

STATE OF WISCONSIN
TAX APPEALS COMMISSION

WISCONSIN COACH LINES, INC.,

DOCKET NO. 15-V-166

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for a decision on cross motions for summary judgement. The Petitioner, Wisconsin Coach Lines, Inc. ("WCL"), of Waukesha, Wisconsin, is represented in this matter by Attorneys Margaret M. Derus and Sara Stellpflug Rapkin, both with the law firm of Reinhart Boerner Van Deuren s.c. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Axel F. Candelaria Rivera.

On October 28, 2016, the parties filed a Partial Stipulation of Facts with the Commission. On November 1, 2016, the Petitioner filed a Notice of Motion and Motion for Summary Judgment along with an affidavit and brief in support of the Motion. The Department filed a brief in opposition to the Motion on November 30, 2016, and on December 22, 2016, the Petitioner filed a reply brief.

In its brief in opposition to the Petitioner's Motion for Summary Judgment, the Department contended that summary judgment in its favor is appropriate. Consequently, we treat this case as coming to us on cross motions for summary judgment. For the reasons set forth below, we grant summary judgment to the Petitioner.

FACTS

The stipulation of facts signed and filed by the parties was a partial stipulation, leaving open the possibility that additional facts could be entered into the record by either party. The Petitioner provided an affidavit in support of its Motion for Summary Judgment that contained some additional proposed facts. The Department submitted no additional facts. Because we determine that the facts as stipulated by the parties provide all material facts necessary to resolve the legal issue presented in this case, we rely on those facts agreed to by the parties.

Jurisdictional Facts

1. In early 2013, WCL filed a motor fuel tax refund claim with the Department for the monthly period ending November 30, 2012. (Stipulation of Facts ("Stip.") ¶ 27; Ex. 4.) The Department then conducted a field audit of WCL for the periods September 30, 2010, through May 31, 2013. (Stip. ¶ 10, Ex. 4.)

2. During the field audit, WCL filed a motor fuel tax refund claim with the Department for the periods ending September 30, 2010, through May 31, 2013, inclusive, which were denied in full by the Department. (Stip. ¶ 11.)

3. By Notice of Amount Due - Motor Fuel Bill Back, dated February 6, 2014, the Department assessed additional motor fuel tax against WCL for the period

beginning on April 30, 2009, and ending on May 31, 2013 ("period at issue"), in the amount of \$92,486.18, along with interest through April 7, 2014, of \$71,745.07, and fees of \$170, for a total amount due of \$164,401.25. (Stip. ¶ 4, Ex. 1.)

4. WCL timely filed a Petition for Redetermination with the Department on April 3, 2014, appealing both the denial of the refund claims and the additional assessment. (Stip. ¶ 5, Ex. 2.)

5. By Notice of Action dated June 15, 2015, the Department denied WCL's Petition for Redetermination. (Stip. ¶ 6, Ex. 3.)

6. WCL timely filed a Petition for Review with the Commission on August 12, 2015. (Commission file.)

7. On September 9, 2015, the Department filed its Answer. (Commission file.)

Material Facts

8. The parties agree that WCL purchased diesel fuel as an end user, that WCL is a common carrier as defined in § 194.01, Stats., and that the diesel fuel was used in the operation of a motor vehicle. (Stip. ¶ 18.)

9. The parties agree that WCL is engaged in the transportation of passengers in vehicles with a capacity of more than 10 persons. (Stip. ¶ 19.)

10. The parties agree that Milwaukee County had a population of 500,000 or more during the period at issue and that Waukesha County and Racine County are contiguous to Milwaukee County. (Stip. ¶ 20.)

11. The parties agree to the number of miles traveled, the number of gallons of diesel fuel purchased, and the calculations used to determine the refund amount should WCL prevail, or the assessment (or bill back) amount should the Department prevail, upon final adjudication of this case. (Stip. ¶ 21.)

12. The parties agree that WCL properly received refunds or credits against motor fuel tax from its supplier for all but the transport services at issue in this case, which are hereinafter referred to as the "SE WI Services." For example, refunds or credits were allowed for miles transporting passengers on WCL's daily commuter services that stayed within Milwaukee County and the contiguous counties. (Stip. ¶ 22, Ex. 5.) The parties' dispute is over WCL's SE WI Services (sometimes referred to as the "Airport Express"). (Stip. ¶ 22.)

13. As a common carrier, WCL is engaged in the business of providing mass transportation to the general public in the State of Wisconsin and in other states. During the period at issue, WCL operated scheduled commuter bus routes, transports in southeast Wisconsin, motor coach tours, and charter services. (Stip. ¶ 23.)

14. The motor fuel tax is already built into the price or cost of diesel fuel at the fuel terminal level prior to sale to the ultimate consumer. In general, when WCL purchased its diesel fuel, part of the cost or payment covered the motor fuel tax. Consequently, for the period at issue, WCL paid motor fuel taxes on diesel fuel purchased from its fuel supplier. (Stip. ¶ 24.)

15. For the periods ending April 30, 2009, through August 31, 2010, WCL applied for and received refunds or credits from its vendors for motor fuel taxes paid to its vendors. (Stip. ¶ 25.)

16. For the periods ending September 30, 2010, through May 31, 2013, WCL did not receive refunds or credits from its vendors for the motor fuel tax paid for the SE WI Services. (Stip. ¶ 26.)

17. Ordinarily, WCL receives its motor fuel tax credits or refunds from its supplier. But because WCL's supplier was going through bankruptcy, WCL filed a motor fuel tax refund claim directly with the Department for the monthly period ending November 30, 2012, as noted in paragraph 1, above. (Stip. ¶ 27.)

18. After the Department determined that WCL had treated motor fuel gallons corresponding to the miles traveled in providing the SE WI Services as exempt, the Department billed back an amount corresponding to the amount of tax previously claimed as exempt in its Notice of Amount Due referenced in paragraph 3, above. (Stip. ¶ 29.)

19. In providing the SE WI Services, WCL transported passengers: (a) from Waukesha County to Milwaukee County; (b) within Milwaukee County; and (c) from Milwaukee County to Racine County. Those buses then continued on with passenger service from Racine County to Kenosha County and from Kenosha County to Chicago area airports. WCL's buses also ran those transports in reverse order throughout the day. (Stip. ¶ 31.)

20. WCL claimed the tax exemption for diesel fuel used in transporting passengers: (a) from Waukesha County to Milwaukee County; (b) within Milwaukee County; and (c) from Milwaukee County to Racine County, and for the reverse transports. WCL is not claiming exemption for tax paid on diesel fuel used in transportation from the southern border of Racine County to Kenosha County or Kenosha County to Chicago, or the respective return transports. (Stip. ¶ 30.)

21. Passengers purchased bus tickets for each of the separate transports identified above or a combination of those transports (for example, from Waukesha to Milwaukee, from Milwaukee to Racine, and/or from Milwaukee to Chicago O'Hare Airport). Passengers embarked and disembarked the buses at the starting and ending points for which they purchased the tickets. (Stip. ¶ 33.)

ISSUE

As part of the stipulation filed in this case, the parties agreed: "The issue of law is whether WCL is entitled to the diesel fuel exemption under § 78.01(2m)(e), Wis. Stat. (2009-10)."

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.

Burden of Proof

Assessments made by the Department are presumed to be correct, and the burden is upon the petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

Applicable Statutes

Wis. Stat. § 78.01(2m)(e)¹:

(2m) DIESEL FUEL EXEMPTIONS. No tax is imposed under sub. (1) [relating to the imposition of tax], and no supplier, wholesaler or retail dealer may collect a tax, on diesel fuel that is purchased by an end user if that fuel fulfills the requirements under sub. (2p) [relating to dyed fuel] or fulfills one of the following conditions:

...

(e) It is sold to a common motor carrier, as defined in s. 194.01 (1), if that carrier certifies to the department that the diesel fuel is to be used in the operation of a motor vehicle for the urban mass transportation of passengers, as defined in s. 71.38.

Wis. Stat. § 194.01(1)²:

"Common motor carrier" means any person who holds himself or herself out to the public as willing to undertake for hire to transport passengers by motor vehicle between fixed end points or over a regular route upon the public highways or property over regular or irregular routes upon the public

¹ Although § 78.01(2m) was amended during the period at issue here, the amendment did not change subparagraph (e).

² Although Wis. Stat. § 194.01(1) was amended during the period at issue here, the amended language does not affect the resolution of the issue this case. The parties do not dispute that WCL is a common carrier under Wis. Stat. § 194.01(1).

highways. The transportation of passengers in taxicab service or in commuter car pool or van pool vehicles with a passenger-carrying capacity of less than 16 persons or in a school bus under s. 120.13 (27) shall not be construed as being that of a common motor carrier.

Wis. Stat. § 71.38:

In this subchapter, "urban mass transportation of passengers" means the transportation of passengers by means of vehicles having a passenger-carrying capacity of 10 or more persons including the operator, such capacity to be determined by dividing by 20 the total seating space measured in inches, when such transportation takes place entirely within contiguous cities, villages or towns and in cities, villages or towns contiguous to that in which the carrier has its principal place of business, or within or between cities, villages or towns located within a radius of 10 miles of the city, village or town in which the carrier has its principal place of business, or entirely within one city, village or town contiguous thereto, or within a county having a population of 500,000 or more or within such county and the counties contiguous thereto, or suburban operations classified as such by the department of transportation.

DECISION

WCL's SE WI Services involve the transportation by bus of passengers from Waukesha County to Milwaukee County, between various locations in Milwaukee County, from Milwaukee County to Racine County, from Racine County to Kenosha County, and from Kenosha County to Chicago area airports. The route is then run in reverse order. Passengers can purchase tickets for all or any part of the route.

Section 78.01(2m)(e) of the Wisconsin Statutes provides an exemption from the motor fuel tax on diesel fuel "sold to a common motor carrier, as defined in s. 194.01 (1), if that carrier certifies to the department that the diesel fuel is to be used in the operation of a motor vehicle for the urban mass transportation of passengers, as defined

in s. 71.38.” The parties agree that WCL meets the definition of a “common motor carrier.” The issue in this case is whether the fuel for which WCL claimed an exemption in connection with its SE WI Services is “used in the operation of motor vehicles for the urban mass transportation of passengers” under the meaning of Wis. Stat. § 78.38.

Statutes that grant tax exemptions, deductions, and privileges are matters of legislative grace, and tax statutes are to be construed against the granting of the same. *Ramrod, Inc. v. Dep't of Revenue*, 64 Wis. 2d 499, 504, 219 N.W.2d 604 (1974). Any taxpayer who claims such a privilege must point to an express provision granting such privilege and bring himself or herself clearly within its terms. *Id.* Thus, to prevail in this case, WCL must show that the fuel for which it has claimed an exemption fits squarely within the terms of Wis. Stat. § 71.38.

Wis. Stat. § 71.38 defines “urban mass transportation of passengers” as follows:

[T]he transportation of passengers by means of vehicles having a passenger-carrying capacity of 10 or more persons including the operator, such capacity to be determined by dividing by 20 the total seating space measured in inches, when such transportation takes place entirely within contiguous cities, villages or towns and in cities, villages or towns contiguous to that in which the carrier has its principal place of business, or within or between cities, villages or towns located within a radius of 10 miles of the city, village or town in which the carrier has its principal place of business, or entirely within one city, village or town contiguous thereto, *or within a county having a population of 500,000 or more or within such county and the counties contiguous thereto*, or suburban operations classified as such by the department of transportation. (emphasis added)

The parties agree that WCL meets the passenger capacity requirement of the statute. Their dispute involves the application of the geographic requirements of the statute, and particularly the phrase highlighted above, to WCL's operation of the SE WI Services.

Based on the highlighted language, WCL took an exemption for fuel used in transporting passengers on its SE WI. Services through Waukesha, Milwaukee, and Racine Counties. It claimed no exemption for fuel used for transporting passengers in Kenosha County or in Illinois. In its view, the exemption is justified because it is claimed for fuel used in transporting passengers "within a county having a population of 500,000 or more [Milwaukee County] or within such county and the counties contiguous thereto [Waukesha and Racine Counties]."

The Department denied the exemption because, in its view, the statute requires the transport of passengers to occur *entirely within* the geographic areas identified in the statute. In arriving at its conclusion, the Department insists that the statute must be read as follows:

... such transportation has to take place:

(a) entirely within

(i) contiguous cities, villages or towns and in cities, villages or towns contiguous to that in which the carrier has its principal place of business, or

(ii) within or between cities, villages or towns located within a radius of 10 miles of the city, village or town in which the carrier has its principal place of business;

or,

(b) entirely within

(i) one city, village or town contiguous thereto, or

(ii) within a county having a population of 500,000 or

more or within such county and the counties contiguous thereto, or

(iii) suburban operations classified as such by the department of transportation ...

With the Department's proffered reading, the transport of passengers would have to take place "entirely within" (or, perhaps more precisely, "entirely within within") Milwaukee County and counties contiguous thereto in order to qualify for the fuel tax exemption under the provision on which WCL relied. Because the route run in WCL's SE WI Services included stops in Kenosha County and Illinois, the Department concluded that the transportation was not *entirely* within the defined geographic area and did not, therefore, qualify for the fuel tax exemption.

We agree instead with WCL's view of the statutory language. Based on rules of grammar and the language and punctuation of the statute, we read the relevant provision as follows:

... when such transportation takes place:

(a) entirely within contiguous cities, villages or towns and in cities, villages or towns contiguous to that in which the carrier has its principal place of business, OR

(b) within or between cities, villages or towns located within a radius of 10 miles of the city, village or town in which the carrier has its principal place of business, OR

(c) entirely within one city, village or town contiguous thereto, OR

(d) within a county having a population of 500,000 or more or within such county and the counties contiguous thereto,³

³ Even though section (d) in this reading consists of two complete prepositional phrases, we read them together because the "or" that connects them is not preceded by a serial comma (as each other conjunctive "or" is), and because part of the object of the second phrase is a reference back to the object of the first phrase ("such county").

OR

(e) suburban operations classified as such by the department of transportation.

The place where the transportation takes place in order for the fuel to be exempt is set out in a series of prepositional phrases connected by the coordinating conjunction "or." With the exception of the words after the final "or," an issue we will address below, each phrase contains the preposition "within." In two of the phrases, the preposition "within" is modified by the adverb "entirely" and, in one of the phrases, "within" is joined with the preposition "between" by an "or." Each of these prepositional phrases is a grammatically complete phrase, and each is perfectly clear.

The Department's tortured reading of the relevant statute violates basic rules of grammar and ignores the punctuation contained in the statute. The Department splits the provision's series of prepositional phrases into two sections, one with two subsections and the other with three, all of which are preceded by the words "entirely within," even though each phrase already begins with the words "within" or "within or between." Moreover, the Department's reading both adds words to the statute that are not there (the words "entirely within" before "within") and renders certain of the words in the statute meaningless (the word "within" following the added "entirely within") thereby violating two fundamental rules of statutory interpretation. *State of Wis. – Dep't of Corr. v. Schwarz*, 2005 WI 34, ¶ 20, 279 Wis. 2d 223, 693 N.W.2d 703 ("We will not read into the statute language that the legislature did not put in One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning."); *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d

633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.").

To support its reading of Wis. Stat. § 78.38, the Department points to the language at the end of the statute, directly after the phrase relevant to this case – “suburban operations classified as such by the department of transportation.” Unlike the prepositional phrases before it, this grouping of words lacks a preposition and is thus, by itself, not a complete phrase. The Department contends that, unless the statute is read as they suggest, we are left with “when such transportation takes place suburban operations classified as such by the department of transportation,” which, it says, makes no sense. Because there is a “statutory crater” between “takes place” and “suburban operations,” the Department argues that the Commission would have to add “within,” “entirely within,” or some other prepositional component before these words in order for them to make sense. This, the Department maintains, is in violation of the rule of statutory construction that courts should not add language to a statute that the legislature did not include.

First, whether the Department or the Commission could make sense of this particular language in reference to suburban operations specifically classified by the Department of Transportation is not the issue in this case,⁴ and it would not be prudent for the Commission to try to construe this language in dicta based on a hypothetical set of facts. Second, even if there is a missing word in the language at the end of Wis. Stat. §

⁴ WCL notes that a classification issued by the Department of Transportation may, in itself, provide adequate context to make sense of the provision.

78.38, which does appear to be the case, that in no way justifies the addition of words to other phrases in the statute which are grammatically complete. The Department's proposed reading adds words not only to the final section of the statute, but to each other complete phrase, thereby changing the plain meaning of those phrases as written.

The language of Wis. Stat. § 78.38 on which WCL relied in claiming the fuel tax exemption for transporting passengers in Milwaukee, Waukesha, and Racine counties is clear and precise - "urban mass transportation of passengers" includes the transportation of passengers "when such transportation takes place ... within a county having a population of 500,000 or more or within such county and the counties contiguous thereto" WCL is entitled to the exemption it claimed under the clear language of the statute.⁵

CONCLUSIONS OF LAW

1. There being no material facts in dispute, the stipulated facts are sufficient to support a ruling as a matter of law.
2. WCL's transport of passengers within Milwaukee, Waukesha, and Racine counties in the provision of its SE WI Services qualifies as "urban mass transportation of passengers" under the meaning of Wis. Stat. § 78.38, because it "takes

⁵ WCL provided evidence that the statutory language at issue in this case had been construed by a former member of the Department's legal staff and, initially, by the auditor, consistently with WCL's reading of the statute. The Department disputed some of that evidence and argued that neither the auditor nor the former member of the legal staff was qualified or authorized to speak for the Department on this issue. Because we find that the statute is clear on its face, we have not considered these proposed matters of fact. Similarly, WCL argued that, even if the statutory language it relied on was qualified by "entirely within," it took an exemption only for fuel used in transporting passengers in Milwaukee and contiguous counties. The fact that the vehicles traveled on to other locations does not change the fact that the transportation for which the exemption was claimed occurred entirely within the defined geographic area. Again, because we find the statute to be clear, we have not addressed this argument.

place ... within a county having a population of 500,000 or more or within such county and the counties contiguous thereto”

3. WCL is entitled to the diesel fuel exemption under § 78.01(2m)(e), Wis. Stat. (2009-10) for the fuel used in transporting passengers within Milwaukee County and the contiguous counties of Waukesha and Racine.

ORDER

Based on the foregoing, the Commission orders as follows:

1. WCL’s Motion for Summary Judgment is granted.
2. The Department’s Motion for Summary Judgment is denied.
3. The Department’s assessment is reversed.

Dated at Madison, Wisconsin, this 21st day of June, 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 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.