. This contrasts sharply with the sales

transactions in *Kollasch* and *American Heart Association*<sup>4</sup> which generated monetary losses without the type of commercial promotion engaged in by the petitioner here.

It is also obvious that the provision of meals was not an integral part of petitioner's charitable mission, but a means of supporting it. We can reasonably infer from the record that the sales of meals were "profit seeking transactions" of the type described by the Supreme Court in *Kollasch*, 104 Wis. 2d at 567, quoted *supra*. The meals were commercially catered and were an on-site amenity for the convenience of conference participants and to the calculated financial advantage of petitioner.

We cannot reasonably conclude that the sale and serving of such guest meals was an integral part of petitioner's charitable mission in the same sense as the meals in *Kollasch* or the literature in *American Heart Association*. This determination is reinforced by the fact that many of these meals were provided to individuals attending governmental meetings, family reunions, ski clubs, wedding receptions and other events apparently unrelated to the petitioner's stated charitable mission. The meal sales undoubtedly helped support petitioner's charitable mission, but they were not in any sense an *integral part* of it. In fact, aside from its mission statement and its non-profit form of organization, petitioner's convention and conference facility operations

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<sup>4</sup> The meals provided in *Kollasch* averaged under \$17,000 annually from 1969-73; the literature sold to non-exempt groups by the Heart Association averaged under \$45,000 annually from 1986-91, which was less than 1% of its gross revenues.

differed little from businesses that host conventions and conferences for a profit.

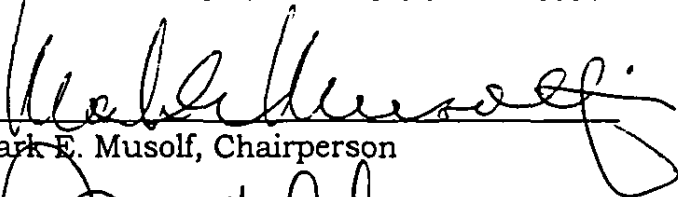
We therefore conclude that the petitioners, quite unlike the Sisters in *Kollasch*, were "retailers" of the disputed meals and therefore liable on the receipts derived therefrom in the absence of some specific exemption from the tax. Because the record shows that the respondent has already allowed such exemptions claimed by the petitioners, we must affirm the respondent's denial of petitioner's refund claim.

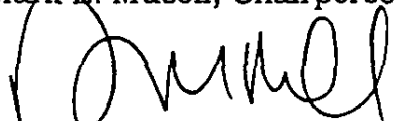
**ORDER**


The respondent is awarded summary judgment pursuant to § 802.08, *Stats.*, and its action on petitioner's petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 27th day of July, 1998.

**WISCONSIN TAX APPEALS COMMISSION**

  
\_\_\_\_\_  
Mark E. Musolf, Chairperson

  
\_\_\_\_\_  
Don M. Millis, Commissioner

  
\_\_\_\_\_  
David Prosser, Jr., Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"