STATE OF WISCONSIN

TAX APPEALS COMMISSION

PRIMERA FOODS CORPORATION,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NOS. 10-I-277 AND 10-S-278

RULING AND ORDER

ROGER W. LEGRAND, COMMISSIONER:

These matters come before the Commission pursuant to the Petitions for Review filed by Petitioner, Primera Foods Corporation on December 7, 2010. Primera is represented in these matters by Attorney Joseph A. Pickart, Attorney David C. Swanson and Whyte Hirschboeck Dudek S.C., Milwaukee, Wisconsin. The Department is represented by Attorney Julie A. Zimmer. On April 18, 2012, the parties filed with the Commission a Stipulation of Facts and Issues which are as follows:

STIPULATED FACTS AND ISSUES

1. Petitioner is Primera Foods Corporation ("Primera"), a Wisconsin business corporation organized under Chapter 180 of the Wisconsin Statutes on February 7, 2002, with its principal place of business located at P.O. Box 373 Cameron, Wisconsin.

2. Respondent is the State of Wisconsin Department of Revenue (the "Department").

3. Primera is, and was during the period of July 1, 2002, through and including December 31, 2005 (the "Franchise Audit Period"), and during the period of January 1, 2003, through and including December 31, 2006 (the "Sales and Use Audit Period"), engaged in manufacturing and marketing fresh, liquid and prepared egg products to commercial food manufacturers in the United States.

FRANCHISE TAX ASSESSMENT (DOCKET NO. 10-I-277)

4. By Notice of Field Audit Action dated May 9, 2008 (the "Franchise Tax Assessment"), the Department assessed against Primera, for the Franchise Audit Period, certain corporate franchise tax liabilities in the amount of $22,987.88, consisting of tax in the amount of $16,431.89 and interest in the amount of $6,555.99, as calculated through July 8, 2008. (Ex. 1.)

5. By Petition for Redetermination dated June 27, 2008, Primera timely petitioned the Department for a redetermination of the Franchise Tax Assessment for the Franchise Audit Period. (Ex. 2.)

6. Upon the filing of its Petition for Redetermination, Primera deposited $22,987.88 with the Department to stop the accrual of additional interest on the franchise tax assessed by the Department in this matter.

7. On or about June 2, 2008, Primera timely filed amended Form 4 Wisconsin Corporation Franchise or Income Tax Returns claiming Manufacturing Sales

Tax Credits ("MSTCs") under Wis. Stat. § 71.28(3) for each year of the Franchise Audit Period, totaling $161,299. (Ex. 3, 4, 5 and 6.)

8. By letter dated July 16, 2008 (the "Franchise Tax Refund Claim Denial Notice"), the Department denied Primera's claim for MSTCs for each year of the Franchise Audit Period. The Department alleged that the MSTCs were unavailable to Primera because Primera did not remit sales or use tax on its purchases of natural gas during the Franchise Audit Period. (Ex. 7.)

9. By Petition for Redetermination dated September 11, 2008, and pursuant to Wis. Stat. § 71.88(1), Primera timely petitioned the Department for a redetermination of the Department's July 16, 2008 Franchise Tax Refund Claim Denial Notice for the Franchise Audit Period. Primera's appeal of the Franchise Tax Refund Claim Denial Notice was incorporated into Primera's appeal of the field audit Franchise Tax Assessment for the Franchise Audit Period. (Ex. 8.)

10. Pursuant to the Agreement on Field Audit Assessment(s) and Refund Claim Denial between the parties dated October 1, 2010 (the "Agreement"), the parties settled certain issues in this matter, resulting in a franchise tax overpayment by Primera in the amount of $36,717.41 for the Franchise Audit Period, plus Primera's deposit of $22,987.88, for a total overpayment in the amount of $59,705.29. This amount was refunded by the Department to Primera. (Ex. 9.)

11. Also pursuant to the Agreement, the Department allowed a portion of the MSTCs Primera claimed on its amended Wisconsin franchise tax returns for sales

and use tax it paid on the purchase of electricity used exclusively and directly in manufacturing during the Franchise Audit Period in the amount of $27,055.04. This amount was included in Primera's $59,705.29 refund. (Ex. 9.)

12. By two Notices of Action dated October 7, 2010, and pursuant to the Agreement, the Department granted in part and denied in part Primera's Petitions for Redetermination with regard to the Franchise Tax Assessment and the MSTC refund claims for the Franchise Audit Period. (Ex. 10.)

13. On December 6, 2010, Primera timely filed its Petition for Review with the Commission in this matter. (Ex. 11.)

SALES/USE TAX ASSESSMENT (DOCKET NO. 10-S-278)

14. By Notice of Field Audit Action dated May 2, 2008 (the "Sales and Use Tax Assessment"), the Department assessed against Primera, for the Sales and Use Audit Period, certain sales and use tax liabilities in the amount of $290,602.25, consisting of tax in the amount of $180,413.58, interest in the amount of $69,902.29, as calculated through July 1, 2008, and penalties under Wis. Stat. § 77.60(3) in the amount of $40,286.38. (Ex. 12.)

15. By Petition for Redetermination dated June 27, 2008, Primera timely petitioned the Department for a redetermination of the Sales and Use Tax Assessment for the Sales and Use Audit Period. (Ex. 2.)

16. Upon the filing of its Petition for Redetermination, Primera deposited $290,602.25 with the Department to stop the accrual of additional interest on the sales and use tax assessed by the Department in this matter.

17. Pursuant to the Agreement dated October 1, 2010, the parties settled certain issues in this matter, resulting in a revised sales/use tax assessment against Primera in the amount of $133,169.62, plus interest (less refund interest) in the amount of $54,432.59 and related 25% penalty under Wis. Stat. § 77.60(3) in the amount of $36,721.45, for a total revised assessment in the amount of $224,323.66. Applying Primera's $290,602.25 deposit resulted in an overpayment by Primera in the amount of $66,278.59 for the Sales and Use Audit Period. This amount was refunded by the Department to Primera. (Ex. 9.)

18. By Notice of Action dated October 7, 2010, and pursuant to the Agreement, the Department granted in part and denied in part Primera's June 27, 2008 Petition for Redetermination with regards to the Sales and Use Tax Assessment for the Sales and Use Audit Period. (Ex. 14)

19. On December 6, 2010, Primera timely filed its Petition for Review with the Commission in this matter. (Ex. 15.)

ADDITIONAL MATERIAL FACTS

20. The Franchise Audit Period covered the first partial year of Primera's existence as an operating Wisconsin corporation following a reorganization (July 1, 2002, through December 31, 2002), its Form 4 Wisconsin Corporation Franchise

or Income Tax Return for that same period, and the three subsequent calendar years and related returns (2003, 2004 and 2005).

21. The Sales and Use Audit Period covered the first four full calendar years of Primera's existence as a Wisconsin corporation following the reorganization and related returns for 2003 through 2006.

22. During the periods at issue, Primera purchased natural gas to be used in manufacturing tangible personal property in Wisconsin.

23. On its original Wisconsin sales and use tax returns for the Sales and Use Audit Period, Primera did not report or pay sales or use tax on its purchases of the natural gas at issue. Primera's purchases of the natural gas at issue were subject to Wisconsin sales/use tax during the Sales and Use Audit Period, resulting in the Department's assessment of additional sales/use tax on these purchases.

24. During the Franchise Audit Period, Primera did not claim Manufacturing Sales Tax Credits ("MSTCs") on its respective original franchise tax returns. Primera claimed MSTCs on its timely amended franchise tax returns in the total amount of $161,299 for the Franchise Audit Period.

25. If Primera had paid sales or use tax on its purchases of natural gas consumed in manufacturing tangible personal property during the Franchise Audit period and had claimed such amounts as MSTCs on its original franchise tax returns during that same period, then the Department would have allowed those credits.

26. During the Franchise Audit Period, Wis. Stat. § 71.28(3) provided as follows in part:

> (3) MANUFACTURING SALES TAX CREDIT.
>
> (a) In this subsection:
>
> 1. "Manufacturing" has the meaning given in s. 77.54 (6m).
>
> 2. "Sales and use tax under ch. 77 paid by the corporation" includes use taxes paid directly by the corporation and sales and use taxes paid by the corporation's supplier and passed on to the corporation whether separately stated on the invoice or included in the total price.
>
> (b) The tax imposed upon or measured by corporation Wisconsin net income under s. 71.23 (1) or (2) shall be reduced by an amount equal to the sales and use tax under ch. 77 paid by the corporation in such taxable year on fuel and electricity consumed in manufacturing tangible personal property in this state.
>
> (c) 7. No credit may be claimed under this subsection for taxable years that begin after December 31, 2005.

27. Pursuant to the Agreement dated October 1, 2010, the parties have settled all issues raised by the audits in question except for the stipulated issues described in ¶ 28.

STIPULATED ISSUES

28. Pursuant to the parties' Agreement dated October 1, 2010, Primera has agreed to limit its appeals for review by the Tax Appeals Commission in these matters to the following stipulated issues:

- Whether the Department correctly imposed the 25% penalty of $36,721.45 in the Sales and Use Tax Assessment against Primera; and,

- Whether Primera is entitled to an "equitable recoupment" offset, either on the Franchise Tax Assessment or the Sales and Use Tax Assessment, because use tax is due on untaxed natural gas purchased and included in Schedule 3 of the Sales and Use Tax Assessment; and,
- Whether Primera is entitled to a manufacturer's sales tax credit on natural gas purchased during the period beginning July 1, 2002, and ending December 31, 2005, which was not allowed by the Department on Exhibit STC of the field audit Franchise Tax Assessment.

29. The parties reserve the right to make such legal arguments as they see fit regarding the stipulated issues in ¶ 28.

In addition, the parties stipulated to a briefing schedule which they have complied with. Neither party filed a Motion for Summary Judgment, but since all the facts are stipulated, and issues are stipulated, there remains no genuine issue as to material facts. The Commission will treat the case as if both parties moved for Summary Judgment. The Commission's decision on the stipulated issues will resolve the case.

DECISION

After reviewing the stipulated facts and the briefs of both parties, the Commission finds that:

1. Primera is entitled to a Manufacturer's Sales Tax Credit on natural gas purchased during the period beginning July 1, 2002, and ending December 1, 2005, which was not allowed by the Department on Exhibit STC of the field audit Franchise

Tax Agreement.

2. Petitioner Primera is entitled to claim the Manufacturing Sales Tax Credit for the years 2002 to 2005. The imposition of the negligence penalty was not correct because, after the Manufacturing Sales Tax Credit was applied to Primera's 2002 to 2005 tax returns, there was no sales tax owing.

3. It is unnecessary for Primera to take an "equitable recoupment" offset because the Manufacturing Sales Tax Credit zeroed out any use tax due on natural gas purchases from 2002 to 2005.

This case asks the Commission to apply Wis. Stat. § 71.28(3) to a set of stipulated facts relevant to our decision as follows:

- From 2002 to 2005, Primera purchased natural gas which was used in manufacturing tangible personal property in Wisconsin. (Stipulation of Facts, #22.)
- Primera did not pay sales or use tax on its purchases of natural gas from 2002 to 2005. (Stipulation of Facts, #23.)
- After an audit, Primera admitted it was liable for the sales and use tax on those purchases. (Stipulation of Facts, #17.)
- Primera timely filed amended Form 4, Wisconsin Corporation Franchise or Income Tax Return claiming tax credits on the unpaid use tax liability. (Stipulation of Facts, #7.)
- Primera deposited a sum sufficient to cover the use tax deficiency, while at the same time, filing for a redetermination of the assessment. (Stipulation of Facts, 5-6, and 15-16.)

The Department denied Primera's Petition for Redetermination. It argues that Primera was not entitled to the Manufacturing Sales Tax Credits from 2002 to 2005,

because it had not "paid" any sales tax on the natural gas it purchased for manufacturing purposes during those years. Under its interpretation of Wis. Stat. § 71.28(3), the tax credits could only be granted to reduce income by an amount equal to sales or use taxes actually "paid" on fuel or electricity consumed for manufacturing purposes during that year. The Department contends that, since Primera had not paid the taxes, they could not take the credit.

Primera essentially contends that this is a "strict, but unreasonable" interpretation of Wis. Stat. § 71.28(3) *See, e.g., Covenant Healthcare System, Inc. v. City of Wauwatosa*, 2011 WI 80, 336 Wis. 2d 522, 800 N.W.2d 906 ("While we are required to strictly construe tax exemption statutes..., the statute need not be given an unreasonable construction or the narrowest possible construction... Moreover, it should not be construed as to defeat the legislative intent."). We agree for several reasons. First, for a long time, tax cases in various contexts have held that "paid" can mean "paid or incurred" or "paid or accrued."[1] All agree that the sales taxes in this case were incurred; therefore, on the facts of this case, they were "paid" to a sufficient degree for the credit to apply. Second, the Department appears to view the word "paid" to require something akin to simultaneous exchange, but does not offer any legal support for that construction. In the context of the sales and use tax, where the retailer essentially acts as the state's agent, that construction does not seem right.

Third, it is blackletter law that, when the legislature does not provide us

[1] *The Ocean Accident and Guarantee Corporation, Ltd. v. Commissioner of Internal Revenue*, 47 F.2d 582 (1931).

with a definition of a term such as "paid," we may consult a recognized dictionary for guidance. When we do that here, we see that *Webster's Seventh New Collegiate Dictionary* states as follows for "pay":

> 1a to make due return to for services rendered or property delivered, b: to engage for money: hire;
> 2a to give in return for goods or service (~wages), b: to discharge indebtedness for: **settle**

(emphasis added)

Nowhere does the dictionary definition suggest the strict and narrow reading the Department makes here. Instead, at least in context, we view "pay" as something more akin to "settle," or incurred. In the context of a sales tax issue, this construction makes sense as three parties are typically involved and the retailer acts as the state's agent in collecting the sales tax from the buyer. If a retail sale is made, clearly a tax is owed, and, ultimately must be paid, but simultaneous exchange is not required to get a credit.

Fourth, Primera further contends that Wis. Stat. § 71.28(3) should be read in the context of the legislature's intent when creating the tax credit. The Commission agrees with Primera that the intent of the legislature in granting the credit was to promote manufacturing by exempting fuel used in the manufacturing process. The statute is not ambiguous. The exact words the Legislature used are as follows:

> (3) MANUFACTURING SALES TAX CREDIT
> (b) The tax imposed upon or measured by corporation Wisconsin net income... **shall be reduced** by an amount equal to the sales and use tax...

(emphasis added)

It is clear that we have to construe statutes as a whole, harmonizing provisions wherever possible. *Milwaukee County v. Department of Industry, Labor and Human Relations Commission,* 80 Wis. 2d 445, 259 N.W.2d 118 (1977) ("Cardinal rule in interpreting statutes is that purpose of whole act is to be sought and is favored over construction which will defeat manifest object of the act.") That intent is further demonstrated by the legislature's subsequent simplification of this tax credit to an outright exemption beginning in 2006. See Wis. Stat. § 77.54(6)(c) (2005-06). The Department's construction simply puts too much emphasis on "paid," and not enough on Wis. Stat. § 71.28(3)(b).

Fifth, we note that the statute in question in fact merely says in Wis. Stat. 71.28(3)(a)2 that it "... *includes* use taxes paid..." The Department in this case has converted this provision to the equivalent of a substantive requirement, but does not offer us any support for this. If the legislature had meant a construction similar to the Department's here, we believe they would have used a term in this statute similar to "*actually* paid." *See, e.g., Wis. Stats. §§ 182.71, 86.303, 645.53, 138.09, 241.05.*[2] The Department's brief discusses *Fort Howard Paper Co. v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶ 202-253 (WTAC 1983). To the degree it is applicable, we think *Fort Howard* favors a construction similar to ours. In sum, for the totality of all of these reasons, we must reject the Department's construction of the statute.

---

[2] There is a definition of "pay" in Wis. Stat. § 71.01(8r) (2009-10) but we do not believe it assists in deciding the question here. Neither party presents an argument based on Wis. Stat. § 71.01.

The Department concedes that, had Primera paid any sales tax on fuel during the years in question, Primera would have been entitled to the credit. Thus, the Department has acknowledged that, had the return been filed correctly, no tax was due. Sound principles of tax equity and administrative fairness do not support an assessment against the taxpayer for amounts that were not due. *Fort Howard Paper Co.,* ("Principles of tax equity and sound tax administration require that such unfair and inconsistent conduct not be permitted.")

When Primera received the assessment on unpaid fuel taxes from 2002 to 2005, they appealed in a timely fashion which was their right. They filed an amended return on which they took the tax credit which zeroed out the tax due. They also filed a deposit to cover the incurred but as yet unpaid sales taxes, acknowledging that they were liable for these taxes. The Department argued that this was not enough, citing Wis. Stat. § 71.90(1) that a deposit is not a payment. True enough. But, the Department also asserts that, if Primera had not made this deposit, it would have lost its right to appeal. Primera had to make the deposit to preserve its right to argue for an equitable recoupment. We believe the Department's position is patently unfair to Petitioner because it would have foreclosed its right to appeal.

Primera's transactions of filing an amended return, acknowledging liability for the sales tax, making a deposit to cover the tax, and taking the manufacturing exemption resulted in the taxpayer owing no sales or use tax. This result was what the legislature intended when it provided a tax credit dollar-for-dollar

against payments for fuel used in manufacturing. It is not necessary for the Commission to address the penalty issue. Under Wis. Stat. § 77.60(3), such penalty is assessed on "the entire tax finally determined." Because there is no tax due the application of the sales tax credit on Primera's 2002 to 2005 amended returns, the penalty amount is zero. Likewise, it is not necessary to address an "equitable recoupment" offset because the sales tax credit applied to the unpaid sales or use tax zeroes out any tax due.

The Commission, therefore, concludes that Primera is entitled to a manufacturer's sales tax credit on natural gas purchased during the period beginning July 1, 2002, and ending December 31, 2005, which was not allowed by the Department.

ORDER

The Commission reverses the Department's actions on the Petitioner's Petitions for Redetermination and allows Petitioner to claim tax credits pursuant to Wis. Stat. § 71.28(3) for the tax assessed in connection with Petitioner's purchases of natural gas for the years 2002 to 2005.

Dated at Madison, Wisconsin, this 14th day of March, 2013.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

Roger W. LeGrand, Commissioner

(Did not participate)
Thomas J. McAdams, 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.