

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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ENVIRO QUIP, LLC.,

DOCKET NO. 11-S-354

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**ROGER W. LEGRAND, COMMISSIONER:**

This case comes before the Commission on the Department's Motion to Dismiss. The Petitioner is an LLC, and is represented by Mr. D. J. Burns. The Respondent is represented by Attorney Julie A. Zimmer. Both parties have filed affidavits and briefs in this matter.

**JURISDICTIONAL FACTS**

1. Petitioner filed a seller's claim for refund of sales taxes dated November 2, 2010, which had previously been remitted to the Department for the periods July 2000 through September 2010. The total amount of the refund requested was \$16,173.72. Exhibit 1.

2. On January 20, 2011, a letter was issued by the Department granting Petitioner's claim for refund for the open periods January 2006 through September 2010 in the amount of \$6,253.18, but denied Petitioner's claim for refund for

the periods July 2000 through December 2005 in the amount of \$9,920.54 because the claim for refund for those periods was filed outside the statute of limitations. Exhibit 2.

3. Petitioner filed a letter dated March 18, 2011, including a timely Petition for Redetermination of the partial denial of its claim for refund. Exhibit 3.

4. By Notice of Action dated October 11, 2011, the Department denied Petitioner's Petition for Redetermination. Exhibit 4.

5. Petitioner timely filed a Petition for Review of the Department's action with the Wisconsin Tax Appeals Commission on December 9, 2011. Exhibit 5.

#### DECISION

After reviewing the file, the briefs, affidavits, and other filings made by the parties, the Commission grants the Department's Motion to Dismiss because the claim for refund was filed outside the statute of limitations provided for in Wis. Stat. § 77.59(4)(a), Stats. (2009-2010), and, therefore, the Commission lacks jurisdiction to review the alleged grievances of the Petitioner.

This case is about a claim for refund filed by Petitioner on November 2, 2010, in the amount of \$16,173.72. The Department granted \$6,253.18 of the claim for the years from January 2006 through September 2010, but denied the parts of the claim dealing with the periods from July 2000 through December 2005, because the claim for refund was filed outside the statute of limitations.

The statutes in question dealing with deficiency and refund provisions are Wis. Stats. § 77.59(1), and (4)(a), which read as follows:

I. *Relevant Wisconsin Statutes (2009-2010)*

**77.59 Deficiency and refund determinations.**

(1) The department may, by office audit, determine the tax required to be paid to the state or the refund due to any person pursuant to this subchapter. The determination may be made upon the basis of the facts contained in the return being audited or upon the basis of any other information within the department's possession. The determination shall be presumed to be correct and the burden of proving it to be incorrect shall be upon the person challenging the correctness thereof. One or more such office audit determinations may be made of the amount due for any one or for more than one period.

(4)(a) Except as provided in sub. (3m), at any time within 4 years after the due date, or in the case of buyers the unextended due date, of a person's corresponding Wisconsin income or franchise tax return or, if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year for which that person files a claim, that person may, unless a determination by the department by office or field audit of a seller has been made and unless a determination by office audit of a buyer other than an audit in which the tax that is the subject of the refund claim was not adjusted has been made and unless a determination by field audit of the buyer has been made, file with the department a claim for refund of taxes paid to the department by that person. If the amount of the claim is at least \$50 or if either the seller has ceased doing business, the buyer is being field audited or the seller may no longer file a claim, the buyer may, within the time period under this subsection, file a claim with the department for a refund of the taxes paid to the seller. A claim is timely if it fulfills the requirements under s. 77.61 (14). A buyer may claim a refund under this paragraph only on a form prescribed by the department, only by signing that form and only if the seller signs the form unless the department waives that requirement. If both a buyer and a seller file a valid claim for the same refund, the department may pay either claim. The claim for refund shall be regarded as a request for determination. The determination thus requested shall be

made by the department within one year after the claim for refund is received by it unless the taxpayer has consented in writing to an extension of the one-year time period prior to its expiration.

Determinations made by the Department are presumed to be correct and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respect the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-401 (WTAC 1984). This presumption of correctness extends to the office audit and denial of tax refund claims. Wis. Stat. § 77.59(1). Tax refund statutes must be construed strictly in favor of imposing the tax and against allowing the refund, and the burden is on the person requesting the refund to bring himself within the refund statute. *Ho-Chunk Nation v. Dep't of Revenue*, 312 Wis. 2d 553, 766 N.W.2d 738 (2009).

In this case, the Department denied Petitioner's claim for refunds for the periods July 2000 through December 2005. Petitioner made the claim for refund on November 2, 2010. The statute of limitations deadline for making the claim for refund for the periods of July 2000 through December 2005, was the due date of the 2005 tax return (April 15, 2006), plus 4 years, which would be April 15, 2010. The Department's denial of the refund claim of November 2, 2010, for the periods from July 2000 through July 2005, was therefore correct, as the claim was barred by the statute of limitations.

The Petitioner in this matter has had continual contact with the Department about the taxability of the services provided by Enviro Quip but never filed a claim for reimbursement until November 2, 2010. On January 20, 2011, the

Department informed Enviro Quip that its services were not taxable and refunded the amount of sales taxes paid from January 2006 through September 2010. However, it denied a refund of the sales taxes allegedly paid from January 2000 through December of 2005, because the 4-year statute of limitations closed any potential refunds for those periods. Enviro Quip objected. The gist of Enviro Quip's argument is that they are not claiming a refund, but rather asking for reimbursement for "erroneous payments" since they never had sales tax liability in the first place.

But, as *Gilbert v. Dep't. of Revenue*, 246 Wis. 2d 734, 633 N.W.2d 218 (Ct. App. 2001) points out, if a taxpayer fails to file a refund claim within the time period set by statute, the Tax Appeals Commission lacks jurisdiction to determine whether the refund claim is valid. Here, the income on which tax was paid by Enviro Equip was not in fact taxable. But the Commission is without jurisdiction to hear Petitioner's grievances when the refund claim is late. *Spear v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) 401-537 (WTAC 2012).

Between July 2000 and September 2010, Petitioner made erroneous sales tax payments to the Department. The legislature provided an exclusive remedy for obtaining reimbursement of these payments in Wis. Stat. § 77.59(4). Petitioner could have applied for a refund of these payments at any time during these ten years but chose to file under the provision for the first time on November 2, 2010. As *Gilbert* states, "Where the legislature allows a remedy for recovery of allegedly illegal or excessive sales taxes, that remedy is exclusive, and no action seeking a different remedy against the State may be maintained." *Id.*

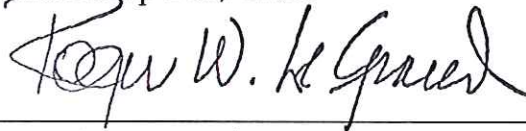
Enviro Quip finally contends that it paid sales taxes on the advice of a representative from the Department of Revenue. There is no evidence of the name of the representative, nor any other evidence provided to back up this claim. However, even if such evidence existed, Enviro Quip was subject to the 4-year statute of limitations set out in Wis. Stat. § 77.59(4). The Commission concludes that it has no jurisdiction to hear Enviro Quip's claim and therefore grants the Department's Motion to Dismiss.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of June, 2013.

WISCONSIN TAX APPEALS COMMISSION



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Lorna Hemp Boll, Chair



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Roger W. LeGrand, 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 either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) 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.