STATE OF WISCONSIN

TAX APPEALS COMMISSION

GRANITE RIDGE RANCH, LLC
W5927 Lagest Road
Niagara, WI 54151,

DOCKET NO. 02-S-289

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

DON M. MILLIS, COMMISSION CHAIRPERSON:

This matter comes before the Commission on petitioner's motion for summary judgment. The parties have stipulated to certain facts, and respondent has filed an affidavit. Both parties have submitted briefs in support of their position on petitioner's motion. Petitioner is represented by Roels, Keidatz, Cerminara & Fink, LLP, by Attorney Thomas L. Keidatz. Respondent is represented by Attorney Robert C. Stellick, Jr.

Based upon the stipulation of the parties, the submissions of the parties, and the entire record in this matter, the Commission finds, concludes, and orders as follows:

UNDISPUTED MATERIAL FACTS

The Commission summarizes the undisputed material facts by incorporating the Stipulation of Facts (omitting references to exhibits and making non-

substantive alterations), the exhibits to the Stipulation of Facts, and the affidavit offered by respondent as follows:

1. Petitioner is a Wisconsin limited liability company organized under the laws of the State of Wisconsin, and owns and operates a farm and game ranch at W5927 Lagest Road, Niagara, Wisconsin.

2. Petitioner purchased and raised various animals and game on its ranch, including fallow and red deer, boars, emus, turkey, white tail deer, Texas dall sheep and rams, Corsican rams, black Hawaiian rams, Barbados rams, Painted Desert rams, Moutlan rams, Spanish goats, Asian four horn rams, and ibex.

3. Beginning in 1995, petitioner began to hold hunts on its ranch. For the most part, petitioner charged two types of fees to hunters.[1]

Hunt Fees

4. Prior to the fall of 1997, hunt fees were charged for each hunt, regardless of whether an animal was taken. Hunt fees were typically charged for each day on which the hunters hunted. For example, in 1995, a one-day hunt cost $150, a two-day hunt cost $175, and a three-day hunt cost $200.

5. Beginning with the fall of 1997, hunt fees were all based on a one- or two-day hunt and varied based on the weight of the animal taken. For example, during the fall of 1997 and spring of 1998, an animal weighing less than 200 pounds cost $350, but

[1] Unless otherwise stated, all facts pertain to 1995 through 2000, the period under review.

the cost of an animal weighing 400 pounds and over cost $650.[2] If no animal was taken, the hunter paid $150.

Trophy Fees

6. Until the fall of 1997, petitioner also charged trophy fees based on the number and, at times, the size of the game taken. Up until the fall of 1996, the trophy fee was a flat rate: $225 per animal taken in 1995 and $275 per animal taken in the first five months of 1996.

7. From the fall of 1996 through May of 1997, trophy fees were based on the size of the animal taken. For example, during the fall of 1996, the trophy fee for an animal weighing less than 200 pounds was $240, but the trophy fee for an animal weighing 400 pounds or greater was $550.

8. Petitioner also charged a hunter if the hunter wounded an animal. This charge was refunded if the animal survived.

9. Aside from holding the hunt, petitioner provided the following in exchange for the fees described above: meals and overnight lodging during the hunt, field dressing of animals taken, and the animals that were taken.

10. Most of the animals offered for hunts by petitioner are horned or antlered animals that can provide an impressive trophy.

11. The primary motivation of hunters at petitioner's ranch is to obtain trophy animals. The trophy status of animals is directly related to their weight.

[2] For purposes of calculating the fees based on weight of the animal taken, the animal was weighed prior to field dressing.

12. At times, petitioner has charged more for animals that displayed enhanced trophy status, above and beyond their weight. For example, petitioner charged $1,800 for a nine-point, white tail deer when the maximum fee for that animal based on petitioner's pricing schedule appears to be $650.

13. The primary motivation of hunters at petitioner's ranch is not to obtain meat for consumption. The meat of some of the animals hunted at petitioner's ranch is commercially available at substantially less cost.

14. Petitioner did not apply for or obtain a Wisconsin seller's permit. Petitioner did not collect or remit sales tax to respondent with respect to any of the fees it collected.

Jurisdictional Facts

15. Under the date of February 14, 2002, respondent issued a sales and use tax assessment against petitioner in the principal amount of $10,164.70, plus interest of $5,616.40 and late filing fee of $260.

16. Petitioner concedes that it is liable for sales tax on hunt fees, and on June 26, 2002, remitted payment to respondent based on its calculation of the hunt fees collected during the period under review. Petitioner argues that the trophy fees and the fees for wounded animals are not subject to the sales tax.

17. Petitioner filed a timely petition for redetermination with respondent. Under the date of July 10, 2002, respondent denied the petition for redetermination. Petitioner filed a timely petition for review with the Commission.

APPLICABLE LAW

Statutes

77.52 Imposition of retail sales tax.
(1) For the privilege of selling, leasing or renting tangible personal property, including accessories, components, attachments, parts, supplies and materials, 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, including accessories, components, attachments, parts, supplies and materials, sold, leased or rented at retail in this state.

* * *

(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. The sale of admissions to amusement, athletic, entertainment or recreational events or places except county fairs, the sale, rental or use of regular bingo cards, extra regular cards, special bingo cards and the sale of bingo supplies to players 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, including but not limited to membership rights, vacation services and club memberships.

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

* * *

(20) Except as provided in par. (c), there are exempt from the taxes imposed by this subchapter the gross receipts from the sales of, and the storage, use or other consumption of, food, food products and beverages for human consumption.

Administrative Code

Tax 11.65 Admissions. (1) TAXABLE SALES.

* * *

(c) Admissions to customer participation events such as swimming, skiing, bowling, skating, bingo, golfing, curling, dancing, card playing, hayrides, hunting, fishing, and horseback or pony riding are taxable.

(d) The charge for the privilege of fishing in fish ponds is taxable, even if the charge is based in whole or in part on the pounds or size of fish caught. The charge for the privilege of hunting in shooting preserves, pheasant farms and fenced area bird and animal farms is also taxable, even if the charge is based in whole or in part on the number of game birds or animals taken.

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. Trophy fees charged by petitioner are subject to the sales tax under section 77.52(2)(a)2 of the Statutes. *Tollaksen v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-184, 10 WTAC 92 (1975).

3. To the extent the trophy fees are not taxable under section 77.52(2)(a)2, they are subject to the sales tax as gross receipts from the sale of tangible personal property under section 77.52(1) of the Statutes.

4. Petitioner has failed to show that the trophy fees it collected amount to payment for food for human consumption under section 77.54(20) of the Statutes.

5. The defense of laches does not apply to respondent's assessment, because petitioner does not come to the Commission with clean hands and respondent acted within the statute of limitations.

OPINION

The primary issue for the Commission is whether the fees charged by petitioner, other than the hunt fees, are subject to the sales tax. Petitioners bear the burden to show that respondent's assessment is incorrect. *Woller v. Dep't of Taxation*, 35 Wis. 2d 227, 232 (1967). To the extent that this case involves an imposition statute, the tax cannot be imposed without clear and express language, with all doubts or ambiguities being resolved against taxability. *Kearney & Trecker Corp. v. Dep't of Revenue*, 91 Wis. 2d 746, 753 (1979); *Department of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48-49 (1977). To the extent this case involves a tax exemption, petitioner bears the burden of showing that it falls clearly within the terms of the exemption, with all doubts or ambiguities resolved in favor of taxability. *Department of Revenue v. Greiling*, 112 Wis. 2d 602, 605 (1983).

Petitioner concedes that the hunt fees are taxable under section 77.52(2)(a)2 of the Statutes. However, petitioner strenuously argues that the remaining fees at issue do not fall squarely under this statute or the administrative rule promulgated to implement this statute, TAX 11.65(1)(c)-(d). In particular, petitioner focuses on the fact that the trophy fee is based on the number and/or weight of the animals taken. Petitioner argues that there is nothing in section 77.52(2)(a)2, TAX 11.65(1)(c)-(d), or the case law

interpreting the statute, that imposes a sales tax on the number or weight of the game taken.

Petitioner seeks not only to distinguish the present case from the facts of *Tollaksen*, but also argues that we should reverse *Tollaksen*. In *Tollaksen*, the Commission held that a fee for fish caught based on the length of the fish was subject to the sales tax by section 77.52(2)(a)2. We certainly see no reason to reverse *Tollaksen*. Moreover, we can see no material difference between a fee based on the length of a fish caught or a fee based on the weight of an animal taken.

Even if *Tollaksen* did not apply and if the trophy fee is not a fee subject to section 77.52(2)(a)2, then it is payment for tangible personal property. As such, it is clearly subject to the sales tax under section 77.52(1) of the Statutes.

Under the heading of "Equal Protection," petitioner argues that applying the sales tax to petitioner would be treating game farm owners less favorably than grocers. To the extent petitioner is making an argument under the equal protection clauses of the federal and state constitutions, we cannot take this argument seriously. The Wisconsin Supreme Court has set forth a five-part analysis when considering an equal protection challenge to a statute. *GTE Sprint Comm. Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 194 (1990). Petitioner's argument does not begin to address these factors.

More likely, petitioner is arguing that the sales tax exemption that applies to the sale of certain food should apply to petitioner. We cannot conclude, however, that petitioner has brought itself within the plain language of the exemption for food, food

products, and beverages for human consumption found in section 77.54(20) of the Statutes.

In another case involving a game farm, *Toubl Game Bird Farms v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-120 (WTAC 1982), the Commission concluded that the exemption under section 77.54(20) applied to the game farm's sale of dressed pheasants to individuals to be used as food. *Id.* at 11,748. This exemption does not apply here because petitioner has not shown that a trophy fee is payment for food for human consumption. In fact, the record indicates just the opposite. First, it appears that the trophy fee is really a fee for the trophy status of the animal taken. Second, since the animals are only field dressed, we cannot conclude that the animals are food for human consumption.

In an impressive display of chutzpah, petitioner argues that respondent's assessment is barred by laches because respondent possessed petitioner's income tax returns for the period under review but failed to notify petitioner of his obligation to pay sales taxes. By conceding that the hunt fees were subject to the sales tax, petitioner is, in effect, admitting that it should have obtained a seller's permit and filed sales tax returns during the period under review. Respondent may issue a sales and use tax assessment for a period of time within four years following the filing date of a sales and use tax return for that period. *Zignego Co., Inc. v. Dep't of Revenue*, 211 Wis. 2d 819, 826-27 (Ct. App. 1997) (construing section 77.59(3) of the Statutes). Because petitioner never filed sales and use tax returns for the period under review, respondent's statute of limitations

has not yet begun to run and, therefore, respondent's assessment is not barred by the statute of limitations.

Laches is an equitable remedy. *Kenosha County v. Town of Paris,* 148 Wis. 2d 175, 188 (Ct. App. 1988). A party seeking an equitable remedy must come to the court with clean hands and will not obtain relief from a predicament that is of the party's own making. *Hendricks v. M.C.I., Inc.*, 152 Wis. 2d 363, 368 (1989). Here, respondent's assessment was able to reach back to 1995 precisely due to petitioner's failure to comply with the law and file sales and use tax returns beginning in 1995. Petitioner does not come to the Commission with clean hands.

Laches is not a rule that limits the time for bringing an action, but rather is a defense to an action based upon a plaintiff's unreasonable delay. *Vogel v. Grant-Lafayette Electric Coop.*, 195 Wis. 2d 198, 213 (Ct. App. 1995). The elements of laches are (1) an unreasonable delay, (2) lack of knowledge by the person asserting laches that the other party would assert its right, and (3) prejudice to the person asserting laches if the suit is maintained. *Smart v. Dane County Board of Adjustments*, 177 Wis. 2d 445, 458 (Ct. App. 1993).

We conclude that when respondent acts within the statute of limitations prescribed by the legislature, it is never unreasonable under the doctrine of laches. For these reasons, we reject petitioner's assertion of laches.

ORDER

1. Petitioner's motion for summary judgment is denied.

2. Summary judgment is awarded to respondent under section 802.08(6) of the Statutes.

3. Respondent's action on the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 7th day of April, 2004.

WISCONSIN TAX APPEALS COMMISSION

Don M. Millis, Commission Chairperson

Thomas M. Boykoff, Commissioner

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