

NORTH STAR VAN AND STORAGE INC S9821 S10105 100285 TAC

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STATE OF WISCONSIN
TAX APPEALS COMMISSION

STATE OF WISCONSIN
DEPARTMENT OF REVENUE

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LEGAL DIVISION

NORTH STAR VAN AND STORAGE, INC.
4545 N. Port Washington Rd.
Glendale, WI 53212,

Petitioner,

vs.

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

Respondent.

DOCKET NOS. S-9821
and S-10105

RULING AND ORDER

(Drafted by
Commissioner Doyle)

The above-entitled matters having come on to be heard by this Commission; the petitioner, North Star Van and Storage, Inc., having appeared by its president, John M. Mallery, Jr., and by its attorney, F. Patrick Matthews; the respondent, Wisconsin Department of Revenue, having appeared by its attorney, Allyn Lepeska; the Commission, having considered the entire record herein, hereby finds, decides and orders as follows:

FINDINGS OF FACT

1. Petitioner is a Wisconsin corporation which is subject to the provisions of Chapter 77 of the Wisconsin Statutes.
2. Petitioner's principal business is the provision of household moving services.
3. By notice dated November 20, 1980, respondent (1) issued an assessment of additional sales and use tax against

petitioner for the period 1976-1979 based upon a field audit which increased the measure of sales tax by -0- and increased the measure of use tax by \$152,193.00 with a total tax due of \$7,521.91, including interest; and (2) issued a denial of a claim for refund for the period 1977 filed by petitioner on October 14, 1980. (An assessment for September, 1977 was issued by respondent based upon an office audit. Petitioner paid the assessment and subsequently filed said claim for refund of amounts paid.)

4. Respondent's November 20, 1980 assessment was based upon a field audit conducted by auditor Richard Zdanowski, which was solely on use tax. The auditor examined only records relating to purchases made by petitioner during the relevant periods and no further examination of petitioner's records. No field audit was done for sales tax purposes.

5. By letter dated January 7, 1981, petitioner petitioned for redetermination of respondent's November 20, 1980 notice.

6. During the six month period following petitioner's filing of its petition for redetermination (pursuant to sec. 77.59(6)(a), Wis. Stats., respondent must notify petitioner of its redetermination within 6 months), respondent sought from petitioner a signed stipulation extending respondent's time period for action on petitioner's petition for redetermination. Petitioner did not respond to respondent's request for extension.

7. On April 19, 1981, petitioner's president suffered a heart attack and was unable to work until September, 1981.

8. Because respondent had received no stipulation for an extension, respondent issued its Notice of Action on June 19, 1981, granting in part and denying in part petitioner's petition for redetermination.

9. In its June 19, 1981 action, respondent, following the Commission's decision in Leight Transfer & Storage Co., Inc. v. Wisconsin Department of Revenue, Docket No. S-5201, November 23, 1979, eliminated the corrugated boxes and container purchases from the use tax measure and increased the sales tax measure by a like amount. In making its determination of the measure of sales tax, respondent used information obtained from the auditor's notes regarding the purchases of containers and boxes, and did no additional field audit of petitioner's gross receipts to determine the proper measure of sales tax. This review was done in the offices of respondent's Appellate Bureau. Respondent's notice further stated that "this revision is being made without actual knowledge of the actual gross receipts from sales of corrugated boxes and containers to your customers. If the actual gross receipts of such sales were furnished, we would adjust the amount due to reflect actual rather than estimated sales of corrugated boxes and containers."

10. The June 19, 1981 redetermination showed a revised measure of use tax of \$44,876.00 and a revised measure of sales tax of \$107,317.00. The total sales and use tax due was \$7,841.52 including interest.

11. Petitioner did not appeal from respondent's June 19, 1981 Notice of Action, and the assessment became delinquent on August 21, 1981.

12. Respondent commenced proceedings for revocation of petitioner's Seller's Permit, and by notice dated November 30, 1981, respondent ordered petitioner's Seller's Permit revoked as of December 31, 1981.

13. In order to keep its Seller's Permit, petitioner paid the sales and use tax deficiency on January 15, 1982 under protest.

14. By letter dated January 7, 1983, petitioner filed a claim for refund of sales tax paid on January 15, 1982.

15. By notice dated February 18, 1983, respondent denied petitioner's claim for refund on the grounds that the claim included a period previously closed by a field audit by respondent.

16. By letter dated March 28, 1983, petitioner petitioned for redetermination of respondent's February 18, 1983 action.

17. On April 4, 1983, petitioner filed a Petition for Review with the Commission appealing respondent's February 18, 1983 action, which is Docket No. S-9821, herein.

18. By Notice dated August 4, 1983, respondent denied petitioner's petition for redetermination.

19. On September 12, 1983, petitioner filed with the Commission a Petition for Review of respondent's August 4, 1983 action, which is Docket No. S-10,105, herein.

20. An agreement between respondent and the Wisconsin Movers Association was reached on June 23, 1983 regarding the treatment of corrugated boxes and packing materials, under the Wisconsin sales and use tax laws. The gist of said agreement was to withdraw sales tax assessments against movers with appeals pending for periods prior to January 1, 1980 on corrugated boxes and packing materials on the understanding that such movers would be liable for sales tax on such items for the period of January 1, 1980 to the effective date of legislation on this issue.

21. Under subparagraph (2)(e) of the June 23, 1983 settlement agreement, the petitioner's appeals at issue herein were specifically stated to not be a part of the settlement. Had petitioner appealed to the Commission from respondent's June 19, 1981 action, petitioner, as a mover, would have been subject to such settlement, and the assessment of sales tax at issue herein would have been withdrawn by respondent.

22. Respondent has brought motions to dismiss petitioner's Petitions for Review as to both docket numbers herein on the grounds that the petitioner's Petitions for Review were not timely filed and/or the Petitions for Review relate to periods previously closed by field audit and payment.

23. Docket Nos. S-9821 and S-10,105 were consolidated for purposes of hearing and decision.

WISCONSIN STATUTES INVOLVED

Section 73.01

"(4)(a) Subject to the provisions for judicial review contained in s.73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and ss.70.38(4)(a), 70.64, 70.995(8), 71.12, 72.86(4), 76.38(12)(a), 76.39(4)(c), 76.48(6), 77.26(3), 77.59(6)(b), 78.22, 139.03(4), 139.315 and 139.78. Whenever with respect to a pending appeal there is filed with the commission a stipulation signed by the department of revenue and the adverse party, under s.73.03(25, agreeing to an affirmance, modification or reversal of the department's position with respect to some or all of the issues raised in the appeal, the commission shall enter an order affirming or modifying in whole or in part, or canceling the assessment appealed from, or allowing in whole or in part or denying the petitioner's refund claim, as the case may be, pursuant to and in accordance with the stipulation filed. No responsibility shall devolve upon the commission, respecting the signing of an order of dismissal as to any pending appeal settled by the department without the approval of the commission."

"(5)(a) Any person who is aggrieved by a determination of the state board of assessors under s.70.995(8)(a) or who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department may, within 60 days of the determination of the state board of assessors or, in all other cases, within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department and the number of copies of the petition required by rule adopted by the commission. The clerk of the commission shall transmit one copy to the department of revenue and to each party. In the case of appeals from manufacturing property assessments, the person assessed shall be a party to a proceeding initiated by a municipality. At the time of filing the petition, the petitioner shall pay to the commission a \$5 filing fee which the commission shall deposit in the general fund. Within 30 days after such transmission the department, except for petitions objecting to manufacturing property assessments, shall file with the clerk of the commission an original and the number of copies of an answer to the petition required by rule adopted by the commission and shall serve one copy

on the petitioner or the petitioner's attorney or agent. Within 30 days after service of the answer, the petitioner may file and serve a reply in the same manner as the petition is filed. Any person entitled to be heard by the commission under s.76.38(12)(a),76.39(4)(c) or 76.48 may file a petition with the commission within the time and in the manner provided for the filing of petitions in income tax cases. Such papers may be served as a circuit court summons is served or by certified mail. For the purposes of this subsection, a petition for review is considered timely filed if mailed by certified mail in a properly addressed envelope, with postage duly prepaid, which envelope is postmarked before midnight of the last day for filing."

Section 77.59

"(4)(a) A claim for refund may be made within 2 years of the determination of a tax assessed by office audit if the tax was not protested by the filing of a petition for redetermination and the reporting period had not been closed by field audit prior to the filing of the claim. A claim is timely if it fulfills the requirements under s.77.61(14). No claim may be allowed under this paragraph for any tax self-assessed by the taxpayer."

CONCLUSIONS OF LAW

1. The Petition for Review in Docket No. S-9821 was prematurely filed with the Commission, prior to respondent's issuance of its redetermination of respondent's denial of claim for refund. Pursuant to secs. 73.01(4)(a) and (5)(a), Wis. Stats., the Commission has only the authority to review respondent's actions in petitions for redeterminations, see W.A. Krueger Company v. Wisconsin Department of Revenue, Docket No. I-9743 and I-9943, October 5, 1983. Respondent has shown good and sufficient grounds for the granting of its motion to dismiss said Petition.

2. As to Docket No. S-10,105, petitioner met the requirements of sec. 77.59(4)(a), Wis. Stats., in the filing of its

claim for refund and is entitled to have its claim for refund considered by respondent on its merits. Therefore, as to said Docket, respondent has not shown good and sufficient grounds for the granting of its motion to dismiss.


Therefore,

IT IS ORDERED

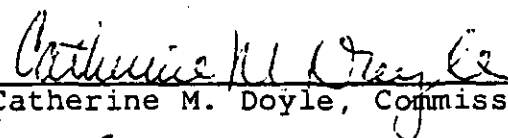
That the Petition for Review in Docket No. S-9821 be hereby dismissed. It is further ordered that respondent's motion to dismiss the Petition for Review in Docket No. S-10,105 is denied and the matter is remanded to respondent for consideration of petitioner's claim for refund filed with respondent on January 7, 1983 on the merits.

Dated at Madison, Wisconsin, this 2nd day of October, 1985.

WISCONSIN TAX APPEALS COMMISSION


John P. Morris, Chairman


Thomas R. Timken, Commissioner


Catherine M. Doyle, Commissioner


William Bradford Smith, Commissioner


Mary Wagner-Malloy, Commissioner

STATE OF WISCONSIN

TAX APPEALS COMMISSION

 NORTH STAR VAN AND STORAGE, INC.,
 Petitioner,
 vs.
 WISCONSIN DEPARTMENT OF REVENUE,
 Respondent.

DOCKET NOS.S-9821
 and S-10105

O P I N I O N

The only issue before the Commission is whether petitioner met the requirements of sec. 77.59(4)(a), Wis. Stats. in the filing of its Claim for Refund of sales taxes paid, dated January 7, 1983. Respondent has raised additional issues regarding the timeliness of the appeal and admission of the validity of the sales tax by payment of the liability, but these issues are irrelevant if the requirements of sec.77.54(4)(a) are met. The Commission holds that the petitioner has met the requirements of said statutory section and that its Claim for Refund at issue should be considered on its merits by respondent.

Sec. 77.59 (4)(a),Wis. Stats., provides as follows:

"A claim for refund may be made within 2 years of the determination of a tax assessed by office audit if the tax was not protested by the filing of a petition for redetermination and the reporting period had not been closed by field audit prior to the filing of the claim. A claim is timely if it fulfills the requirements under s.77.61(14). No claim may be allowed under this paragraph for any tax self-assessed by the taxpayer."

In order to be entitled to file a claim for refund pursuant to sec. 77.54(4)(a), petitioner must show that three requirements were met: (1) the claim for refund must have been filed within two years of the determination of the tax assessed; (2) the tax must not have been protested by the filing of a petition for redetermination and (3) the reporting period must not have been closed by field audit or, a similar requirement, the assessment must have been by office audit.

The Commission must first determine the date of respondent's "determination" of the sales tax at issue within the meaning of sec. 77.59(4)(a). Respondent contends that the "determination" was made in its November 20, 1980 notice entitled "Notice of Sales and Use Tax Deficiency Determination; in which the original use tax was assessed. Petitioner contends that the sales tax was first determined in respondent's June 19, 1981 Notice of Action, wherein respondent changed its theory of taxation on corrugated boxes and containers from use tax measure to sales tax measure.

In Department of Revenue v. Moebius Printing Co., Wis. 2d 610, at page 622 (1979), the Wisconsin Supreme Court discussed the relationship between the Wisconsin use and sales taxes stating that "although the use and sales taxes are complimentary and supplementary, the scope of the use tax is not merely a function of the scope of the sales tax. The two are separate taxes. (citation omitted). The taxes cover different

events involving the same kinds of tangible personal property or services."

In his notes, respondent's auditor specifically stated that his audit related only to use tax and no audit of petitioner's gross receipts for sales tax purposes was made. A determination of use tax as to a certain type of transaction does not constitute a determination of sales tax on the same transaction.

Respondent's action in its June 19, 1981 Notice of Action was far more than a redetermination of taxes previously assessed-- its action constituted an original determination of sales tax.

The date of the determination of the sales tax at issue being June 19, 1981, petitioner's Claim for Refund was filed within two years of such determination. Further, petitioner did not protest the determination by the filing of a petition for redetermination.

The Commission next must decide whether respondent's June 19, 1981 determination of sales tax was by office audit or by field audit.

In making its determination of the measure of sales tax, respondent estimated the gross receipts based upon the original auditor's notes regarding petitioner's purchases of boxes and containers. No additional field audit was conducted of petitioner's gross receipts from the sale of the boxes and containers to its

customers. The review was done entirely in the offices of respondent's Appellate Bureau.

In its cover letter with the redetermination, respondent explained to petitioner that the revision was made "without actual knowledge of actual gross receipts" and, further, that respondent would consider the actual gross receipts if furnished by petitioner.

Respondent contends that the original determination of use tax was from a field audit and that a redetermination using field audit materials does not change the character of a field audit to an office audit.

The Wisconsin Supreme Court in Newport Company v. Tax Commission, 219 Wis. 293, at 299 (1935), addressed the nature of a field audit and what it requires:

The field audit, however, contemplates a verification of the facts as reported in the return of the taxpayer, and a complete review of the taxpayer's books for the purpose of establishing accurately and finally the facts with respect to its income. The field audit was therefore intended to foreclose any further inquiry into the facts relative to the taxpayer's income for the year or years under audit.

Respondent's June 19, 1981 action raised for the first time a sales tax liability on boxes and containers. By its own admissions in the notice itself, the determination was by no means final or accurate but rather was an estimate based upon respondent's own records. Under the Supreme Court's definition of a field audit, respondent's determination would not qualify as such.

Therefore, the Commission has determined the sales tax assessment at issue herein was based upon an office audit, and not closed by field audit.

Respondent has argued that respondent acted properly in adjusting the sales tax at the Appellate level. The Commission does not hold that respondent's action was improper, arbitrary or capricious. In fact, under the circumstances presented, respondent's action was reasonable and logical.

However, respondent's procedure of making an initial determination of sales tax or the appellate level was unusual, and petitioner must not be deprived of the right to file a Claim for Refund under sec. 77.59(4)(a) because circumstances dictated that respondent follow other than normal procedures.

Submitted by:

Catherine M. Doyle

Catherine M. Doyle, Commissioner