

STATE OF WISCONSIN
TAX APPEALS COMMISSION

PAINTBALL DAVE'S, INC.,

DOCKET NO. 07-S-145(P)

Petitioner,

vs.

**RULING AND ORDER
GRANTING PARTIAL
SUMMARY JUDGMENT**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, ACTING CHAIRPERSON:

This case comes before the Commission on the motion of the Wisconsin Department of Revenue (the "Department") for partial summary judgment.¹ Attorney Robert C. Stellick, Jr. represents the Department and has filed a brief with an affidavit and exhibits in support of the motion. Attorney Steven C. McGaver of Gimbel, Reilly, Guerin & Brown represents petitioner, Paintball Dave's, Inc., a Wisconsin corporation ("PDI" or "Paintball Dave's"), and has filed a brief in response to the motion with a supporting affidavit and exhibits.

Having considered the entire record, including the motion, affidavits, exhibits and briefs of the parties, and acting pursuant to Wis. Stat. § 73.01(4)(em)2, the

¹ On August 15, 2007, the Department filed a motion to dismiss the petition for failure to state a claim upon which relief can be granted pursuant to Wis. Stat. § 802.06(2)6, with a supporting brief. On September 28, 2007, petitioner filed its brief with supporting affidavit and exhibits in response to the motion. On October 12, 2007, the Department filed its reply brief with supporting affidavit and exhibits, and converted its motion to a motion for partial summary judgment, since both parties have filed affidavits and exhibits regarding the motion. *See*, Wis. Stats. §§ 802.06(3) and 802.06(2)(b); *see also*, *Mrotek, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-315 (WTAC 1997) and *City of Milwaukee v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-405 (WTAC 1999).

Commission hereby finds, rules and orders as follows:

JURISDICTIONAL AND MATERIAL FACTS

1. By notice dated June 4, 2006, the Department issued an assessment of use tax and interest to PDI for the years 2001 through 2004 (the “period at issue”) in the total amount of \$32,325.98, which consisted of use tax in the amount of \$23,867.35 and interest in the amount of \$8,458.63 (the “assessment”). (Affidavit of Robert C. Stellick, Jr. dated Oct. 11, 2007, Ex. 1.)

2. The Department received PDI’s petition for redetermination on August 3, 2006. (Stellick Aff., Ex. 2.)

3. By Notice of Action dated June 23, 2007, the Department granted in part and denied in part PDI’s petition for redetermination. The Notice stated that the total amount of the assessment had been adjusted to \$34,031.06, including tax in the amount of \$22,972.32 plus interest in the amount of \$11,058.74. (Stellick Aff., Ex. 3.)

4. On July 16, 2007, PDI filed a petition for review of the Department’s denial of its petition for redetermination with the Commission.

5. PDI operates indoor and outdoor facilities where individuals and groups come to purchase paintballs and play paintball games. (Affidavit of David Rudig, owner and operator of Paintball Dave’s, Inc., dated Sep. 26, 2007.)

6. For such games, people come to Paintball Dave’s for the purpose of purchasing paintballs and utilizing its equipment to play paintball, a type of capture the flag game, where one team tries to obtain the flags of the other team before all of its members are hit with splattering paintballs, an indication that they have been shot and

are no longer in the game. (Rudig Aff., ¶ 2.)

7. Customers buy game packages which include the purchase of at least 100 paintballs and the use of paintball gear, including helmets, eye protection devices, protective coverings for clothing and paintball guns. (Rudig Aff., ¶ 3.)

8. In order for patrons to use the paintball guns in a game, they need a paintball and a carbon dioxide cartridge to power the gun and paintballs. Generally, 100 to 250 paintballs are sold to the customer, with the exact number depending on the type of package. PDI charges and remits sales tax on its sales of these game packages. (Rudig Aff., ¶ 4.)

9. If additional paintballs are necessary, they can be purchased separately by the customer. Customers pay sales tax on all purchases of paintballs outside of game packages. (Rudig Aff., ¶¶ 5, 14.)

10. Many different groups of customers buy game packages at Paintball Dave's. Some are corporations providing recreational activities for their employees or clients. Others are individuals or groups of individuals who simply desire to participate in the paintball games. (Rudig Aff., ¶ 6.)

11. According to Mr. Rudig, PDI's customers "play the paintball game because they desire to play a game where the skill of aiming and hitting a moving target is confirmed by the splattering of a paintball over the opponent's garb. People are willing to pay significant sums of money to play paintball games at Paintball Dave's because Paintball Dave's provides them the opportunity to shoot at someone else in a safe environment." (Rudig Aff., ¶ 7.)

12. Paintballs cannot be reused for any purpose or resold to another customer after they are shot from a paintball gun. (Rudig Aff., ¶ 9.)

13. PDI sells paintballs separately from its sales of game packages, including sales of additional paintballs to customers participating in games at Paintball Dave's and sales to the general public through its retail store and at event venues such as the Wisconsin State Fair and the *Milwaukee Journal-Sentinel* sports show. (Rudig Aff., ¶¶ 11-12.)

14. PDI alleges that its sales of paintballs separate from packages account for at least 20% of PDI's total paintball sales in a given year.² (Rudig Aff., ¶ 13.)

15. PDI did not pay sales tax on its purchases of paintballs on the grounds that the paintballs were purchased for resale to PDI's customers.³

16. The Department assessed PDI for use tax on its purchases of paintballs that were later provided by PDI to its customers with their purchases of game packages on the grounds that the paintballs were incidental to PDI's sales of paintball game admissions.

ISSUE

Can PDI claim a resale exemption from sales and use tax on its purchases of paintballs that it provided to customers as part of game packages it sold during the period at issue, on the grounds that the paintballs provided with the packages were not incidental to the customers' purchases of PDI's services?

² The parties have agreed to hold in abeyance the issue of how many paintballs were sold separately from game packages during the period at issue pending the resolution of the issue discussed herein.

³ See, Wis. Stat. § 77.51(14).

CONCLUSION OF LAW

PDI's purchases of paintballs that it provided to customers as part of game packages it sold during the period at issue were not eligible for a resale exemption, because the paintballs provided with the packages were incidental to the customers' purchases of PDI's services.

RULING

A summary judgment motion will be granted if 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). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

In this case, the Department has moved for partial summary judgment on the specific legal question stated above. PDI disputes the Department's interpretation of applicable law, but does not argue that there is a genuine issue as to any material fact bearing on this issue. Consequently, this is purely a question of law and summary judgment is appropriate with respect to this issue.

PDI does not dispute that its sales of paintball game packages are, at least in part, sales of admissions to amusement, athletic, entertainment or recreational events or places that are subject to the Wisconsin sales tax on services under Wis. Stat. § 77.52, which provides, in relevant part, as follows:

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

* * *

2. a. . . ., the sale of admissions to amusement, athletic, entertainment or recreational events or places . . . including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights,

* * *

(2m)(a) With respect to the services subject to tax under sub. (2), no part of the charge for the service may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing or furnishing of the service,

Wis. Stat. § 77.52.

For these purposes, “incidental” is defined as follows:

For purposes of . . . s. 77.52(2m) “incidental” means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property transferred by a service provider is incidental to the service if the purchaser’s main purpose or objective is to obtain the service rather than the property, **even though the property may be necessary or essential to providing the service.**

Wis. Stat. § 77.51(5) (emphasis added).

The Administrative Code provides certain additional guidance:

(1) GENERAL. When a transaction involves the transfer of tangible personal property along with the performance of a service, the true objective of the purchaser shall determine whether the transaction is a sale of tangible personal property or the performance of a service with the transfer of property being merely incidental to the performance of the service. If the objective of the purchaser is to obtain the personal property, a taxable sale of that property is involved. However, if the objective of the purchaser is to obtain the service, a sale of a service is involved even though, as an incidence to the service, some tangible personal property may be transferred.

Wis. Admin. Code § Tax 11.67(1).

(2) RECEIPTS AND PURCHASES OF PERSONS PROVIDING SERVICES.

(a) Since persons engaged in the business of furnishing services are consumers, not retailers, of the tangible personal property which they use incidentally in rendering their services, tax applies to the sale of the tangible personal property to them.

Wis. Admin. Code § Tax 11.67(2)(a).

During the period at issue, PDI did not pay sales tax on its purchases of paintballs on the basis that it was purchasing the paintballs for resale. The Department assessed PDI for use tax on its purchases of paintballs that were later provided by PDI to its customers with their purchases of game packages on the grounds that the paintballs were incidental to PDI's sales of admissions to paintball games. Thus, the issue in this matter submitted for partial summary judgment is whether the paintballs PDI provided with game packages were incidental to PDI's sales of admissions to an amusement, athletic, entertainment or recreational event or place under Wis. Stat. §

77.52(2m)(a).

PDI argues that paintballs are not incidental to the game packages, because the paintballs are an essential element of these packages. The paintball games could not be played without paintballs, which indicates that PDI's customers were paying both for admission to the game and for paintballs. In addition, PDI collected and remitted sales tax on the entire sale price of each game package. PDI argues that the Department's position unreasonably focuses on the form of these transactions, as opposed to their substance, since its customers paid sales tax on the entire price of each package.

In support of its motion, the Department argues that PDI's customers purchased its game packages in order to obtain admission to paintball games, not to acquire paintballs. Consequently, under the applicable statutes and rules, the paintballs were incidental to the sales of admissions, and PDI's purchases of these paintballs were thus ineligible for the claimed resale exemption from sales and use tax. The Department further argues that this is not a question of valuing form over substance, because there are two separate transactions at issue, PDI's purchases of the paintballs and its sales of the related services.

The record and the law support the Department's position. PDI has shown that its customers come to Paintball Dave's to play paintball games, and that they could not play these games without paintballs. Unfortunately for PDI, these facts also prove that PDI was not permitted to claim a resale exemption for its purchases of the paintballs in question under the applicable statutes and rules.

Under Wis. Stat. § 77.52(2m)(a), no part of a charge for admission “may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing or furnishing of the service.” The applicable definition of “incidental” states, in part: “Tangible personal property transferred by a service provider is incidental to the service if the purchaser’s main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service.” Wis. Stat. § 77.51(5) (emphasis added). When a transaction involves the purchase of both a service and tangible personal property, “if the objective of the purchaser is to obtain the service, a sale of a service is involved even though, as an incidence to the service, some tangible personal property may be transferred.” Wis. Admin. Code § Tax 11.67(1). The record shows that PDI’s customers come to Paintball Dave’s and purchase game packages in order to play paintball, not to purchase paintballs. Thus, the paintballs provided with the packages at issue were incidental to the sales of PDI’s services.

“Since persons engaged in the business of furnishing services are consumers, not retailers, of the tangible personal property which they use incidentally in rendering their services, tax applies to the sale of the tangible personal property to them.” Wis. Admin. Code § Tax 11.67(2)(a). As the provider of the services in question, PDI was the consumer of the paintballs used in providing its game packages, and thus it could not claim a resale exemption on its purchases of the paintballs at issue and is liable for the use tax claimed in the assessment. *See*, Wis. Stat. §§ 77.52(15).

In prior cases under Wis. Stat. § 77.52, the Commission and the courts have reached similar conclusions concerning the application of use tax to tangible personal property provided incidentally to admissions to amusement, athletic, entertainment or recreational events or places. In *Wis. Dep't of Revenue v. Milwaukee Brewers*, 111 Wis. 2d 571, 331 N.W.2d 383 (1983), the Supreme Court held that the Milwaukee Brewers baseball club's purchases of (1) various promotional items given to customers and (2) admission tickets were not purchases for resale to the Brewers' customers, but were instead purchases subject to use tax, because the promotional items and tickets were incidental to the customers' purchases of admissions to Brewers' games.

Similarly, in *Thumb Fun, Inc. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-465 (WTAC 1984), the Commission held that an amusement park operator could not claim a resale exemption for its purchases of tickets for use with its "skee ball machine." In that case, the taxpayer's skee ball machine was a coin-operated game that dispensed tickets to customers, with the number of tickets depending upon the skill of the customer at playing the game. The customer could redeem these tickets for various prizes. Like PDI, the taxpayer claimed that it purchased the tickets for resale and that these purchases were therefore exempt from sales and use tax. The Commission held that such purchases were not purchases for resale.

The facts in these two cases are very similar to the facts at issue in this case, and the application of the law is the same. Therefore, on the grounds discussed herein,

IT IS ORDERED

1. The Department's motion for partial summary judgment is granted.
2. The Department's motion for the Commission to assess damages under Wis. Stat. § 73.01(4)(am) is denied.⁴
3. The Commission will contact the parties within approximately 30 days to arrange a telephone status conference to discuss the remaining issues in this matter.

Dated at Madison, Wisconsin, this 9th day of April, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Acting Chairperson

⁴ In its reply brief, the Department requests that the Commission consider assessing such damages, on the grounds that PDI's arguments are frivolous or groundless, which the Commission construes as a motion.