

The position of the department in its assessment and in its arguments before the Commission and the court stressed the separate listing of charges in the bills to customers.

The Court concluded that the guidance provided by *Janesville Data, Kollasch*, and *Frisch* are sufficient to support the conclusion that the equipment charges billed to Dow Jones' teleprinter customers were incidental to the essence of a transaction where the customer's true objective was to receive the information which comprised the news service. Therefore, the department's petition for review was denied and the Commission's decision and order of August 21, 1987, was affirmed.

The department has appealed this decision to the Court of Appeals.



Parking and storage. *Wisconsin Department of Revenue v. EAA Aviation Foundation, Inc.* (Court of Appeals, District IV, February 25, 1988). The Department of Revenue appeals that part of a judgment which affirms the Tax Appeals Commission's decision that fees charged by the EAA Aviation Foundation, Inc., for parking are exempt from sales tax under s. 77.54(9a), Wis. Stats.

The EAA Aviation Foundation, Inc., is a nonstock corporation organized under ch. 181, Wis. Stats. The foundation is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. It is organized and operated exclusively for charitable and educational purposes under both the Internal Revenue Code and the Wisconsin Statutes. The foundation has no members.

Each summer the foundation and the Experimental Aircraft Association, Inc., co-sponsor the International EAA Convention and Sport Aviation Exhibition at Wittman Field in Oshkosh, Wisconsin. Besides other fees which are no longer an issue in this case, the foundation collects fees for providing parking to the public.

This case involves the parking fees for 1977 through 1980. The department agrees with the foundation that either version of s. 77.54(9a), Wis. Stats., can be read as exempting from sales tax gross receipts from the providing of services by tax-exempt organizations. It views the statute as ambiguous. A statute is ambiguous if it may be construed in different ways by reasonably well-informed persons.

The Court of Appeals concluded that the statute is not ambiguous, and that under the plain language of the statute, the foundation is not exempt from sales tax on gross receipts from services by the foundation. The phrase "services by" is conjunctive with "use or other consumption of tangible personal property." So construed the exemption is limited to services used by tax-exempt organizations and does not extend to services by such foundations. It is not necessary to further construe the statute. Under the plain meaning of the statute, gross receipts received by the foundation from the service of providing parking are not exempt from sales tax under s. 77.54(9a), Wis. Stats.

The taxpayer has appealed this decision to the Supreme Court.



Exemptions—manufacturing, waste treatment facilities. *Fort Howard Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 29, 1988). The issues for the Commission to determine are:

A. Whether the taxpayer's lime handling and conveying equipment, which were added to its chlor-alkali plant in 1977, are exempt from sales and use tax as manufacturing machinery and equipment under s. 77.54(6)(a), Wis. Stats.

B. Whether over-roof conveyor equipment consisting of fire doors, steel beams, anti-corrosion paint, and lumber is exempt from sales and use tax as manufacturing machinery and equipment under s. 77.54 (6)(a), Wis. Stats.

C. Whether sludge trucks used in the taxpayer's waste treatment program are exempt from sales and use tax under s. 77.54(26), Wis. Stats.

D. Whether the taxpayer's payments for computer software and services are free from sales and use tax as payments for nontaxable services and intangible property and not for tangible personal property.

E. Whether the department improperly applied retroactively a 12% interest rate to the taxpayer's assessment for periods prior to July 31, 1981.

As part of the taxpayer's business, it operates a chlor-alkali plant to produce caustic soda and calcium hypochlorite, which are used in the paper-making process. One of the principal raw materials used in the chlor-alkali plant is lime.

In 1977, the taxpayer doubled the capacity of its chlor-alkali plant. That made it necessary to augment its existing lime handling and conveying system, to keep up with the newly increased capacity. To do that, the taxpayer, in 1977 as Job 626, added the following equipment to its lime handling and conveying equipment at its chlor-alkali plant: a new outside feeder lime tank, including an upper bin and a lower bin connected by an automatic valve; another automatic valve at the bottom of the lower bin; a pneumatic tube for carrying lime from the lower bin of the new outside lime tank to the upper bin of the existing inside lime tank; bindicators and vibrators mounted on the outside lime tank; a blower to move the lime through the pneumatic tubes; a motor control center which, together with the bindicators, automatically operates the valves and blower; and miscellaneous associated equipment.

On its sales and use tax returns, the taxpayer treated the equipment described in the preceding paragraph as exempt machinery and equipment. The department disallowed the claimed exemption.

The lime handling and conveying equipment which is part of the taxpayer's chlor-alkali plant has two functions, one, to

convert a batch (truckload) arrival system to a controlled constant feed into the lime slakers, and two, to prevent hardening of the lime by keeping it agitated until it is fed into the lime slakers.

In 1979 as Job 919, the taxpayer constructed a conveyor running from the end of the manufacturing line, building 100 (converting), to the point of first storage, building 31 (shipping). This conveyor had to run over the roofs of eight existing intervening buildings. The department allowed most of Job 919 as exempt, treating the conveyor as machinery or equipment directly and exclusively used in manufacturing. However, the department disallowed the taxpayer's claimed exemption for four components of the conveyor. The department assessed tax on six fire doors purchased and installed by the taxpayer as part of the over-roof conveyor, the steel beams used to support the conveyor, the corrosion resistant paint used to coat the steel beams which were exposed to the weather, and the lumber used to frame the openings where the steel beams passed through the roofs of the existing buildings underneath. This wood framing would not have been needed for the buildings apart from the fact the new conveyor was erected above them. The fire doors, steel beams, corrosion resistant paint and lumber were component parts of the over-roof conveyor which was, as the department conceded, exempt under s. 77.54(6)(a), Wis. Stats.

The taxpayer operates a waste treatment facility at its Green Bay plant which consists of two parts, a waste treatment center located at the taxpayer's main plant, and a landfill site located 5 to 6 miles west of the waste treatment center.

The department has determined that the taxpayer's waste treatment facility, including both the waste treatment center and the landfill, is exempt from property taxes as a waste treatment facility under s. 70.11(21)(a), Wis. Stats. The department, however, denied the taxpayer's claim of sales and use tax exemption for two truck tractors used to haul sludge, and also for a diesel engine overhaul (service plus parts) to another truck tractor used for the same purpose. The truck tractors in question are

used exclusively to haul treated waste sludge from the waste treatment center to the landfill. The tractors are licensed for highway use and use public streets and highways to haul the sludge to the landfill.

In a later year, the department approved three identical sludge truck tractors as exempt components of the taxpayer's waste treatment facility for property tax purposes. Through oversight, however, the taxpayer did not apply for property tax exemption in 1978 for the two truck tractors or the engine overhaul in question.

In 1978, the taxpayer in the course of its business, entered into a contract with Oxford Software Corporation for the use of Oxford's TFAST computer software program and related services for a monthly fee of \$250.

The TFAST program originally arrived encoded on a magnetic tape. The value of the tangible personal property, the magnetic tape, was \$15-25. The taxpayer returned each tape to Oxford within one to two days. Oxford wanted the tapes back to reuse them as a physical medium, but not with the same message or program. It was not possible for Oxford to send the same contents to multiple customers, because the TFAST program had to be changed to fit each customer's situation, and the program was being constantly updated. Nevertheless, the tape itself could be used again and again with different contents.

The taxpayer regarded its monthly \$250 payment as being primarily for this service and support function. Oxford's consulting services for the taxpayer under the contracts averaged 8 to 15 hours per month.

In 1978, the taxpayer also entered into a license agreement with Whitlow Computer Systems, Inc., licensing the SyncSort computer software program and related services for a fee of \$150 per month. The taxpayer used SyncSort to sort and rearrange its computer file records. The facts as to the TFAST program also hold true for SyncSort, except for the following differences. Some of the improvements to the program were transferred to the taxpayer by telephone rather than by magnetic tape, Whitlow was available for telephone

consultation concerning SyncSort seven days a week, 24 hours a day, the cost of SyncSort today would be \$300 per month, or a one-time fee of \$8,250 for a three-year period.

The Commission concluded that

A. The taxpayer's lime handling and conveying equipment added to its chlor-alkali plant in 1977 is exempt manufacturing machinery and equipment under s. 77.54(6)(a), Wis. Stats.

B. The fire doors, steel beams, and corrosion resistant paint purchased and used as part of the taxpayer's over-roof conveyor installation were exempt components of the conveyor the department had conceded to be exempt under s. 77.54(6)(a), Wis. Stats. The lumber is not exempt.

C. The taxpayer's sludge trucks used in its waste treatment program are component parts of an exempt waste treatment facility.

D. The taxpayer's payments for computer software and services were not subject to sales or use tax because the essence of the transaction was the purchase of services and intangible property, with the transfer of tangible property being merely incidental.

E. The Commission has jurisdiction to determine the retroactive interest rate issue. The department was correct in retroactively applying a 12% interest rate. The increased interest rate is not unconstitutional.

The taxpayer and the department have not appealed this decision but the department has filed a notice of nonacquiescence in regard to this matter.

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Exemptions—manufacturing. *Wisconsin Department of Revenue vs. Pavelski Enterprises, Inc.* (Circuit Court of Dane County, May 13, 1988). On July 12, 1984, the department issued against the taxpayer

an assessment for sales and use taxes allegedly due on two of the taxpayer's Lor-Al Air Flow Filter machines for the years 1981, 1982, and 1983. This assessment was overturned by the Tax Appeals Commission on October 16, 1986. The Commission found the machines to be instruments of manufacture, exempt from the sales and use taxes under s. 77.51(27), Wis. Stats.

Pavelski Enterprises, Inc. (Pavelski) manufactures agricultural fertilizer compounds at three different locations in Wisconsin. Pavelski's business format is to perform soil analysis for farmers and after being informed of what crop the farmer intends to plant, Pavelski then custom mixes a fertilizer product to meet the specific needs of the farmer's crop.

The fertilizer product which Pavelski manufactures at its plant consists of chemi-

cals such as potash, nitrogen, zinc, boron, sulfur, phosphate, and also includes numerous pesticides. When these ingredients are blended at Pavelski's plant, the chemical configuration of their final product is different in chemical composition than the beginning ingredients.

Pavelski transports the customized fertilizer product to the farmer's field by truck. During this shipping process, the product segregates and is out of specification. To remedy this problem at the field site, Lor-Al Air Flow Filter machines are used. This machine remixes the fertilizer to the formula originally designated. The material is then funneled through a pneumatic air process to distribution nozzles and spread on the field through a process termed impregnation.

The Department of Revenue argues the field process using the Air Flow machine

for mixing and spreading the fertilizer on the farmer's field does not make the Air Flow machine exempt as manufacturing under s. 77.54(6m), Wis. Stats.

The Circuit Court upheld the Tax Appeals Commission decision which determined the use of the Air Flow machine was a continuation of the manufacturing process which the Department of Revenue concedes at the plant is exempt manufacturing. The facts earlier cited by the court, referring to need for use of the Air Flow machines to remix the fertilizer compound which breaks down and segregates in shipping, are a sufficient factual base to support the Tax Appeals Commission decision.

The department has appealed this decision to the Court of Appeals.



TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

The following Tax Releases are included:

Individual Income Taxes

1. Determining Required Estimated Tax Payments of Trusts (p. 10)
2. Educational Assistance Program Benefits - Wisconsin Tax Treatment (p. 10)
3. Effect of Transitional Adjustments on Married Couple Credit Computation (p. 11)
4. Exclusion for Retirement Benefits (p. 11)
5. Married Couple Credit When Widowed Spouse Is Reporting Income of a Deceased Spouse (p. 12)
6. Standard Deduction of Dependent Receiving Taxable Scholarship or Fellowship Income (p. 12)
7. Taxability of Interest from Veterans Administration Life Insurance Policy (p. 12)

Individual and Corporation Franchise or Income Taxes

1. Statute of Limitations for Adjustments Resulting from Internal Revenue Service Adjustments and Amended Federal Returns (p. 13)

Corporation Franchise or Income Taxes

1. Applicability of Federal Regulations, Rules, and Court Cases to Wisconsin Corporation Franchise or Income Tax Law (p. 13)
2. Federal Transitional Rules for Depreciation (p. 14)
3. How Are "Dock Sales" Assigned to Various States for Purposes of the Sales Factor in the Apportionment Formula (p. 14)
4. Return Requirements (p. 16)
5. Withdrawal of Election Not to Be a Tax-Option (S) Corporation for Wisconsin (p. 16)
6. Wisconsin Compensation for Purposes of the Payroll Factor (p. 16)

Farmland Preservation Credit

1. Noncompliance With Soil and Water Conservation Follows the Claimant (p. 18)

Sales/Use Taxes

1. Bicycle Tours (p. 18)
2. Cardboard Used Under Manufacturing Machines (p. 19)
3. Purchases of Telephone Service and Equipment by a Cellular Radio Telephone Company (p. 19)