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Dist F.1 Sec. 1-22-98

STATE OF WISCONSIN | CIRCUIT COURT Branch 6 | DANE COUNTY

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

vs.

TRIERWEILER CONSTRUCTION AND SUPPLY CO., INC.,

Respondent.

MEMORANDUM DECISION AND ORDER (Admin. Review)

Case No. 97-CV-1444

In this judicial review of an administrative decision, the Department of Revenue contends that shipping costs paid by the buyer of property directly to its carriers are part of the sales price, hence subject to a use tax, even though the sellers of the goods had nothing to do with the procurement or payment of the shipping arrangements apart from loading the property onto the carriers' trucks. The Tax Appeals Commission rejected the Department's position and the Court affirms that decision.

REVIEW OF RECORD

The material facts are relatively straightforward and undisputed: Trierweiler Construction is a Wisconsin corporation engaged in the business of highway construction. Beginning in 1990, it manufactured ready-mix concrete, some of which it used for its own projects, most of which was sold to other parties.

During the period under audit, Trierweiler purchased cement from various suppliers in Wisconsin for use at either its road construction sites or its concrete manufacturing plant. These suppliers were retailers of the cement. Tax Appeals Commission

(TAC) Decision, Finding # 10. The suppliers added sales tax to the amount they charged for the cement. Finding # 6.

Trierweiler's suppliers were not obliged to deliver the cement, nor in any way were they employed to provide transportation. Finding # 5. The suppliers' charge for the cement to Trierweiler did not include transportation costs for shipment from the suppliers to Trierweiler. Finding # 6. The suppliers never bore any increase or benefitted from any decrease in the transportation costs. Finding # 9.

"The suppliers made the cement available for pickup at and loaded the subject cement into the carriers' vehicles at the suppliers' terminals and silos . . . ." Finding # 5. The carriers were hired by Trierweiler and were completely independent of the suppliers. Finding # 7. These carriers were not engaged in the sale of the cement but merely in the business of hauling it for others. Id. The carriers billed Trierweiler directly for their transportation services and Trierweiler paid them directly. Finding # 8. The carriers did not charge sales tax for the transportation, nor did Trierweiler pay any sales tax for these transportation costs. Id.

Trierweiler stored, used or consumed the cement in Wisconsin. Finding # 10. It has not paid to the Department any use tax on the transportation charges incurred in the shipping of the cement. Id.

On June 9, 1993, the Department issued a notice of assessment which contained several adjustments to Trierweiler's sales and use tax liability for the audit period, 1989 through 1992. Finding #

2. One adjustment was an assessment of a use tax against the transportation costs for shipping the cement. Id.[1] Trierweiler petitioned for redetermination which was denied by the Department on July 15, 1994.

On September 13, 1994, Trierweiler petitioned TAC for review of the assessment. The parties filed cross motions for summary judgment. Trierweiler's motion was granted by TAC on April 30, 1997. TAC held that:

> Transportation charges paid separately to common carriers by petitioner [Trierweiler] for hauling cement purchased by petitioner from petitioner's suppliers are not included in or added to the cement's "sales price," as that term is defined in § 77.51(15)(a), Stats., and therefore, not subject to the use tax under § 77.53(1), Stats.

Decision at 8.

The Department has petitioned for judicial review of that decision.

CONCLUSIONS OF LAW

The only question presented on this review is whether the costs incurred for transporting personal property which are paid by a buyer directly to a carrier which is not the retailer of the property are part of the sales price of the property and, so, subject to a use tax. The facts are undisputed and this review presents only questions of law. Under sec. 73.015(2), Stats.,

[1]The total assessment for all adjustments against Trierweiler was $111,822.21, including interest and penalties. Finding # 2. The assessment for the transportation costs themselves is not clear, although the parties stipulated that penalties were not added to it. Id.

TAC's decisions are reviewed under chap. 227, Stats. The Court shall set aside or modify agency actions, as required, resulting from material errors of law. Sec. 227.57(5), Stats.

The parties disagree as to the degree of deference to be accorded TAC's analysis of the law. The Department contends that no deference should be given because this case is one virtually of first impression. TAC did consider the same issue in Rhinelander Paper Co. v. Dept. of Revenue, ¶ 400-270 at 30,901 (CCH Wis. Tax Rptr. Dec. 19, 1996), and came up with the same answer but that decision, too, has been appealed by the Department. Depending on such factors as whether the legislature has charged an agency with administering or interpreting a statute, the agency's experience and use of its expertise in interpreting a statute, and its consistency in interpreting the statute, reviewing courts will give the agency's interpretation great, due or no particular weight. See Zignego Co., Inc. v. Dept. of Revenue, 211 Wis.2d 817, 820-24 (Ct. App. 1997). The Court need not reach the issue here because regardless of the degree of deference owed to TAC, its decision must be upheld because it is the correct interpretation of the law.

The sales and use tax system is designed to tax sales at the retail level, unless otherwise exempted. Rice Insulation, Inc. v. Dept. of Revenue, 115 Wis.2d 513, 515 (Ct. App. 1983).[2] Sales taxes are levied against the retailer for the privilege of selling. Dept. of Revenue v. Moebius Printing Co., 89 Wis.2d 610, 622

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[2]It is assumed here that Trierweiler was the purchaser at the retail level of the property and services at issue here.

(1979). Use taxes are levied against the buyer on sales which escape the sales tax, 89 Wis.2d at 621-22, notably out of state purchases by Wisconsin residents.

The parties are agreed that the issue involves the interpretation of tax imposition statutes, not tax exemption statutes. Thus:

> [A] tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax.

Dept. of Revenue v. Horne Directory, Inc., 105 Wis.2d 52, 57 (1981) (quotation marks omitted).

Sec. 77.53(1), Stats.(1989-90), imposes the use tax "on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer, at a rate of 5% of the sales price of that property or taxable service."[3] The Department concedes that the cost of transportation services, per se, is not taxable as "taxable services" under sec. 77.52, Stats. However, it contends that the transportation charges Trierweiler paid to its carriers were included in the "sales price" of the property purchased and, therefore, use taxes are owed. The Court disagrees.

Under sec. 77.51(15)(a), Stats.,

> "Sales price" means the total amount for which tangible personal property is sold, leased or rented, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

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[3]The statutory language has since been altered but not in any way material to this case.

* * *

> 3. The cost of transportation of the property prior to its purchase;

* * *

(Emphasis added). The crucial feature of this provision is obvious to TAC and the Court, not to mention Trierweiler--the sales price is the price charged by the seller. This point is perhaps not so obvious to the Department and, so, requires some elaboration.

Sec. 77.53(1), Stats., imposes a use tax on tangible personal property or certain services "*purchased from any retailer*. . . ." A "retailer" is generally the seller of tangible personal property or taxable services. See sec. 77.51(13), Stats. A "purchase" is a transfer of possession, ownership, use or other rights of tangible personal property for consideration. See sec. 77.51(12), Stats. The measure of the tax is based on the "sales price," which is "the total amount for which tangible personal property is sold, leased or rented . . . ." Sec. 77.51(15)(a), Stats. (emphasis added). The "price" is consideration given in exchange for the property. See Webster's Third New International Dictionary, at 1798 (1986). Read as a whole, it is clear that under the statutory scheme, the "sales price" is the consideration paid to the seller of the property by the buyer for the seller's transfer to the buyer of a certain bundle of rights related to the ownership, possession and use of the property in question.[4]

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[4]The idea that the "sales price" is the consideration paid to the seller or retailer of the property is reinforced by the Department's own regulation which defines the "sales price" used for measuring the use tax synonymously with the "gross receipts"

In that context, the buyer's arrangements with and payments to a third party carrier for the transportation of the subject tangible personal property cannot be part of the taxable "sales price" of that property because it is simply irrelevant to the property seller's transfer of the bundle of rights it sold to the buyer. It makes no difference to the seller, and more particularly to the seller's transfer of rights to the buyer, whether the buyer hires some third party carrier to haul away the goods, whether the buyer carries them away in its own trucks, or whether the buyer takes the goods across the street and ships them with a private or public carrier. The Department's assertion that the purchase of the property and the purchase of the transportation are not two separate and distinct transactions is incorrect; they are precisely that because they involve two separate and distinct contractual relationships with different parties, purposes and considerations.[5]

As a result, TAC correctly rejected the Department's position that sec. 77.51(15)(a)3, Stats., which requires the sales price to be measured "without any deduction" for the cost of transportation

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used for measuring the sales tax. Sec. Tax 11.32(1), Wis. Adm. Code. The term "receipts" clearly requires that the retailer received the money or other value in payment. The idea of consideration is also present in the Uniform Commercial Code, sec. 402.106(6), Stats., of which states that "[a] 'sale' consists in the passing of title from the seller to the buyer for a price (s. 402.401)."

[5]This feature distinguishes this case from Harold W. Fuchs Agency, Inc. v. Dept. of Revenue, 91 Wis.2d 283, 286 (Ct. App. 1979), in which the seller had paid the shipping costs, had the right to collect them from the buyer and did so by simply adding them to the bill. Here, by contrast, the buyer is not answerable to the sellers of the merchandise and the sellers are not answerable to the carriers for payment of the transportation costs.

prior to purchase, clearly and expressly includes transportation costs in the "sales price." Under sec. 77.51(15)(a), Stats., it is "the total amount for which tangible property is sold, leased and rented" which is the sales price so unless transportation costs are already included in that figure, there is nothing to deduct. The legislature's careful choice of the term "without any deduction" presupposes that there may be certain transportation charges already in the "sales price" which some taxpayer may be tempted to deduct in calculating the tax owed. These are transportation charges passed on to the buyer by the property retailer itself, whether they are part of the retailer's own costs of obtaining the property or, under the circumstances described in Harold W. Fuchs Agency, Inc. v. Dept. of Revenue, 91 Wis.2d 283, 286, 289-90 (Ct. App. 1979), the retailer's costs for shipping them to the buyer.

As TAC noted, Decision at 9, the Department is not permitted to add to the sales price costs not already reflected in it. The term "without any deduction" does not impose a tax at all, it merely prohibits deducting from the taxable sales price--that is, "the total amount for which tangible property is sold, leased or rented"--the transportation costs and other items to which the phrase refers. The Department simply sidesteps the significance of this language and overlooks the tax scheme's emphasis on the buyer-seller relationship and the notion that the measure of the tax is the consideration for the transaction.

The Department's reliance on sec. 77.51(14r), Stats. (1989-90), is misplaced.[6] That statute states:

> A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller or his agent to the purchaser or his agent, except that <u>for purposes of this subsection</u> a common carrier or the U.S. postal service shall be deemed the agent of the seller, regardless of any f.o.b. point and regardless of the method by which freight or postage is paid.

(emphasis added).[7] The Department asserts that because the sales to Trierweiler were not complete until it acquired possession of the cement at the receiving end of the shipments, the shipping costs were taxable as transportation costs prior to purchase.

This position may have some substance if the carriers are, indeed, agents of the seller so payment to them may be regarded as consideration to the seller. However, common carriers are only agents of the seller "for purposes of this subsection," language that the legislature did not choose serendipitously but to indicate that the carrier is deemed the seller's agent for the express purpose of determining <u>when</u> a transaction involving a transfer of ownership has been completed. Subsection 14r is not relevant to what is included in the "sales price," or even to the agency of the carrier, except to the extent that it identifies when the sale occurs. Thus, regardless of whether the Department is correct in asserting that under sub. 14r the sales were not completed until

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[6]The statute has since been amended solely to remove gender references. Decision at 7 n. 3.

[7]It is assumed that the carriers employed by Trierweiler were common carriers. Decision at 7.

the carriers delivered the cement to Trierweiler, the transportation costs could not have been part of the sales price of the property unless payment of the costs could be regarded as payment or consideration to the seller, such as if the carriers were, as a matter of fact, agents of the seller.[8]

The record clearly establishes that the carriers here were, in fact, not agents of Trierweiler's suppliers. It is undisputed that Trierweiler's contractual relations with its suppliers were completely independent of its contractual relations with its carriers. The suppliers did not make the transportation arrangements, had no right to the payments nor any obligation to make the payments themselves. Thus, apart from the purposes of sub. 14r, that is determining when the sales were completed, the carriers were not sellers or agents of sellers and payments to them were not consideration to the sellers.

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[8]Commissioner Prosser overstates the ambiguity of the applicability of subsection 14r in his concurring opinion at 20-21. In Harold W. Fuchs Agency, 91 Wis.2d at 290, the Court of Appeals clearly held that subsection 14r defines when a sale has been completed for purposes of the entire sales and use tax subchapter. Sec. 77.51(preamble), Stats., expressly provides as much. However, the language of sub. 14r is equally express that common carriers and the postal service are only agents of the seller "for purposes of this subsection" and that purpose is, as discussed, to determine when the sale has been completed. The obvious implication of this language is that for purposes other than that "of this subsection," common carriers and the postal service are not necessarily the agents of the seller, though they may be so as a matter of fact. There is no conflict, hence no ambiguity, between the Court of Appeals' interpretation of sub. 14r in Harold W. Fuchs Agency, involving the scope of the subsection's applicability, and the express language of sub. 14r which provides its meaning in situations where it applies.

Once it is established that the carriers were not the suppliers' agents, the Department is then left with nothing but a leap of faith, completely unsupported by the language of the tax code, that under sub. 14r any cost incurred prior to the completion of the sale by the buyer in relation to its obtaining ownership of the property is subject to a tax on the "sales price," regardless of the party to whom the cost is owed. The defect in this argument is that, as discussed, the statutory language clearly limits the term "sales price" to the consideration for the particular transaction involved. While the costs Trierweiler incurred here may have been consideration for the provision of transportation services, it is undisputed that these services are not taxable. The costs were not consideration for the purchase of the property and the fact that they may have been incurred prior to the completion of the sales did not make them so. Transportation costs separately incurred by the buyer from a carrier independent of the retailer of the taxable property are simply not part of the sales price of tangible personal property.

The decision of the Court of Appeals in Harold W. Fuchs Agency does not help the Department's position because that case involved shipping costs passed on to buyers by suppliers. In that case, a retailer of property, who was obligated to collect sales taxes, protested that the Department made an assessment against it for freight charges paid by it to common carriers and passed on to the customers as a separate item in the bill of sale. 91 Wis.2d at 286. The seller argued that under now sec. 77.51(15)(b)3, Stats.,

the "'Sales price' shall not include . . . [t]ransportation charges separately stated, if the transportation occurs after the purchase of the property is made." The Court of Appeals upheld the assessment, determining that when now sec. 77.51(14r), Stats., is read together with sub. 15(b)3, transportation costs paid to the seller prior to the sale are taxable. Conversely,

> The cost of transportation is not subject to sales tax if possession is transferred but the goods are left with the seller for further processing, such as labelling, painting or engraving, purchaser to pay seller the cost of subsequent transportation.

91 Wis.2d at 290 (emphasis added). Thus, the crucial question was when the sales had been completed because that determined the taxability of supplier paid shipping costs passed on as such to buyers.

TAC explained this in Rhinelander Paper, ¶ 400-270 at 30,903.

> The statutory scheme at issue envisions sales where the personal property vendor pays for the transportation or transportation costs are reflected in the vendor's price. The taxation of such charges hinges on whether the transportation occurred prior to or following the purchase. This scheme does not envision a situation where, as here, the transportation cost is contracted separately by the purchaser with a third party unrelated to the vendor.

It is highly unlikely that the legislature intended to tax transportation costs paid directly to third party carriers pursuant to contracts independent of the supplier when even those transportation costs passed on by the supplier could escape taxation so long as they occur after the sale.

The unreasonableness of the Department's position is demonstrated by the fact that the transportation costs at issue

here are not subject to the sales tax, a point the Department apparently concedes. See Reply Brief at 8-9. As the Department acknowledges, a sales tax cannot be collected from the carriers here, even if Wisconsin residents, because they were not retailers of either personal property or enumerated taxable services. See secs. 77.52(1), (2), Stats., and Finding # 7. While the suppliers did retail the property, they are not required to pay taxes on the transportation costs because those costs were not "gross receipts" which were "received in money or otherwise" by them. See sec. 77.51(4)(a), Stats. Thus, a sales tax on the transportation costs cannot be collected from any source.

Nevertheless, the Department contends that a use tax is imposed on these transportation costs apparently because the sales tax missed them. As the Department notes, the sales and use taxes cover different taxable events; the sales tax applies to the retailer's privilege to sell, while the use tax applies to the buyer's consumption where the sales tax does not reach the transaction. Moebius Printing Co., 89 Wis.2d at 622. This occurs when the buyer makes the purchase from an out-of-state source. Dept. of Revenue v. Milwaukee Brewers, 108 Wis.2d 553, 556 (Ct. App. 1982), aff'd, 111 Wis.2d 571 (1983). The problem with the Department's position is that the transactions here were in-state transactions which the sales tax did reach in precisely the way the legislature intended. Sales taxes were paid on the purchases of the property, Finding ## 4, 6, but, as discussed, the carriers were not required to collect taxes on the transportation costs because,

as the Department itself insists, Reply Brief at 7, it is not trying to impose a tax on transportation services. Since the legislature could have subjected the transportation services here to a sales tax but chose not to, it would frustrate the legislature's purpose to impose a use tax on the cost of those services. The use tax was designed to capture taxes which cannot be reached by the sales tax, not taxes which the sales tax could have reached but were intentionally designed not to reach.[9]

The Court finds unpersuasive the Department's assertion that not permitting it to collect a tax will place Wisconsin retail stores at a competitive disadvantage against out-of-state manufacturers.[10] All transportation costs incurred by dealers and

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[9]The Court also notes that sec. 77.51(14r), Stats., on which the Department relies so heavily to read application of the use tax to the transportation costs here, applies with equal force to the sales tax statutes. Especially given the similarity of the definitions of "sales price" which forms the measure of the use tax and "gross receipts" which forms the basis of the sales tax, see n. 4, above and sec. Tax 11.32(1), Wis. Adm. Code, the Court fails to see, and the Department fails to reveal, how sub. 14r can lead to a use tax but not to a sales tax on the transportation costs at issue here.

It should also be noted that under sec. 77.56(1), Stats., use of property is exempt from the use tax when "the gross receipts from the sale of which are reported to the department in the measure of the sales tax. . . ." Thus, even if the Department could ignore the synonymity of the terms "sales price" and "gross receipts," this exemption prohibits it from collecting an additional use tax on the same transaction from which a sales tax has already been collected even if the measures are different. The exemption also reinforces the conclusion that the purpose of the use tax is to collect taxes on transactions missed by the sales tax, not on transactions the sales tax deliberately avoids.

[10]Sales or use taxes are imposed on the price or receipts of the "retailer," and a manufacturer may be a "retailer" if it makes the sale directly to the ultimate consumer. See sec. 77.51(13), Stats. The Court understands the Department to be making a distinction between manufacturers and dealers.

passed on to buyers as part of the sales price are taxable. Manufacturers have no such costs to pass on whether or not they are Wisconsin residents. It is the buyer's choice to determine where the retail level is and the tax imposed is based on the actual sales price, whether paid to a manufacturer, wholesaler or dealer, not the price that would have been charged had the buyer made the purchase further down, or up, the stream of commerce. Since the sales price will reflect all of the retailer's costs, and not just its transportation costs, the tax system will almost always add some disincentive against purchases from dealers against those directly from manufacturers, resident or not, by the simple fact that dealers pass on costs that manufacturers do not have. Thus, it is not meaningful for the Department to assert that the tax it seeks to impose here is necessary to make the system more equitable between resident dealers and non-resident manufacturers because the system by its very nature of measuring the tax as a percentage of the price adds taxes to sales by all dealers which are not imposed on sales by all manufacturers, resident or not.

The fairness of the tax the Department seeks to impose must be evaluated by comparing retailers at the same level of the stream of commerce and here its argument fails. Since buyers may avoid the tax on transportation costs by making their own arrangements with third party carriers whether the retailer is a Wisconsin resident or not, there is no disparate taxation based on residency, a point

amply demonstrated by the fact that the suppliers here were all Wisconsin residents. Finding # 4.[11]

The Department suggests that allowing transportation costs paid to third party carriers to go untaxed would create a disadvantage to those retailers who must pass on transportation costs with sales and use taxes. However, retailers who might feel disadvantaged by this scheme are free to encourage their customers to arrange for their own transportation. Moreover, permitting the tax would put buyers who employ third party carriers at a competitive disadvantage against buyers who are not subject to the tax, like those who haul goods in their own trucks or those who pay the seller to transport the goods after the transfer of possession as described in Harold W. Fuchs Agency, 91 Wis.2d at 290.[12]

At any rate, it is the task of the legislature, not the Court, TAC or the Department, to determine which market factors will guide the tax policy of the state. Arguments may be made that

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[11]Since the main purpose of the use tax is to collect taxes on out of state purchases by Wisconsin residents, Milwaukee Brewers, 108 Wis. 2d at 556, the fact that residence of the retailer is irrelevant to the avoidance of the tax the Department seeks to impose reinforces the conclusion that the legislature did not, in fact, impose the tax.

[12]Since sub. 14r by its terms only applies to sales "involving a transfer of ownership," even under the Department's interpretation, it cannot make transportation costs part of the "sales price" of leased or rented property. See sec. 77.51(15)(a), Stats. Thus, in cases of taxable property which is capable of being leased or rented as well as sold, the Department's position would also put buyers and sellers at a disadvantage against renters and lessors of the same property. Accepting the Department's position would also put common carriers at a competitive disadvantage against contract carriers because sub. 14r does not apply to the latter.

transportation costs, per se, should be taxed or that the retailer's costs of shipping to buyers, such as those at issue in Harold W. Fuchs Agency, should not be taxed. The question here is whether the tax the Department seeks to impose is pursuant to "clear and express" statutory authorization. TAC determined that it was not and the Court agrees wholeheartedly.

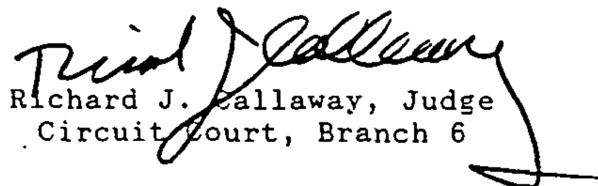
Accordingly,

ORDER

IT IS HEREBY ORDERED that the decision of the Tax Appeals Commission in the above-captioned matter is AFFIRMED.

Dated, at Madison, Wisconsin, this 12 day of December, 1997.

BY THE COURT



Richard J. Callaway, Judge
Circuit Court, Branch 6

cc: Assistant Attorney General Laura Sutherland
Attorney Timothy G. Schally
Attorney David D. Wilmoth
Wisconsin Tax Appeals Commission

CORRESPONDENCE/MEMORANDUM STATE OF WISCONSIN
Department of Revenue

DATE: January 14, 1998

TO: John Evans

FROM: Clay Seth

SUBJECT: Trierweiler Construction & Supply Co, Inc. and Rhinelander Paper Company, Inc.
Dane County Circuit Court Adverse Decisions
Issue: Taxability of Transportation charges arranged by and paid for by purchaser

In response to your January 8, 1998 memo to Diane Hardt and myself, we concur with the recommendation to not appeal these cases further.

CES:14c283

cc: D. Hardt
J. DeYoung
M. Wipperfurth
D. Davis
Conferees