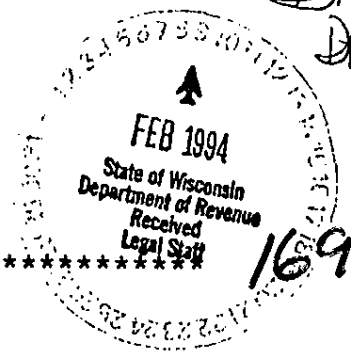
LOVE & VOSS & MURRAY 93R242 020894 TAC

Dist 2 Sup 3/15/94

DAN DAVIS



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STATE OF WISCONSIN

TAX APPEALS COMMISSION

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LOVE, VOSS & MURRAY, a Partnership *
241 Wisconsin Avenue
Waukesha, WI 53186 *

Petitioner, * **RULING AND ORDER**

vs. * Docket No. 93-R-242

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

Respondent. *

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MARK E. MUSOLF, COMMISSION CHAIRPERSON:

This matter is before us on cross motions by the parties for summary judgment, together with affidavits and briefs. On the briefs for the petitioner is Attorney George W. Love, and for the respondent is Attorney Michael J. Buchanan.

Since it appears that no material facts are in dispute, an award of summary judgment is required by § 802.08, Stats., if either party is entitled to the same as a matter of law.

As set forth below, we award summary judgment to the respondent.

FACTS

Petitioner is a Wisconsin partnership engaged in the practice of law, with offices in Waukesha. As such, it filed a Form 3S Wisconsin Partnership Temporary Surcharge return for calendar 1991 on which it reported Wisconsin net business income that resulted in the calculation of an amount owing of $694.22.

The petitioner refused to pay the same, declaring that the surcharge was unconstitutional, which resulted in the assessment at issue and now before this commission.

The petitioner maintains that secs. 77.92, 77.93, 77.94, 77.45 and 77.96, stats.(1991) are unconstitutional as violative of the Fourteenth Amendment to the United States Constitution and Article I, §1 of the Wisconsin Constitution by denying petitioner the equal protection of the laws, and further violative of the tax uniformity provisions of Article VIII, §1 of the Wisconsin Constitution.

More specifically, petitioner claims the law taxes various entities "in a substantially disparate fashion, solely on the basis of whether they are or are not a noncorporate entity engaged in farming..." and that no rational justification exists for excluding noncorporate farming entities from the recycling surcharge.

Respondent, besides asserting that this commission lacks jurisdiction to rule on the constitutionality of the statutes in question, relies on the strong presumption of constitutionality for tax matters under the case law as well as the legislature's broad power to classify as established by case law.

RULING

Because no facts are in dispute, sec. 802.08, stats. requires that we award summary judgment to the moving party entitled thereto as a matter of law. We believe respondent is so entitled.

The statutory scheme attacked by petitioner imposes, "[f]or the privilege of doing business in this state," a "temporary recycling surcharge" which is differentially calculated for four categories of taxpayers: (1) "C" corporations; (2) "S" corporations; (3) sole proprietorships, partnerships, estates and trusts not engaged in farming; and (4) sole proprietorships, partnerships, estates and trusts engaged in farming.

In the first three categories, the surcharge is calculated as a percent either of the Wisconsin income tax (for category 1) or of net income (for categories 2 and 3), with a minimum surcharge of $25 and a maximum of $9,800.

But, petitioner complains, in category 4 the surcharge is a nominal $25 regardless of income or tax and is imposed only if net income exceeds $1,000, thus denying petitioner (who falls in category 3) the equal protection of the laws merely because petitioner is not engaged in farming. Petitioner further protests that no rationale exists to exclude farmers from the recycling surcharge in light of their considerable generation of recyclable materials and their use and generation of chemicals and toxic wastes.

Although petitioner has made a forceful argument in support of its position, we find the law to be overwhelmingly in respondent's favor as to the constitutionality of the statutes under review.

Respondent's brief quotes from and cites numerous Wisconsin and United States Supreme Court cases which emphasize the

onerous burden on one challenging a state tax statute on equal protection grounds.[1] Indeed, both parties quote from Simanco, Inc. v. Department of Revenue, 57 Wis.2d 47 (1973) in that regard.

Particularly telling in the Simanco opinion, which was written over twenty years ago but is as solid today as then, is a quotation from 82 Harvard Law Review, published in 1969, which sums up the U.S. Supreme Court's approach even then to challenges such as the one before us:

> It would seem, then, that in fiscal and regulatory matters, the [Supreme] Court has not only entertained a presumption of constitutionality and placed the burden on the challenging party to show that the law has no reasonable basis, but has in fact almost abandoned the task of reviewing questions of equal protection. 57 Wis.2d at 56.

We also find definitive guidance as to classification in Country Motors v. Friendly Finance Corp., 13 Wis.2d 475, 485 (1961), where the court reiterates its pronouncement in a 1941 case that "the classification made by the legislature is presumed to be valid unless the court can say that no state of facts can reasonably be conceived that would sustain it."

The respondent has shown not one "state of facts" but two which would justify the classification scheme of which petitioner complains. First, both farm income and numbers of farms in Wisconsin (most of which are individual or family operations) were in decline prior to the legislature's action, providing one

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[1] Nordlinger v. Hahn, 505 U.S. ____, 120 LEd 2d 1 (1992); Lehnhausen v. Lake Shore Auto Parts Company, 410 U.S. 356 (1973); Harper v. Virginia Board of Elections, 383 U.S. 663, 666.

rationale for easing the burden of the surcharge on farm entities in economic trouble in "America's Dairyland."

Second, because these smaller family and individual farm operations are more subject to the vagaries of the commodity marketplace and government price supports, they are not able to pass the surcharge on to consumers by raising prices. Respondent's materials showed that the legislature was aware of this, and it provides another logical justification for the lesser surcharge burden placed on entities in category 4.

We also note that the statutory scheme requires that surcharge proceeds be deposited into a trust fund for use in solid waste recycling programs. To the extent that petitioner's factual materials (which are not in dispute) and legal argument relate to hazardous waste disposal problems rather than the solid waste problems addressed by the surcharge legislation, we deem them irrelevant.

In sum, we find several reasonable rationales to sustain the statutory classification scheme attacked by petitioner as a denial of equal protection of the laws and tax uniformity under both the United States and Wisconsin Constitutions.

Finally, we note the following language of the last sentence of Article VIII, §1 of the Wisconsin Constitution:

> Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided. (Emphasis added.)

Given this provision and the many United States and Wisconsin Supreme Court cases upholding legislative prerogative in

making classifications when enacting tax laws and other public-purpose legislation[2], together with the many longstanding statutory tax preferences accorded farmers in Wisconsin[3], we are compelled to rule against petitioner's challenge.

Having so ruled, we need not address respondent's argument that this commission lacks the authority to declare these statutes unconstitutional.

ORDER

The respondent's motion for summary judgment is granted, and its action on the petition for redetermination is affirmed.

Dated at Madison, Wisconsin, this 8th day of February, 1994.

WISCONSIN TAX APPEALS COMMISSION

Mark E. Musolf, Chairperson

(approved)
Thomas R. Timken, Commissioner

Joseph P. Mettner, Commissioner

ATTACHMENT:
"Notice of Appeal Information"

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[2] Craig v. Boren, 429 U.S. 190 (1976); State v. McKenzie, 151 Wis.2d 775 (Ct.App. 1989); Milwaukee Brewers Baseball Club v. DHSS, 130 Wis.2d 79 (1986); Walters v. St. Louis, 347 U.S. 231 (1954); Associated Hospital Service v. Milwaukee, 13 Wis.2d 447 (1961).

[3] Respondent's brief, p. 20.