SUPERIOR HAZARDOUS WASTE GR 965676 061798 TAC

STATE OF WISCONSIN

TAX APPEALS COMMISSION

SUPERIOR HAZARDOUS WASTE GROUP, INC., f/k/a ALLIANCE TRANSPORTATION SERVICES, INC.
10150 West National Avenue, Suite 350
West Allis, WI 53227,

Petitioner,

vs.

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

Respondent.

Docket No. 96-S-676

RULING AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

DON M. MILLIS, COMMISSIONER:

The above-entitled matter comes before the Commission on motions for summary judgment filed by both parties. Both parties have submitted briefs and supporting papers concerning the cross-motions. Petitioner is represented by Foley & Lardner, by Attorneys Timothy C. Frautschi and Maureen A. McGinnity. Respondent is represented by Attorney Linda M. Mintener.

Having considered the entire record before it, the Commission hereby finds, concludes, and orders as follows:

SUMMARY OF UNDISPUTED FACTS

1. Petitioner is a Wisconsin corporation whose primary business is the hauling of hazardous waste materials.

2. During the period at issue,[1] petitioner was licensed by the Wisconsin Department of Transportation as a contract carrier and held a Wisconsin contract motor carrier license number to haul goods of others for hire.

3. When it licenses a carrier, the Wisconsin Department of Transportation makes no determination that the carrier is in fact entitled to be licensed. Moreover, the fact that a carrier has obtained a license does not necessarily mean that the carrier in fact operates as a common or contract carrier.

4. Petitioner was also licensed as a contract carrier by many other states and held a hazardous waste permit issued by the Wisconsin Department of Natural Resources.[2]

5. In the normal course of its business, petitioner purchased trucks and accessories; attachments, parts, supplies, and materials therefor; and repairs, alteration, and maintenance thereof. Petitioner did not pay sales or use tax on these purchases, relying upon the exemption set forth in section 77.54(5)(b) of the Statutes.

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1 All facts pertain to the period under review (1987-92) unless otherwise indicated.

2 Respondent argued that the facts set forth in this finding, as well as a few others, were not properly authenticated by petitioner in affidavit form, but rather were taken from petitioner's own responses to respondent's discovery requests. While petitioner did not submit authentication for these discovery responses, respondent did. Respondent attached petitioner's discovery responses to its counsel's affidavit. If respondent so submits petitioner's discovery responses in support of its motion for summary judgment, it must be prepared for any portion of the discovery responses to be cited by petitioner.

6. Virtually all the materials transported by petitioner were classified as hazardous waste by the Environmental Protection Agency and/or the Wisconsin Department of Natural Resources.

7. Many of the wastes transported by petitioner had value to the generator and/or recipient of the waste. Many of these wastes were recycled or otherwise used in some other process. The wastes with value include:

A. Waste sulfuric acid and hydrochloric acid recycled for use by municipal wastewater treatment plants;

B. Iron sulfate and iron chloride, both in virgin form, used in wastewater treatment;

C. Metal hydroxide sludges recycled to recover metals for resale;

D. Waste nitric acid recycled to recover copper;

E. Waste flammables and combustibles recycled and remanufactured as solvents and cleaners or mixed with other combustibles for fuel; and

F. Waste oil and water recycled to capture oil for reuse.

8. With regard to each of petitioner's trucks at issue, approximately 65-75% of the waste transported had value and 25-35% of the waste transported had no value. Each of the trucks at issue was used exclusively to transport petitioner's customers' waste.

9. Petitioner's customers were waste generators who hired and paid petitioner to transport their waste. Petitioner asserts that it never purchased, took title to or owned the waste transported.

10. Petitioner did not have a sales and use tax seller's permit. Petitioner did not sell the waste it transported and derived no income from the sale of waste that had value.

11. Petitioner had no contracts with landfill operators or disposal sites.

12. In general, petitioner made available to each customer a list of facilities that could accept that customer's waste. The customer then had the option of selecting one or more of these facilities as the destination(s) for the waste it generates.

13. Waste from each of petitioner's customers was transported in separate containers and waste from different customers was never intermingled, although it may have been transported on the same truck.

14. Petitioner did not assume its customers' responsibility to properly dispose of waste.

15. Under the date of August 19, 1994, respondent issued a sales and use tax assessment against petitioner in the principal amount of $108,181.33, plus interest and late fee. Petitioner filed a timely petition for redetermination. Respondent granted in part and denied in part the petition for

redetermination. Petitioner filed a timely petition for review with the Commission.

APPLICABLE WISCONSIN STATUTES

77.54 General exemptions. There are exempted from the taxes imposed by this subchapter:

* * *

(5) The gross receipts from the sale of and the storage, use or other consumption of:

* * *

(b) Motor trucks, truck tractors, road tractors, buses, trailers and semitrailers, and accessories, attachments, parts, supplies and materials therefor, sold to common or contract carriers who use such motor trucks, truck tractors, road tractors, buses, trailers and semitrailers exclusively as common or contract carriers, including the urban mass transportation of passengers as defined in s. 71.38.

194.01 Definitions. In this chapter, unless the context otherwise requires:

* * *

(2) "Contract motor carrier" means any person engaged in the transport by motor vehicle over a regular or irregular route upon the public highways of property for hire.

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. Petitioner was not exempt from the sales and use tax under section 77.54(5)(b) of the Statutes because:

A. 25-35% of the waste transported by each truck at issue was not "property" within the meaning of section 194.01(2) of the Statutes because the waste had no value; and

B. Using 25-35% of the capacity of each truck for a use that is neither contract nor common carriage is not an incidental, non-exempt use.

3. The sales and use tax exemption found in section 77.54(5)(b) of the Statutes, as applied to the facts of this case, does not violate the equal protection guarantees of the state and federal constitutions.

RULING

The first issue is whether petitioner has brought itself within the terms of the exemption at issue. Specifically, were petitioner's trucks used "exclusively as . . . contract carriers" within the meaning of section 77.54(5)(b) of the Statutes? If petitioner's trucks were exclusively used as contract carriers, then petitioner would not be liable for sales and use tax on its purchase of

trucks and accessories; attachments, parts, supplies, and materials therefor; and repairs, alteration, and maintenance thereof.

In the event the Commission concludes that petitioner's trucks were not used exclusively as contract carriers, then petitioner raises a second issue, challenging the constitutionality of this exemption. Specifically, petitioner argues that respondent's reading of section 77.54(5)(b) violates the equal protection guarantees of the state and federal constitutions because there is no legitimate or rational purpose to support the distinctions created by the exemption statute.

Exemption statutes, such as section 77.54(5)(b), are matters of legislative grace and are to be strictly construed against granting the exemption. *Ladish Malting Co. v. Dep't of Revenue*, 98 Wis. 2d 496, 502 (1980); *Ramrod, Inc. v. Dep't of Revenue*, 64 Wis. 2d 499, 504 (1974). Doubts regarding the applicability of the exemption are to be resolved against the exemption and in favor of taxability. *Greiling v. Dep't of Revenue*, 112 Wis. 2d 602, 605 (1983).

Ordinarily, petitioner bears the burden to show that respondent's action on the petition for redetermination is incorrect. However, because this matter comes before the Commission on motions for summary judgment, neither moving party will prevail on its motion unless the party demonstrates it is entitled to summary judgment as a matter of law. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980).

I. Application of Section 77.54(5)(b)

Section 77.54(5)(b) exempts from the sales and use tax certain items "sold to ... contract carriers who use such [items] exclusively as ... contract carriers...." This section does not define "contract carriers." In *Gensler v. Dep't of Revenue*, 70 Wis. 2d 1108 (1975), the Supreme Court held that in construing this exemption it was appropriate to rely upon the definitions set forth in section 194.01 of the Statutes. *Id.* at 1116. This section defines contract carrier as:

> any person engaged in the transportation by motor vehicle over a regular or irregular route upon the public highways of property for hire.

§ 194.01(2), *Stats.*

A. Meaning of "property"

Respondent's action with respect to the sales and use tax exemption claimed by petitioner is based on the undisputed fact that 25-35% of the waste transported by each truck at issue had no value. Respondent argues that the definition of contract carrier involves the transportation of "property," and that waste that has no value cannot be considered "property" as that term is used in this definition. Past decisions of the Commission support this construction.

1. J.M Disposal v. Dep't of Revenue

In *J.M. Disposal Service, Inc. v. Dep't of Revenue*, 8 WTAC 122, Wis. Tax Rptr. (CCH) ¶200-585 (1970), *aff'd*, Wis. Tax Rptr. (CCH) ¶200-622 (Dane Co. Cir. Ct. 1970), the Commission held that refuse transported by a waste

hauler for disposal did not constitute "property" within the definition of contract motor carrier set forth in section 194.01(11).[3] 8 WTAC at 123. The Commission relied upon the long-standing construction of the term "property" by the Public Service Commission, holding that refuse is not considered "property" as used in section 194.01(11). *Id.* at 124. The Commission's decision was affirmed by the Dane County Circuit Court. Wis. Tax Rptr. (CCH) ¶200-622.

Petitioner disagrees with this analysis, arguing that the meaning of the term "property" was not essential to the result in *J.M. Disposal.* While it may be possible that the Commission could have found for respondent on a different ground, it is clear that the meaning of the term "property" was central to the Commission's ruling. The first conclusion of law concerned the meaning of "property":

> A substantial part of the refuse transported by petitioner for disposal purposes does not constitute "property" within the definition of "contract motor carrier" as defined in Section 194.01(11) Wis. Stats.

8 WTAC at 123.

Petitioner also argues that the Commission's holding on the meaning of "property" related to the issue of who owned the material transported. That is, if the hauler owned the material transported, the hauler was a private carrier, not a contract carrier. Petitioner misreads *J.M. Disposal.*

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[3] Section 194.01(11) has since been renumbered to section 194.01(2).

The issue of ownership of the refuse related to whether the disposal company was "for hire" within the meaning of section 194.01(11):

> In view of the above it is clear that since petitioner's testimony indicates that he is the bona fide *owner of the refuse* he collects, he does not haul said material *for hire.*

8 WTAC at 124 (emphasis supplied). It is just as clear that the meaning of property in section 194.01(11) hinged on the nature of what was transported, not who owned it:

> The concept or definition of *property* expressed by the [Public Service] Commission's manual represents, and has represented since 1935, the Commission's policy concerning materials transported only for the purpose of disposal.

8 WTAC at 124 (emphasis supplied). The Commission considered the meaning of "property" central to the result in *J.M. Disposal* and, at a minimum, held that "property" did not include refuse that had no value.

2. Rieder v. Dep't of Revenue

Petitioner also seeks to distinguish a similar result in *Rieder v. Dep't of Revenue*, 8 WTAC 195, Wis. Tax Rptr. (CCH) ¶200-641 (1970). In *Rieder*, the Commission held:

> The materials transported by the petitioner for disposal purposes involved herein [do] not constitute "property for hire" within the definition of "contract motor carrier" as defined in Section 194.01(11) Wis. Stats.

8 WTAC at 196. Petitioner argues that the result in *Rieder* as well as *J.M.*

Disposal, is explained by the fact that the haulers in each case had complete discretion regarding disposal sites. The problem with petitioner's argument is that these decisions don't say this. Rather, in each case, the Commission concluded that "property" in the definition of contract motor carrier does not include refuse or material transported for disposal.

3. Gensler v. Dep't of Revenue

Petitioner next argues that, in any case, *J.M. Disposal* has been effectively overturned by the Wisconsin Supreme Court's decision in *Gensler v. Dep't of Revenue*, 70 Wis. 2d 1108 (1975). In *Gensler*, the issue was whether the taxpayer was a contract carrier. *Id.* at 1117. The Court adopted a primary business test to determine that the taxpayer was in fact a contract carrier (engaged in the business of hauling gravel for hire) rather than a private carrier (selling gravel). *Id.* at 1122.

The hauler in *Gensler* transported nothing but sand and tailings which had a very low value for a given volume. *Id.* at 1115, 1124. There was no issue of hauling some material with value and some without value. All material transported had value, albeit a low value. Moreover, issues of the value of material transported and the meaning of "property" within the definition of contract carrier were not raised.

Petitioner argues that it was immaterial to the *Gensler* Court whether the material transported had value. The value of the material

transported was not relevant because this issue was not raised in *Gensler*. All the material transported in *Gensler* had value, and so it is not surprising that respondent refrained from raising this issue.

4. Arnott Trucking Inc. v. Dep't of Revenue

Petitioner also relies upon *Arnott Trucking, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 200-496 (WTAC 1984). Careful analysis of the Commission's decision in *Arnott* demonstrates that petitioner's reliance is misplaced.

The taxpayer in *Arnott* was paid by Owens-Illinois to transport bark refuse from paper mills to a bark boiler operated by Owens-Illinois in Tomahawk. *Id.* at 12,440. Owens-Illinois made all the arrangements with paper mills to obtain the bark refuse and then sent the taxpayer to transport the bark refuse to its Tomahawk facility, paying the taxpayer at a rate of $5 per ton. *Id.* at 12,441. Respondent assessed the taxpayer for sales tax—asserting that the taxpayer was actually selling bark refuse to Owens-Illinois—and denied the sales tax exemption at issue in this case. *Id.* at 12,440.

The Commission found that the "[b]ark refuse had negative value and was a liability *for the paper mills* which generated it." *Id.* at 12,441 (emphasis supplied). It was upon this finding that the Commission based its holding that the taxpayer had "no sales or taxable gross receipts within the mean of Sections 77.51(11) and 77.21(1), Wis. Stats." *Id.*

In a separate holding, the Commission concluded that the taxpayer was eligible for the exemption found in section 77.54(5)(b). Petitioner argues that this holding means that a contract carrier can be eligible for this exemption, even if it is transporting waste with no value. Petitioner is mistaken in two respects. First, in *Arnott*, respondent did not argue that the bark refuse had no value and, therefore, was not property as that term is used in section 194.01. In fact, respondent's argument was based on the premise that the bark refuse had value and was being sold from the paper mills to the taxpayer and from the taxpayer to Owens-Illinois. *Id.* at 12,440.

Second, even if the Commission never had to address the value issue with regard to the meaning of the term "property," it is clear that the bark refuse had value to Owens-Illinois. Owens-Illinois built a facility to burn bark refuse and paid the taxpayer to haul bark refuse to its facility. It is also important to note that the Commission found that the bark refuse had no value to the *paper mills that generated it.* They did not find that the bark refuse had no value to Owens-Illinois.

The result in *Arnott* is not inconsistent with the Commission's decisions in *J.M. Disposal* and *Rieder.* In fact, all three cases justify respondent's position that waste that has no value is not "property" as that term is used in section 194.01(2).

5. Common law concept of "property"

Petitioner further argues that the concept of property should include any tangible item, irrespective of its value. Petitioner points out that common law notions of property include property that may have no market value. To support its view, petitioner relies upon a note in Tax 11.16(1)(am) of the Administrative Code. That note explains that the exemption at issue applies only if the vehicle at issue is used exclusively to haul "goods of others for hire." Petitioner argues that the phrase "goods of others" means any tangible thing owned by a person other than the hauler.

Statutes must be construed in context. Past decisions of the Commission and the interpretation of the Public Service Commission have recognized that contract carriers transport items that have value to persons at the shipping end or the receiving end, or both. The term "property" must be read in this context. The phrase used in the note to Tax 11.16(1)(am) ("goods of others") is consistent with this. One definition of goods is "[i]tems of merchandise, supplies, raw materials, or finished goods." BLACK'S LAW DICTIONARY at 353 (5th Ed. Abr.). This is what one normally expects a contract carrier to transport. One does not ordinarily associate contract carriers with waste that has no value to the generator and that is disposed of in a waste facility.

B. Incidental Use

Petitioner further argues that even if 25-35% of the waste hauled by each truck at issue was not property, it still meets the exclusive use requirement. Petitioner cites *Dep't of Revenue v. Parks-Pioneer Corp.*, 170 Wis. 2d 44 (Ct. App. 1992); *Geis v. City of Fond du Lac*, 140 Wis. 2d 205 (Ct. App. 1987); and *Pabst Brewing Co. v. Dep't of Revenue*, 125 Wis. 2d 437 (1985).

In *Parks-Pioneer*, the issue was a taxpayer's eligibility for the sales and use tax exemption for machinery and equipment "exclusively and directly used for waste reduction and recycling activities." 170 Wis. 2d at 46. Part of the controversy involved boxes that were used to collect scrap metal, deliver the scrap metal to the taxpayer's premises, and then deliver the recycled metal to the taxpayer's customers. *Id.* at 47. The delivery of recycled materials to the taxpayer's customer was not "waste reduction or recycling activities." However, since customer delivery was not more than 10 percent of the use of the boxes, the Court determined that this use was incidental and did not violate the exclusivity requirement. *Id.* at 47. The Court cited *The Manitowoc Co., Inc. v. City of Sturgeon Bay*, 122 Wis. 2d 406 (Ct. App. 1984) (holding that 5% non-exempt use is incidental and did not violate the exclusivity requirement of section 70.11(27)). While 5% or 10% may be incidental, we do not believe that 25-35% is incidental. Therefore, we conclude that neither of these cases support petitioner's case.

In *Geis v. City of Fond du Lac*, 140 Wis. 205 (Ct. App. 1987), the court concluded that storage silos that were used 50% for storage nevertheless qualified for the exclusive and direct use requirement of section 70.11(27) because they were "vital" to the manufacturing process. *Id.* at 210. In *Pabst Brewing Co. v. City of Milwaukee*, 125 Wis. 2d 437 (Ct. App. 1985), the Court explained that, in employing the function and use test, the incidental use of manufacturing property for a non-exempt purpose did not violate the exclusivity requirement of section 70.11(27).

These cases are distinguished from the current case because they dealt with property whose purpose was not entirely manufacturing but was nevertheless integral or vital to the manufacturing (i.e., the exempt activity). *E.g.*, 140 Wis. 2d at 210; 125 Wis. 2d at 450. In the present case, petitioner has trucks that are used for an exempt activity (transporting waste with value) and also a non-exempt activity (transporting waste with no value). But here the non-exempt activity is not integral to the exempt activity. Petitioner's transport of waste with no value is not integral or vital to its transport of waste with value.

This is similar to the boxes at issue in *Parks-Pioneer*. The boxes were used to collect scrap metal and transport the scrap metal to the taxpayer (exempt activity) as well as to transport the recycled product to customers (non-exempt activity). The Court in *Parks-Pioneer* concluded that the use of boxes to deliver product to customers was not integral to the exempt activity and,

therefore, the boxes were not exempt from the property tax. 170 Wis. 2d at 50. Because the transport of waste with no value was not integral to the transport of waste with value, we conclude that the holdings of *Geis* and *Pabst Brewing* do not apply to the present case.

We conclude that the transport by each of petitioner's trucks of waste with no value (representing 25-35% of all waste hauled by that truck) is not an incidental non-exempt use, and, therefore, the trucks at issue were not used exclusively as contract carriers as required by section 77.54(4)(b). We must conclude that petitioner has failed to bring itself within the terms of this exemption.

II. Equal Protection

Petitioner argues that the distinction between contract carriers transporting property with value and carriers that transport waste with no value lacks any rational and legitimate basis and, therefore, violates the equal protection guarantees of the state and federal constitutions.

Legislative acts are presumed constitutional, and this presumption is particularly strong in challenges to tax statutes. *GTE Sprint v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 192 (1990). Petitioner bears the burden of proving the exemption is unconstitutional beyond a reasonable doubt. *See, State v. Iglesias*, 185 Wis. 2d 117, 133 (1994). Every presumption in favor of the power of the state's taxing power is indulged, and only a clear and demonstrated usurpation

of power will authorize judicial interference with legislative action. 155 Wis. 2d at 192. The protection afforded by Article I, Section 1 of the Wisconsin Constitution is substantially equivalent to the protection afforded by the 14th Amendment to the U.S. Constitution, and, as a result, the same analysis applies under the equal protection guarantee of either constitution. *Trieber v. Knoll*, 135 Wis. 2d 58, 68 (1987).

The Commission previously held that the exemption in section 77.54(5)(b) did not violate equal protection with respect to the distinction between private carriers and common and contract carriers. *Wisconsin Steel Industries, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-191 (WTAC 1996). Using the same analysis as set forth in *GTE Sprint* (155 Wis. 2d at 194), we conclude that the exemption at issue is not unconstitutional.

First, the classification is based upon substantial distinctions which make one class really different from another. The classification at issue here is between trucks used as contract and common carriers and trucks used to haul waste and garbage. There is a real distinction between trucks used for these two purposes.

Second, the classification is germane to the purpose of the law. The law was obviously intended to promote the proliferation of common and contract carriers. Limiting the exemption to only those trucks transporting property with value is certainly germane to encouraging common and contract carriers.

Third, the classification is not based upon existing circumstances only and is not so constituted as to preclude addition to the members included within a class. There is no barrier to entry into the class exempted by section 77.54(5)(b). In fact, petitioner could have brought itself within the terms of the exemption had it collected only waste with value. Alternatively, petitioner might have qualified much of its fleet for the exemption if it limited the number of trucks used to transport waste with no value.

Fourth, the law applies equally to each member of the class. This exemption applies equally to all contract and common carriers; as long as they transport property with value, they fall within the exemption.

Fifth, the characteristics of each class are so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. The class of common and contract carriers that transport property with value is different enough from the carriers that transport waste with no value so as to justify the disparate treatment under the statute.

We conclude that, as applied to the facts of this case, section 77.54(5)(b) is not unconstitutional beyond a reasonable doubt.

Therefore,

IT IS ORDERED

That respondent's motion for summary judgment is granted, and respondent's action on the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 17th day of June, 1998.

WISCONSIN TAX APPEALS COMMISSION

Mark E. Musolf, Chairperson

Don M. Millis, Commissioner

David Prosser, Jr., Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW,
THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION
OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. **The petition must be filed in circuit court and served upon the Wisconsin Tax Appeals Commission and the Department of Revenue** within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) **The petition for judicial review should name the Department of Revenue as respondent.**

This notice is part of the decision and incorporated therein.

TA-22(R-5/93)