

STATE OF WISCONSIN
TAX APPEALS COMMISSION

PMFC HOLDING, LLC,

DOCKET NO. 16-S-079

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 judgment. The Petitioner, PMFC Holding, LLC, of Green Bay, Wisconsin ("PMFC"), is represented in this matter by Attorneys Daniel C. W. Narvey and Timothy C. Smith, both of Godfrey & Kahn, S.C. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer.

The parties filed a Partial Stipulation of Facts with the Commission, along with Cross-Motions for Summary Judgment, accompanied by Affidavits and supporting Briefs. Each party also filed a Brief in opposition to the other's Motion. For the reasons set forth below, we grant PMFC's Motion for Summary Judgment.

FACTS

Jurisdictional Facts

1. After conducting a field audit of PMFC for the years 2008 through 2011 (the "Audit Period"), the Department issued a Notice of Field Audit Action, dated November 14, 2014, assessing \$92,642.68 of additional use tax, \$24,776.42 in regular 12% interest, \$29,174.66 in delinquent 18% interest, and \$23,160.68 in negligence penalty, for a total of \$169,754.44. The assessment related to PMFC's purchase of fuel and electricity for air makeup units at its Green Bay and Oshkosh plants during the Audit Period. (Partial Stipulation of Facts ("Stip.") ¶ 10; Ex. 1.)

2. By letter dated January 13, 2015, PMFC timely petitioned the Department for a redetermination of the assessment in the Notice of Field Audit Action. (Stip. ¶ 11; Ex. 2.)

3. On March 11, 2015, PMFC made an agreed-to payment in the amount of \$12,160.94 to cover tax and interest only for certain items adjusted in the Notice of Field Audit Action, which fully and finally resolved those items. (Stip. ¶ 12.)

4. On February 9, 2016, the Department denied PMFC's Petition for Redetermination for the remaining items. (Stip. ¶ 13; Ex. 3.)

5. On April 8, 2016, PMFC timely filed a Petition for Review with the Tax Appeals Commission appealing the Department's action on its Petition for Redetermination. PMFC objected to (1) the assessment of use tax on its purchase of fuel for its air intake units during the Audit Period, (2) the delinquent interest assessment, and (3) the negligence penalty assessment. (Stip. ¶ 14; Ex. 4.)

6. On October 15, 2016, PMFC placed \$183,333.40 on deposit pending the outcome of its appeal, pursuant to Wis. Stat. § 77.59(6)(c). (Stip. ¶ 15.)

7. On May 23, 2017, PMFC and the Department settled the delinquent interest and negligence penalty assessments under mutually agreeable terms. Those issues are no longer in dispute. (Stip. ¶ 16.)

8. Still at issue is the \$149,037.06 remaining on deposit which represents the amount of use tax and regular interest assessed on PMFC's purchase of fuel for its air makeup units at its Green Bay and Oshkosh plants during the Audit Period. (Stip. ¶ 17.)

Evidentiary Facts

9. PMFC is a holding company that owns and conducts its business through its wholly-owned subsidiary, Pioneer Metal Finishing, LLC, which is a disregarded entity for both Wisconsin income tax and sales/use tax purposes. (Stip. ¶ 1.)

10. During the Audit Period, PMFC provided metal finishing services to its customers, including anodizing, painting, powder coating, metal plating, pretreating metals, and mechanically finishing metals. (Stip. ¶ 2.)

11. PMFC conducted its metal finishing operations throughout the United States, including at its Wisconsin plants in Green Bay and Oshkosh. (Stip. ¶ 3.)

12. During the Audit Period, PMFC's metal finishing operations inside its Green Bay and Oshkosh plants released fumes, vapors, mists, and dusts into the air. (Stip. ¶ 4.) PMFC's Green Bay operations involved dipping parts into chemical baths.

(Affidavit of Attorney Daniel C. W. Narvey (“Narvey Aff.”) ¶ 2, Ex. A, p. 13.)¹ The baths, many of which were heated, released toxic fumes into the air. (Narvey Aff. Ex. A, p. 17.) The operations at PMFC’s Oshkosh facility primarily involved painting. (Narvey Aff. Ex. A, p. 25.) These painting operations also resulted in fumes being released into the plant environment. (Narvey Aff. Ex. A, p. 28.)

13. PMFC was required by the federal Environmental Protection Agency and the Wisconsin Department of Natural Resources to clean or scrub certain contaminants from the air at its Green Bay plant before releasing it into the environment. The air scrubbers used for this purpose and the electricity used to run them are exempt from sales and use tax and are not at issue in this case. (Stip. ¶ 5.)

14. Pursuant to federal Occupational Safety and Health Administration (“OSHA”) standards, PMFC was also required to ventilate the air in both its Wisconsin plants to reduce the levels of potentially hazardous contaminants to which its employees were exposed. This was done by exhausting the contaminated air out of the plants and replacing it with fresh outside air through the use of exhaust ventilation in conjunction with air scrubbing (in Green Bay) and filtration (in Oshkosh). (Stip. ¶ 6.)

15. The exhaust ventilation and air treatment systems (“EVAT Systems”) which performed this function were overseen by PMFC’s senior process and systems engineer, Karsten Nielsen, with the assistance of outside contractors. (Narvey Aff. Ex. A, p. 5.) Mr. Nielsen is an engineer with a master’s degree in material science

¹ Exhibit A to the Narvey Affidavit are portions of the transcript of the January 27, 2017 deposition of PMFC senior process and systems engineer Karsten Nielsen.

and engineering. (Narvey Aff. Ex. A, p. 8.) During the Audit Period, he was responsible for the company's capital equipment, including purchases, analysis, and modification of equipment. He was also responsible for ensuring the equipment was designed and engineered correctly. (Narvey Aff. Ex. A, pp. 6-7.)

16. The purpose of the EVAT Systems was to control worker exposure to airborne toxic chemicals or flammable vapors by exhausting contaminated air from the work area and replacing it with clean air, and to filter or scrub the air before releasing it into the environment. (Affidavit of Karsten Nielsen ("Nielsen Aff.") ¶ 4.)

17. The EVAT Systems installed in PMFC's Green Bay and Oshkosh plants had six basic elements:

- Exhaust hoods, which capture the fumes at the source;
- Ducting from the hoods, which carry the fumes to air scrubbers (in Green Bay) or through a filtration system (in Oshkosh);
- Fans, which move the air through the system and discharge it outdoors;
- Air scrubbers (in Green Bay) and the filtration units (in Oshkosh), which remove the contaminants from the fumes in compliance with EPA regulations before they are released into the environment;
- Exhaust stacks, which are directly attached to the fan discharge to meet discharge requirements; and
- Air makeup units, which are balanced to supply air to replace the dispelled air.

(Narvey Aff. ¶ 3, Ex. B, No. 5; Nielsen Aff. ¶ 6.)²

18. The EVAT Systems functioned differently at the Green Bay and Oshkosh plants because of the different nature of their plant operations. To protect the

² Exhibit B to the Narvey Affidavit is a copy of PMFC's responses to the Department's First Set of Interrogatories.

health of the workers from the fumes from the baths used at the Green Bay plant, PMFC provided ventilation through ductwork sitting immediately behind the tanks. (Narvey Aff. Ex. A, p. 18.) The ductwork drew in the fumes and exhausted to the outside. In accordance with EPA and DNR regulations, the fumes must be cleaned with air scrubbers before being discharged to the outside. (Id.) At the Oshkosh plant, the contaminated air from the painting operations was ventilated through paper filters that cleaned the air before it was exhausted out of the plant. (Narvey Aff. Ex. A, p. 29.) In both plants, the air that was dispelled through the EVAT Systems had to be replaced by air drawn in by air makeup units. (Narvey Aff. Ex. A, p. 20.)

19. PMFC's EVAT Systems operated on the principle that air moves from areas of high pressure to areas of low pressure. (Nielsen Aff. ¶ 5.) The EVAT Systems installed in the Green Bay and Oshkosh plants were designed by professional engineers to create a slightly negative pressure in the plants, meaning that more air was dispelled than supplied via the air makeup units. (Narvey Aff. Ex. A, pp. 62, 63; Ex. B, No. 7.) This design ensured that emissions were drawn through the EVAT Systems instead of seeping out through uncontrolled openings in the plants. (Narvey Aff. Ex. A, pp. 62, 63.)

20. If not for the replacement air supplied by the air makeup units, the plants would experience too much negative pressure. This in turn would hinder the EVAT Systems from drawing the contaminants out of the plant, which could result in unintended worker exposure to hazardous contaminants and fumes. (Nielsen Aff. ¶ 8.)

21. Federal and state regulations also required PMFC's plants to be heated in the winter months to at least 60-65 degrees for the comfort and safety of its employees. (Stip. ¶ 7.) During the winter months, the air makeup units in the Green Bay and Oshkosh plants heated the outside air as it was drawn into the plants when the indoor air temperature fell below 60 degrees Fahrenheit. (Stip. ¶ 8.)

22. The purpose of preheating the air drawn into the plants was not to heat either the Green Bay or Oshkosh plant, as the Green Bay building was substantially heated by the amount of heat generated by the baths, and the Oshkosh building typically had an excess of heat due to large ovens used to cure the paint. (Narvey Aff. Ex. A, pp. 22, 32.) Rather, the purpose of preheating was to comply with applicable law. Further, if the air was not preheated, the air makeup units could blow snow into the plant. (Narvey Aff. Ex. A, p. 32.)

23. While PMFC was required to preheat the air supplied by the air makeup units, the air makeup units provided heat in a much costlier and less efficient manner than using conventional heat methods. (Nielsen Aff. ¶ 10.) The Green Bay and Oshkosh plants therefore have conventional heating systems that are used in the rare instances when additional heat is required, such as when a plant is not operating and there is no need to run the EVAT System, or when there are outages of the air makeup units. (Narvey Aff. Ex. A, p. 56; Affidavit of Department Attorney Julie A. Zimmer ("Zimmer Aff.") ¶ 2, Ex. 15, No. 8.)³

³ Like Exhibit B to the Narvey Affidavit, Exhibit 15 to the Zimmer Affidavit is a copy of PMFC's responses to the Department's First Set of Interrogatories.

24. When PMFC purchased the Oshkosh plant, it lacked sufficient air makeup units, resulting in unbalanced air pressure and fumes not being exhausted properly, which in turn created exposure problems to workers. Additional air makeup units were therefore installed to the EVAT Systems to provide proper balance to the systems. (Narvey Aff. Ex. A, p. 31.)

25. PMFC's air makeup units at both its plants required natural gas and electricity to operate. During the Audit Period, PMFC did not pay Wisconsin use tax on its purchase of the gas and electricity used to fuel its air makeup units. (Stip. ¶ 9.)

26. PMFC's air makeup units are not physically connected to its air scrubbers, except for one air scrubber in Green Bay that was connected by electrical wires to one air makeup unit so that when that air scrubber was shut off, the connected air makeup unit would also shut off. (Zimmer Aff. ¶ 3, Ex. 16, pp. 21-22, 50-51.)⁴

27. Whether or not the air blown into the plants by the makeup units was heated did not matter for purposes of fume abatement. (Zimmer Aff. ¶ 3, Ex. 16, pp. 45-46.)

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

⁴ Like Exhibit A to the Narvey Affidavit, Exhibit 16 to the Zimmer Affidavit are portions of the transcript of the January 27, 2017 deposition of Karsten Nielsen.

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. *Healthcare Services Group, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-086 (WTAC 2016).

Burden of Proof

Assessments made by the Department are presumed to be correct, and the burden is on 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 and Administrative Rules

Wis. Stat. § 77.54(26)

77.54 General exemptions. There are exempted from the taxes imposed by this subchapter:

...

(26) The sales price from the sales of and the storage, use, or other consumption of tangible personal property . . . which becomes a component part of an industrial waste treatment facility that is exempt under s. 70.11 (21) or that would be exempt under s. 70.11 (21) if the property were taxable under ch. 70 The exemption includes replacement parts therefor, and also applies to chemicals and supplies used or consumed in operating a waste treatment facility

Wis. Stat. § 70.11(21)

70.11 Property exempted from taxation.

...

(21) Treatment plant and pollution abatement equipment.
(ab) In this subsection:

...

3. "Used exclusively" means to the exclusion of all other uses except any of the following:

- a. For other use not exceeding 5 percent of total use.

...

(am) All property purchased or constructed as a waste treatment facility used exclusively and directly to remove, store, or cause a physical or chemical change in industrial waste or air contaminants for the purpose of abating or eliminating pollution of surface waters, the air, or waters of the state

Wis. Admin. Code § Tax 12.40(3)(a)4

"Waste treatment facility" means tangible property that is built, constructed or installed as a unit so as to be readily identifiable as directly removing, altering or storing leftover, superfluous, discarded or fugitive material.

DECISION

During the Audit Period, PMFC conducted metal finishing operations inside plants in Green Bay and Oshkosh, Wisconsin. Those operations released fumes, vapors, mists, and dusts into the air. Federal OSHA regulations required PMFC to ventilate the air in both plants to reduce the levels of potentially hazardous contaminants to which its employees were exposed. PMFC was also required by both federal and state environmental laws to filter or scrub certain contaminants from the air before releasing it into the environment.

To meet these requirements, an EVAT System was designed and installed in each plant. The EVAT Systems ventilated the plants by exhausting the contaminated air out of the plants and replacing it with fresh outside air. The air ventilated from the Green Bay plant was exhausted through air scrubbers, while the air ventilated from the Oshkosh plant was exhausted through air filters.

In ventilating the plants, PMFC used a series of air makeup units to draw air in from the outside to replace the contaminated air that had been exhausted. The EVAT Systems in the plants were designed to create a slightly negative pressure, meaning that more air was dispelled than supplied via the air makeup units. Without sufficient replacement air supplied by the air makeup units, there would be too much negative pressure. This, in turn, would cause the EVAT System to draw air less effectively from the emission sources, which could result in unintended worker exposure to hazardous contaminants and fumes. Pursuant to federal and state regulations, the temperature in the plants was required to be at least 60-65 degrees. Thus, during the winter months, the air makeup units preheated the outside air as it was drawn into the building to maintain the temperature in the plant.

This case presents the question of whether PMFC's purchase of the fuel and electricity used to power the air makeup units in the Green Bay and Oshkosh plants during the Audit Period was exempt from Wisconsin sales and use tax under Wis. Stat. § 77.54(26). The answer to this question turns on whether the air makeup units were part of a "waste treatment facility" under the meaning of Wis. Stat. § 70.11(21).⁵ During the Audit Period, PMFC did not pay sales tax on the electricity and natural gas used to operate the air makeup units, taking the position that the units were part of a waste treatment facility because the EVAT Systems in the plants would not work properly without them. The Department disagrees.

⁵ The Department and PMFC both note that PMFC did not claim the air makeup units as exempt property under Wis. Stat. § 70.11(21) during the Audit Period. The Department has not argued that the failure to claim the property as exempt precludes a claim of the sales tax exemption.

The Department's first argument is based on the language of Wis. Admin. Code § Tax 12.40(3)(a)4, specifically, the definition of a "waste treatment facility" as "tangible property that is built, constructed or installed as a unit." The Department notes that, in response to its discovery request asking for the date of the purchase of each of the Green Bay plant air scrubbers and air makeup units, PMFC could identify 1992 as the purchase date of four of the six scrubbers and three of the six air makeup units but could not provide a purchase date for one of the scrubbers and three of the air makeup units. As for the Oshkosh plant, PMFC stated that, when it purchased the Oshkosh facility, air filtration and air makeup units were already installed and operating, and they had no information on the purchase or installation dates of the existing equipment. PMFC did, after purchase, install two additional air makeup units because the existing unit was not creating sufficient negative air pressure to allow all contaminants to be cleared from the plant. Based on these discovery responses, the Department argues that "PMFC simply cannot meet its burden to show that its air makeup units were built, constructed or installed along with the components of its local exhaust ventilation and air scrubbing and filtration system 'as a unit.'"

PMFC's senior process and systems engineer, who along with outside contractors is responsible for the operation and management of the EVAT Systems, testified at deposition that the system at the Green Bay plant was engineered and installed in 1992, and the purchase dates provided in response to the Department's discovery requests would appear to support that testimony, at least for four of the six scrubbers and three of the six air makeup units. He also stated that the other scrubbers and air makeup

units were installed sometime earlier, before he started with the company. In Oshkosh, seven filtration units and one air makeup unit were installed and working when PMFC purchased the plant. Two additional air makeup units were engineered and installed, one in 2008, and the other first used in 2014, when PMFC determined that the existing air makeup unit was not providing sufficient negative air pressure to clear contaminants from the plant.

The Department's argument is that, even if the scrubbers, filters, air makeup units, ducting, fume hoods, fans, exhaust stacks, and other components of its EVAT Systems worked during the Audit Period as a unit to remove contaminants from its Green Bay and Oshkosh plants, the air makeup units cannot qualify as part of a "waste treatment facility" under the meaning of Wis. Stat. § 70.11(21) because PMFC cannot show that they were all "built, constructed or installed" at the same time as the other components of the EVAT Systems. Taking the Department's argument to its logical conclusion, a waste treatment facility, once constructed and installed as a unit, would be a static thing for tax purposes. It is an exempt waste treatment facility unless and until the taxpayer adds some component to the unit, perhaps to make it more effective in accomplishing its goal, perhaps to make its operation more cost effective, perhaps to accommodate growth in plant size or production, or perhaps to bring the facility into compliance with changing regulatory requirements. At that point, under the Department's view, even though the equipment continues to operate as a unit to

eliminate contaminants, the added component cannot qualify as part of the “waste treatment facility.”⁶

We do not believe this is a reasonable reading of Wis. Stat. § 70.11(21). The statute provides that “All property purchased or constructed as a waste treatment facility” is exempt. We do not believe that the legislature intended that the exemption exclude improvements made to the facility after its initial purchase or construction. To the extent that the language of Wis. Admin. Code § Tax 12.40(3)(a)4 could be read to require that a waste treatment facility be built, constructed or installed as a unit, *all at the same time*, it is inconsistent with the statute which contains no such requirement.⁷

The Department’s second argument is that the air makeup units were not, functionally, part of the waste treatment facilities in PFMC’s Green Bay and Oshkosh plants because, quoting language in Wis. Stat. § 70.11(21), they “were not used *directly* ‘to remove, store, or cause a physical or chemical change in industrial waste or air contaminants for the purpose of abating or eliminating pollution of surface waters, the air, or waters of the state.’” Citing *Wisconsin Dep’t of Revenue v. Parks-Pioneer Corp.*, 170 Wis. 2d 44, 49, 487 N.W.2d 63 (Ct. App. 1992), the Department states, “Wisconsin Courts have said that equipment is ‘directly used’ in a process if it performs an ‘integral function’ in that process.”

⁶ In this case, the Department has argued only that the air makeup units are not part of the exempt waste treatment facilities in PMFC’s Green Bay and Oshkosh plants, even though it also makes the point that PMFC has not shown that the scrubbers, filtration units, ducting, fume hoods, fans, exhaust stacks, and other components of the EVAT Systems were purchased or installed at the same time.

⁷ As noted by the Department in its brief, Wis. Admin. Code § Tax 12.40(3)(a)4 was repealed in 2014.

Here, the Department makes three principal points. First, PMFC's air makeup units were not physically connected to its air scrubbers or filters, except for one air scrubber in Green Bay that was connected by electrical wires to one air makeup unit. Second, in response to specific questions from the Department at deposition, PMFC's senior process and systems engineer acknowledged that PMFC's air makeup units were upstream of the air contaminants in the plants, did not remove air contaminants from the air, did not treat or scrub air contaminants from the air, did not cause a physical or chemical change to the air contaminants, and did not store air contaminants. Third, the Department states that the purpose of the air makeup units was to replace the contaminated air that had been exhausted from the plants and that "The air contaminant abatement had already been accomplished by the exhaust ventilation and air scrubbing/filtration systems; the air makeup units did nothing more than bring fresh air back into the plants."

This final statement is wholly inconsistent with the uncontroverted facts presented in this case and demonstrates the weakness of the Department's argument that the air makeup units were not used directly to remove air contaminants for the purpose of abating pollution. As noted above, the EVAT Systems at the Green Bay and Oshkosh plants were designed by professional engineers to create a slight negative pressure in the plants. This design ensured that emissions were drawn through the EVAT System instead of seeping out through uncontrolled openings in the plants. A lack of sufficient replacement air would cause the EVAT System to draw too little air from the emission sources and could result in employee exposure to hazardous contaminants and fumes.

In short, the air makeup units, in the parlance of the *Parks Pioneer* case, performed an 'integral function' in the process of removing contaminants from the air. It is simply not the case, as the Department claims, that the contamination abatement had already been accomplished before the air makeup units brought fresh air into the plants.

Acknowledgments by the PMFC senior process and systems engineer that the air makeup units did not remove, scrub, or treat air contaminants from the air, did not cause a physical or chemical change to the air contaminants, and did not store air contaminants is not conclusive as to whether the air makeup units were functionally part of a system that did just that. Certainly, the air makeup units did not, in and of themselves, remove, scrub, or treat air contaminants any more than any other single component of the EVAT Systems in the plants. All the components of these systems, including the air makeup units, must function together to effectively remove harmful contaminants from the plants. The fact that the air makeup units were not physically connected to other components does not mean that they were not a part of the EVAT Systems. In what was largely a closed system, the air makeup units were essential to effectively exhaust contaminants from the plant. Consequently, they were used directly in the removal of air contaminants and were part of a waste treatment facility under the meaning of Wis. Stat. § 70.11(21).

The Department's final argument is that because the air makeup units heated the air drawn into the plants during cold weather, a specific function which did nothing to remove contaminants, neither the air makeup units nor the EVAT Systems of which they were a part, qualify as a "waste treatment facility" under Wis. Stat. § 70.11(21),

as they were not used *exclusively* to remove air contaminants. The statute provides that “used exclusively” means to the exclusion of all other uses except other use not exceeding 5 percent of total use. The Department contends that heating the air brought into the plant during winter months “certainly exceeded the *de minimis* standard in the statute.”⁸

PMFC argues that the air makeup units were not installed or used to heat the plants. The plant operations themselves generated excess heat, through the heated chemical baths in Green Bay and the paint curing ovens in Oshkosh. In the rare event one of the plants was not in operation (in which case the EVAT System was not in operation since there were no air contaminants being released), the plants had conventional heating equipment to provide sufficient heat.

When an EVAT System was in operation during cold weather, the warm air otherwise generated in the plant was exhausted and cold outside air was drawn into the plant. If not preheated by the air makeup units, the cold replacement air would cause the temperature in the plant to fall well below acceptable temperatures and could allow snow to blow into the plant. Indeed, federal and state regulations required the temperature in the plants to be maintained to at least 60-65 degrees for the comfort and safety of the employees. Thus, when the EVAT Systems removed warm air from the plants and replaced it with fresh air from outside, the failure to preheat cold air would be a violation

⁸ The Department makes this statement without further explanation. Neither party presented evidence which would allow the Commission to determine whether the operation of the heaters in the air makeup units exceeded 5 percent of the “total use” of the EVAT Systems. While it might be the case that the fuel and electricity used to operate the heaters in the air makeup units was more than 5 percent of the fuel and electricity used by the EVAT Systems, we note that the “exclusive use” requirement does not appear in Wis. Stat. § 77.54(26), which exempts fuel and electricity, but in Wis. Stat. § 70.11(21), which defines and provides an exemption for waste treatment facilities.

of state and federal law. PMFC argues that the EVAT Systems should not lose their exemptions simply because they were designed and operated to comply with federal and state law.

The Department, however, counters by contending that the plain language of the statute requires that the property be used exclusively for pollution abatement and provides no exception for any non-*de minimis* uses, even if mandated by other applicable law. The Department states, “Regardless of *why* there is another use for the air makeup units, the fact that there *is* another significant use violates the exclusive use requirement of the exemption statute.”

In support of its position, the Department cites and discusses *Wausau Paper v. Wisconsin Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-375 (Cir. Ct. 1998), which considered the application of a tax credit for sales and use tax paid on electricity consumed in manufacturing. In that case, the circuit court upheld the decision of the Commission denying a credit for electricity used in operating a paper mill's wastewater treatment plant. The taxpayer argued that because it was required by law to clean the waste water generated by its mill, the waste water treatment plant should be considered “manufacturing” for purpose of the tax credit since the mill could not legally operate without it. The court stated:

Water has always been a necessary and essential part of the manufacturing process. The water at issue here, however, is water that has already made its contribution to the papermaking process. The cleaning of that water may be necessary for Wausau Paper to stay in business due to State and Federal environmental laws but other business functions—marketing, transportation, human resources and

general administration—are also essential to a successful manufacturing process yet are not considered to be a part of the manufacturing process. Before the environmental protection laws the wastewater was simply that, unwanted waste that was discharged into the Wisconsin River. While these laws have helped keep the Wisconsin River clean and safe, they have not improved either the papermaking process or the paper products manufactured by that process. Today it is still feasible, even if unlawful, to turn the wastewater treatment plant “off” without any affect upon either the manufacturing process or the quality of the paper products.

The Department concludes, while PMFC may be required by state and federal law to maintain a particular temperature in its plants for the comfort and safety of its employees, that is irrelevant to whether the air makeup units, and the EVAT Systems as a whole, meet the exemption's express requirements.

This case, however, is distinguishable from *Wausau Paper*. In *Wausau Paper*, the court, in characterizing the position of the Department and the holding of the Commission stated, “Essentially, they concluded that the electricity used in the wastewater treatment plant has nothing to do with the actual paper manufacturing process and that the paper manufacturing process is complete before the wastewater is collected and treated.” And in its quote above, the court concluded that the water at issue “has already made its contribution to the papermaking process.” Thus, the Commission and the court viewed the process of treating the waste water as a separate and distinct process that occurred when the manufacturing process had been completed.

Here, air was not heated separately and apart from, or after completion of, the pollution abatement process. The air was heated in the process itself. The purpose of heating the air brought into the plant by the air makeup units was not to heat the plant

- the plant was adequately heated before the EVAT System was powered up. The purpose was to replace the heat the EVAT System necessarily removed from the plant as part of the pollution abatement process. The burners in the air makeup units simply allowed the EVAT System, as a whole, to operate consistently with employee safety laws, much like safety devices required on manufacturing or agricultural equipment. The addition of a legally mandated press brake safety system to an industrial punch press does not disqualify the press as exempt manufacturing machinery, even though the press could be used in the manufacture of products without it. The sole purpose of the press brake safety system is to assure employee safety as required by law. But this does not mean that the press is no longer used exclusively in manufacturing. The system simply conforms the equipment to law.

Again, the EVAT Systems were not designed and installed in PNFC's plants to provide heat. The plants were adequately heated by the plant operations and, when necessary, by conventional heating systems. The EVAT Systems were designed, engineered, and installed solely for the purpose of exhausting the contaminated air out of the plants and replacing it with fresh outside air using exhaust ventilation and air scrubbing or air filtration equipment. In colder months, the process created a potential employee safety and comfort issue in violation of federal and state laws. Preheating the outside air as it was drawn into the plant by the air makeup units addressed the safety and comfort issue and allowed the system to operate consistently with applicable law.

During the Audit Period, the EVAT Systems in PMFC's plants qualified as exempt waste treatment facilities under the clear language of Wis. Stat. § 70.11(21). We do not believe that disqualifying the EVAT Systems from exemption because they incorporated a component that allowed them to operate in compliance with the state's own employee safety and comfort laws would be consistent with the legislature's intent.

CONCLUSIONS OF LAW

1. There being no material facts in dispute, the stipulated facts and the facts presented through affidavits are sufficient to support a ruling as a matter of law.
2. The air makeup units in PHFC's Green Bay and Oshkosh plants were, during the Audit Period, components of a "waste treatment facility" under the meaning of Wis. Stat. § 70.11(21).
3. PMFC's purchase of fuel and electricity used or consumed in operating the air makeup units in its Green Bay and Oshkosh plants during the Audit Period was exempt from Wisconsin sales tax pursuant to Wis. Stat. § 77.54(26).

ORDER

Based on the foregoing, the Commission orders as follows:

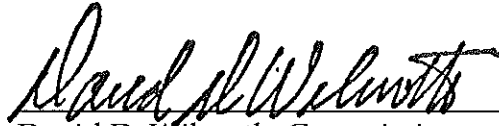
1. PMFC's Motion for Summary Judgment is granted.
2. The Department's Motion for Summary Judgment is denied.
3. The Department's assessment is reversed.

Dated at Madison, Wisconsin, this 29th day of January, 2018.

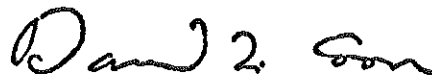
WISCONSIN TAX APPEALS COMMISSION



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.