

STATE OF WISCONSIN
TAX APPEALS COMMISSION

TELEPHONE AND DATA SYSTEMS, INC.,

DOCKET NO. 10-S-146

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent

RULING AND ORDER (Pt. 2)

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission on the continued motions of the parties. The Petitioner ("TDS") has filed a Motion for Summary Judgment and the Respondent, the Wisconsin Department of Revenue ("the Department"), has filed a Motion to Dismiss. The Petitioner is represented by Attorney John R. Austin and Attorney Kristina E. Somers of Reinhart Boerner Van Deuren s.c., Milwaukee, Wisconsin. The Department is represented by Attorney Julie A. Zimmer.

In an earlier decision, this Commission recognized three issues:

1. Whether the extension request form TDS filed in 2004, which the Department apparently declined to sign, extended the period to file so the 2008 refund claim is valid.

2. Whether the Department should be equitably estopped from arguing that the 2004 extension request was invalid.

3. Whether the refund provision of Wis. Stat. § 77.59(4)(b) applies.

In its decision of February 5, 2013, the Commission ruled on the first issue, holding that the extension request form was technically invalid and ordering further proceedings as to two additional issues. We will look next to the third issue of whether a 2-year statute of limitations found in Wis. Stat. 77.59(4)(b) could have applied to the facts of this case or whether TDS was limited to a 60-day time frame, from the time of the assessment, in which to claim a refund under Wis. Stat. 77.59(2).

Because we find that the 2-year statute of limitations would have applied had the extension request been valid, we set this case for further proceedings regarding Petitioner's argument of equitable estoppel.

RELEVANT STATUTE

The section of the Wisconsin Statutes at issue here is Wis. Stat. § 77.59 (2007-2008) and the relevant subsections are (2), (4), and (6).¹

77.59 Deficiency and refund determinations.

(2) The department may, by field audit, determine the tax required to be paid to the state or the refund due to any person under this subchapter. . . . The determination shall be presumed to be correct and the burden of proving it to be incorrect shall be upon the person challenging its correctness. A determination by the department in a field audit becomes final at the expiration of the appeal periods provided in sub. (6), and the tax liability of the taxpayer for

¹ Section 77.59(3m) was addressed in our earlier decision "Pt. 1."

the period audited may not be subsequently adjusted except as provided in sub. (4) (b), (8) or (8m). . . .

(4)(a) Except as provided in sub. (3m), at any time within 4 years after the due date, or in the case of buyers the unextended due date, of a person's corresponding Wisconsin income or franchise tax return or, if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year for which that person files a claim, that person may, unless a determination by the department by office or field audit of a seller has been made and unless a determination by office audit of a buyer other than an audit in which the tax that is the subject of the refund claim was not adjusted has been made and unless a determination by field audit of the buyer has been made, file with the department a claim for refund of taxes paid to the department by that person. If the amount of the claim is at least \$50 or if either the seller has ceased doing business, the buyer is being field audited or the seller may no longer file a claim, the buyer may, within the time period under this subsection, file a claim with the department for a refund of the taxes paid to the seller. A claim is timely if it fulfills the requirements under s. 77.61 (14). A buyer may claim a refund under this paragraph only on a form prescribed by the department, only by signing that form and only if the seller signs the form unless the department waives that requirement. If both a buyer and a seller file a valid claim for the same refund, the department may pay either claim. The claim for refund shall be regarded as a request for determination. The determination thus requested shall be made by the department within one year after the claim for refund is received by it unless the taxpayer has consented in writing to an extension of the one-year time period prior to its expiration.

(4) (b) A claim for refund that is not to be passed along to customers under sub. (8m) may be made within 2 years of the determination of a tax assessed by office audit or field audit and paid if the tax was not protested by the filing of a petition for redetermination. A claim is timely if it fulfills the requirements under s. 77.61 (14). No claim may be allowed under this paragraph for any tax self-assessed by the taxpayer. If a claim is filed under this paragraph, the

department may make an additional assessment in respect to any item that was a subject of the prior assessment.

(6) Except as provided in sub. (4) (b), a determination by the department is final unless, within 60 days after receipt of the notice of the determination, the taxpayer, or other person directly interested, petitions the department for a redetermination. . . .

(emphasis added)

OPINION

This is a case where the parties dispute the timeliness of TDS's refund claim for the amount of \$252,815 in sales tax TDS should not have paid to a retailer for custom software from 1997-2000. The facts were set forth in detail in our previous decision. In brief, in 2008, TDS filed two refund claims, one of which covered the period of 1997-2000 and the other which covered the period from 2001-2003.

In July of 2008, the Supreme Court of Wisconsin decided the *Menasha* case,² holding that sales such as those which are the subject of the TDS's refund claims were not taxable. In 2009, the Department granted TDS a refund for the 2001-2003 period. The case now involves only the earlier time period for which the Department denied the refund claim as late, claiming primarily that the period to file for a refund expired 60 days after the Department issued its determination in 2002 per Wis. Stat. § 77.59(6).

TDS argues that it is entitled to a refund of the \$252,815 it should not have paid. TDS argues that its claim is timely because it was made within the 2-year-from-

² See *Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 23, 311 Wis. 2d 579, 754 N.W.2d 95.

audit period.³ This Commission has previously found that the extension request was technically invalid; however, TDS intends to argue equitable estoppel if the 2-year statute would have otherwise applied. The Department continues to argue that Wis. Stat. § 77.59(4)(b) does not apply, and, therefore, the request was untimely under the 60-day period of Wis. Stat. § 77.59(6) and TDS has no right to seek a return of the money. We hold otherwise.

A. Burden of Proof

Determinations the Department makes are presumed to be correct, and the Petitioner bears the burden to prove by clear and satisfactory evidence in what respects the Department erred. *Edwin J. Puissant, Jr. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). This presumption extends to field audits and denial of tax refund claims. Wis. Stat. § 77.59(2). Moreover, tax refund statutes must be construed strictly in favor of imposing the tax and against allowing the refund, and the burden is on the taxpayer to bring itself within the refund statute. *Ho-Chunk Nation v. Dep't of Revenue*, 317 Wis. 2d 553, 570, 766 N.W.2d 738 (2009).

Before we begin our analysis, we specifically reject the assertion by the Department that every ambiguity in a tax refund statute must lead to automatic tax liability. The taxpayer still carries the burden of proof which, although high, is not per se insurmountable. In fact, the Commission in *Dairyland*, while finding ambiguity in

³ The parties do not dispute that TDS's 2004 extension request was filed within 2 years of the 2002 audit of these earlier years.

the former version of this statute, did not rule against the taxpayer. *See Dairyland Harvestore, Inc. v. Dep't of Revenue*, 151 Wis. 2d 799, 447 N.W.2d 56 (Ct. App. 1989).

B. Application of Wis. Stat. § 77.59(4)

This case requires that we apply Wis. Stat. § 77.59.⁴ Generally, this section sets a 4-year statute of limitations for refund claims. Wis. Stat. § 77.59(4)(a). However, where there has been a field audit, the Department's decision becomes final after 60 days unless protested through a petition for redetermination, after 60 days. Wis. Stats. §§ 77.59(2) and (6). Subsection (4)(b) of the statute provides for an exception to the 60-day time period set forth in Wis. Stat. § 77.59(6). If subsection (4)(b) applies, the time allowed for requesting a refund is extended to 2 years from the date of determination.

There was some initial question surrounding the fact that TDS was a buyer rather than a seller. As a buyer, TDS had paid the monies it is claiming for refund to a seller as opposed to making the payment directly to the Department. However, the Department has clarified that this distinction is not pertinent to our discussion: "To be clear, the Department has never suggested that buyers could not claim refunds of sales taxes paid to sellers during the 1997-2000 period at issue here; just that they must do it according to the explicit terms and within the specific time limits of the statutes." (Dep't. Supp. Br. at p. 12.) "The Department agrees that buyers may make

⁴ Because there has been a field audit, neither party argues that Wis. Stat. § 77.59(4)(a) applies. However, in light of some of the comments in the briefs, we draw attention to the placement of the word "either" noting that the 3 latter conditions only apply if the claim is not "at least \$50."

refund claims under Wis. Stat. § 77.59(4)(b) - but only of 'a tax assessed by office audit or field audit and paid' (Dep't. Supp. Reply Br. at p. 4).⁵

There was also an initial issue with the language "within 2 years of the determination of a tax assessed by office audit or field audit and paid." The question arose because the audit in this case did not result in a net tax owing. The question, which has now been adequately briefed, was whether TDS's claim qualified even though TDS was not actually required to pay anything as a result of the audit. We find that actual payment is not required in order to meet this aspect of the statute. *See Gehl Co. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-423 (WTAC 1999). As long as the final determination included an assessment, even though it may have been offset, that is sufficient to fall within the meaning of "paid" for the purposes of Wis. Stat. § 77.59(4)(b). *Id.* This point is not contested by the Department. (Dep't. Supp. Br. at pp. 16-17.)

There is also no dispute that TDS has met the remaining requirements of the statute: TDS did not file a petition for redetermination to protest the determination of any tax assessed in the audit, and the tax in question was not self-assessed.

The one aspect in dispute is whether the statute requires the request for refund be of "the" tax which was the subject of the field audit. The request for refund in this case is for the same type of tax (sales) paid for the same years audited (1997-

⁵ In light of the reference to potential application of subsection (8)(m), this subsection may in fact apply more often to buyers since often sellers are required to remit their refunds back to the customers who paid them.

2000), but this precise item of sales tax was not a topic of the field audit. The question before us is whether that matters. The statute allows a claim for refund as follows:

(4) (b) A claim for refund that is not to be passed along to customers under sub. (8m) may be made within 2 years of the determination of a tax assessed by office audit or field audit and paid if the tax was not protested by the filing of a petition for redetermination.

Does this language describe what may be claimed in the refund or simply when a refund claim can be made? From a purely grammatical perspective, no modifiers are associated with “claim for refund” other than the requirement that the refund be one that will not be passed along to customers.⁶ The subsequent phrases modify the prepositional phrase regarding the time frame “within 2 years.” Refund claims may be filed within 2 years “of the determination of a tax assessed by . . . field audit.” Even if the modifying phrase were construed somehow to modify the claim for refund, the language only refers to “a” tax and not “the” tax.

Both parties cite Wis. Stat. § 71.75(5) (the successor to Wis. Stat. § 71.10(10)(e)), the nearly parallel section which addresses income tax as opposed to sales tax. That specific section is virtually identical to Wis. Stat. § 77.59(4)(b) in all material respects, but adds the language, “No claim for refund may be made in respect to items that were not adjusted in the notice of assessment or of refund.” That language would not be necessary if the language of the subsection already so limited claims. The sales tax section, Wis. Stat. § 77.59(4)(b), has no such language. Because statutory language is

⁶ This subsection applies to both buyers and sellers so this language is potentially applicable to sellers. Also, because this section falls within the chapter and section addressing sales tax, it is reasonable to infer that a refund claimed under this subsection must be for sales tax and must also relate to the same tax year as the audit.

presumed to have a purpose and presumed not to be surplusage, we interpret the absence of that language in the corresponding sales tax statute to mean that claims for refunds of sales tax are not limited to items adjusted in the audit. "[S]tatutes must be construed, if possible, so that no word or clause is rendered surplusage." *Hayne v. Progressive N. Ins. Co.*, 115 Wis. 2d 68, 339 N.W.2d 588 (1983).

This conclusion also ensures that the third sentence of Wis. Stat. § 77.59(4)(a) is not rendered surplusage.

No claim may be allowed under this paragraph for any tax self-assessed by the taxpayer.

If refunds could only be claimed for items assessed in the audit, this section would have no meaning because no tax assessed by the Department in connection with the field audit could have been self-assessed by the taxpayer.⁷

TDS is a buyer who paid taxes erroneously to a seller in years which were field audited. TDS did not protest the audit but instead could have brought a valid claim for refund under Wis. Stat. § 77.59(4)(b) within 2 years of the field audit determination.

C. Equitable Estoppel

We reiterate that a party asserting estoppel must prove all of the elements by clear, convincing, and satisfactory evidence. *Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Supply Co., Inc. v. Dept. of Revenue*, 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986). Equitable estoppel is a bar to the assertion of what would

⁷ The final clause limits the situation to ones in which the tax assessed and paid has not been protested by the filing of a petition for redetermination. No petition was filed in this case, so this portion of the statute is not in issue.

otherwise be a right; it does not of itself create a right. *Murray v. City of Milwaukee*, 2002 WI App 62, ¶ 15, 252 Wis. 2d 613, 642 N.W.2d 541. The elements of equitable estoppel are (1) action or non-action by the person against whom estoppel is asserted, (2) that induces reliance by another, (3) to his or her detriment. *Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979). The Commission must then balance the public interests at stake if the governmental action is estopped against the injustice that would be caused if the governmental action is not estopped.⁸ *Id.* at 639. A party's reliance on another's action or inaction must be reasonable. *Coconate v. Schwanz*, 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991); *Gonzalez v. Teskey*, 160 Wis. 2d 1, 14, 465 N.W.2d 525 (Ct. App. 1990). Equitable estoppel is not as freely granted against a governmental agency as it is against private parties. *Moebius* at 638. Equitable estoppel is designed to promote equity and justice. *Rascar, Inc. v. Bank of Oregon*, 87 Wis. 2d 446, 453, 275 N.W.2d 108 (Ct. App. 1978).

The third element of equitable estoppel is whether TDS has suffered detriment. On these facts, TDS suffers detriment only if the 2-year time limitation was open when the taxpayer filed the extension request form. As detailed above, we have found that the 2-year statute would have applied and the February 2004 request was within 2 years of the June 2002 audit. However, as noted in our earlier decision, several questions remain regarding the first two elements of equitable estoppel:

⁸ The balancing test needs to be applied only when a party is successful in showing the basic elements of equitable estoppel. See *Independence Corrugated, LLC v. City of Oak Creek*, 2008 WI App 160, 314 Wis. 2d 508, 758 N.W.2d 225.

1. When did the Department actually decide not to agree to the extension request for 1997 to 2000 that TDS filed in February, 2004? Was it in 2004, or in 2009?

2. Did the Department return both of the extension requests (one signed, the other unsigned?) to TDS in April, 2004? Was there a separate cover letter for the 2001 to 2003 period?

3. Who received the form(s) back at TDS and did that person (or persons) actually believe that both of the extension requests had been accepted by the Department? Was there any follow-up done? Was any decision made at TDS not to file a refund claim at that point?

4. The Commission notes that the April 15, 2004 letter from the Department to TDS describes what the taxpayer filed in February of 2004 on more than one occasion as a "Claim for Refund," but never mentions any request for extension. (See Exhibit 3). The letter then goes on to provide information which is relevant to claims for refunds, and not to extension requests. Is that fact significant?

5. What is the Department's usual practice in answering the extension requests it receives? In particular, the extension requests it declines to agree to?

6. Was there any advantage to the taxpayer in filing an extension request in February of 2004, as opposed to a claim for refund?

7. Is there any functional difference between a claim for refund and an extension request?

The Commission will discuss with the parties as to the manner in which these and other facts will be presented or decided.

CONCLUSIONS OF LAW

1. If the extension request were valid, Petitioner's claim for refund satisfies all of the requirements of Wis. Stat. § 77.59(4)(b) to qualify for a 2-year-from-audit time to file; therefore, grounds do not exist for the granting of Respondent's Motion to Dismiss.

2. There will need to be further proceedings as to possible application of equitable estoppel.

ORDERS

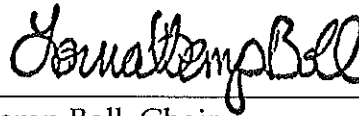
1. The Department's Motion to Dismiss is denied pending a resolution of the equitable estoppel issue.

2. Petitioner's Motion for Summary Judgment is denied pending a resolution of the equitable estoppel issue.

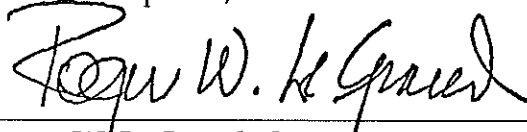
3. The Commission will contact the parties within 30 days to arrange a teleconference to discuss further proceedings.

Dated at Madison, Wisconsin, this 28th day of February, 2014.

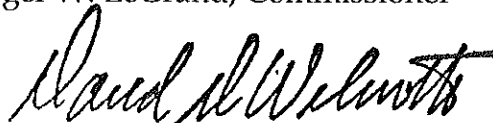
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



David D. Wilmoth, Commissioner