

STATE OF WISCONSIN
TAX APPEALS COMMISSION

WR COLD STORAGE LLC,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NOS. 08-M-79,
08-M-80, 09-M-99, 09-M-100,
10-M-36 AND 10-M-37 (P-I)

**RULING & ORDER DENYING
MOTIONS FOR PARTIAL
SUMMARY JUDGMENT**

THOMAS J. MCADAMS, COMMISSIONER:

This matter comes before the Commission on Motions for Partial Summary Judgment filed by both parties. The Petitioner in this matter is represented by Attorneys Don M. Millis and John R. Austin of the law firm of Reinhart, Boerner & Van Deuren, S.C., located in Milwaukee, Wisconsin. The Respondent in this matter, the Wisconsin Department of Revenue (“the Department”), is represented by Attorney John R. Evans, of Madison, Wisconsin. The Petitioner in this case also filed a Motion to Compel Discovery after the Respondent filed its Motion for Summary Judgment. The Department opposes both motions the Petitioner filed. For the reasons stated below, we deny both Motions for Partial Summary Judgment.

FINDINGS OF FACT

The six cases at issue here concern the property tax assessment of personal and real property of WR Cold Storage for the assessment years beginning on January 1,

2007, 2008 and 2009. There is no stipulation of agreed upon facts in this case. Instead, each party has submitted its own proposed findings of material facts to the Commission. For the purposes of deciding the motions before it, the Commission finds the following jurisdictional facts:¹

1. WR Cold Storage timely filed manufacturing property reports required by Wis. Stat. § 70.995(12)(a) for the subject property for each of the years at issue.

2. The Department of Revenue (the “Department”) assessed the personal and real property at issue as follows for each of the years at issue:

A. 2007 Personal Property: \$1,469,100

B. 2007 Real Property: \$2,923,900

C. 2008 Personal Property: \$1,274,800

D. 2008 Real Property: \$4,823,900

E. 2009 Personal Property: \$1,107,800

F. 2009 Real Property: \$4,826,100

3. WR Cold Storage filed timely objections challenging each of those assessments.

4. The State Board of Assessors made no changes in the assessments.

The only property determined to be exempt by the Department were certain computers, not at issue here.

¹ In circuit court proceedings, it is said that “Findings of fact are unnecessary under and depart from summary judgment methodology.” *State Bank v. Elsen*, 128 Wis. 2d 508, 383 N.W.2d 916 (Ct. App. 1986). Wis. Stat. § 73.01(4)(e), however, requires that the Commission make decisions in writing accompanied by findings of fact.

5. WR Cold Storage filed timely petitions for review to the Commission appealing each of the notices of determination issued by the Department.

OPINION

The Petitioner filed its Motion for Partial Summary Judgment on April 27, 2010. In brief, WR Cold Storage requests that the Commission determine that certain items of personal and real property used by WR Cold Storage in the processing of cranberries constitute exempt manufacturing machinery and specific processing equipment. In support of this claim, the Petitioner submitted with its motion several affidavits, including one from Dr. Akhtar Khwaja, a certified professional soil scientist and certified professional agronomist. Dr. Khwaja has a Ph.D. in soil fertility and crop management. Attached as Exhibit 1 to his affidavit is a report he authored concerning the results of research he compiled after the 2006 and 2007 cranberry harvests comparing cranberries frozen to -20°F to cranberries frozen to 0°F. The Petitioner argues that the result of this research was that fast freezing at the colder temperature increased certain desirable characteristics in cranberries.²

The Department filed its response on July 30, 2010. In its reply, the Department also submitted several affidavits, including one from Dr. Jiwan Palta, a Professor of Horticulture in the College of Agriculture and Life Sciences at the University of Wisconsin since 1982. Regarding Dr. Khwaja's findings, Dr. Palta asserts that "there is no scientific basis upon which such a hypothesis can be predicated and no

² The Petitioner asserts that the freezing to -20°F increased the Brix level and the TAcY level, which are measures of sweetness and color respectively.

scientific facts that would form a basis for such a conclusion.” Attached to his affidavit as Exhibits 7 and 8 are scientific journal articles concerning research on the characteristics of frozen raspberries and frozen blueberries respectively.

The Department deposed Dr. Khwaja on April 19, 2010. The Petitioner attempted to depose the Department’s expert, but he was unavailable for an extended period of time in 2010 and the Petitioner went ahead and filed its Motion for Partial Summary Judgment on April 27, 2010, apparently planning to depose Dr. Palta and an employee of the Department before filing its reply brief. Several extensions to the briefing schedule were agreed to by the parties, but eventually the Department opposed the taking of the depositions after the Motions for Partial Summary Judgment were filed with the Commission.

On September 13, 2010 the Petitioner filed a Motion to Compel discovery, seeking to depose the Department’s expert and one departmental employee. As a basis for its motion, the Petitioner argues that it is entitled to take the depositions under Wis. Stat. § 804.01(2)(d)2. The Department filed a brief in opposition to the Motion to Compel on September 23, 2010, arguing that pursuant to Wis. Stat. § 802.08(4) the Petitioner is not entitled to discovery.

The first part of this opinion will discuss the factual background necessary to understand the legal issue. The second part of this opinion will discuss the law applicable to summary judgment motions. The third part of this opinion will set forth the relevant statutes and case law. The fourth part of this opinion will summarize the

parties' legal arguments. The fifth part of this opinion will apply the law to the Motions for Partial Summary Judgment.³

A. BACKGROUND

This dispute deals with the taxpayer's claim that certain equipment should be exempt from taxation. The taxpayer's contention is that the pertinent equipment "manufactures" or "processes" cranberries. The Department contests this assertion, claiming instead that the taxpayer's activities are merely a form of storage. This case will ultimately require us to determine if hyper-freezing cranberries in order to increase their commercial desirability is "manufacturing" or "storage."

B. SUMMARY JUDGMENT

Summary judgment is warranted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Summary judgment procedure imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim. Wis. Stat. §§ 802.08(2) and (3). A factual issue is genuine if the evidence is such that this Commission could reasonably find in favor of the Petitioner. *Keneflick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). The court must view the evidence, and the inferences from it, in the light

³ The motion is for partial summary judgment because the valuation of the personal and real property is in issue.

most favorable to the party opposing the motion. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979).

As to the burden of proof, summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g., Peters v. Holiday Inns, Inc.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979). Summary judgment is not a matter of right, and the trial court may deny summary judgment if it determines that the opposite side is entitled to trial. *Wozniak v. Local No. 1111 of United Elec., Radio, and Mach. Workers of America (UE)*, 45 Wis. 2d 588, 173 N.W.2d 596 (1970). A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy. *Kraemer*, 89 Wis. 2d at 566. Summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 260 N.W.2d 241 (1977). Summary judgment should not be granted if reasonable persons could reach reasonable, but differing inferences and results from the facts that are undisputed. *Maynard v. Port Publ'ns, Inc.*, 98 Wis. 2d 555, 297 N.W.2d 500 (1980). Any reasonable doubt as to existence of a genuine issue of material fact must be resolved against the moving party. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

A material fact is one that would influence the outcome of the controversy. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶21, 291 Wis. 2d 393, 717 N.W.2d 58. An issue of fact is genuine if a reasonable jury could find for the

nonmoving party. *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991).

In our review of a summary judgment motion, we are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. *Id.*

C. RELEVANT STATUTES, REGULATIONS AND CASELAW

1. Statutes

70.995. State assessment of manufacturing property.

(1) Applicability. (a) In this section “manufacturing property” includes all lands, buildings, structures and other real property used in **manufacturing**, assembling, **processing**, fabricating, making or milling tangible personal property for profit. Manufacturing property also includes warehouses, storage facilities and office structures when the predominant use of the warehouses, storage facilities or offices is in support of the manufacturing property, and all personal property owned or used by any person engaged in this state in any of the activities mentioned, and used in the activity, including raw materials, supplies, machinery, equipment, work in process and finished inventory when located at the site of the activity. ...Materials processed by a manufacturing establishment include products of agriculture, forestry, fishing, mining and quarrying. ...

...

(c) Manufacturing shall not include the following agricultural activities:

1. Processing on farms if the raw materials are grown on the farm.

....

(d) Except for the activities under sub. (2), activities not classified as manufacturing in the standard industrial classification manual, 1987 edition, published by the U.S. office of management and budget are not manufacturing for this section.

(2) Further classification. In addition to the criteria set forth in sub. (1), property shall be deemed prima facie manufacturing property and eligible for assessment under this section if it is included in one of the following major group classifications set forth in the standard industrial classification manual, 1987 edition, published by the U.S. office of management and budget. For the purposes of this section, any other

property described in this subsection shall also be deemed manufacturing property and eligible for assessment under this section:

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);

(27) Manufacturing machinery and specific processing equipment. (a) In this subsection:

1. "Building" means any structure used for sheltering people, machinery, animals or plants; storing property; or working, office, parking, sales or display space.

2. "Machinery" means a structure or assemblage of parts that transmits forces, motion or energy from one part to another in a predetermined way by electrical, mechanical or chemical means, but "machinery" does not include a building.

3. "Manufacturing" means engaging in an activity classified as manufacturing under s. 70.995.

...

5. "Production process" means the manufacturing activities beginning with conveyance of raw materials from plant inventory to a work point of the same plant and ending with conveyance of the finished product to the place of first storage on the plant premises, including conveyance of work in process directly from one manufacturing operation to another in the same plant, including the holding for 3 days or less of work in process to ensure the uninterrupted flow of all or part of the production process and including quality control activities during the time period specified in this subdivision **but excluding storage**, machine repair and maintenance, research and development, plant communication, advertising, marketing, plant engineering, plant housekeeping and employee safety and fire prevention activities; and excluding generating, transmitting, transforming and furnishing electric current for light or heat; generating and furnishing steam; supplying hot water for heat, power or manufacturing; and generating and furnishing gas for lighting or fuel or both.

...

6m. "Storage" means the holding or safekeeping of raw materials or components before introduction into the production process; the holding, safekeeping or preservation of work in process or of components outside the production process; and the holding or safekeeping of finished products or of components after completion of the production process; whether or not any natural processes occur during that holding, safekeeping or preservation; but "storage" does not include the holding for 3 days or less of work in process to ensure the uninterrupted flow of all or part of the production process.

...

(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.

[emphasis added].

2. Regulations

Tax 11.39 Manufacturing.

(1) DEFINITIONS. (a) 1. Manufacturing means the production by machinery of a new article of tangible personal property or item or property under s. 77.52 (1) (b) or (c), Stats., with a different form, use, and name from existing materials, by a process popularly regarded as manufacturing.

2. Manufacturing does not include storing raw materials or finished units of tangible personal property or items or property under s. 77.52 (1) (b) or (c), Stats., research or development, delivery to or from the plant, or repairing or maintaining plant facilities.

...

(2) SCOPE OF MANUFACTURING. (a) Manufacturing:

1. Begins with conveying of raw materials and supplies from plant inventory to the place where the work is performed in the same plant and

ends with conveying finished units of tangible personal property or items or property under s. 77.52 (1) (b) or (c), Stats., to the point of first storage in the same plant.

2. Includes conveying work in progress directly from one manufacturing operation to another in the same plant.

...

4. Includes storing work in progress in the same plant where the manufacturing occurs.

...

(b) Manufacturing does not include storing raw materials or finished units of tangible personal property or items or property under s. 77.52 (1) (b) or (c), Stats., delivery to or from the plant, repairing or maintaining facilities, or research and development.

(3) MANUFACTURERS. Manufacturers ordinarily include the following:

...

(m) Food processing plants, canning and freezing.

...

(4) NONMANUFACTURERS. Nonmanufacturers ordinarily include the following:

...

(e) Freezer and locker plants.

3. Case Law

One of the two parts of the summary judgment equation is whether or not there is entitlement to judgment as a matter of law. In their respective briefs, the parties discuss three Wisconsin cases which arguably have relevance here. In this section, we

will briefly discuss each case as it relates to whether or not the law is clear that one of the parties here is entitled to judgment.

In *Karthauser & Sons, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-089 (WTAC 1989), the Commission considered a taxpayer's request that greenhouses used to grow flowers be exempted as manufacturing property. The Petitioner in *Karthauser* grew plants for sale in large, modern, highly automated, greenhouses. *Karthauser* contended that its commercial growing of plants constituted "manufacturing" under § 70.995(1), Stats., in the sense of "processing ... tangible personal property for profit ...". Further, it pointed to the phrase in that subsection stating that "[m]aterials processed by a manufacturing establishment include products of agriculture ..."

In *Karthauser*, the Commission upheld a Department determination that a nursery's commercial greenhouses were not manufacturing property under Wis. Stat. § 70.995. The Commission placed emphasis on the dictionary definition of "process," and concluded that "[n]othing in the meaning of 'process' implicates 'growing.'" *Karthauser*, Wis. Tax Rptr. (CCH) ¶203-089 at 14,372. As noted by the Petitioner here, the Commission stated the following:

Growing and processing are separate activities. Growing produces the agricultural product, but only the subsequent "processing" – e.g. **being frozen**, canned, packaged, prepared for market, etc. – falls within "manufacturing."

[emphasis added]. The Commission held that overall consideration of Wis. Stat. § 70.995(1) and (2) precluded classifying *Karthauser's* floricultural activities as

“processing agricultural products.” Thus, the greenhouse equipment was properly assessed.

The issue in the second case the parties discuss concerns tomato ripening equipment. *A. Gagliano v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶400-665 (WTAC 2003).⁴ In the late 1990’s, Gagliano installed in its facility 20 pressurized ripening chambers, which were state-of-the-art in pressurized ripening chamber technology. Gagliano used the chambers exclusively to ripen the produce it received in an unripened condition. Each chamber was equipped with ripening control equipment, including ceiling mounted discharge coils, duct systems with ventilating fans and dampers, air deflectors, refrigeration equipment, two pumping stations, heat exchangers, fans, lights, heaters, supports, curbing, racking, and specially designed doors. Each chamber had a control panel which allowed Gagliano to monitor and control the temperature, within one-tenth of one degree.

The Commission noted that Wis. Stat. §§ 70.995(1)(d) and (2) provide that, to qualify as manufacturing, a process must be classified in one of 26 major group classifications, 21 of which are set forth in the *Standard Industrial Classification Manual*, 1987 edition, (“SIC Manual”) published by the U. S. Office of Management and Budget. The Department asserted that Gagliano's ripening process was not included in the 26 enumerated categories in Wis. Stat. § 70.995(2)(a) through (z). This list included 21 activities which the SIC Manual classifies as “manufacturing,” as well as 5 activities

⁴ The Commission’s decision was upheld by the Wisconsin Court of Appeals in *Wisconsin Dep’t of Revenue v. A. Gagliano Co., Inc.*, 2005 WI App 170, 284 Wis. 2d 741, 702 N.W.2d 834.

listed as nonmanufacturing in the SIC Manual but classified as manufacturing, nonetheless, for Wisconsin property tax purposes.

Because Gagliano's process was not identified in Wis. Stat. § 70.995(2), asserted the Department, it was not manufacturing. Gagliano argued -- and the Commission agreed -- that merely because its process was not so identified, it is not *ipso facto* a non-manufacturing process. In fact, except as provided in Wis. Stat. § 70.995(1)(d), Wis. Stat. § 70.995(2) provides a safe harbor for manufacturing classifications. The fact that a classification is not enumerated in Wis. Stat. § 70.995(2) does not necessarily mean the classification is not a manufacturing classification. Moreover, Gagliano noted that its process was not developed until *after* the publication of the SIC Manual.

After weighing the relevant factors raised at the trial, the Commission concluded that Gagliano's activities were more similar to the manufacturing classification described in "Division D; Manufacturing; The Division as a Whole" than to the nonmanufacturing category in "Division F; Wholesale Trade." Gagliano's activities were more than merely repackaging and distributing fruits and vegetables. Its sophisticated ripening chambers and related computers were major factors in the transformation of raw produce to a new product. Thus, the Commission reversed the Department's denials of Gagliano's applications for "manufacturing property" status under Wis. Stat. § 70.995(1).

The third case the parties discuss concerns brewing equipment. *Pabst Brewing Co. v. City of Milwaukee*, 125 Wis. 2d 437, 373 N.W.2d 680 (Ct. App. 1985). In

that case, the City of Milwaukee and the Department appealed from a judgment determining that certain structures owned by the Pabst Brewing Company and used in the brewing process were exempt from taxation because they were machinery or equipment, and not buildings or building components. The principal question presented for review was whether the trial court correctly ruled that Pabst's grain bins, malt house, the head house portion of its malt bin, and certain cellars were exempt from property tax because they were not buildings or building components and were exclusively and directly used in the manufacture of tangible personal property.

The Department argued that the cellars did no more than shelter the large tanks within and that, thus, they did not directly transform a substance into tangible personal property. The court noted that the framing and walls of the cellars played a passive role in the fermentation process, but so did the walls and framing of any refrigerator. The appellate court stated that the passive nature of the cellar walls and framing did not obscure the fact that their sole reason for existence was to create the conditions that permit fermentation. Because the cellars were machinery that primarily, directly, and significantly contributed to the manufacture of tangible personal property, they were exempt from property taxation. The appellate court affirmed the trial court's determination that the structures were exempt and that Pabst was entitled to a refund of the taxes paid between 1974 and 1980.

In our view, these three cases do not answer the questions here. First, the statement in *Karthauser* the Petitioner relies on borders on dicta,⁵ as the issue in that case was greenhouses that were used to grow flowers.⁶ Second, none of these three cases directly involves freezing, or super-freezing. In general, a summary judgment motion is a short-cut method of concluding a controversy when one party has no chance of winning under the law. *Schandelmeier v. Brown*, 37 Wis. 2d 656, 658, 155 N.W.2d 659, 660 (Ct. App. 1983). Here, however, neither party has shown the clear entitlement to judgment necessary to prevail on summary judgment.

D. THE ARGUMENTS THE PARTIES MAKE

1. The Petitioner's Arguments

The Petitioner requests that the Commission determine that certain items of personal property and real property used by the WR Cold Storage in the processing of cranberries constitute exempt manufacturing machinery and specific processing equipment. The basis of the claim is that the property at issue is used in the rapid freezing process at the WR Cold Storage facility and, therefore, constitutes machinery or specific processing equipment that is used exclusively and directly in the production process in manufacturing tangible personal property pursuant to Wis. Stat. § 70.11(27). The items include the following:

⁵ "Dicta" are defined as statements which are broader than necessary and not essential to the determination of the issues. *Zarder v. Humana Ins. Co.*, 2010 WI 35, 324 Wis. 2d 325, 782 N.W.2d 682.

⁶ The Wisconsin Supreme Court has mentioned freezing food in passing on at least two occasions. *H. Samuels Co., Inc. v. Wisconsin Dept. of Revenue*, 70 Wis. 2d 1076, 236 N.W.2d 250 (1975); *Wisconsin Department of Revenue v. Bailey-Bohrman Steel Corporation*, 93 Wis. 2d 602, 287 N.W.2d 715 (1980).

1. Freezers
2. Refrigeration Equipment
3. Electrical Equipment Supporting the Refrigeration Equipment
4. Plumbing Supporting the Refrigeration Equipment
5. Concrete supporting the Refrigeration Equipment
6. Racking Inside the Freezers
7. Freezer Wall Panels
8. Roof Enhancement for the Cooling Units
9. Toyota Reach Truck
10. Fork Lifts

The Petitioner argues that both the statutes and the case law demonstrate that the rapid and prolonged freezing of cranberries at the WR Cold Storage facility is a manufacturing process. According to the Petitioner, the rapid and prolonged freezing of cranberries changes the cranberries in several beneficial ways: (1) the cranberries become frozen; (2) the Brix level increases; and (3) the TAcY level increases. The Petitioner argues that by classifying the real and personal property at the facility as manufacturing property, the Department has conceded that the rapid and prolonged freezing of cranberries is a manufacturing process. Finally, the rapid freezing and storage of cranberries is not storage.

2. The Department's Arguments

The Department argues that the facility is being used for storage under any set of circumstances and therefore is excluded from exemption pursuant to Wis. Stat. § 70.11(27)(a)6m. The building is a non-exempt building and there is no statutory provision for exempting a building due to use. The strict construction requirement does not allow a building with compressors to be interpreted as other than a building with compressors. Under the SIC Manual, the Petitioner is not a manufacturer and does not

qualify for exemption pursuant to Wis. Stat. § 70.995(1)(d). Further, there is no scientific foundation for Dr. Khwaja's report and there is no science that supports the alleged theories of the Petitioner. Finally, the Department objects to the Petitioner's summary of undisputed material facts.

As to the Motion to Compel, the Department argues that the Petitioner is not entitled to discovery pursuant to summary judgment procedure. The Petitioner's motion to compel discovery is insufficient pursuant to Wis. Stat. § 802.08(4). In order to succeed on its motion for partial summary judgment, the Petitioner needs to show that the freezing has a causal relationship to an increase in Brix, but fails here in two respects. First, the Petitioner has failed to substantiate its measurement methodology. Second, the Petitioner has failed to show a nexus between the freezing and the creation of Brix in a scientific sense.

E. APPLYING THE LAW TO THE FACTS

As outlined above, there are two parts to a motion for summary judgment. First, a party must show that there is no genuine issue of material fact. Second, a party must show entitlement to judgment as a matter of law. In order to prevail, a party must demonstrate both.

In this case, the issue involves the effect freezing to low temperatures has on cranberries. The Petitioner contends that this is a manufacturing process and that hence the pertinent property is exempt. The Respondent counters, *inter alia*, that the alleged manufacturing process is in fact nothing but conventional storage and refrigeration. The Department points out that the relevant building and equipment are

used in the -20°F mode only for a portion of the year lasting approximately 6 weeks and there is no exemption based on use. In support of its summary judgment claim, the taxpayer submits affidavits from several individuals, one of whom is a scientist who performed experiments which it is claimed verify the effects. The Department responds by submitting affidavits from its own expert, who critiques the experiments and argues that the claim that freezing causes the effect is impossible.

Having reviewed the evidence the parties submitted, we hold that summary judgment is inappropriate for several reasons. First, while still vigorously arguing for their own motions, the parties attack each other's submissions in detail, leading us to conclude that there are material facts in dispute. For example, the Department's brief states the following:

While there is a substantial objection to the Petitioner's Summary of Undisputed Material Facts, the basic factual recitations are generally correct.

(Respondent's Brief at 4.)

The Department's brief goes on to object specifically, and several times at length, to 21 of the Taxpayer's 58 proposed undisputed material facts.

The Petitioner in its reply brief in support of its Motion to Compel writes the following:

At best, all the Department has managed to do is to provide equivocal evidence that could be read to challenge the claim that rapid and continued freezing to -20°F increases Brix levels in cranberries. The Department has failed to address the other advantages cited by WR Cold Storage.

The existence of material factual disputes can be further illustrated by brief samples from the affidavits. For example, the Petitioner's expert, Dr. Khwaja, states the following:

22. Even after cranberries are frozen, the Brix and TAcY levels will continue to increase within the cranberries. The advantage of freezing cranberries is that they do not become overly ripe or rot and, therefore, do not possess any of the problems associated with overly ripe or rotted cranberries.

23. It is possible to increase the TAcY and Brix levels in cranberries without the problems associated with overly ripe or rotten cranberries by freezing cranberries to 0°F. However, it is possible to increase the Brix level to even greater levels by rapidly freezing the cranberries to -20°.

24. I believe that rapidly freezing cranberries to a temperature of -20°F causes the cell walls of the cranberry [to] break down and allows the ripening process to continue so that higher levels of Brix and TAcY are achieved. Regardless of the precise process that occurs within the cranberry, it is undeniable that rapidly freezing cranberries to -20°F increases the Brix levels to even greater levels than would be possible in nature without over ripening or rotting and than would be possible at 0°F.

...

27. Attached as Exhibit 1 to this Affidavit is a true and correct copy of a report that I authored that describes the science behind the increase in Brix and TAcY levels when cranberries are rapidly frozen to a temperature of -20°F. Included in this report are the results of research that I compiled.

...

30. The methods described above are consistent with the scientific method and resulting in scientifically meaningful results.

[April 26, 2010 Affidavit of Dr. Akhtar Khwaja].

The Department's expert, Dr. Jiwan Palta, replies as follows in his affidavit:

13. The petitioner claims that 'rapidly freezing cranberries to -20°F and maintaining that temperature for prolonged periods of time produces cranberries with Higher Brix levels than are possible in nature and [than] possible by conventional freezing to 0°F. In addition this process accelerates the increase in the Brix and TAcY levels.....' To my knowledge no scientific study is available supporting these statements and claims. In contrast, two scientific studies conducted using raspberries and blueberries do not support this claim...

21. Based on the material presented above [in this affidavit], the petitioner, in my judgment, [has] not provided valid data to substantiate their claim. Moreover, in my judgment, as well as according to the published reports, there is no basis for a cranberry fruit to synthesize either Brix or anthocyanin during storage at 0°F or -20°F.

[Affidavit of Dr. Jiwan Palta, dated July 29, 2010].

Taken together, these excerpts indicate to us the existence of material factual disputes that fall into two general categories. First, the parties do not agree on causation. Second, the parties dispute the reliability and the validity of the Petitioner's data.⁷ Under well-established law, however, summary judgment should not be granted unless there are no material facts in dispute and there are no competing inferences that can arise. *See Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 189, 260 N.W.2d 241, 243 (1977). Summary judgment is not to be a trial on affidavits and depositions. *See id.*

The second reason that summary judgment is inappropriate is that the Petitioner filed a Motion to Compel Discovery on September 10, 2010, after the cross-motions for partial summary judgment were filed. Specifically, the Petitioner sought an order from the Commission compelling the Department to make Dr. Palta and a Department auditor available for deposition. The Petitioner cites Wis. Stat. § 804.01(2)(d)2 to discover facts known or opinions held by those individuals. The Department responds that the deposition is inappropriate at this point in the case under Wis. Stat. § 802.08(4). The Department argues that by electing to proceed with its summary judgment motion, the Petitioner represented that it had all of the facts or that

⁷ Our limited discussion of the factual disputes in this case should not imply that there are not additional factual disputes.

no facts were in dispute.⁸ The Department argues that the Petitioner is, in effect, recanting that motion by moving for discovery. While we perhaps would not go that far, the filing of the motion indicates to us that this case is simply not ready for summary judgment.

Third, another reason summary judgment is inappropriate here is that, in our view, given the affidavits that have been filed, there are questions left to be answered. The legal framework for analyzing whether property is “manufacturing property” for purposes of Wis. Stat. § 70.995 is set forth in *Zip Sort, Inc. v. DOR*, 2001 WI App 185, 247 Wis. 2d 295, 634 N.W.2d 99. We are required first to ask whether the activity in question fits “perfectly” into any of the categories specifically listed as manufacturing in the SIC Manual or Wis. Stat. § 70.995(2). *See Zip Sort*, 247 Wis. 2d 295. If it does not, a second question must be addressed: Does the activity nonetheless fit the general definition of manufacturing in Wis. Stat. § 70.995(1)? *Zip Sort*, 247 Wis. 2d 295. Whether an activity is manufacturing under the general definition in Wis. Stat. § 70.995(1) may be resolved by reference to three questions set forth in the Wisconsin Property Assessment Manual. *Zip Sort*, 247 Wis. 2d 295. The questions are as follows:

1. Is the activity more similar to those specifically classified manufacturing by law and the SIC Manual, or more similar to those specifically classified nonmanufacturing by law and the SIC Manual?
2. Is the activity more closely aligned with the general description of producing, assembling, fabricating, making or milling by machinery and equipment of a new article with a

⁸ The Respondent points out that the taking of affidavits after the filing of a motion is a not unheard of practice and points to a recent case where that was, in fact, done.

different form, use and name from existing materials, or is it more aligned with the general activities involved with services as generally described in the SIC Manual, wholesale trade, retail trade, agriculture, or construction?

3. Does the activity produce products more for wholesalers, interplant transfer, to order for industrial users or more for direct sale to domestic consumers?

Zip Sort, 247 Wis. 2d 295. In our view, as substantial and thorough as the factual submissions are here, we lack enough information to answer questions 1 and 2.

On summary judgment, courts do not weigh evidence or determine the truth of asserted matters. *Lambrecht v. Estate of Kaczmarczyk*, 241 Wis. 2d 804, 623 N.W.2d 751 (2001). A summary judgment motion is comparable to a directed verdict at trial. The two rest on the same theory: No genuine issue of material fact needs to be resolved by the fact-finder and the moving party is entitled to have a judgment on the merits entered in his or her favor as a matter of law. *Id.* Summary judgment procedure does not allow us to decide this case based on which party has the better affidavits. There are genuine issues of material fact that are yet to be resolved here.

In sum, when we look at the record as a whole, neither party has shown clear entitlement to judgment based on the statutes, regulations and case law. Further, for purposes of summary judgment, there are genuine issues of material fact yet to be resolved.

CONCLUSION

We deny each party’s Motion for Partial Summary Judgment. First, there is a genuine issue of material fact as to whether the process at issue constitutes manufacturing under the relevant Wisconsin Statutes. Second, the law is not clear that either party is entitled to judgment.

ORDER

1. The parties’ motions for Partial Summary Judgment are denied.
2. The Commission will contact the parties to discuss further proceedings in these matters, including resolution of the Petitioner’s Motion to Compel.

Dated at Madison, Wisconsin, this 28th day of February, 2011.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner