

STATE OF WISCONSIN
TAX APPEALS COMMISSION

EMCO CHEMICAL DISTRIBUTORS INC.,

DOCKET NO. 14-M-141

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on Cross-Motions for Summary Judgment. The Petitioner, EMCO Chemical Distributors Inc. ("EMCO"), is represented by Attorney Joseph A. Pickart of Whyte Hirschboeck Dudek S.C.,¹ Milwaukee, Wisconsin. The Wisconsin Department of Revenue (the "Department") is represented by Attorney Carley Peich Kiesling. Both parties have filed briefs and affidavits in support of their respective positions. For the reasons stated below, we grant summary judgment to the Department.

¹ Now, Husch Blackwell LLP.

FACTS

A. Jurisdictional Facts

1. On April 1, 2013, EMCO filed a 2013 Wisconsin Manufacturing Personal Property Return, claiming \$10,519,320 in personal property as exempt from property taxes because it was used in a manufacturing activity pursuant to Wis. Stat. § 70.11(27). (Affidavit of Department Attorney Carley J. Peich Kiesling (“Peich Kiesling Aff.”), ¶ 2, Ex. P-1.)

2. By letter dated May 15, 2013, the Department denied EMCO's request that the personal property be exempt from property taxes for 2013. (Peich Kiesling Aff. ¶ 3, Ex. P-2.)

3. By the 2013 Notice of Personal Property Assessment dated June 10, 2013, the Department assessed the personal property that EMCO had reported as exempt for 2013. (Peich Kiesling Aff. ¶ 4, Ex. P-3.)

4. On August 9, 2013, EMCO timely petitioned the Board of Assessors for a redetermination of the Department's May 15, 2013 decision. (Peich Kiesling Aff. ¶ 5, Ex. P-4.)

5. By the Notice of Determination dated March 18, 2014, the Board of Assessors denied EMCO's appeal. (Peich Kiesling Aff. ¶ 6, Ex. P-5.)

6. On May 12, 2014, EMCO timely appealed the Board of Assessors denial to the Wisconsin Tax Appeals Commission. (Peich Kiesling Aff. ¶ 7, Ex. P-6.)

B. Material Facts

7. EMCO was established in 1971 and is headquartered in Pleasant Prairie, Wisconsin. It has manufacturing facilities in Pleasant Prairie, North Chicago, Illinois, and Columbia, Illinois. (Affidavit of EMCO President Edward Polen ("Polen Aff."), ¶ 4.)

8. EMCO provides products and services ranging from blending and packaging chemical products to supplying chemical raw materials to a variety of industries, including those involved in paint and coatings, adhesives, inks, sealants, elastomers, flavor and fragrance, food additives, pharmaceuticals, lubricants, personal care products, rubber and plastic, and household, industrial, institutional and agricultural products. (Polen Aff. ¶ 6.)

9. EMCO was formerly headquartered in North Chicago, Illinois, where it had its primary manufacturing facility. By 2009, its manufacturing and rail car capacity was at its maximum, which prompted an analysis of options for relocation and expansion. (Polen Aff. ¶ 7.)

10. In February of 2010, Brems Realty LLC, an affiliate of EMCO, purchased a property at 8601 95th St., Pleasant Prairie, Wisconsin, from Hexion Specialty Chemicals. EMCO leased the property from Brems and began the renovation and reconstruction (the "construction") of the plant for use in EMCO's manufacturing operations and, possibly, as its corporate headquarters. (Polen Aff. ¶¶ 9 and 11.)

11. By letter dated May 25, 2010, counsel for EMCO contacted Melody Ryddner, Property Assessment Specialist-Advanced with the Department, and

provided her with the closing statement, the transfer fee return, and a letter describing the nature of the acquisition of the former Hexion plant. (Affidavit of Melody Ryddner ("Ryddner Aff."), ¶ 3, Ex. R-1.)

12. By an email message dated May 27, 2010, Julie Matthes, Department Property Assessment Supervisor and supervisor for Ms. Ryddner, requested additional information relating to the transaction. (Affidavit of Julie Matthes ("Matthes Aff." ¶ 3, Ex. M-1.)

13. On September 28, 2010, EMCO, by its counsel, submitted to the Department a Wisconsin Department of Revenue Questionnaire for Potential Manufacturers along with supplemental information. (Ryddner Aff. ¶ 4, Ex. R-2.)

14. On October 25, 2010, Ms. Ryddner contacted Mr. Polen, President of EMCO, regarding a visit to the Pleasant Prairie facility and was informed at that time that the facility was vacant and would not be functioning for 12-18 months. (Ryddner Aff. ¶ 5, Ex. R-3.)

15. On November 1, 2010, Julie Matthes spoke to Attorney John Healy, one of EMCO's attorneys. (Matthes Aff. ¶ 5, Ex. M-2.)

16. During the conversation, Mr. Healy told Ms. Matthes that EMCO was in the developmental stages, had architectural plans for remodeling the interior of the Pleasant Prairie facility to suit their needs, and would be getting bids to complete that work in the near future. Mr. Healy reported that no equipment was on site except for a few personal property items abandoned by Hexion and that it may be 12 to 18 months before EMCO was operational. (Matthes Aff. ¶ 6, Ex. M-2.)

17. During the conversation, Mr. Healy stated that EMCO intended to move some operations from Chicago to Pleasant Prairie, but there were many variables that may impact their future plans there. (Matthes Aff. ¶ 7, Ex. M-2.)

18. During the conversation, Ms. Matthes told Mr. Healy that no decision regarding classification of personal property at the facility would be made until EMCO was fully operational at the Pleasant Prairie facility. She explained that the personal property exemption only extended to machinery and equipment being used directly in the manufacturing process, as opposed to all personal property at the facility. (Matthes Aff. ¶ 8, Ex. M-2.)

19. In December 2010, EMCO's counsel, Attorney Pickart, contacted Mr. William Wardwell, then the Department's Section Chief responsible for manufacturing property tax assessments in the State of Wisconsin. Attorney Pickart asked Mr. Wardwell for Department guidance regarding classification of personal property at EMCO's Pleasant Prairie facility. (Affidavit of William Wardwell ("Wardwell Aff.") ¶¶ 1 and 2.)

20. By letter dated December 15, 2010, sent by email dated December 16, 2010, Attorney Pickart provided Mr. Wardwell with additional information regarding EMCO's manufacturing classification request and identified the various categories of machinery and equipment that it might use in its manufacturing operations in Pleasant Prairie. (Wardwell Aff. ¶ 3, Ex. W-1.)

21. Shortly after receipt of the December 16, 2010 email, Mr. Wardwell had a conversation with Attorney Pickart. During that conversation, Mr. Wardwell

informed Attorney Pickart which categories of equipment identified by EMCO in its December 15, 2010 letter should qualify, may qualify, or would not qualify for exemption from property tax, based on the information provided by EMCO at that time. (Wardwell Aff. ¶ 4.) Mr. Wardwell also informed Attorney Pickart that the guidance he was providing was based on the information they were providing to him at that time and that the exemptions being discussed would only apply to personal property if it was being used directly and exclusively in manufacturing at the time of the assessment. (Wardwell Aff. ¶ 5.)

22. Mr. Wardwell informed Attorney Pickart that the Department's classification determination would be issued in writing at a later date by Tim Drascic, the Department's Manufacturing and Utility Bureau Director. (Wardwell Aff. ¶ 8.)

23. On February 1, 2011, Attorney Pickart contacted Mr. Drascic to inquire about the status of EMCO's manufacturing classification request. Mr. Drascic responded that he would review the request within the next week or two and would provide a response. (Affidavit of Timothy J. Drascic ("Drascic Aff.") ¶ 2, Ex. D-1.)

24. On February 25 and 27, 2011, Attorney Pickart contacted Mr. Drascic to confirm whether EMCO would need to file another PA-780 for the January 1, 2011 tax assessment. By email dated February 28, 2011, Mr. Drascic informed EMCO that they did not need to file another request for 2011 and that a decision on their classification as manufacturing for 2011 and 2012 was in process. (Drascic Aff. ¶ 3, Ex. D-2.)

25. On March 4, 2011, Ms. Ryddner spoke with Mr. Polen regarding the status of the Pleasant Prairie facility and operations. Mr. Polen told Ms. Ryddner that EMCO was not yet operational at that facility and that he hoped EMCO would be operational by January 1, 2012. Ms. Ryddner reported this information to Mr. Drascic for consideration in the pending personal property classification decisions for 2011 and 2012. (Ryddner Aff. ¶ 6, Ex. R-4; Drascic Aff. ¶ 4.)

26. On March 25, 2011, Mr. Drascic sent a letter to Attorney Pickart. (Drascic Aff. ¶ 6, Ex. D-4.) The letter stated:

- a. Based on the preliminary information provided, the Department had determined that the proposed activities would qualify the Pleasant Prairie facility as "manufacturing" for property assessment purposes.
- b. Some of EMCO's personal property may qualify for the exemption under Wis. Stat. § 70.11(27).
- c. EMCO's real estate would be assessed as manufacturing for 2011.
- d. EMCO's personal property would not be assessed for 2011 because they had not located any personal property at the facility and were not manufacturing any product.
- e. EMCO's personal property would be classified as manufacturing for 2012, but it would be premature to render exemption decisions on specific equipment since EMCO had not located any personal property at the facility. A decision on the exempt status of particular machinery

and equipment would best be made during an on-site inspection after the production machinery was in place.

27. These terms set forth in Mr. Drascic's letter dated March 25, 2011, were based on the information provided to the Department by EMCO at that time, including Mr. Polen's statements to Ms. Ryddner that they hoped to be operational by January 1, 2012. (Drascic Aff. ¶ 7, Ex. D-4.)

28. On January 18, 2012, Ms. Ryddner contacted Mr. Polen regarding the status of the Pleasant Prairie facility. Mr. Polen informed Ms. Ryddner at that time that manufacturing equipment was on site at the Pleasant Prairie facility but that the machinery and equipment were not yet hooked up and not yet operational.

29. Mr. Polen further informed Ms. Ryddner on January 18, 2012, that EMCO hoped to be operational at the Pleasant Prairie facility by April or May of 2012. (Ryddner Aff. ¶ 7, Ex. R-5.)

30. On January 19, 2012, Ms. Ryddner sent a letter to EMCO. (Ryddner Aff. ¶ 8, Ex. R-6.) Ms. Ryddner's letter stated:

- a. The personal property had now been classified as Manufacturing Property for property tax purposes for 2012.
- b. As a manufacturer, EMCO's machinery and equipment used exclusively and directly in the manufacturing production process qualified for a property tax exemption under Wis. Stat. § 70.11(27).
- c. To initially obtain this exemption EMCO was required to submit an asset listing along with its M-P form identifying each asset, its original

cost, its acquisition date, and whether it is reported as taxable or exempt in the M-P form. If the asset listing is not provided, all assets will be considered taxable.

- d. The asset listing must then be maintained by EMCO at its place of business or accountant's place of business each year. If the updated listing is not available for our inspections, the appraiser may assess a minimum of 20% of the assets as taxable.

31. Ms. Ryddner's statement on January 19, 2012, that the Department would assess the personal property located at the Pleasant Prairie facility as manufacturing for 2012, was based on representations by EMCO that the Pleasant Prairie facility would be operational by April or May of 2012. (Ryddner Aff. ¶ 9.)

32. On April 2, 2012, EMCO submitted a 2012 M-P form for the Pleasant Prairie facility but provided no asset listing. (Ryddner Aff. ¶ 12, Ex. R-8.) Under Schedule M, "Machinery, Tools, Patterns and Shop Equipment," EMCO listed personal property of \$6,647,536 as projects in progress, and reported \$6,222,080 of that amount as exempt personal property. (Affidavit of EMCO employee David Signafus ¶ 29.)

33. Although EMCO was not operational as of January 1, 2012, and had not submitted an asset listing for 2012, the Department determined that it would allow the exemption for 2012, particularly in light of the representation by Mr. Polen that they would be operational by April or May of 2012. (Ryddner Aff. ¶ 14.)

34. On January 29, 2013, Ms. Ryddner had a discussion with Mr. Polen regarding the status of the Pleasant Prairie facility. During that conversation, Mr. Polen informed Ms. Ryddner that the Pleasant Prairie facility was still not yet operational, and he hoped it would be operational by July or August of 2013. (Ryddner Aff. ¶ 15, Ex. R-9; Polen Aff. ¶ 21.)

35. On February 1, 2013, Ms. Ryddner sent an email to Mr. Polen confirming his statements on January 29, 2013, that the Pleasant Prairie facility was not yet operational and he hoped it would be operational by late summer 2013. In that email, Ms. Ryddner also requested a site visit and indicated that an asset listing was required for the 2013 audit. (Ryddner Aff. ¶ 16, Ex. R-10; Polen Aff. ¶ 22.)

36. On February 28, 2013, Ms. Ryddner, Ms. Matthes, and Claude Lois (Administrator, Division of State and Local Finance) visited the Pleasant Prairie facility and met with Mr. Polen. (Ryddner Aff. ¶ 17, Ex. R-11; Matthes Aff. ¶ 10; Affidavit of Claude Lois ("Lois Aff.") ¶ 2.)

37. At the time of the site visit on February 28, 2013, no manufacturing activity was occurring at the Pleasant Prairie facility. (Ryddner Aff. ¶ 20, Ex. R-11; Matthes Aff. ¶ 12; Lois Aff. ¶ 4.)

38. At the time of the visit on February 28, 2013, EMCO had not yet relocated any of its personnel from its Chicago corporate office to the Pleasant Prairie facility. (Ryddner Aff. ¶ 22, Ex. R-11; Matthes Aff. ¶ 15.)

39. At the time of the site visit on February 28, 2013, EMCO had not yet provided an asset listing for the Pleasant Prairie facility. (Ryddner Aff. ¶ 23, Ex. R-11; Matthes Aff. ¶ 16; Lois Aff. ¶ 7.)

40. At the time of the visit on February 28, 2013, it was the perception of the Department's representatives that:

- a. The facility was largely empty except for some equipment, tanks, and office furniture abandoned by EMCO's predecessor.
- b. Parts of the facility appeared to be used for storage of equipment that was not being used in manufacturing at that time.
- c. No manufacturing activity was occurring, most if not all of the machinery and equipment that was present was not operational, and there were no active product lines.

(Ryddner Aff. ¶¶ 18, 19, and 20.)

41. By contrast, EMCO's project manager for the construction stated that, as of the site visit on February 28, 2013, there was substantial equipment and product on site and "equipment that was on-site ... was operational for use in manufacturing..." although he did not explain which items of equipment were then there and which were not, or what his statement meant when the facility was not expected to be operational for months. (Supplemental Affidavit of EMCO employee B.J. Korman ¶¶ 9, 10, 11, and 14.)

42. On April 1, 2013, the Department received EMCO's 2013 Manufacturing Personal Property Return and asset listing for the Pleasant Prairie facility. (Ryddner Aff. ¶ 26, Ex. R-13.)

43. On May 15, 2013, Ms. Ryddner sent a letter to Mr. Polen stating that the Department was denying EMCO's request that its personal property at the Pleasant Prairie facility be classified as manufacturing for purposes of property taxes for 2013, because no manufacturing was occurring at that facility as of January 1, 2013. (Ryddner Aff. ¶ 28, Ex. R-14.)

44. EMCO acted as its own general contractor in connection with the construction project. The construction was overseen by EMCO employee B.J. Korman. (Affidavit of B.J. Korman ("Korman Aff.") ¶ 4.)

45. The construction project was split into three basic phases - design, construction, and commissioning. Although these phases overlapped, the basic timeline was: design phase - approximately February 2010 to April 2011; construction phase - approximately April 2011 to July 2013; and commissioning phase - approximately November 2012 to July 2013. (Korman Aff. ¶¶ 5 and 6; Ex. K1.)

46. Between February 2010 and November 2010, EMCO held meeting and property inspections and developed multiple engineering and drawing concepts for the construction. In late November, 2010, EMCO revised its initial plant design and, as a result, revised its construction budget. (Korman Aff. ¶¶ 9, 10, and 11; Exs. K4 and K5.)

47. From July 2011 through July 2013, EMCO actively pursued construction of the Pleasant Prairie facility, ordered and accepted delivery of equipment and fixtures, facilitated installation and testing of equipment and fixtures, and continued to design and redesign the project generally and particular systems specifically. AS EMCO made modifications to the design and scope of the project, its construction budget increased accordingly. (Korman Aff. ¶¶ 12 through 29; Exs. K6 through K9.)

48. On January 1, 2013, EMCO intended that all of the machinery and equipment at the Pleasant Prairie facility would be fully operational and used in production as of July or August of 2013. (Korman Aff. ¶ 33.)

49. In July, 2013, EMCO engaged in its final inspection and testing of all equipment and commenced manufacturing operations. (Korman Aff. ¶ 40.)

50. During the construction phase, EMCO experienced several unforeseen developments which affected the timing and costs of construction. (Korman Aff. ¶ 42.) These included a significant rebuild of the facility's fire suppression system, removal and replacement of the facility's fire alarm system, replacement of large sections of the facility's electrical distribution system, and the replacement of the facility's warm room truck scale. (Korman Aff. ¶¶ 43 through 61.)

51. Notwithstanding these unforeseen conditions, the period of time to complete the construction of the Pleasant Prairie facility and install the personal property was reasonable by construction industry standards. (Korman Aff. ¶ 63.)

APPLICABLE LAW

Summary Judgment

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law remain. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4, 308 Wis. 2d 684, 748 N.W.2d 154.

Applicable Statutes

70.109 Presumption of taxability. Exemptions under this chapter shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption.

70.11 Property exempted from taxation. The property described in this section is exempted from general property taxes if the property is exempt under sub. (1), (2), (18), (21), (27) or (30); if it was exempt for the previous year and its use, occupancy or ownership did not change in a way that makes it taxable; if the property was taxable for the previous year, the use, occupancy or ownership of the property changed in a way that makes it exempt and its owner, on or before March 1, files with the assessor of the taxation district where the property is located a form that the department of revenue prescribes or if the property did not exist in the previous year and its owner, on or before March 1, files with the assessor of the taxation district where the property is located a form that the department of revenue prescribes. ... Property exempted from general property taxes is:

70.11(27) Manufacturing machinery and specific processing equipment.

(b) Machinery and specific processing equipment; and repair parts, replacement machines, safety attachments and special foundations for that machinery and equipment; that are used exclusively and directly in the production process in manufacturing tangible personal property, regardless of their attachment to real property, but not including buildings. The exemption under this paragraph shall be strictly construed.

70.995 State assessment of manufacturing property.

(5) The department of revenue shall assess all property of manufacturing establishments included under subs. (1) and (2) as of the close of January 1 of each year, if on or before March 1 of that year the department has classified the property as manufacturing or the owner of the property has requested, in writing, that the department make such a classification and the department later does so. A change in ownership, location, or name of the manufacturing establishment does not necessitate a new request. ...

DECISION

Background and Issues

For Wisconsin property tax purposes, the “department of revenue shall assess all property of manufacturing establishments ... as of the close of January 1 of each year.” Wis. Stat. § 70.995(5). Machinery and equipment “used exclusively and directly in the production process in manufacturing tangible personal property” is exempt from Wisconsin property tax. Wis. Stat. § 70.11(27). The issue in this case is whether certain of EMCO’s personal property located at the Pleasant Prairie facility qualified for the Wisconsin manufacturing property tax exemption for the tax year 2013.

The parties agree that the personal property at issue is the kind of property which, if used exclusively and directly in manufacturing, would qualify for

the exemption. The parties also agree that, prior to July 2013, no manufacturing activity was conducted by EMCO at the Pleasant Prairie facility.

The Department offers a bright-line test for determining whether the exemption applies. As of the assessment date of January 1, 2013, the property was not being used by EMCO exclusively and directly in manufacturing. Consequently, the Department concludes that the property does not qualify for the manufacturing exemption under the clear language of the applicable statutes.

EMCO disagrees. Citing *Family Hospital Nursing Home, Inc. v. City of Milwaukee*, 78 Wis. 2d 312, 254 N.W.2d 268 (1977), EMCO claims that a “readying rule” justifies granting the manufacturing exemption for 2013. In *Family Hospital Nursing Home*, the Wisconsin Supreme Court held that property being “readied” for exempt use as a benevolent nursing home on the assessment date qualified for exemption, even though it did not admit patients and commence operations until three months after the assessment date. From the time the Pleasant Prairie facility was leased by EMCO in 2010, EMCO asserts that it diligently, purposefully, and consistently engaged in readying the property for the exempt manufacturing use, that there were no unreasonable delays in its construction, and that it never intended to use, nor did it use, the personal property at its facility for any purpose other than manufacturing. Consequently, EMCO argues that, by reason of the application of the readying rule, its property at the Pleasant Prairie facility qualified for the manufacturing exemption for 2013, even though there was no manufacturing activity at the facility until July of that year.

These conflicting positions present the question of whether a readying rule applies to the classification and assessment of manufacturing property in Wisconsin and, if so, whether such a rule results in EMCO's property at the Pleasant Prairie facility being exempt under the facts presented in this case.

*Is a Readyng Rule Applicable in the Classification
and Assessment of Manufacturing Property?*

The *Family Hospital* case involved a nursing home in the City of Milwaukee. Most of the Wisconsin Supreme Court's opinion in the case was devoted to the question of whether the nursing home met the definition of a "benevolent" nursing home so as to qualify for the property tax exemption available for property used exclusively for the purposes of a benevolent nursing home under Wis. Stat. § 70.11(4). Concluding that the nursing home was entitled to the exemption, the court turned to an issue similar to the one presented in this case:

The city also contends the nursing home was not "exclusively used" for benevolent purposes on assessment day, May 1, 1970 because the evidence established the nursing home was not occupied by patients until sometime after August 1, 1970. The trial court found however, that on May 1, the nursing home was equipped and in the process of readying itself for the receipt of its first patient. The delay between the time construction was completed and the time the first patient arrived was due to the necessity of acquiring a full complement of operating personnel. The nursing home property was not used for any other purpose during the period. We agree with the trial court that the nursing home should not be taxable during the period in which it was readying itself for its benevolent purpose.

Family Hospital Nursing Home, 78 Wis. 2d 312 at 323.

EMCO relies on this language for its contention that the property at the Pleasant Prairie facility should be exempt for 2013, just as it was for 2012, because it was being "readied" for use in its exempt purpose.

While acknowledging the application of the readying rule to property of benevolent associations exempt under Wis. Stat. § 70.11(4), the Department maintains that there is no similar readying rule applicable to property tax exemptions in general or to the manufacturing property tax exemption specifically. The Department argues that Wis. Stat. § 70.11(27) is "a completely different and more restrictive exemption statute than" Wis. Stat. § 70.11(4).

First, the Department notes that § 70.11(27) requires that the property be used "exclusively and directly" in manufacturing while § 70.11(4) lacks the "direct" component. While that may be different and more restrictive, the Department does not explain why that difference would exclude application of a readying rule. The property at issue in this case was, in fact, used exclusively and directly in manufacturing once EMCO commenced its manufacturing activities, just as the property at issue in *Family Hospital* was used exclusively as a benevolent nursing home once the facility began admitting patients. So the question is not whether the property is used "exclusively" or "exclusively and directly," but whether, being on the cusp of using the property for its exempt purpose on the assessment date as opposed to actually using it, is sufficient to qualify for the exemption.

Next, the Department points out that § 70.11(4) includes a requirement that the association that owns the property be considered "benevolent" while § 70.11(27)

has no specific requirement with regard to the owner of the property. That is a difference, albeit one that makes § 70.11(4) more restrictive. But again, the Department does not explain how that difference is relevant to the question of whether a readying rule may apply to the manufacturing property tax exemption.

Finally, the Department cites the general rule of statutory construction that tax exemptions, deductions, and privileges are matters of legislative grace and are strictly construed against the taxpayer. In addition, Wis. Stat. § 70.109 specifically provides that the exemptions contained Chapter 70 shall be strictly construed. The Department states: “Furthermore, Wis. Stat. § 70.11(27) in fact contains another round of ‘strictly construed’ language, suggesting that the legislature was particularly concerned with making sure that this exemption was even more strictly construed than other exemptions.” A statute can be either strictly construed or not. The notion that this Commission and the courts should apply strict, double strict, and triple strict standards of construction depending on the exemption is untenable and impractical. In our view, the statutory provisions cited by the Department simply codify the general rule of statutory construction. The Wisconsin Supreme Court applied a readying rule while strictly construing Wis. Stat. § 70.11(4), and we see no reason why one should not similarly apply to Wis. Stat. § 70.11(27)².

² While property tax exemptions are subject to strict construction, the Wisconsin Supreme Court has, on several occasions, held that the appropriate standard is “strict but reasonable.” “In Wisconsin, the taxation of property is the rule and exemption is the exception. ... In general, we apply a ‘strict but reasonable construction’ to tax exemption statutes. ... Since exemption from the payment of taxes is an act of legislative grace, the party seeking the exemption bears the burden of proving that it falls within a statutory exemption. ... Consequently, any doubt under the ‘strict but reasonable’ construction rule must be resolved against the party seeking the exemption. *Deutsches Land, Inc. v. City of Glendale*, 225 Wis. 2d 70, 79-80, 591 N.W.2d 583 (1999). *See also, Columbia Hospital Association v. City of Milwaukee*, 35 Wis. 2d 660,

Moreover, we believe the Department sees no reason why a readying rule should not apply to manufacturing property, inasmuch as they applied one in this very case. The Department admits that it knew no manufacturing activity was being conducted at the Pleasant Prairie site on January 1, 2012, and that the Department's decision to treat the personal property located at the Pleasant Prairie facility as exempt manufacturing property for 2012 was based on representations by EMCO that the Pleasant Prairie facility would be operational by April or May of 2012. We do not believe that the Department would have granted the exemption for 2012 if it truly believed it had no statutory authority to do so. Consequently, we conclude that a readying rule, under appropriate circumstances, can apply to the granting of a manufacturing property tax exemption under Wis. Stat. § 70.11(27).

*Did the Department Error by
Failing to Apply a Readying Rule in This Case?*

1. Decisions Considering and Applying the Readying Rule

As noted above, the Wisconsin Supreme Court first applied a readying rule in *Family Hospital* in 1977. There, a benevolent nursing home was fully constructed and equipped on the assessment date of May 1, but had not admitted any patients and began operations because it was in the process of acquiring a full complement of operating personnel. The court held that the nursing home was entitled to an

668, 151 N.W.2d 750 (1967). The Wisconsin Supreme Court, in *Family Hospital*, employed a strict but reasonable construction to apply a readying rule to the facts before it, as opposed to construing the statute to impose the kind of bright line test the Department advances. But the question that remains is how far that fair but reasonable construction extends.

exemption for the tax period at issue even though it did not admit its first patient until August because it was readying the facility for its exempt purpose.

The court of appeals considered the readying rule in *Group Health Cooperative of Eau Claire v. Wisconsin Department of Revenue*, 229 Wis. 2d 846, 601 N.W.2d 1 (Wis. App. 1999). There, a health cooperative purchased and obtained approval for the planned exempt use of a property; conducted an environmental audit; recorded utility, parking, sidewalk, and driveway easements; submitted site and landscape plans for approval; and applied for a building permit. As of the assessment date, however, the property was vacant and construction had not yet commenced. The court held that, because the cooperative “had not yet even commenced construction...” the property could not be considered to fall under the readying rule. *Id.* at 859.

In *FH Healthcare Dev., Inc. v. City of Wauwatosa*, 2004 WI App 182, 276 Wis. 2d 243, 687 N.W.2d 532, the court of appeals considered the application of the property tax exemption found in Wis. Stat. § 70.11(4m), which exempts real property owned and used exclusively by a non-profit hospital for its exempt purposes. There, Froedtert Hospital was constructing a building which it claimed was intended to be used for the hospital’s exempt purposes. Ultimately, a significant portion of the building was leased to a third-party lab, which the court determined was a commercial use. Nevertheless, the hospital argued that, during the building’s construction in 2000, it was being readied for an intended exempt use and should have been classified as exempt property. The court stated:

Here, there is no indication that, as in *Family Hospital*, the FHHD building was fully constructed and equipped, and in the final stages of readying itself for an exempt purpose. While FHHD contends that the entire building “was being prepared for use in furtherance of the tax-exempt purposes of Froedtert Hospital[,]” it has failed to establish that. Such a self-serving, conclusory statement regarding the partially constructed building hardly equates the FHHD Building with the nursing home in *Family Hospital*. Furthermore, regarding FHHD's contention that the space could not possibly have been used for a commercial purpose until it was completed and occupied by United/Dynacare, we note that the relevant case law appears to be concerned with the use of the property at the time of assessment, and again, FHHD has failed to provide us with enough to establish that it was being readied for an exempt purpose.

Id. at ¶ 36.

The only Wisconsin case in which a court has applied the readying rule to extend the exemption beyond the statutory assessment date is *Family Hospital*. In that case, the facility was fully constructed and equipped merely awaiting a full complement of employees to begin its operations. In contrast, here we are faced with a facility which remained under construction on the assessment date and was not expected to begin operating until months later.

2. Wisconsin Property Assessment Manual

EMCO argues that the readying rule applies to a property under construction if it is intended to be used for an exempt purpose, it is not otherwise used for a nonexempt purpose, construction continues diligently and without delay, and the property is devoted to its exempt purpose promptly upon completion of construction. As authority for that proposition, EMCO cites the *Family Hospital, Group Health*

Cooperative, and *FH Healthcare* cases and, more to the point, certain provisions of the Wisconsin Property Assessment Manual (“WPAM”).

WPAM Chapter 22 is entitled “Property Tax Exemptions.” In Chapter 22 is a section entitled “Recurring Exemption Requirements,” under which is a subsection entitled “Improvements Under Construction.” In that subsection, the WPAM provides at WPAM 22-7:

Property under construction on the assessment date that is owned by an exempt association is entitled to exemption. The assessor must conduct a thorough review of the association to ensure that the property will be used for an exempt purpose when completed. This includes monitoring the property to ensure that construction is proceeding at a reasonable pace. In addition, the assessor should review the property when construction is complete to ensure that it is being used for an exempt purpose.

In *Family Nursing Home, Inc. v. Milwaukee*, 78 Wis. 2d 312 (1977), the City contended that the nursing home was not “exclusively used” for benevolent purposes on the assessment date because the home was not occupied by patients until several months later. The home was equipped and in the process of hiring staff on the assessment date. The nursing home was not used for any other purpose during the period. The court ruled that the nursing home should not be taxable during the period as it was readying itself for benevolent purposes.

The assessor must base exemption decisions on a “strict but reasonable” construction of the statutes. This means that the assessor must not interpret the exemption so narrowly as to deny reasonable claims for exemption. If a property under construction is readying itself for exempt purposes and is not being used for other purposes, it would appear reasonable to exempt such property.

To the extent this subsection of WPAM can be read to require the Department to grant exempt status to property which is under construction on the

assessment date but which will not be used for an exempt purpose until sometime well after the assessment date, it goes far beyond what the Wisconsin statutes require in order to qualify for exemption.³ Wisconsin Statute § 70.995(5) provides that the “department of revenue shall assess all property of manufacturing establishments ... as of the close of January 1 of each year.” Wisconsin Statute § 70.11(27) states that machinery and equipment “used exclusively and directly in the production process in manufacturing tangible personal property” is exempt from Wisconsin property tax. These provisions are to be strictly construed with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption. Wis. Stats. §§ 70.109 and 70.11(27)(b). Manufacturing equipment which stands idle while construction of a manufacturing facility continues is clearly not used exclusively and directly in the manufacturing process.

Nor, in our view, is such a rule justified by the supreme court’s decision in *Family Hospital*, which addressed a facility which was, as of the assessment date, fully constructed and equipped and which was shortly thereafter fully operating and admitting its first patients. The court of appeals provided a small bit of guidance when it declined to apply the readying rule in *Group Health Cooperative* where construction “had not yet even commenced.” But it is not a reasonable extension that simply

³ Wis. Stat. § 70.32(1) directs assessors to value real property in the manner specified in the WPAM. Likewise, Wis. Stat. § 70.34 directs assessors to act in the manner specified in the WPAM in assessing personal property. However, Wisconsin courts have held that adherence with the WPAM is required, absent conflicting law. *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687, ¶ 85. “Wisconsin Stat. §73.03(2a) makes clear that the decisions of the Wisconsin courts are binding upon the Department of Revenue as it prepares and publishes the Manual, not the other way around.” *Id.*, (Abrahamson, CJ, concurring, fn. 21).

commencing construction is sufficient; that is, we cannot conclude that a readying rule applies to provide an exemption from the time the first ceremonial shovel touches the ground until construction is complete.

The kind of construction readying rule advanced by EMCO would be difficult and impractical to apply, particularly in construction projects spanning years. Things happen, as evidenced by the significant changes in the scope of the project in this case over the course of 2011 and 2012. While the project in this case successfully proceeded to its intended conclusion, market forces, economic pressures, changes in product demand, or any of a myriad of other factors could derail other projects. The result could be that property could be granted an exemption, potentially for years, without any exempt activity ever having occurred. Moreover, , the Department would have the unenviable task of trying to determine whether discrete items of machinery or equipment on site while construction is continuing will, at some point in the future, be used exclusively and directly in the manufacturing process, as opposed to some other related activity conducted on site (such as design, testing, storage, shipping, etc.).

The readying rule fashioned by the supreme court in *Family Hospital* is found in a single paragraph of a decision otherwise devoted entirely to the issue of whether the nursing home was, in fact, benevolent. There is no discussion of statutory construction or legislative intent. Particularly when the legislature has directed that the property tax exemption provisions are to be strictly construed, we do not believe that the readying rule can justifiably be stretched to cover the entire period during which a facility is constructed, even if the construction proceeds expeditiously with the intent

and result that the facility is devoted to an exempt purpose and no other. Such an extension is within the exclusive purview of the legislature.

3. Is a Readying Rule Applicable in this Case?

The Pleasant Prairie property was acquired in 2010 with the intent of using it as a manufacturing facility. EMCO began construction activities on the property upon its acquisition, and the construction process continued for more than three years until its completion in July of 2013.

In late 2010, EMCO informed the Department that, based upon existing site plans, the construction of the property would not likely be completed for 12 to 18 months, and that EMCO's hope was to be operational by January 1, 2012.

In March of 2011, the Department informed EMCO that based on the information provided the proposed activities at the Pleasant Prairie facility would qualify as "manufacturing," that the real property would be assessed as manufacturing property for 2011,⁴ and that no personal property would be assessed for 2011 because none was located at the facility (other than property left by the seller of the property). The Department further advised that EMCO's personal property would be classified as exempt manufacturing property for 2012, though classification of specific equipment could not be made until the equipment was in use in manufacturing activities. The Department's conclusions were based on the information provided to it by EMCO,

⁴ There is no statutory exemption for manufacturing real property. The only consequence of classifying real property as "manufacturing" property is that it is assessed by the State of Wisconsin rather than the local municipality. Wis. Stat. § 70.995. Classifying real property for assessment purposes is not the same as determining whether personal property qualifies for the exemption under Wis. Stat. § 70.11(27).

including the statement of EMCO's president that he hoped the facility would be operational by January 1, 2012.

In January of 2012, EMCO informed the Department that manufacturing machinery and equipment was on the premises, but was not yet operational. EMCO told the Department that it hoped the Pleasant Prairie facility would be operational by April or May of 2012. Based on that information, the Department informed EMCO that its machinery and equipment would be classified as manufacturing property for property tax purposes, so long as it was used exclusively and directly in the manufacturing process. EMCO, however, did not commence manufacturing activities at the Pleasant Prairie facility at any time during 2012. Nevertheless, \$6,222,080 of EMCO's personal property located at the facility was treated as exempt manufacturing property for 2012.

Late in January of 2013, EMCO informed the Department that the facility was still not operational and that it hoped that manufacturing activity would commence by July or August of 2013. The Department made a site visit to the Pleasant Prairie facility on February 28, 2013. At the time of the site visit, no manufacturing activity was occurring. The Department's perception was that the facility was mostly empty, except for equipment being stored. EMCO provided sworn statements to the effect that a substantial amount of machinery, equipment, and product was present at the facility, and commissioning and testing activity was occurring. EMCO's construction manager stated in his affidavit that the machinery and equipment at the facility was "operational" on January 1, 2013, but he does not explain what machinery

and equipment he was referring to or exactly what his statement meant in relation to the facility's readiness to commence manufacturing. His affidavit specifically stated that construction of the facility continued until July of 2013. EMCO's president stated in his affidavit that the facility was not operational in January of 2013. And, as everyone agrees, no manufacturing activity occurred at the facility until July of 2013.

The status of the Pleasant Prairie facility on the assessment date in this case is not the same or materially similar to the status of the nursing home at issue in the *Family Hospital* case. It was not fully constructed and equipped on the assessment date, and EMCO acknowledged that no exempt manufacturing activity was likely to occur until July or August of 2013 - after a substantial portion of the period for which the exemption was sought had passed. Even then, we would not be surprised if the Department had been skeptical of that timeline, given prior expressions of EMCO's intent to begin manufacturing activities and the Department's perception of the condition of the facility during its site visit in February of 2013. Suffice it to say that the Pleasant Prairie facility was not sufficiently close to being operational so as to require the Department grant an exemption for the machinery and equipment located at the facility destined to be used in manufacturing at some point in the future.

CONCLUSIONS OF LAW

As required by applicable rules of statutory construction and the provisions of Wis. Stats. §§ 70.109 and 70.11(27)(b), we must apply a "strict but reasonable" construction to the manufacturing property tax exemption in Wis. Stats. § 70.11(27). We must presume that the property in question is taxable and the burden of

proof is on the Petitioner to prove that it falls within the requirements of the exemption provision. EMCO has failed to do so. Thus we find summary judgment for the Department is appropriate and conclude as follows:

1. There are no material facts in dispute and this matter is ripe for summary judgment.

2. The readying rule applicable to the property tax exemption for benevolent entities under Wis. Stat. § 70.11(4) is similarly applicable to the property tax exemption for machinery and equipment used exclusively and directly in manufacturing under Wis. Stats. § 70.11(27).⁵

3. The readying rule is not applicable to the entire period a facility is under construction even if the intended use of the facility when fully constructed is an exempt use.

4. EMCO's Pleasant Prairie facility was neither fully constructed nor sufficiently close to being operational on the assessment date of January 1, 2013, so as to require the Department to grant a 2013 property tax exemption under the readying rule for the machinery and equipment located at the facility.

ORDER

Based on the foregoing, the Commission orders as follows:

1. The Department's Motion for Summary Judgment is granted.
2. The Petitioner's Motion for Summary Judgment is denied.

⁵ Because we find that the readying rule applies to the manufacturing property tax credit, we need not address EMCO's contention that failure to so apply the rule would violate the Uniformity Clause of the Wisconsin Constitution.


3. The Department's action on the Petitioner's Petition for Redetermination is hereby affirmed.

Dated at Madison, Wisconsin, this 27th day of February, 2017.

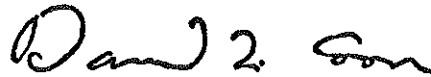
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



David D. Wilmoth, Commissioner



David L. Coon, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

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**

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.**
2. **If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.**
3. **The 30-day period starts the day after personal service or the day we mail the decision.**
4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.