MALONE CHARLES 915454 032593 TAC

STATE OF WISCONSIN

TAX APPEALS COMMISSION

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CHARLES M. MALONE 2221 Skeels Avenue Eau Claire, WI 54701	*	DOCKET NO. 91-S-454
Petitioner,	*	RULING AND ORDER
vs.	*	GRANTING MOTION FOR
WISCONSIN DEPARTMENT OF REVENUE P.O. Box 8933 Madison, WI 53708	*	SUMMARY JUDGMENT
Respondent.	*	

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MARK E. MUSOLF, COMMISSION CHAIRPERSON:

Following a filing by the parties of a "Stipulation of Issues and Facts" in this matter, the respondent filed a Motion for Summary Judgment, which is vigorously opposed by the petitioner. Both parties have filed briefs and supporting affidavits and, in addition, the petitioner has moved for relief from sec. 804.11(2), Stats., pertaining to matters deemed admitted.

On the briefs for petitioner is Attorney Nancy Rottier and for respondent is Attorney Linda Mintener.

As set forth below, we grant petitioner's motion for relief and award summary judgment to the respondent.

RULING

Petitioner's Motion for Relief from Sec. 804.11(2)

We grant this motion, on the grounds that justice would not be served by punishing petitioner where respondent was not prejudiced thereby and apparently accepted the late admissions by

negotiating with petitioner to incorporate some of them into the stipulation of facts.

Respondent's Motion for Summary Judgment

The parties have stipulated the following as the issues to be decided by us in this case:

1. Whether Sec. 77.52(2)(a)6, Stats., exempts from sales tax the gross receipts from washers and dryers which are activated by tickets and not by coins.

2. If not, whether the respondent should be estopped from collecting the sales tax which is the subject of this action from petitioner.

3. Whether the respondent has retroactively applied Wis. Adm. Code sec. TAX 11.72 to the petitioner.

We therefore apply summary judgment methodology to each of the stipulated issues.

The summary judgment statute, sec. 802.08, requires us to render such judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The purpose of this statute is to determine whether a dispute can be resolved without a trial. In re Cherokee Park Plat, 113 Wis. 2d 112, 115 (Ct.App. 1983). The Cherokee court details the methodology to be used:

> If the complaint...states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in

> evidence or other proof to determine whether that party has made a prima facie case for summary judgment. * * * If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences can be drawn from the undisputed facts, and therefore a trial is necessary. Grams v. Boss, 97 Wis. 2d 332, 338...(1980).

113 Wis.2d at 116.

An interesting wrinkle here, not present in any reported summary judgment case of which we are aware, is that the parties have filed a formal stipulation of facts, so those are obviously not in dispute. It remains for us to determine if additional material facts remain relevant to any of the stipulated issues. Summary judgment is appropriate on any issue with respect to which there are no such disputed facts.

Following the methodology, we look first at the Petition for Review, and it appears that no factual allegations (as distinguished from legal conclusions) contained therein are in dispute as to any of the three issues, having been either admitted by respondent in its answer or resolved by the parties in their stipulation. We therefore conclude that the respondent has made a prima facie case for summary judgment, based on the pleadings and, of course, the stipulation of facts.

We next examine the affidavits of petitioner "for evidentiary facts and other proof" which could reveal a material factual dispute between the parties on any issue. Where no such dispute exists, we must grant summary judgment.

Issue 1: Does the statutory exemption apply to tickets?

Neither party has disputed any of the facts presented on this issue. What is in dispute is the legal significance of these facts, which is a question of law which may be decided on summary judgment. Sec. 77.52(2)(a), Stats. (1987-88), imposes the retail sales tax on specified services enumerated therein, including:

> 6. Laundry, dry cleaning, pressing and dyeing services..., except when the service is performed by the customer through the use of coin-operated, self-service machines (emphasis supplied).

The underlined language was first enacted in 1966 and remained unchanged through the period under review.

Petitioner insists that his ticket-operated machines qualify for the "coin-operated" exemption; respondent holds that only those activated by coins qualify. The parties' briefs devote considerable discussion to the definition of "coin" and whether it can encompass a "ticket."

Several statutory construction precepts doom petitioner's arguments on this issue. First, when statutory language is clear and unambiguous, no judicial construction is permitted, and we must arrive at the intention of the legislature by giving the language its ordinary and accepted meaning. Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44 (1977). See also Hillman v. Columbia County, 164 Wis. 2d 376 (Ct.App. 1991). Also, "If the words are clear, we must not search for ambiguity." State v. Bruckner, 151 Wis. 2d 833, 844-5 (Ct.App. 1989). Second, tax exemptions, as matters of legislative grace, are strictly construed against

granting the exemption. Ramrod, Inc. v. Dept. of Revenue, 64 Wis. 2d 499 (1974), and paragraph 21 of the parties' stipulation.

Here, the statutory language is clear and unambiguous, and we embrace the position of respondent as set forth at page 4 of its motion brief and at pp. 3-6 and 9-10 of its reply brief to the effect that the ordinary and accepted meaning of "coin" and "coin-operated" does not include "ticket" and "ticket-operated", notwithstanding petitioner's creative arguments to the contrary. Statutory construction by this commission is therefore improper and inappropriate.

Even if statutory construction were appropriate, petitioner's arguments would most likely fail because the legislature and Governor have been presented with a number of opportunities since 1966 to broaden the exemption but have failed to do so.

We therefore award summary judgment to respondent on this issue and rule that Sec. 77.52(2)(a)6., Stats., does not exempt from sales tax the gross receipts from washers and dryers which are activated by tickets and not by coins.

Issue 2: Should Respondent be estopped from collecting the sales tax?

Again, there are no material facts in dispute. The affidavits submitted by petitioner present no additional material facts on the estoppel issue which are not contained in the stipulation. However, for purposes of this ruling, we will consider as true those factual assertions in the affidavits which petitioner claims have a bearing on the estoppel issue. Even doing

so, we conclude summary judgment on this issue is appropriate in favor of the respondent.

For this commission to apply estoppel against the respondent, the petitioner must show: 1) action or non-action on the part of respondent, which 2) induced reliance thereon by the petitioner, either in action or non-action, which was 3) to petitioner's detriment. It is elementary, however, that petitioner's reliance on the words or conduct of respondent must have been reasonable. See, Dept. of Revenue v. Family Hospital, 105 Wis. 2d 250, 254-5 (1982).

Petitioner claims non-action on the part of respondent in failing to apply the sales tax to ticket-activated machines for many years prior to the assessment under review. In support of this position petitioner presents three affidavits, one by petitioner's attorney, another by a William R. Doerner, and a third by Susan Mokler. The attorney's affidavit contains no evidentiary facts, and we disregard it. See, Hopper v. City of Madison, 79 Wis. 2d 120, 130 (1977). The Doerner and Mokler affidavits, however, do contain evidentiary facts which might well be material to the question of whether there was non-action by the respondent in enforcing the tax on receipts from self-service ticket-activated machines against other laundry operators. If petitioner can so prove at a hearing, then the first estoppel test could be satisfied.

The second estoppel element which petitioner must prove is induced reliance. However, nothing in the affidavits, the

stipulation, or its attached exhibits shows that petitioner relied on any oral or written statements of respondent or its agents, or even on respondent's alleged inaction with respect to enforcing the tax it has assessed against petitioner. True, petitioner relied on professional advice; but the stipulated facts specifically detail that petitioner neither requested nor received advice from the respondent as to taxability of the ticket-operated machine receipts. Certainly petitioner cannot be faulted for seeking outside professional advice, but that does not show induced reliance or due diligence for the purpose of applying equitable estoppel against a governmental agency such as respondent. See, Dept. of Revenue v. Moebius Printing Co., 89 Wis. 2d 610 (1979). In Moebius, the Supreme Court found that reliance was clearly shown, unlike petitioner's claimed reliance here. Proof of estoppel must be clear and convincing, and may not rest on conjecture. Bank of Sun Prairie v. Opstein, 86 Wis. 2d 669, 680 (1979).

Because the second necessary estoppel element is not present, the respondent is entitled to summary judgment on this issue, even allowing that the third element, detriment, is present.

Issue 3: Did respondent apply TAX 11.72 retroactively to petitioner?

The summary judgment award to respondent on the statutory exemption issue obviates a decision on this issue since we have already ruled that respondent's assessment was valid under the statute. Wis. Adm. Code TAX 11.72, in effect at the time, simply repeated the statutory exemption language. The 1991 revision, which petitioner claims was applied retroactively, is of no

consequence; it states with even more clarity than the earlier version that machines activated by "tokens" or "magnetic cards" are not "coin-operated".

ORDER

Petitioner's motion for relief from sec. 804.11, stats. is granted.

Summary judgment is awarded to the respondent on all stipulated issues, and its assessment is accordingly affirmed.

Dated at Madison, Wisconsin, this 25th day of March, 1993.

WISCONSIN TAX APPEALS COMMISSION

Mark E. Musolf, Chairperson

Thomas R. Timken, Commissioner

(Dissents)
Douglass H. Bartley, Commissioner

ATTACHMENT:
"Notice of Appeal Information"

Bartley, Commissioner, dissenting:

It seems to me that here we should not focus on the words, "coin-operated", but rather on the spirit or objective of the statute which was, I think, to spare those unfortunates who must suffer the indignity of putting their dirty laundry on public display from the added agony of a sales tax; in my opinion, the 1966 legislature cared not one whit whether metal money, paper money, tickets, tokens, or magnetic cards were used to operate the washing machines, and used the term "coin-operated" as an instinctive descriptive for 1966 laundromat technology.

It is true that taken literally, the statute would deny the exemption or exclusion to anything other than metal money machines. However, as I noted in a recent case, [1]

> "[T]here have been many cases where unambiguous statutes or phrases in contracts or other instruments have been 'construed' to determine the object or spirit of the 'plain meaning' verbiage involved. One classic example involved a Vermont statute which provided that jury verdicts be set aside whenever the winning side treated the jurors to 'victuals or drink' after the verdict. The statute was used to nullify a plaintiff's verdict where the plaintiff bought cigars for the jury. In sizing up the situation, the court upheld the set aside on the grounds that although cigars were not edible, and although the plaintiff had not violated the letter of the statute, he had violated its spirit and object, that being to express illustratively the prohibition against gratuities from parties to jurors. [2]

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[1] Mail N' More v. Wisconsin Department of Revenue, Docket No. 92-S-54-SC (September 28, 1992) (rev'd. on reh'g. December 4, 1992).

[2] Baker v. Jacobs, 64 Vt. 197, 23 A 588 (1891), cited at Sutherland, Stat. Const., §54.01.

> Or consider the murdering heir cases—where a statute or will provides, for example, that a decedent's property was to pass to his son whereupon the son promptly murders the father and claims the inheritance. In these cases, there is no ambiguity in the statute or the will—each plainly says that the son is to inherit and the decedent's stated intent is clear. Yet courts have routinely intervened to stop these bloody inheritances, usually by reconstructing the testator's and legislature's intent, presuming that neither legislature nor testator would have wanted the ill-gotten inheritance to stand under the circumstances." [3]

I went on to note,

> "The principle of objective or spirit construction dates back to 1574, when Lord Plowden wrote:
>
> The Reader may observe that it is not the Words of the Law, but the internal Sense of it that makes the Law, and our Law (like all others) consists of two parts, viz. of Body and Soul, the Letter of the Law is the Body . . . and the Sense and Reason . . . the Soul . . . . And the Law may be resembled to a Nut, which has a Shell and a Kernal within, the Letter . . . represents the Shell, and the Sense . . . the Kernal, and as you will be no better for the Nut if you make use only of the Shell so you will receive no Benefit by the Law, if you rely only upon the Letter . . . for sometimes the Sense is more confined and contracted than the Letter, and sometimes it is more large and extensive. And Equity . . . larges or diminishes the Letter according to its discretion. And in order to form a right Judgment when the Letter . . . is restrained, and when enlarged by Equity, it is a good Way, when you peruse a Statute to suppose that the Law-Maker is present, and that you have asked him the Question you want touching the Equity, then you must give yourself such an Answer as you would imagine he would have done . . . . And if the Law-maker would have followed the

[3] Id at §54.06.

> Equity, notwithstanding the Words of the Law . . . you may safely do the like, for while you can do no more than the Law-maker would have done, you do not act contrary to the Law, but in Conformity to it." [4]

Here I think it plain that if we crack the shell of the statute to get at the kernal, we would have to conclude that the spirit and the equity (and indeed the law) was to exempt or exclude do-it-yourselfers from taxation on their own handiwork.

This case reminds me of In re House Bill No. 1,291 [5] involving the Massachusetts constitutional provision that house members "shall be chosen by written vote." The question that faced then-Chief Justice Holmes was whether new voting machines that used no paper at all or that dispensed with the use of a separate piece of paper for each vote violated the constitution. Holmes upheld the use of the machines, explaining that the purpose of the constitutional provision was to prevent oral or hand voting. Because the machine did this, it was constitutional, Holmes held.

We have a like-situation here, where technology has overtaken verbiage. As in the voting machine case, we here ought to read the 1966 coin-operated statute as descriptive of 1966 technology, and not as a mandate of coins-only. [6]

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[4] Eyston v. Studd, 2 Plowd 459A at 467, 75 Eng. Repr 688, 699 (1574), as quoted Sutherland, Stat. Const., §54.02.

[5] 178 Mass 605, 60 N.E. 129 (1901), discussed in Posner, The Problems of Jurisprudence, Harvard Univ. Press (1990) at 267.

[6] This reading conforms to the ancient maxim, "Neque leges neque senatus consulta ita scribi possunt ut omnis casus qui quandoque in sediriunt comprehendatur; sed sufficit ea quae plaerumque accidunt contineri"——"[N]either laws nor acts of parliament can be so written as to include all actual or possible cases; it is sufficient if they provide for those things which frequently or ordinarily

Finally, I should say also that the failure of the 1991 legislature to override the governor's veto of legislation "to broaden the exemption" [7] to include ticket-operated machines strikes me as inconsequential insofar as the meaning of the statute is concerned.

First, we must remember that what we are dealing with here is what the legislature of 1966 would have intended (and therefore what the statute actually means), not with what later legislators and governors might think it means. The intent of its framers controls, not the opinions or ex post facto intent of the successors to its framers. The objective, intent, and meaning of a statute is fixed when enacted; it does not fluctuate according to

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may happen." Black's Law Dictionary, 5th Ed. at 937.

The Wisconsin Supreme Court has endorsed the theory of progressive construction:

> "It is upon this theory . . . that the powers conferred upon Congress to regulate commerce, and to establish post-offices and post-roads, have been held not confined to the instrumentalities of commerce, or of the postal service known when the constitution was adopted, but keep pace with the progress and developments of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmissions of communications by telegraph."

Wisconsin Tel. Co. v. Oskosh, 62 Wis 32 (1884), quoted in Sutherland, Stat. Const., §49.02.

So has the U.S. Supreme Court. See Olmstead v. United States, 227 U.S. 438 (1928) (holding wiretapping an invasion of Fourth Amendment rights).

[7] The commission majority's words.

opinion, even when the opinion is that of lawmakers themselves. [8]

Second, we must realize that the effort to revise the statute failed, making any subsequent "legislative history" and "legislative intent" a non-event. It's hard enough to ascribe legislative intent to legislation that is enacted; but hopeless, I think, to ascribe it to legislation that has failed. In any event, I find no authority for the proposition that prior legislative intent can be deduced from subsequent failed legislation. [9]

Douglass H. Bartley

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[8] A statute retains its fixed meaning even when it is read to cover things that come into existence after its passage that weren't literally covered in the statutory verbiage. For the inclusion of like-kind things not anticipated and therefore not mentioned within its literal terms is thought to be within the range of objects the legislature would have included had it known of them. The Plowden rule of "reasonable reconstruction" should not be seen as a rule that allows fluctuating meaning but as a rule of utility that among other things salvages conceptually-proper statutes from purely technical obsolescence.

[9] But even if we accept the dubious proposition that the uncodified or unfulfilled intent of later legislators can somehow "amend" the intent of, or meaning imparted, by statute's original framers, there still would be serious problems here in identifying what that subsequent unfulfilled intent was. Here the 1991 legislative action to amend the statute cannot automatically be taken as a legislative declaration that the existing exemption or exclusion needed broadening.

Though there is apparently a rule that an enacted amendment materially changing the statutory language is presumed to indicate a change in legal rights, Sutherland, Stat. Const., §22.30, often amendments are designed to clarify the law, to remove ambiguity, to eliminate redundancy, or to modernize. And in Wisconsin, the rule is that an amendment to a statute changes the previous law only so far as it expressly states or necessarily implies change. Jaeger Baking Co. v. Kretschmann, 96 Wis. 2d 590, quoted id at §22.30.

Here there is no evidence of an express collective declaration that a law change was sought. Nor is a law change necessarily implied. Here the attempted amendment of 1991 could be seen as an attempt to remove a source of ambiguity, to conform the language to solidify its original purpose, in order to eliminate controversy.

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. ***The petition should be filed in circuit court and served*** upon the Wisconsin Tax Appeals Commission within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) **The petition for judicial review should name the Department of Revenue as respondent and must be served upon that department** within 30 days of filing the petition for judicial review in circuit court.

This notice is part of the decision and incorporated therein.