**STATE OF WISCONSIN**

**TAX APPEALS COMMISSION**

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**JAMES ENGEL D/B/A SUNBURST SNOWTUBING AND RECREATION PARK, LLC,** **DOCKET NO. 07-S-168**

and

**SUMMIT SKI CORP. D/B/A SUNBURST SKI AREA,** **DOCKET NO. 07-S-169**

Petitioners,

vs. **RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE**

Respondent.

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**DAVID C. SWANSON, COMMISSIONER:**

These matters come before the Commission on motions for judgment on the pleadings filed by Respondent, the Wisconsin Department of Revenue (the "Department"), on October 8, 2007 in Docket No. 07-S-168 and October 12, 2007 in Docket No. 07-S-169, respectively. Petitioners James Engel (d/b/a Sunburst Snowtubing and Recreation Park, LLC) (the "LLC") and Summit Ski Corp. (d/b/a Sunburst Ski Area) (the "Corporation," and together with the LLC, "Sunburst"), appear by James A. Engel, President of the LLC and Vice President and owner of the Corporation. The Department appears by Attorney Linda M. Mintener.

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

## FINDINGS OF FACT[1]

### A. Jurisdictional Facts: Docket No. 07-S-168

1. By Notice of Field Audit Action dated January 28, 2007, the Department issued a sales/use tax assessment against the LLC in the amount of $20,371.20, including interest calculated to March 29, 2007. (Affidavit of Linda M. Mintener dated Oct. 5, 2007 ("Mintener Aff. 1"), ¶ 2, Ex. 1.)

2. On or about February 8, 2007, the LLC filed a petition for redetermination of the assessment contesting only the use tax assessed on its purchases of certain snow-grooming tractors. (Mintener Aff. 1, ¶ 3, Ex. 2.) The LLC also made a payment of $20,153.70 that the Department treated as deposit in a contested matter and transferred to its Resolution Unit holding fund. (Mintener Aff. 1, ¶ 3, Ex. 3.)

3. On June 28, 2007, the Department issued a Notice of Action denying the LLC's petition for redetermination. (Mintener Aff. 1, ¶ 3, Ex. 4.)

4. On August 24, 2007, the LLC filed a petition for review in this matter with the Commission by certified mail ("Petition for Review 1").

5. The Department filed an answer to this petition on September 28, 2007.

### B. Jurisdictional Facts: Docket No. 07-S-169

6. By Notice of Field Audit Action dated January 28, 2007, the Department issued a sales/use tax assessment against the Corporation in the amount of

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[1] Unless otherwise noted, these Findings of Fact apply to both cases for the period covered by the relevant Department audits, which included periods between July 1, 2002 through June 30, 2006 (the "period at issue"). The petitioners have stipulated to the accuracy of Facts numbered 1 through 11 (Pet. Brief, p. 2).

$25,124.91, including interest calculated to March 29, 2007. (Affidavit of Linda M. Mintener dated Oct. 12, 2007 ("Mintener Aff. 2"), ¶ 2, Ex. 1.)

7. On or about February 8, 2007, the Corporation filed a petition for redetermination of the assessment contesting only the use tax assessed on its purchases of certain snow-grooming tractors and grooming tractor repairs and admitting to the use tax assessed on other purchases. (Mintener Aff. 2, ¶ 3, Ex. 2.) The Corporation also made a payment of $24,886.26 that the Department treated as deposit in a contested matter and transferred to its Resolution Unit holding fund. (Mintener Aff. 2, ¶ 3, Ex. 3.)

8. On June 28, 2007, the Department issued a Notice of Action denying the Corporation's petition for redetermination. (Mintener Aff. 2, ¶ 3, Ex. 4.)

9. On August 24, 2007, the Corporation filed a petition for review in this matter with the Commission by certified mail ("Petition for Review 2").

10. The Department filed an answer to this petition on September 28, 2007.

**C. Material Facts**

11. The LLC and the Corporation (together, "Sunburst") operate a snow-making operation that is considered to be a manufacturing process. In the audits at issue, the Department granted as exempt all of the machinery and equipment that Sunburst used in its snow-making operation from the beginning of the process to the point where the manufactured snow was piled in various areas of Sunburst's ski, snowboarding and snowtubing areas. (Mintener Aff. 1, ¶ 6; Mintener Aff. 2, ¶ 6.)

12. Sunburst owns and operates a winter recreational ski,

snowboarding and snowtubing area where the public can enter and participate for a fee. (Pet. Brief, p. 2.)

13. Sunburst collects and remits sales taxes on its use fees. (Pet. Brief, p. 2.) Sunburst collects and remits these sales taxes on its sales of services of "admissions to amusement, athletic, entertainment or recreational events or places . . . [and] the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities" pursuant to Wis. Stat. § 77.52(2)(a)2. (Dept. Reply Brief, p.1.)

14. In connection with its business, Sunburst owns and operates certain snow-making and grooming equipment. Sunburst uses its snow-grooming tractors and related equipment to spread and groom manufactured snow on the slopes of its facility. (Pet. for Review 1, Ex. B; Pet. for Review 2, p. 3 and Ex. B.)

15. Sunburst used the snow-grooming tractors and related equipment at issue (collectively, the "grooming tractors") to groom both manufactured snow and natural snow at its facility. (Pet. for Review 1, pp. 2, 3 and 5; Pet. for Review 2, pp. 2, 3 and 5; Pet. Brief, p. 2.)

16. Sunburst used the grooming tractors on a daily basis to "refinish" snow surfaces "regardless of new natural or machine made snow additions" and "regardless of any 'snowmaking' process." (Pet. for Review 1, pp. 2, 3 and 5; Pet. for Review 2, pp. 2, 3 and 5, and Ex. C.) On a daily or twice daily basis, Sunburst uses the grooming tractors directly and exclusively to create a "Corduroy Groomed Surface Condition" on the slopes of its facilities for use by its customers. (Pet. Brief, pp. 2-3.)

17. Sunburst does not manufacture snow for sale to its customers. Sunburst asserts that it manufactures a "Corduroy Groomed Surface Condition" for sale to its customers that the customers purchase and consume through use on the slopes. (Pet. Brief, p. 3.)

## CONCLUSION OF LAW

The snow-grooming tractors and related equipment at issue in these matters are not exempt from Wisconsin sales/use tax under Wis. Stat. § 77.54(6)(a).

## OPINION

### I. Summary Judgment

These matters involve the Department's assessments of sales/use tax on grooming tractors owned by Sunburst, which Sunburst asserts are exempt from such tax under Wis. Stat. § 77.54(6)(a). The Department filed motions for judgment on the pleadings under Wis. Stat. § 802.06(3) and Wis. Admin. Code §§ TA 1.31(1) and 1.39 in October 2007, and the Commission consolidated the two matters for review.

Because the Department also filed affidavits with exhibits and briefs in support of the motions, the Commission treats the Department's motions as motions for summary judgment. *See* Wis. Stats. §§ 802.06(3) and 802.06(2)(b); *see also Mrotek, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-315 (WTAC 1997) (where the Department submitted matters outside of the pleadings, motion for judgment on the pleadings treated as motion for summary judgment) and *City of Milwaukee v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999) (where parties submitted affidavits and briefs, motion to dismiss for failure to state a claim treated as motion for summary judgment).

Summary judgment is warranted where "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). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). Any doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. *Id.* at 338-339 (citations omitted). Because we construe the Department's motions as motions for summary judgment, the Department has the burden of proving that there is no genuine issue of material fact in these matters.

Sunburst has filed briefs with affidavits and exhibits in response to the motions, but does not dispute that judgment on the pleadings is warranted, nor has it requested a hearing. Thus, we find that these matters are appropriate for summary judgment.

## II. Applicable Statutes and Rules

Wis. Stat. § 77.54(6)(a)[2] provided an exemption from sales/use tax during the audit period for manufacturing equipment as follows:

> (6) The gross receipts from the sale of and the storage, use or other consumption of:
>
> (a) Machines and specific processing equipment and repair parts or replacements thereof, exclusively and directly used

[2] All statutory references are to the 2003-2004 Statutes. The statutes or rules cited herein were not amended during the period at issue.

by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment.

* * *

(6m) For purposes of sub. (6)(a) "manufacturing" is the production by machinery of a new article with a different form, use and name from existing materials by a process popularly regarded as manufacturing. . . .

* * *

(6r) The exemption under sub. (6) shall be strictly construed.

Wis. Stat. 77.51(20) provides the applicable definition of "tangible personal property," as follows:

(20) "Tangible personal property" means all tangible personal property of every kind and description and includes electricity, natural gas, steam and water . . . .

The applicable administrative rules provide as follows in relevant part:

Tax 11.39 Manufacturing.

(1) DEFINITION. Manufacturing means an operation complete in itself, or one of a series of operations, whereby, through the application of machines to tangible personal property by a process popularly regarded as manufacturing, a new article of tangible personal property with a different form, use and name is produced.

(2) SCOPE OF MANUFACTURING.

(a) Manufacturing includes the assembly of finished units of tangible personal property and packaging when it is a part of an operation performed by the producer of the product or by another on the producer's behalf and the package or container becomes a part of the tangible personal property as the unit is customarily offered for sale by the producer. It includes the conveyance of raw materials and supplies from plant inventory to the work point of the same plant, conveyance of work in progress directly from one

manufacturing operation to another in the same plant and conveyance of finished products to the point of first storage on the plant premises. It includes the testing or inspection throughout the scope of manufacturing.

* * *

Tax 11.40 Exemption of machines and processing equipment.

(1) GENERAL.

(a) Section 77.54(6)(a), Stats., exempts the gross receipts from the sale of and the storage, use or other consumption of "Machines and specific processing equipment and repair parts or replacements thereof, exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment." "Exclusively", as used in s. 77.54(6)(a), Stats., and in this section, means that the machines and specific processing equipment and repair parts or replacements thereof are used solely by a manufacturer in manufacturing tangible personal property to the exclusion of all other uses, except that the sales and use tax exemption will not be invalidated by an infrequent and sporadic use other than in manufacturing tangible personal property. This exemption is to be strictly construed.

(b) Section 77.54(6m), Stats., provides "For purposes of s. 77.54(6)(a) 'manufacturing' is the production by machinery of a new article with a different form, use and name from existing materials by a process popularly regarded as manufacturing."

(c) In determining whether a particular machine or piece of processing equipment is included in the exemption under par. (a), s. 77.54(6)(a) and (6m), Stats., must be considered together.

* * *

(2) CONDITIONS FOR EXEMPTION AND EXAMPLES. The exemption under sub. (1)(a) shall apply if all the following conditions are met:

(a) Machines and processing equipment shall be used by a manufacturer in manufacturing tangible personal property. The exemption shall not apply to machines and processing

equipment used in providing services or in other nonmanufacturing activities.

* * *

(b) Machines and processing equipment shall be used exclusively in manufacturing.

Example: A forklift truck used on a production line to move products from machine to machine and used regularly or frequently in a warehouse to move and stock finished products is not used exclusively in manufacturing.

(c) Machines and processing equipment shall be used directly in manufacturing. The exemption shall not apply if machines and processing equipment are not used directly in the step-by-step processes by which an end product results, even though the machine and equipment are indirectly related to the step-by-step processes. Machine foundations are real property improvements rather than personal property and do not qualify for exemption.

* * *

(3) OTHER EXAMPLES OF THE EXEMPTION. Other examples of application of the exemption are as follows:

* * *

(d) The exemption does not apply to machines or processing equipment used in whole or in part by a manufacturer before the manufacturing process has begun or after it has been completed.

With respect to the application of sales and use tax to sales of services, Wis. Stat. § 77.52 provides, in relevant part, as follows:

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

* * *

> 2. a. . . ., the sale of admissions to amusement, athletic, entertainment or recreational events or places . . . and the furnishing, for dues, fees or other considerations, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities, including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, . . . .
>
> * * *
>
> (2m)(a) With respect to the services subject to tax under sub. (2), no part of the charge for the service may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing or furnishing of the service, . . . .

Wis. Stat. § 77.52.

> For these purposes, "incidental" is defined as follows:
>
> For purposes of . . . s. 77.52(2m) "incidental" means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service.

Wis. Stat. § 77.51(5) (emphasis added).

> The Administrative Code provides certain additional guidance:
>
> (1) GENERAL. When a transaction involves the transfer of tangible personal property along with the performance of a service, the true objective of the purchaser shall determine whether the transaction is a sale of tangible personal property or the performance of a service with the transfer of property being merely incidental to the performance of the

> service. If the objective of the purchaser is to obtain the personal property, a taxable sale of that property is involved. However, if the objective of the purchaser is to obtain the service, a sale of a service is involved even though, as an incidence to the service, some tangible personal property may be transferred.

Wis. Admin. Code § Tax 11.67(1).

**III. Standard of Review and Statutory Construction**

The Department's sales and use tax field audit assessments are presumed to be correct, and the petitioners have the burden of proving an assessment to be incorrect. Wis. Stat. § 77.59(2). Under Wisconsin law, it is presumed that all sales of tangible personal property are subject to sales or use tax until the contrary is established. Wis. Stat. §§77.52(1) and (3) and 77.53(1); *H. Samuels Co. v. Dep't of Revenue*, 70 Wis. 2d 1076 at 1077-1078, 236 N.W.2d 250 (1975).

Tax exemptions are a matter of legislative grace and not of right. *Fall River Canning Co. v. Dep't of Taxation*, 3 Wis. 2d 632, 637, 89 N.W.2d 203 (1958). Because taxation is the rule and exemption is the exception, tax exemption statutes are to be strictly construed against granting an exemption. *Pabst Brewing Co. v. City of Milwaukee*, 125 Wis. 2d 437, 445, 373 N.W.2d 680, 684 (Ct. App. 1985). "An exemption from taxation must be clear and express. All presumptions are against it, and it should not be extended by implication." *Wrase v. City of Neenah*, 220 Wis. 2d 166, 171-172, 582 N.W. 2d 457 (Ct. App. 1998). By statute, the exemption provided under Wis. Stat. § 77.54(6) must be strictly construed. Wis. Stat. § 77.54(6r).

## IV. Ruling

In these matters, Sunburst argues that its purchases of the grooming tractors at issue were exempt from Wisconsin sales/use tax under Wis. Stat. § 77.54(6)(a) because the tractors are exempt manufacturing equipment, as defined under that section. The Department argues that the tractors do not qualify for the claimed exemption. For the reasons discussed herein, we rule in favor of the Department.

### A. Application of *Dresser Industries*

At various points in the pleadings, Sunburst refers to having "paid" the tax liability claimed in the assessments at issue. Based on these statements, the Department argues that these petitions should be dismissed, citing *Dresser Industries, Inc. v. Wis. Dep't of Revenue*, Docket No. 94-S-97 (WTAC Aug. 31, 1994). According to *Dresser Industries*, the Commission lacks jurisdiction to hear an appeal of a tax dispute where the taxpayer has paid the disputed amount in full. *See also*, Wis. Stat. § 77.59(6)(c).

These cases present a very different set of facts. Sunburst submitted its payments of the assessments as deposits in conjunction with its appeals of the assessments. Similarly, the Department treated these payments as deposits and continues to hold them as deposits. Consequently, while Sunburst's pleadings may include references to payment of the assessments that are somewhat inconsistent with their treatment as deposits, the actions of both parties indicate that the parties have always considered these payments to be deposits, not payments of the liabilities in question. Thus, the rationale explained in *Dresser Industries* does not apply, the

payments in question are properly treated as deposits, and the Commission has jurisdiction to hear these matters.

**B. Wis. Stat. § 77.54(6)(a)**

In order to be exempt under Wis. Stat. § 77.54(6)(a) as manufacturing equipment, Sunburst's grooming tractors must be "exclusively and directly used . . . in manufacturing tangible personal property." The issue in dispute in these matters is twofold: (1) what is the tangible personal being manufactured; and (2) at what point is the manufacturing process complete?

The parties agree that making snow is a manufacturing activity, and the Department exempted all of Sunburst's equipment used to make snow. According to the Department, the tangible personal property produced by the manufacturing process is snow, and the manufacturing process in question ends when the snow is deposited in piles on the slopes of Sunburst's facilities. In contrast, Sunburst asserts that the end product of its manufacturing process is a "corduroy groomed surface condition" composed of natural and man-made snow and produced by the grooming tractors.

According to the statutory definition, "'manufacturing' is the production by machinery of a new article with a different form, use and name from existing materials by a process popularly regarded as manufacturing . . . ." Wis. Stat. § 77.54(6m). Based on the facts in evidence, Sunburst has not proved that creating a "corduroy groomed surface condition" from natural and man-made snow constitutes manufacturing under the statute. In its pleadings, Sunburst asserts that a "corduroy groomed surface condition" is "a new article with a different form, use and name from

existing materials," but does not provide any evidence proving that point, other than its own definition of "corduroy groomed surface condition." Sunburst further asserts that grooming natural and man-made snow is "a process popularly regarded as manufacturing," but again provides no evidence to bolster its claim, other than the unsupported opinion of its representative, Mr. Engel.

This lack of proof alone requires a holding for the Department, because we must strictly construe the exemption in question, and Sunburst has the burden of proof. Wis. Stat. § 77.54(6r).[3] However, the Department's position is also supported by the statutes and rules governing this exemption.

Under the rule defining the scope of manufacturing for purposes of this exemption, a manufacturing process ends with the "conveyance of finished products to the point of first storage on the plant premises." Wis. Admin. Code § Tax 11.39(2)(a). The parties agree that Sunburst manufactures snow and then stores it in piles on the slopes of its facilities. Thus, the treatment of Sunburst's snow-making operation as manufacturing ends at the point where the snow is stored in piles on its slopes.

Sunburst argues that the manufacturing process continues through grooming by the tractors, because the snow must be groomed for sale to its customers in "corduroy groomed surface condition." But Sunburst is not in the business of selling snow, including packed snow with a "corduroy groomed surface," to its customers. Sunburst's customers do not come to its facilities to purchase snow; they come to ski,

[3] Sunburst attempts to escape the limitations on this exemption by citing language from *Wis. Dep't of Revenue v. Bailey-Bohrman Steel Corp.*, 93 Wis.2d 602, 287 N.W.2d 715 (1980), but the Department correctly notes that the holding in *Bailey-Bohrman* was overturned by the Legislature through the enactment of 1989 Wis. Act 31, which created Wis. Stat. § 77.54(6r).

snowboard or go snowtubing. Sunburst sells amusement, athletic and recreational services, which are subject to the sales tax on admissions under Wis. Stat. § 77.52(2)(a)2. During the period at issue, Sunburst properly collected and remitted that tax to the Department. To the extent Sunburst sells any snow (including groomed snow) as tangible personal property in conjunction with its sales of admissions, such sales would be treated as incidental to its sales of services. Wis. Stat. §§ 77.52(2m)(a) and 77.51(5); Wis. Admin. Code § Tax 11.67(1).

Because no statute, rule or case specifically addresses the exemption of snow-grooming tractors under this statute, both parties draw various analogies to other types of equipment in support of their cases. However, the analogy that seems to best fit the grooming tractors is not discussed by either party, and that is equipment used by other providers of amusement, athletic or recreational services to maintain their facilities. For example, owners of golf courses must maintain their fairways and greens in very specific conditions for use by their customers, but it is difficult to imagine classifying their lawn mowers as manufacturing equipment. Yet that is exactly what Sunburst requests that we do with respect to its grooming tractors. Such a holding would be entirely inconsistent with the facts and the law in these matters, and we thus rule in favor of the Department.

**Conclusion**

There is no genuine issue of material fact in these matters, and the Department is entitled to judgment as a matter of law. For the reasons discussed herein, we hold that the snow-grooming equipment at issue in these assessments is not

exempt from sales/use tax under Wis. Stat. § 77.54(6)(a). Therefore,

**IT IS ORDERED**

The Department's motions are granted, and its actions on the petitioners' petitions for review in these matters are affirmed.

Dated at Madison, Wisconsin, this 27th day of May, 2008.

**WISCONSIN TAX APPEALS COMMISSION**

David C. Swanson, Chairperson

Roger W. LeGrand, Commissioner

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