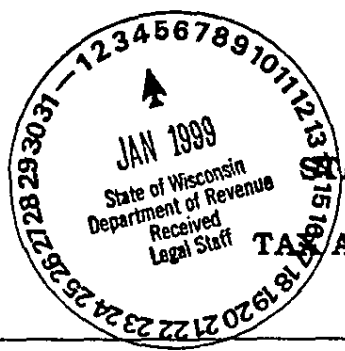
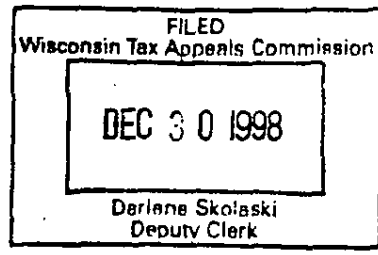


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JOHNSON WELDING & MFG CO INC ET AL 97S252 123098 TAC



STATE OF WISCONSIN
TAX APPEALS COMMISSION



JOHNSON WELDING & MFG. CO., INC.
a/k/a **Johnson Truck Bodies**
P.O. Box 480
Rice Lake, WI 54868

DOCKET NO. 97-S-252

*Disc
FA 3/1/99
6/3/99*

Petitioner,

vs.

RULING AND ORDER

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

**AWARDING
SUMMARY JUDGMENT**

Respondent.

MARK E. MUSOLF, CHAIRPERSON:

This matter is before us on cross-motions for summary judgment. Both parties have filed briefs; the petitioner filed affidavits with its initial brief. On briefs are Attorney Steven R. Duback for the petitioner and Attorney John Cappellari for the respondent.

Having considered the entire record, the Commission hereby finds, concludes, rules, and orders as follows:

UNDISPUTED MATERIAL FACTS¹

1. Petitioner's principal place of business is located in Rice Lake, Wisconsin. It has been engaged in the business of manufacturing and

¹ Unless otherwise stated, all facts pertain to the period under review, which is the month of January 1997.

selling truck bodies in Rice Lake since 1931.

2. All of the truck bodies involved in this case were manufactured by petitioner in Rice Lake, sold to Schwan's Sales Enterprises, Inc. ("Schwan's") in January of 1997, and delivered to Schwan's representatives at petitioner's Rice Lake plant. Schwan's is petitioner's largest customer and has been for many years.

3. Schwan's is a corporation organized and existing under the laws of the State of Minnesota. It was incorporated under the laws of Minnesota on April 7, 1964, and has been continuously in existence and incorporated under the laws of Minnesota since that date. Its corporate headquarters are, and at all times during its existence have been, in Marshall, Minnesota. The address of its corporate headquarters is 115 West College Drive, Marshall, Minnesota 56258-1796.

4. Schwan's does business in all 50 states of the United States.

5. Based on apportionment data derived from and used in preparing and filing its state corporate income tax and franchise tax returns, a comparison of the percentage of Schwan's sales, property, and payroll in Wisconsin as compared to its sales, property, and payroll outside Wisconsin for the three calendar years immediately preceding January 1997 is as follows:

	<u>1994</u>	<u>1995</u>	<u>1996</u>
PAYROLL			
% in Wisconsin	3.2343	3.1743	3.2439
% outside Wisconsin	96.7657	96.8257	96.7561

6. Schwan's has permanent places of business at 19 locations throughout Wisconsin.

7. During the month of January 1997, Schwan's purchased a total of 28 truck bodies from petitioner. Three of these truck bodies were installed on trucks assigned by Schwan's to Schwan's depots located in Wisconsin. The other 25 truck bodies were installed on trucks assigned by

Schwan's to Schwan's depots located in Indiana, Washington, Iowa, Missouri, Illinois, Minnesota, Michigan, Ohio, Pennsylvania, New Mexico, Tennessee, New York, and Arizona. These 25 trucks have not been and will not be used by Schwan's in Wisconsin otherwise than in removing them from petitioner's plant in Rice Lake, Wisconsin, at the time of Schwan's taking initial delivery of the truck bodies which petitioner had installed on their chassis. When initial delivery was taken, the 25 trucks were all picked up and directly removed from petitioner's Rice Lake plant by a Schwan's driver to Schwan's principal place of business in Marshall, Minnesota, after which they were assigned to the various non-Wisconsin locations described above.

8. Petitioner charged Schwan's and collected 5.5% Wisconsin state and county sales tax on all 28 truck bodies it sold to Schwan's in January 1997, and it remitted such tax to respondent.

9. Based on information furnished to petitioner by Schwan's that 25 of the 28 truck bodies were—after initial removal from Rice Lake to Schwan's locations in Marshall, Minnesota—assigned by Schwan's to be used

at depots located outside Wisconsin, petitioner prepared and filed with respondent a claim for refund seeking recovery of the January 1997 Wisconsin sales tax it had charged and collected from Schwan's with respect to the 25 non-Wisconsin destination truck bodies.

10. Petitioner's claim for refund was filed on March 25, 1997, in the form of an amended sales and use tax return for January 1997 (Form ST-12X). The claim for refund was for a total of \$28,806.26 of Wisconsin sales tax petitioner had collected and paid to respondent, measured by the aggregate of \$523,748 in sales prices paid for the 25 non-Wisconsin destination truck bodies described in ¶ 7., above.

11. Petitioner's basis for seeking recovery of the sales tax was and is that the sales of the 25 non-Wisconsin destination truck bodies to Schwan's are exempt under § 77.54(5)(a), Wis. Stats., because they were sales made to a person who is not a resident of Wisconsin and who will not use the trucks for which the truck bodies were made otherwise than in their removal from Wisconsin.

12. Respondent denied petitioner's refund claim in a letter dated April 2, 1997.

13. On April 11, 1997, petitioner filed with respondent a petition for redetermination objecting to the denial of its refund claim.

14. By notice of action dated May 27, 1997, respondent denied ~~petitioner's petition for redetermination.~~

WISCONSIN STATUTE INVOLVED

77.54 General exemptions. There are exempted from the taxes imposed by this subchapter:

* * *

(5) The gross receipts from the sale of and the storage, use or other consumption of:

(a) ... truck bodies sold to persons who are not residents of this state and who will not use such ... trucks for which the truck bodies were made in this state otherwise than in the removal of such ... trucks from this state.

CONCLUSION OF LAW

The disputed sales by petitioner of truck bodies to Schwan's Sales Enterprises, Inc., a Minnesota corporation, were exempt from the Wisconsin sales tax within the meaning of § 77.54(5)(a), *Stats.*, because Schwan's was not a resident of Wisconsin.

OPINION

Section 77.54(5)(a) is a tax exemption statute. Such statutes, since they are matters of legislative grace, are strictly construed against granting the exemption. *Ramrod, Inc. v. Dept of Revenue*, 64 Wis. 2d 499, 504 (1974). One who claims an exemption has the burden of showing that the property is clearly within the terms of the exception. Doubts are resolved against the exemption and in favor of taxability. *Revenue Dept. v. Greiling*, 112 Wis. 2d 602, 605 (1983). However, the interpretation of an exemption need not be unreasonable or the narrowest possible. *Columbia Hospital Assoc. v. Milwaukee*, 35 Wis. 2d 660, 668 (1967).

The only dispute for resolution by this commission is whether

Schwan's was a non-resident of Wisconsin. If so, the petitioner is entitled to the exemption because the respondent agrees that the other statutory criteria for exemption under § 77.54(5)(a) have been met.

Chapter 77 does not define "resident." However, as discussed at some length in petitioner's initial brief,² there is copious authority to the effect that, at least for purposes of the corporation income and franchise taxes imposed under prior versions of Chapter 71,³ the "residence" of a corporation is its state of incorporation. See, for example, *Dept. of Taxation v. Aluminum Goods Mfg. Co.*, 275 Wis. 389 (1957), and *Briggs & Stratton Corp. v. Dept. of Taxation*, 248 Wis. 160 (1945), both to the effect that a foreign corporation was not a Wisconsin resident in spite of having manufacturing plants and principal offices in Wisconsin.

These court cases culminated in a decision by the Wisconsin Board of Tax Appeals,⁴ *Franan Enterprises, Inc. v. Wis. Dept. of Taxation*, 5 WBTA 80 (1962), which held that "for Wisconsin income tax purposes a corporation is a resident of [its] domiciliary state...."

Although there have been no Wisconsin court cases interpreting the word "resident" as applied to a corporation for sales and use tax purposes under Wis. Stats. Chapter 77, this Commission has considered the question.

² Brief of Petitioner, pp. 10-19.

³ Corporate "residence" is no longer a consideration under Chapter 71 except with regard to personal holding companies.

⁴ The WBTA was the predecessor to the Wisconsin Tax Appeals Commission.

In *K-C Aviation, Inc. v. WDOR*, ¶ 400-052 (CCH) Wis. Tax Rptr. (WTAC 1994), we concluded that various corporations were not Wisconsin residents for sales tax purposes of § 77.54(5)(a) solely by reason of their doing business in Wisconsin as evidenced by holding a Wisconsin Seller's Permit and/or filing Wisconsin tax returns.

The respondent argues that *K-C Aviation* is controlling here. But contrary to the assertion in respondent's brief, we did not rule there that a corporation is a resident under § 77.54(5)(a) if it has offices, employees, property, payroll, and/or sales in Wisconsin. In that case, our *secondary* conclusion was that such a corporation *may* be a resident under certain unspecified facts. In hindsight, because no specific facts were before us, we must treat that secondary conclusion as unsupported dictum. Here the issue is squarely before us on specific facts showing petitioner's Minnesota domicile together with a strong Wisconsin business presence.

As the Board of Tax Appeals explained in *Franan Enterprises, Inc.*, *supra*, and as we explained in *K-C Aviation*, citing 36 AM. JUR. 2D *Foreign Corporations* § 37,⁵ a corporation is generally considered a resident of its state of incorporation and no other; however, it can be a resident of another state for some purposes, depending on its activities there and depending on local statutes to that effect.

We then unequivocally found, as we do here, that in the absence of

⁵ In *Franan Enterprises*, the citation was to 14A CORPUS JURIS, p. 1215.

specific statutory authority, the respondent's denial of non-residency under § 77.54(5)(a) was improper. In the case before us, the determining factor in our conclusion that a foreign corporation is a non-resident for purposes of § 77.54(5)(a) is that no provision exists in Chapter 77 which would include petitioner, a Minnesota corporation, as a Wisconsin "resident" for sales tax purposes. Absent such a provision, the petitioner, a Minnesota corporation, is a non-resident irrespective of the extent of its Wisconsin presence.

The respondent cites numerous cases from other states concluding otherwise. Most of these are of no moment here because they involved extant administrative rules which specifically defined residency for sales tax purposes. No such administrative rule exists in Wisconsin.

One case which does support respondent's view is *The Garrett Corporation v. State Board of Equalization*, CA-Tax Rptr.-TB (CCH) ¶ 201-691 (Cal. Dist. Ct. App. 1961), interpreting a California exemption statute similar to Wisconsin's. The court found that foreign corporations with "places of business in California staffed by numerous employees and grossing millions of dollars during the years in question" could not be considered non-residents of California for sales tax exemption purposes.

We decline to follow the *Garrett* decision because Wisconsin courts and the Wisconsin Board of Tax Appeals, interpreting other Wisconsin taxation statutes, have consistently found a corporation's residence to be its state of incorporation. Further, there is no language in Chapter 77 or anywhere in our

case law even *implying* a different definition for sales tax purposes, and that chapter was enacted in 1961 when the legislature is presumed to have been aware of Supreme Court cases such as *Dept. of Taxation v. Aluminum Goods Mfg. Co.* and *Briggs & Stratton Corp.*, *supra*. See, *Joint School Board Dist. No. 2 v. State*, 71 Wis.2d 276, 283 (1976).

If there is to be an entirely different definition of a "resident" corporation for sales tax purposes, the legislature must enact it or, at a minimum, acquiesce in an administrative rule so defining it. As petitioner aptly points out,⁶ without that clarity in Chapter 77, Wisconsin sellers would be unable to ascertain which of their customers were non-residents.

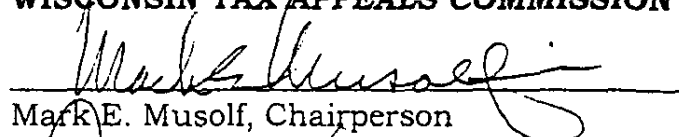
The petitioner has shown that, as a Minnesota corporation, Schwan's is a non-resident of Wisconsin and therefore exempt from the sales tax within the meaning of Wis. Stats. § 77.54(5)(a).

ORDER


The respondent's action on petitioner's petition for redetermination is reversed.

Dated at Madison, Wisconsin, this 30th day of December, 1998.

WISCONSIN TAX APPEALS COMMISSION


Mark E. Musolf, Chairperson

ATTACHMENT: "NOTICE
OF APPEAL INFORMATION"


Don M. Millis, Commissioner

⁶ Petitioner's Reply Brief, p. 9-10.