

STATE OF WISCONSIN
TAX APPEALS COMMISSION

PRIMERA FOODS CORPORATION,

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

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ROGER W. LEGRAND, COMMISSIONER:

These matters come before the Commission pursuant to the Commission's granting the Department's Motion for Rehearing dated April 24, 2014. In that order, the Commission found that further consideration was warranted on the issues of: (1) statutory interpretation of the term "paid" for purposes of the Wisconsin Manufacturing Sales Tax Credit under Wis. Stat. § 71.28(3)(b); (2) the negligence penalty in relation to the sales and use tax assessment made by the Department; and (3) the applicability of equitable recoupment to the cases at hand. Following a telephone conference held on June 10, 2013, the Commission set a briefing schedule and both parties filed briefs on the issues as requested by the Commission.

Based upon further review of the file and the new briefs, the Commission finds that it made an error of law and fact when it found that Petitioner's actions of filing an amended Wisconsin franchise tax return, admitting sales and use tax liability,

and filing a deposit to cover the incurred sales and use tax constituted a payment of sales and use tax which would entitle Petitioner to claim Manufacturing Sales Tax Credits for franchise tax purposes. Because of this erroneous interpretation of the word "paid," the original ruling and decision allowed Petitioner to take Manufacturer's Sales Tax Credits on natural gas purchased during the periods beginning July 1, 2002, and ending December 31, 2005. After reconsideration, the Commission reverses that ruling.

The statutory language of Wis. Stat. § 71.28(3)(b) must be given its common, ordinary, and accepted meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis. 2d 633, 663,).

Wis. Stat. § 71.28(3)(b) reads:

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.

Under the stipulated facts of this case (Finding No. 23 of the original Ruling and Order), Petitioner did not pay sales or use tax on its purchases of the natural gas at issue. Under the plain, clear words of the statute, Petitioner was not eligible for the Manufacturing Sales Tax Credits. This interpretation is supported by the Commission's prior ruling in *Fort Howard Paper Co. v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) 202-253 (WTAC 1983). In that case, Fort Howard purchased coal for manufacturing purposes for the years 1970 through 1973. It paid sales tax on the

purchases only in the year 1973. The Commission ruled that Fort Howard qualified for the Manufacturing Sales Tax Credit only for the year it paid the sales tax (1973), not for the other years in which the tax obligation was incurred. *Id.*

Therefore the Commission reverses its original decision and upholds the Department's action denying Petitioner's claim for Manufacturing Sales Tax Credits for the years at issue.

Petitioner has not paid the sales and use taxes at issue in the audit and the Petitioner does not qualify for the Manufacturing Sales Tax Credits for those years. Based on those findings, the Commission's must revisit the negligence penalty associated with the sales and use tax assessment.

The statute under which the penalty was imposed is Wis. Stat. § 77.60(3) which states:

If due to neglect an incorrect return is filed, the entire tax finally determined shall be subject to a penalty of 25%, or 50% in the case of returns under s. 77.61(1)(c) of the tax exclusive of interest or other penalty. A person filing an incorrect return shall have the burden of proving that that the error or errors were due to good cause and not due to neglect.

In this case an incorrect return was filed. Petitioner has the burden of proving that the errors were due to good cause and not neglect. The Commission finds that the Petitioner has not met that burden and that the imposition of the penalty by the Department was correct. On its tax return, Petitioner committed the error of failing to report the tax due on its purchases of natural gas for manufacturing purposes. Natural

gas was a clearly taxable item and the Department's position on the taxability of natural gas purchases was widely published. Despite this, Petitioner never reported the sales of purchases of natural gas on its returns. Petitioner argues that it should be excused from the penalty because it always filed and paid sales taxes despite the complexities of the Wisconsin statutory and regulatory system and it mistakenly thought that purchases of fuel for manufacturing qualified for an exemption. In light of the fact that the Department's position on purchases of fuel for manufacturing was widely published and the fact that Petitioner did pay sales tax on its purchase of electricity for the years in question, its argument does not ring true. The Commission concludes that the Department's imposition of the negligence penalty was correct.

Finally, the Petitioner has asked the Commission to determine that it is entitled to an "equitable recoupment" offset of its refund claim for the Manufacturing Sales Tax Credit against the Department's sales and use tax assessment against Petitioner.

We note that, at the onset, these two cases were consolidated because they involved the same parties and arose out of essentially the same set of circumstances. However, we hasten to point out that they involve distinctly separate tax issues, the first being the sales and use tax on the natural gas purchases which were clearly taxable but never paid, the second being Petitioner's potential entitlement to the Manufacturing Sales Tax Credit against its franchise tax liability for the years in question.

In its Supplemental Brief, Petitioner correctly states:

In Wisconsin tax matters, "equitable recoupment is applicable in two situations where there has been a tax assessment or refund claim." *Spear v. Wis. Dept. of Revenue*, Docket No. 11-I-140 (WTAC Mar. 16, 2012). In the first situation, the Department may reduce a timely claim for a tax refund by the amount of a deficiency tax assessment that would otherwise be barred by the statute of limitations. Conversely, in the second situation, a taxpayer is entitled to credit a refund claim that would ordinarily be barred by the statute of limitations against a timely-assessed tax deficiency.

Thus, according to the doctrine of equitable recoupment, this Commission could, under the right circumstances, allow a taxpayer to offset a valid but untimely tax refund claim against a valid and timely tax assessment.

Here, the Petitioner has a timely but invalid claim for refund related to the Manufacturing Tax Credit. Although the funds are now on deposit with respect to the sales and use tax assessment, the bottom line is that the tax still has yet to be paid. As noted above, if the tax was not paid in the year of the purchase, a taxpayer does not have a valid claim for the Manufacturing Sales Tax Credit. There is nothing in the doctrine of equitable recoupment that would allow the invalid refund claim to be offset against the valid and timely sales and use tax assessment made by the Department. The Commission finds that the doctrine of "equitable recoupment" does not apply to this case.

In summary, The Commission has reconsidered its original ruling and decision and reverses it as follows:

- 1) The Department's action on the Petition for Redetermination denying

Petitioner's claim for Manufacturing Sales Tax Credits for the years 2002 through 2005 is affirmed;

2) The Department's action in assessing a 25% penalty under Wis. Stat. § 77.60(3) is affirmed; and

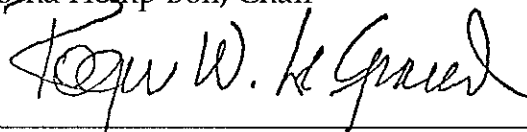
3) Petitioner is not entitled to an equitable offset of its invalid refund claim against the sales and use tax assessment.

Dated at Madison, Wisconsin, this 7th day of March, 2014.

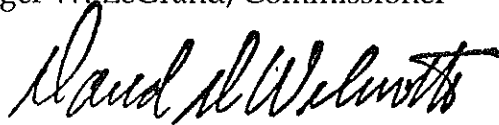
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



David D. Wilmoth, 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.