



Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

Corporation Franchise and Income Taxes

Apportionment – apportionable income <i>Louis Dreyfus Petroleum Products Corp.</i>	15
Sales and Use Taxes	
Exemption for Industrial Waste Treatment Facilities <i>City of Green Bay</i>	16

CORPORATION FRANCHISE AND INCOME TAXES

Apportionment – apportionable income.
Louis Dreyfus Petroleum Products Corp. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 2, 2008). The issues in this case are whether the following income of Louis Dreyfus Petroleum Products Corp. (LDPPC) is apportionable to Wisconsin:

1. Gain from the sale of a partnership interest.
2. Interest derived from a loan to its parent company.

LDPPC, a Delaware corporation, was a 50% general partner in Pilot Travel Ventures (PTV), a Delaware general partnership, together with Pilot Corporation (Pilot), a Tennessee corporation that was the other 50% general partner. LDPPC sold its interest in PTV to Pilot, resulting in a capital gain. PTV's assets included ownership or leasehold interests in travel centers, one of which was located in Wisconsin.

In addition to the capital gain, LDPPC recognized interest from a loan to its parent company, Louis Dreyfus Energy Corp. The loan was made with proceeds from the sale of the partnership interest.

The Commission determined the capital gain income was apportionable to Wisconsin and the interest income was not.

With regard to the capital gain income, the Commission first looked to applicable Wisconsin law. The Commission concluded that, under sec. 178.21(2), Wis. Stats., LDPPC was co-owner with Pilot of PTV's property in Wisconsin. Therefore, under sec. 71.25(5)(a)5., Wis. Stats., income from the sale of that property in Wisconsin, which was used in the production of business income, was apportionable to Wisconsin.

The Commission then looked to whether the apportionment was constitutionally permissible under the unitary business and operational function tests established in the Supreme Court decision *Allied Signal v. Director, Div. of Tax.*, 504 U.S. 768 (1992). With regard to whether LDPPC was a unitary business with PTV, the Commission looked to the following three central factors in *Allied Signal*:

1. Whether LDPPC and PTV were functionally integrated.
2. Whether LDPPC and PTV had centralized management.
3. Whether there were economies of scale between LDPPC and PTV.

The Commission concluded that LDPPC and PTV were a unitary business, and LDPPC's investment in PTV served an operational rather than an investment function. Therefore, the apportionment was constitutionally permissible.

With regard to the interest income, the Commission concluded that after LDPPC sold its interest in PTV it no longer had a unitary or operational connection with PTV, and also ceased to have any contacts with Wisconsin. Therefore, when LDPPC loaned a portion of the proceeds from the sale to its parent company, its interest income from that loan was not apportionable to Wisconsin.

The taxpayer has appealed this decision to the Circuit Court. The department has not appealed this decision. [☞](#)

SALES AND USE TAXES

Exemption for Industrial Waste Treatment Facilities. *City of Green Bay vs. Wisconsin Department of Revenue and Green Bay Packaging, Inc.* (Wisconsin Tax Appeals Commission, December 21, 2007).

The issue in this case is whether the total amount of the real estate and improvements at Green Bay Packaging, Inc.'s (GBP) Green Bay Mill is exempt from property taxation under sec. 70.11(21), Wis. Stats.

NOTE: Although this is a property tax case, the property tax treatment directly affects the Wisconsin sales and use tax treatment of certain transactions. Section 77.54(26), Wis. Stats., provides an exemption from Wisconsin sales and use tax for tangible personal property which becomes a component part of an industrial waste treatment facility that is exempt from property tax under sec. 70.11(21), Wis. Stats. Please see pages 33 – 34 of *Wisconsin Tax Bulletin* 154 (December 2007) for an explanation of tax law changes made in 2007 Wisconsin Act 19. This article can be accessed from the Department of Revenue's website at www.revenue.wi.gov/ise/wtb/154law.pdf.

On June 20, 2005, the Department of Revenue (DOR) issued a Real Estate Assessment Notice to GBP, assessing GBP's Green Bay Mill. In August of 2005, GBP timely filed a form of objection to the DOR's 2005 real estate assessment, asserting that the Green Bay Mill qualified to be exempt under sec. 70.11(21), Wis. Stats., as property used in recycling operations. On March 28, 2006, the State Board of Assessors issued a Notice of Determination revising the full value assessment to zero dollars. The City of Green Bay challenges DOR's determination that this property is totally exempt from taxation under sec. 70.11(21), Wis. Stats. Most of the equipment employed by GBP at the Green Bay Mill is already entitled to an exemption under sec. 70.11(27), Wis. Stats., as manufacturing machinery and equipment.

GBP's Green Bay Mill manufactures linerboard and corrugating medium (together, the components of containerboard) with 100% recycled fiber. The Green Bay Mill is a closed process water (also referred to as a "closed-loop"), non-bleaching, and 100% recycled containerboard mill, and is one of the first 100% closed process water system paper mills in the world.

The Green Bay Mill operations are divided into six separate areas, consisting of the Main Office and Areas A, B, C, D, and E. The operations are summarized below:

Main Office - Recycled fiber is purchased by the Fiber Procurement Manager; environmental evaluations and compliance documents are maintained by the Environmental Manager; orders for recycled product are received, processed and planned; and the Customer Service Department and Quality Department review concerns with recycled product or process.

Area A (Recycled/Waste Fiber Receiving Area) - This area is used for bale storage, bale unloading, and to house the "Phoenix" press (machine used to dewater rejected fiber) and the "rejects screw" (an auger-type device that further dewateres the fiber and forms a pile of reject fiber in the rejects loading area). GBP pays the recycled/waste fiber suppliers at predetermined rates based on the weight and quality standards of the fiber they supply.

Area B (Recycled Fiber Cleaning, Screening, and Preparation Area) - The equipment in Area B is used to convert paper bales into fiber slurry and remove contaminants. Area B includes chemical storage, the clarifier, refiners, the lab, which monitors and meets environmental permit conditions and evaluates incoming fiber sources, and the holding area for fiber slurry. Once the fiber slurry leaves Area B, the process of cleaning and screening the recycled pulp slurry and contaminants is essentially completed.

Area C (Maintenance and Maintenance Offices) - The maintenance shop, maintenance offices, and sheet metal shop are the areas used to store tools and other supplies used to repair all of the fiber processing and other equipment housed throughout the Green Bay Mill.

Area D (Papermachine, Winder, and Shipping) - Area D includes the papermachine, the reel, and the winder. The papermachine takes the fiber slurry and forms it into a useable paper sheet. The sheet moves from the calender (a part of the papermachine) and builds onto a parent reel. When the calender reaches the full size, a new parent reel is started. The completed parent reel is transported to the winders. When the parent reel reaches the winder, slitter blades are set to the predesignated roll width size and cut the (large) parent reel of recycled containerboard into smaller desired roll sizes.

The vast majority of the Green Bay Mill's process water is recycled during the operation of the papermachine. The only process water that is not recycled back to the closed-loop process water system is the water that evaporates in the dryer section.

Area D also includes the shipping area, which assigns a unique number to each roll for tracking purposes.

Area E (Boiler Room and Baghouse) - The boiler is a standard spreader stoker coal-fired boiler used to generate the steam for the dryer section of the papermachine, which dries the recycled containerboard to the final moisture levels as described above. The boiler room and baghouse contain "multicyclones," which use centrifugal force to remove large particles from the combustion emissions prior to entering the baghouse. After passing through the multicyclones the combustion emissions are routed through the baghouse. The baghouse removes 99% of the particulate from the gaseous emissions generated by the coal combustion process. The baghouse is necessary to meet environmental air standards.

Closed-Loop Process Water Storage Facilities - The closed-loop process water recycling system recovers process waters through various stages of operations at the Green Bay Mill. The vast majority of process water recovery occurs in Area D, as the fiber slurry is reduced from 99% water content down to 7% water content.

The City of Green Bay urged the Commission to conclude that, because the legislature did not explicitly intend to expand the exemption, *Newark Group, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Circuit Court, January 31, 2005) (CCH 400-809), was wrongly decided.

In Newark Group, the Circuit Court affirmed the Wisconsin Tax Appeals Commission's decision that the recycling operations of Newark's Milwaukee Paperboard Division, and its real and personal property used in those operations, from the receipt of old corrugated containers and waste paper to its manufacture of paperboard, was a "waste treatment facility" under sec. 70.11(21), Wis. Stats. The treatment of waste was "for the purpose of abating or eliminating pollution of surface waters, the air or waters of the state..." The Commission stated that DOR's administrative rule defined "facility" more narrowly than the statute. Besides "tangible personal property . . . that is constructed . . .", the Commission held that the real property upon which the facility stands and the supporting buildings and real estate improvements (for example, cement and

asphalt storage areas and cyclone fencing) were part of the "facility."

The Commission also held that acquiring, removing contaminants from, and baling waste paper and old corrugated containers away from the Milwaukee Paperboard waste treatment facility is not part of the facility's operation. Therefore, the operations of Newark's Recycled Fibers' Division of collecting, compacting, baling, and removing contaminants from old corrugated containers and waste paper were not found to be part of a "waste treatment facility." The real and personal property used in these operations were not exempt from property tax under sec. 70.11(21), Wis. Stats. Property used in sorting, compacting, and baling the waste paper was taxable, because those activities did not alter the nature or composition of the paper. The only alteration was that the volume of paper was reduced.

In *Newark Group*, the Commission interpreted the statute at issue more broadly than DOR had previously interpreted it. Therefore, in the current case the City of Green Bay requested that the Commission limit its decision in *Newark Group* to its facts and parties and not follow that decision in this case. The City of Green Bay contended that the Commission is not bound by its prior decisions and has reversed course in the past after determining that a prior decision had been erroneous.

The Commission determined that Areas A, B, D, E and all closed-loop process water recycling system storage facilities at the Green Bay Mill are exempt under sec. 70.11(21)(a), Wis. Stats., but the remaining portions of the property are not exempt under that statute.

The Commission also reaffirmed the central holdings of the Commission in *Newark Group*, but limited that decision to allow the exemption from property taxation under sec. 70.11(21)(a), Wis. Stats., of a waste treatment facility that is located on property that is also used for other types or purposes or facilities. The Commission also stated that the legislature's recent amendment of sec. 70.11(21)(a), Wis. Stats., to limit the reach of *Newark Group* in future cases does indicate that the decision in *Newark Group* may have been overbroad.

It was not known at the time of publication whether the taxpayer would appeal this decision. 