

**STATE OF WISCONSIN**  
**TAX APPEALS COMMISSION**

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**OSHKOSH TRUCK CORPORATION (P)**  
P. O. Box 2566  
Oshkosh, WI 54903-2566,

**DOCKET NO. 03-I-343 (P)**

Petitioner,

vs.

**RULING AND ORDER**

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

Respondent.

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**DIANE E. NORMAN, COMMISSIONER:**

This matter comes before the Commission for a ruling on the motion filed on November 10, 2004 by respondent, Wisconsin Department of Revenue ("Department"), to dismiss those portions of the Amended Petition filed on July 22, 2004 by petitioner, Oshkosh Truck Corporation ("petitioner"), relating to claims for research credits under the doctrine of equitable recoupment.

Petitioner is represented by Attorneys Timothy C. Frautschi, Maureen A. McGinnity, and Timothy L. Voigtman of Foley & Lardner LLP. The Department is represented by Attorney John R. Evans.

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

**FINDINGS OF FACT**

1. On July 5, 2001, the Department issued an assessment notice to petitioner for additional franchise tax for the tax years ending September 30, 1996 and September 30, 1997<sup>1</sup> in the amount of \$266,207.38. Under date of August 29, 2001, petitioner filed a timely petition for redetermination, which was granted in part and denied in part by the Department on October 27, 2003.

2. On December 22, 2003, petitioner filed a timely appeal with the Wisconsin Tax Appeals Commission.

3. On July 22, 2004, petitioner filed a motion to amend the petition. The Commission granted the motion by an Order dated July 26, 2004.

4. The Amended Petition stated a claim, for the first time, to offset the additional franchise tax assessed by the Department with credits for qualified research expenditures for 1996 and 1997, even though the statute of limitations to claim the credits under Wis. Stat. §§ 71.28(4) and 71.75(2) had lapsed. Petitioner claimed that the credits should be allowed as an equitable offset under the doctrine of equitable recoupment.

5. The Department filed a motion on November 10, 2004 for Partial Summary Judgment or, in the alternative, an order dismissing those portions of petitioner's Amended Petition relating to "stale" claims for research credits on the basis that the doctrine of equitable recoupment is not applicable in this case.

## **APPLICABLE WISCONSIN STATUTES**

### **71.28 Credits.**

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<sup>1</sup> All facts relate to the period under review for tax years ending September 30, 1996 and September 30, 1997, unless otherwise stated.

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**(4) RESEARCH CREDIT.**

(a) *Credit.* Any corporation may credit against taxes otherwise due under this chapter an amount equal to 5% of the amount obtained by subtracting from the corporation's qualified research expenses, as defined in section 41 of the internal revenue code . . . .

\* \* \*

(h) *Timely claim.* No credit may be allowed under this subsection unless it is claimed within the period specified in s. 71.75(2).

**71.75 Claims for refund.**

\* \* \*

(2) With respect to income taxes and franchise taxes . . . refunds may be made if the claim therefor is filed within 4 years of the unextended date under this section on which the tax return was due.

**ISSUE INVOLVED**

Is petitioner allowed to claim, under the doctrine of equitable recoupment, allowable research credits under Wis. Stat. § 71.28(4) to offset additional franchise tax assessed by the Department after the statute of limitations found in Wis. Stat. §§ 71.28(4)(h) and 71.75(2) has lapsed?

**CONCLUSION OF LAW**

Under the doctrine of equitable recoupment, petitioner may offset additional franchise tax assessed by the Department with any allowable research credits under Wis. Stat. § 71.28(4), which would otherwise be barred by the statute of limitations under Wis. Stats. §§ 71.28(4)(h) and 71.75(2).

**OPINION**

### *Doctrine of Equitable Recoupment*

The doctrine of equitable recoupment is a judge-made exception to the legislative policy of barring claims for and against the government in tax matters by statutes of limitations. *Wisconsin Department of Revenue v. Van Engel*, 230 Wis. 2d 607, 601 N.W. 2d 830 (1999). A seminal case applying the doctrine of equitable recoupment is *Bull v. United States*, 295 U.S. 247 (1935), where the Supreme Court permitted the return of monies after the statute of limitations had run, but cautioned that the doctrine was limited to disputes "arising out of the same transaction." *Id.* at 261.

In Wisconsin, equitable recoupment is applicable in two situations where there has been a tax assessment or refund claim. First, the State may invoke the doctrine to reduce a timely tax refund claim by the amount of a deficiency assessment barred by the statute of limitations. *American Motors Corp. v. Dep't of Revenue*, 64 Wis. 2d 337, 351, 219 N.W. 2d 300 (1974).

Similarly, if the State makes a timely additional assessment against a taxpayer, the taxpayer may credit a refund claim that would ordinarily be barred by the statute of limitations against the deficiency. *Dairyland Harvestore v. Dep't of Revenue*, 151 Wis. 2d 799, 806-07, 447 N.W. 2d 56 (Ct. App. 1989) (citing *American Motors Corp.*, *supra*, at 351).

In applying the doctrine of equitable recoupment, the Wisconsin Supreme Court adopted the "same transaction" test used in *National Cash Register Co. v. Joseph*, 299 N.Y. 200, 86 N.E. 2d 561 (1949).

The result of this broader test or definition is that either the state or the taxpayer can counter with a "stale" claim, meaning one barred by the statute of limitations, so long as the same year or income tax period is involved.

*American Motors Corp., supra*, at 353.

Therefore, the "same transaction" test must be applied to determine if equitable recoupment can be applied to allow petitioner's stale refund claims for 1996 and 1997 to offset the Department's assessment for those same years. More precisely, it must be determined whether petitioner's time-barred refund claims apply to "the same year or income tax period" as the Department's timely additional assessments.

Petitioner's stale claims for credit, in this case, satisfy the test of "the same year or income tax period" required to claim equitable recoupment. It is not disputed that the Department assessed additional taxes for 1996 and 1997. These are the identical years and distinct income tax periods for which petitioner has stale refund claims for research tax credits it seeks to offset.

*Wis. Stat. § 71.28(4)(h) Statute of Limitations*

The Department argues that the doctrine of equitable recoupment is not applicable in this case because, in enacting the research credit legislation<sup>2</sup>, the legislature had restricted any actions in equity by the specific language in Wis. Stat. § 71.28(4)(h), which states:

No credit may be allowed under this subsection unless it is claimed within the period specified in § 71.75(2).

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<sup>2</sup> Wis. Stat. § 71.28(4) was originally enacted as part of 1983 Wis. Act 27 as Wis. Stat. § 71.09(12r)(a), and was recodified in 1987 Wis. Act 312.

As stated above, the doctrine of equitable recoupment is a judge-made exception to the legislative policy of barring claims for and against the government in tax matters by statutes of limitations. *Van Engel, supra*. Such a defense is never barred by the statute of limitations so long as the main action is itself timely. *Bull v. United States, supra*, at 262.

The Department argues that Wis. Stat. § 71.28(4)(h) was enacted after the doctrine of equitable recoupment was adopted in Wisconsin in *American Motors, supra*,

and that the legislature intended to prevent the application of the doctrine for claims of research credits. “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis. 2d 633, 662, 681 N.W. 2d 110 (2004). When the language of the statute is unambiguous, the Court must apply the plain meaning. *See id.* A statute is ambiguous only if reasonably well-informed persons can reasonably understand the statute in two or more manners. *Id.* at 665. Wis. Stat. § 71.28(4)(h) is a statute that limits the amount of time a taxpayer is allowed to claim research credits and nothing more. There is nothing in the plain language of this statute of limitations that would make it more restrictive than the general statute of limitations for tax cases found in Wis. Stat. § 71.75(2). It is simply a statute of limitations to claim research credits, and refers to the general statute of limitations time period found in Wis. Stat. § 71.75(2) of four years. Therefore, application of the doctrine of equitable recoupment is not prevented by Wis. Stat. § 71.28(4)(h).

This does not mean that the statute of limitations found in Wis. Stat. § 71.28(4)(h) is meaningless. The doctrine of equitable recoupment does not ignore the statute of limitations and allow petitioner to claim a refund for research credits as if they had been timely claimed. It only allows petitioner to claim the credit as a defense or equitable offset against the additional franchise tax assessment if the credits arise out of the same year or income tax period. Petitioner would not be allowed any refund over the amount of the additional assessment. The court in *American Motors* found "both equity and equality of treatment of the contending parties served by [this]

approach." *American Motors, supra*, at 353.

*Due Diligence or Unclean Hands*

The Department also argues that the doctrine of equitable recoupment cannot apply to this case because petitioner simply failed to claim the credits within the statute of limitations period. The Department argues that this failure to act with due diligence or unclean hands prevents the application of equity.

The doctrine of "unclean hands" does not apply to this case. In order for petitioner to be denied relief in an equitable action for having "unclean hands," petitioner must have caused the harm from which petitioner seeks relief by petitioner's own wrongful or unlawful course of conduct. *Security Pacific National Bank v. Ginkowski*, 140 Wis. 2d 332, 410 N.W. 2d 589 (Ct. App. 1987). Petitioner's actions were not wrongful; rather, petitioner simply failed to claim the credits within the statute of limitations time period.

Petitioner's lack of due diligence also does not prevent the application of the doctrine of equitable recoupment. It is precisely this type of situation to which the doctrine has been applied:

[I]f a taxing authority makes a timely additional assessment against a taxpayer, the taxpayer may credit a refund claim that would ordinarily be barred by the statute of limitations against the deficiency.

*Dairyland Harvestore, supra*, at 806-807.

Moreover, the Wisconsin Court of Appeals has stated that a taxpayer was not barred from making an equitable claim for an offset to a reassessment by the

Department, even though the taxpayer failed to make the claim until after filing a petition with the Tax Appeals Commission. *Nelson Brothers Furniture Corporation v. Dep't of Revenue*, 152 Wis. 2d 746, 449 N.W. 2d 328 (Ct. App. 1989).

In this case, the Department has made a timely assessment against petitioner. Now, petitioner may make a claim for any allowable research credits that would normally be barred by the statute of limitations as an offset against that deficiency under the doctrine of equitable recoupment.

Therefore,

**IT IS ORDERED**

The Department's motion to dismiss those portions of petitioner's Amended Petition relating to "stale" claims for research credits is denied.

Dated at Madison, Wisconsin, this 11th day of February, 2005.

**WISCONSIN TAX APPEALS COMMISSION**

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Jennifer E. Nashold, Chairperson

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Diane E. Norman, Commissioner