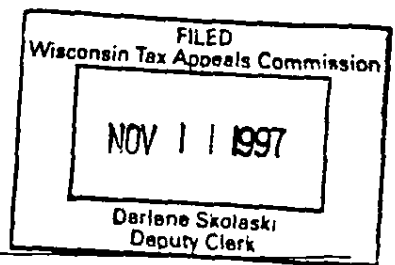


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STATE OF WISCONSIN  
TAX APPEALS COMMISSION



**PARKVIEW SAND & GRAVEL, INC.**  
W208 S8905 Hillendale Dr.  
Muskego, WI 53150

\*  
\* DOCKET NO. 97-S-148

Petitioner,

vs.

\* **RULING AND ORDER**

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

Respondent.



**DAVID PROSSER, JR., COMMISSIONER:**

The above-entitled matter comes before the Commission upon respondent's motion to dismiss the petitioner's amended petition for review on grounds that it fails to state a claim upon which relief can be granted. Respondent has filed jurisdictional documents, including part of a field audit, with its motion. Petitioner did not file any supplementary documents. The petitioner is represented by Gayle R. Dvorak, CPA. The respondent is represented by Attorney Linda M. Mintener.

Based on the record before it, the Commission hereby finds, rules, and orders as follows:

## SUMMARY OF UNDISPUTED FACTS

1. Parkview Sand & Gravel, Inc. ("the petitioner") is a Wisconsin corporation based in Muskego. It is primarily engaged in operating a sand and gravel pit. The Wisconsin Department of Revenue ("the respondent") conducted a field audit of the petitioner for fiscal years 1992-1995.

2. In the audit, the respondent determined that the petitioner had correctly reported all sales subject to sales tax but had not correctly reported all purchases subject to use tax. On June 13, 1996, the respondent assessed the petitioner \$29,229.41 in additional use tax, plus \$9,724.34 in interest and \$7,307.37 in penalties, for a total assessment of \$46,261.12.

3. The petitioner sent a timely petition for redetermination. It stated in pertinent part: "The first area of disagreement is with the stupidity of trying to tax the Backhoe and related refurbishing. The entire assessment must be appealed to determine transaction by transaction where negligence occurred and if Parkview Sand & Gravel, Inc. was negligent...."

4. On February 4, 1997, the respondent denied the petition for redetermination, stating in part: "The link belt backhoe, backhoe bucket and repairs are not exempt under sec. 77.54(6)(a) Wis. Stats. since they are not used directly and exclusively in manufacturing." The Notice of Action also stated: "...[I]t is our position that the negligence penalty was properly imposed and the reasons given for failure to report use tax do not constitute reasonable cause."

5. On April 7, 1997, the petitioner filed a petition for review with the Commission. The petition read in pertinent part:

The appeal is based on the fact that the assessment on the Backhoe is nothing more than a weak attempt to increase the revenue generated by this assessment. Mr. Loppnow tried to give the proper background and knowledge of its use, by giving Ms. Jacobs an enormous amounts [sic] of time but apparently, pursuit of the truth, does not increase revenue.

The only negligence involved in this case was and is on the part of the Wisconsin Department of Revenue. During the 30 plus years of cafeteria Sales Tax Law the Wisconsin Department of Revenue has selected four different issues from the vast menu that they prepare. The fact that it took the fourth visit to discover negligence, would indicate it was with them all along. The sad truth is, they have been so desperate to raise revenue they can not apply common sense to any issue and as a result end up looking totally stupid.

6. On May 13, 1997, respondent filed a Notice of Motion and Motion to Dismiss for Failure to State a Claim.

7. On May 25, 1997, the Commission held its initial scheduling conference with the parties. The respondent's motion to dismiss was discussed. After the conference, the Commission issued an order which stated:

The respondent has filed a motion to dismiss the petition for review for failure to state a claim upon which relief can be granted. The Commission hereby extends to the petitioner until July 1, 1997, to amend the petition for review in order to allege with greater specificity why the assessment of the respondent is incorrect. The petition for review must state a claim upon which relief can be granted.

8. On July 2, 1997, the petitioner submitted an amended petition for review, which reads in part:

The appeal on the assessment of sales tax on the Backhoe and repairs to the Backhoe is simple. It is exempt under Section 77.54 Wis. Statue [sic] and the Wisconsin Department of Revenue simply refuses to accept that fact. It is used to perform various functions in conjunction with the wash plant. The wash plant is considered part of the manufacturing process, therefore the Backhoe used in support of the wash plant is exempt.

The negligence penalty issue shouldn't need any clarification. The Wisconsin Department of Revenue under order from the Legislature must raise revenue without increasing taxes so DOR becomes a pathetic, mindless band of marauders who asses [sic] unwarranted negligence penalties in order to steel [sic] enough money to please the Legislature and to perpetuate their bureaucracy. The raid was good enough in this round to create a large surplus and now the Legislators look like buffoons while they try to waste it. The point is that Park View Sand & Gravel, Inc. has been an outstanding Corporate citizen of Wisconsin for 34 years and has always paid their taxes and to be called negligent and expected to pay severe penalties pertaining to a sales tax law that is so complex the Legislators and the Wisconsin Department of Revenue make up their approaches in each situation based on the amount of revenue they think they need without understanding the law itself. The negligence penalty must be removed.

*Bill - possible quote  
To FASD  
ALL at 2/11/97*

#### APPLICABLE STATUTES

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

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

(a) Machines and specific processing equipment and repair parts or replacements thereof, exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment.

\* \* \*

**(6m)** For purposes of sub. (6)(a) "manufacturing" is the production by machinery of a new article with a different form, use and name from existing materials by a process popularly regarded as manufacturing. "Manufacturing" includes but is not limited to:

(a) Crushing, washing, grading and blending sand, rock, gravel and other minerals.

#### **RULING**

The petitioner operates a sand and gravel pit. Neither party has provided any explanation or evidence on exactly what the company sells or how it operates its business.

The respondent assessed the petitioner for unpaid use taxes on purchases the petitioner made, plus interest and penalties. The ultimate issue is whether any of these purchases are exempt from the use tax under Wis. Stats. §§ 77.54(6)(a) and (6m) in that they involve machines and other equipment "exclusively and directly" used in manufacturing, in circumstances where manufacturing includes crushing, washing, grading and blending sand, rock, gravel and other minerals. If any exempt purchases are established, they will affect both the interest and penalties.

In an appeal to the Tax Appeals Commission, the petitioner has the

burden of showing that the Department's determination is incorrect. *Woller v. Department of Taxation*, 35 Wis. 2d 227, 232, 233, 151 N.W. 2d 170 (1967). This burden is especially pronounced when the petitioner is challenging the Department's determination on a tax exemption, a tax deduction, or a tax credit. Tax exemptions and deductions are matters purely of legislative grace. Tax statutes are to be strictly construed against granting exemptions and deductions. A petitioner must bring itself clearly within the terms of the exemption or deduction. *Comet Co. v. Department of Taxation*, 243 Wis. 117, 123, 9 N.W. 2d 620 (1943); *Fall River Canning Co. v. Department of Taxation*, 3 Wis. 2d 632, 637, 89 N.W. 2d 203 (1958); *Ramrod, Inc. v. Department of Revenue*, 64 Wis. 2d 499, 504, 219 N.W. 2d 604 (1974); and *Revenue Department v. Greiling*, 112 Wis. 2d 602, 605, 334 N.W. 2d 118 (1983).

There is no doubt that this long-standing case law applies to the exemption claimed here because the statute itself commands that: "The exemption under sub. (6) shall be strictly construed." Wis. Stats. § 77.54(6r).

In the present motion, however, the Commission is asked to rule on the sufficiency of the pleadings. Respondent moved to dismiss the amended petition for review for failure to state a claim upon which relief can be granted. See, Wis. Stats. § 802.06(2)(a)6.

Section 802.06(2)(b) provides in part:

... If on a motion asserting the defense described in par. (a)6. to dismiss for failure of the pleading to state a claim upon which relief can be granted ... matters

outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

Although the respondent has submitted matters outside the pleadings, namely, the traditional documents which establish the Commission's jurisdiction, these documents are not used to prove its case. Consequently, the motion to dismiss will not be treated as a motion for summary judgment under § 802.06(2)(b).

To determine whether a petition for review states a claim upon which relief can be granted, the facts pled are taken as admitted and inferences are drawn in favor of the party against whom the motion is brought. *Eagle v. Christensen*, 191 Wis. 2d 301, 311, 529 N.W. 2d 245 (Ct. App. 1995); *Heinritz v. Lawrence University*, 194 Wis. 2d 606, 610, 535 N.W. 2d 81 (Ct. App. 1995). The petition is to be liberally construed. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W. 2d 600 (1981); *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W. 2d 25 (1985); *Heinritz, supra*. A claim will not be dismissed unless the petitioner cannot prevail under any circumstances. *Quesenberry v. Milwaukee County*, 106 Wis. 2d 685, 690, 317 N.W. 2d 468 (1982); *Evans, supra*; *Heinritz, supra*.

The petitioner has stated a claim that the backhoe, the equipment related to the backhoe, and the "repair" or "refurbishing" of the backhoe are all exempt under § 77.54. The petitioner alleged that its backhoe is "used to



perform various functions in conjunction with the wash plant. The wash plant is considered part of the manufacturing process..." [Emphasis supplied] These statements amount to a claim of exemption under §§ 77.54(6)(a) and (6m). A claim that a machine is exempt under these subsections is really a claim that the machine is used by a manufacturer "exclusively and directly" in manufacturing tangible personal property or that it is a "safety attachment" for manufacturing machinery or equipment.

Dismissing this \$46,000 appeal on grounds that the petitioner did not adequately claim the exemption — particularly on grounds that petitioner used the ambiguous phrase "in conjunction with" instead of the unambiguous words "exclusively" and "directly" in its amended petition for review — would not be a liberal construction of the petition and would not enhance public confidence in the review process.

Consequently, the respondent's motion to dismiss the petitioner's claim of a tax exemption under § 77.54 for the backhoe, its parts including safety attachments, and the services performed to repair it is denied. Henceforward, the burden will be upon the petitioner to close the gap between pleading and proof.

In the amended petition for review, the petitioner has also challenged the negligence penalties imposed by the respondent under Wis. Stats. § 77.60(3). This statute provides:

**(3)** If due to neglect an incorrect return is filed, the

entire tax finally determined shall be subject to a penalty of 25% ... of the tax exclusive of interest or other penalty. A person filing an incorrect return shall have the burden of proving that the error or errors were due to good cause and not due to neglect. [Emphasis supplied]

If the petitioner's returns for fiscal years 1992-1995 ultimately prove to be incorrect, petitioner has not alleged any good cause for the errors. Sophomoric attacks on the Wisconsin Department of Revenue and the Wisconsin legislature do not provide good cause for errors in tax returns and do not satisfy the petitioner's burden in pleading. Nonetheless, so long as the claim of tax exemption remains viable, the Commission is not prepared to dismiss the amended petition for review with respect to the negligence penalties.

Therefore,


**IT IS ORDERED**

That respondent's motion to dismiss the amended petition for review for failure to state a claim upon which relief can be granted is denied.

The Commission will contact the parties for a telephone scheduling conference.

Dated at Madison, Wisconsin, this 11th day of November, 1997.

**WISCONSIN TAX APPEALS COMMISSION**

  
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David Prosser, Jr., Commissioner