

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-3091

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BROWNING-FERRIS INDUSTRIES OF WISCONSIN, INC.,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 VERGERONT, J. This appeal concerns the interpretation of WIS. STAT. § 77.54(26m) (1999-2000),¹ which exempts from Wisconsin sales and use

¹ WISCONSIN STAT. § 77.54(26m) provides:

(continued)

tax certain waste reduction and recycling machinery and equipment. The Tax Appeals Commission decided that Browning-Ferris Industries, Inc.'s compactors, bins, and containers, which the company purchased and which were used by its customers to reduce the size of or to collect disposed items, and motor vehicles and related items used to transport waste and recyclables were not exempt under

These are exempted from the [sales and use] taxes imposed by this subchapter:

....

(26m) The gross receipts from the sale of and the storage, use or other consumption of waste reduction or recycling machinery and equipment, including parts therefor, exclusively and directly used for waste reduction or recycling activities which reduce the amount of solid waste generated, reuse solid waste, recycle solid waste, compost solid waste or recover energy from solid waste. The exemption applies even though an economically useful end product results from the use of the machinery and equipment. For the purposes of this subsection, "solid waste" means garbage, refuse, sludge or other materials or articles, whether these materials or articles are discarded or purchased, including solid, semisolid, liquid or contained gaseous materials or articles resulting from industrial, commercial, mining or agricultural operations or from domestic use or from public service activities.

WISCONSIN STAT. § 77.54(5)(c) uses similar language with respect to motor vehicles:

(5) The gross receipts from the sale of and the storage, use or other consumption of:

....

(c) Motor vehicles which are not required to be licensed for highway use and which are exclusively and directly used in conjunction with waste reduction or recycling activities which reduce the amount of solid waste generated, reuse solid waste, recycle solid waste, compost solid waste or recover energy from solid waste. For the purposes of this paragraph, "solid waste" means garbage, refuse, sludge or other materials or articles, whether these materials or articles are discarded or purchased, including solid, semisolid, liquid or contained gaseous materials or articles resulting from industrial, commercial, mining or agricultural operations or from domestic use or from public service activities.

We do not understand Browning-Ferris to argue that the motor vehicles are exempt under WIS. STAT. § 77.54(5)(c) if they are not exempt under subsec. (26m), and therefore we do not address para. (5)(c). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

subsec. (26m).² The circuit court affirmed that decision. Browning-Ferris appeals, contending that these items are exclusively and directly used in waste reduction activities and are therefore exempt. We conclude the commission's interpretation is entitled to at least due deference, and, applying that standard of review, we conclude the commission's interpretation is reasonable and Browning-Ferris has not offered one that is more reasonable. Therefore, we affirm.

BACKGROUND

¶2 The commission made the following factual findings based on stipulated facts. Browning-Ferris was primarily engaged in the business of collecting discarded materials from its Wisconsin residential and commercial customers and transporting those discarded materials to landfills, recycling centers or material recycling facilities. The types of items collected and hauled included trash, garbage, and recyclables. Browning-Ferris hauled waste products with no value to landfill sites for disposal. Browning-Ferris hauled recyclables that could be reused in some capacity to recycling centers and material recycling facilities, not to landfills. Separate bins and trucks were used to collect and transport recyclable items from those used to collect and transport non-recyclables.

¶3 Browning-Ferris leased or sold compactors to some of its customers. It also provided its customers, without additional charge, with bins, dumpsters, and containers. The customers deposited their recyclable items in bins, dumpsters, and containers that were specifically labeled to collect recyclable items, and their non-recyclable waste items in dumpsters that were specifically labeled to collect

² The Tax Appeals Commission also decided other issues not relevant to this appeal.

waste materials. Browning-Ferris picked up and transported the recyclable items to either recycling centers or material recycling facilities and the non-recyclable items to landfills.

¶4 The tangible personal property items at issue are these compactors, bins, and containers, and motor vehicles³ used to transport recyclables to processing facilities, as well as various related items. Browning-Ferris paid no sales or use tax when purchasing this tangible personal property.

¶5 The Wisconsin Department of Revenue (DOR) issued a Notice of Field Audit Action and a Notice of Amount Due against Browning-Ferris, assessing sales and use tax, plus interest, on the disputed items for the period October 1, 1989 through September 30, 1993. Browning-Ferris filed a petition for redetermination objecting to the assessment, and when that was denied, it filed a petition for review with the commission.

¶6 In its decision affirming the assessment, the commission referred to *DOR v. Parks-Pioneer Corp.*, 170 Wis. 2d 44, 487 N.W.2d 63 (Ct. App. 1992), in which we focused on the language in WIS. STAT. § 77.54(26m) that the waste reduction and recycling machinery or equipment be “exclusively and directly used for recycling activities.” We held that the lugger and roll-off boxes Parks-Pioneer used to collect scrap metal from its suppliers’ premises, to transport it to its premises, and to deliver the recycled metal to its customers were used exclusively for recycling activities; but, we held, they were not “directly” used for recycling activities since they did not perform an “integral function” in the recycling

³ For brevity’s sake, we use the term “motor vehicle” to include the equipment, attachments, and repairs for the motor vehicles.

activities. We reasoned that the scrap metal was recycled after it was collected and transported in those boxes.

¶7 In its decision the commission pointed out that it had relied on *Parks-Pioneer* in *Ruef's Sanitary Serv., Inc. v. DOR*, Wis. Tax. Rep. ¶400-064, 30, 216 (1994). In *Ruef's*, the commission concluded that curb-sorters mounted on motor vehicles and used to collect, sort, and transport recyclable materials did not perform an “integral function” in recycling activities, and therefore were not used “directly” for recycling.

¶8 The commission reasoned that Browning-Ferris's bins and storage containers do not perform an integral function in recycling activities because they are simply receptacles into which recyclable and waste materials are placed before Browning-Ferris collects those materials and transports them to a facility where the recycling actually occurs. Similarly, the commission reasoned that the compactors and motor vehicles failed the integral function test because the materials were recycled after they had been compressed in the compactor and were transported to the recycling facility by Browning-Ferris vehicles.

¶9 The commission also rejected Browning-Ferris's argument that the disputed items were used exclusively and directly in waste reduction activities because, it stated, the statute applies only to waste reduction or recycling activities that “reduce the amount of solid waste generated, reuse solid waste, recycle solid waste, compost solid waste or recover energy from solid waste.” The commission concluded that neither the compactors nor the other types of disputed items did any of these things. In particular, the commission stated, compressing solid waste does not reduce the amount of solid waste generated, but simply reduces the volume of solid waste already generated.

¶10 Browning Ferris appealed the commission's decision to the circuit court, which affirmed. The court decided that the commission's interpretation of the statute was entitled to due weight, and, applying that standard, it concluded that the interpretation of WIS. STAT. § 77.54(26m) proposed by Browning-Ferris was not more reasonable than the commission's.

DISCUSSION

¶11 On appeal Browning-Ferris contends the commission erred because the bins, storage containers, compactors, and motor vehicles at issue are used directly in waste reduction activities. The proper definition of "waste reduction," it asserts, is "diminishment in the amount of refuse from people's homes." It further asserts that waste reduction includes the separation, collection, and processing of waste material, and that the disputed items are directly used in the separation, collection, and transportation to the landfill. Browning-Ferris emphasizes that waste reduction and recycling are distinct activities, and that *Parks-Pioneer* addressed only recycling activities.

¶12 In resolving this appeal, we review the decision of the commission, not that of the trial court. *Zignego Co., Inc. v. DOR*, 211 Wis. 2d 819, 824, 565 N.W.2d 590 (Ct. App. 1997). The threshold question is what degree of deference, if any, we give to the commission's interpretation of the statute. Although an agency's interpretation of a statute is a question of law and we are not bound by the agency's interpretation, we defer to an agency's interpretation of a statute in certain situations. *Id.* at 823. We give great weight when the following conditions are met:

- (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency

employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id. (citing *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996)). When we give great weight, we will sustain a reasonable agency conclusion even if an alternative conclusion is more reasonable. *Id.*

¶13 We give due weight or due deference when the agency has some experience in an area, but has not developed the expertise that necessarily places it in a better position than a court to make judgments regarding the interpretation of the statute. *Id.* Under this test, we will not overturn a reasonable agency decision that comports with the purpose of the statute unless we determine that there is a more reasonable interpretation available. *Id.* at 823-24.

¶14 We review an agency's interpretation of a statute de novo only when the issue before the agency is clearly one of first impression, or when the agency's position on the issue has been so inconsistent as to provide no real guidance. *Id.* at 824.

¶15 Browning-Ferris contends that we should review the commission's decision de novo because the commission has never considered the waste reduction component of WIS. STAT. § 77.54(26m). The commission responds that, at a minimum, the decision is entitled to due weight and that it may also properly be accorded great weight.

¶16 We agree with the commission and the circuit court that the commission's decision is entitled to at least due weight. The commission is charged by the legislature with hearing and determining all questions of law and fact arising under the tax statutes. WIS. STAT. § 73.01(4)(a). The commission

thus has considerable experience and specialized knowledge in interpreting and applying WIS. STAT. § 77.54, and we are to give due weight to the experience, technical competence, and specialized knowledge of the agency. WIS. STAT. § 227.57(10) In addition, the commission has in *Ruef's* applied the *Parks-Pioneer* construction of “directly used” to a claim that the activities involved were waste reduction as well as recycling.⁴ The combination of the commission’s authority and its one prior opportunity (at least) to analyze the same statutory language at issue in this case warrant granting at least due weight to the commission’s interpretation. See *Zignego*, 211 Wis. 2d at 826. We need not decide whether there is a basis for granting great weight because we conclude that Browning-Ferris’s interpretation is not more reasonable than the commission’s. Therefore, even if we give the commission’s decision due weight as opposed to great weight, we must affirm.

¶17 The commission’s decision to interpret “directly used for” in relation to waste reduction in the same manner we interpreted those words in relation to recycling in *Parks-Pioneer* is a reasonable one. As already noted, we held in *Parks-Pioneer* that “directly used for” recycling activities means “performs an integral function in” those activities. Since the same words—“directly used for”—also modify “waste reduction,” we can see no rational basis for giving those words

⁴ In *Ruef's Sanitary Service, Inc. v. WDOR*, Wis. Tax. Rep. ¶400-064, 30, 216 (WTAC 1994), the commission concluded that the curb-sorters were not directly used in recycling activities because they were used only to transport the recyclables to the company’s truck yard where they were dumped and ultimately sold or given away, and, therefore, there was no “legally significant distinction” between these curb-sorters and the containers at issue in *DOR v. Parks-Pioneer Corp.*, 170 Wis. 2d 44, 487 N.W.2d 63 (Ct. App. 1992). The commission then rejected the argument that the curb-sorters were directly used in waste reduction activities, concluding that there was no “practical distinction between ‘waste reduction’ and ‘recycling’ as applied to [the] Curb Sorters and their function. Any actual waste reduction or recycling occurred *after* the recyclables left the Curb Sorters, which was precisely the case in *Parks-Pioneer*, *supra*.” *Ruef's*, ¶400-064 at 30, 219.

any meaning other than “performs an integral function for” waste reduction activities.

¶18 The question then becomes whether the disputed items perform an integral function in waste reduction activities. The commission answered “no” because it construed “waste reduction ... activities”, like “recycling activities” to be modified by the clause “which reduce the amount of solid waste generated, reuse solid waste, recycle solid waste, compost solid waste or recover energy from solid waste,” WIS. STAT. § 77.54(26m), and it decided that the disputed items did none of those things. We conclude that the commission’s reading of this clause to modify “waste reduction,” as well as “recycling,” is not only reasonable but is the only reasonable construction: neither the grammatical structure of the sentence nor the content of the clause suggests that the clause modifies only “recycling activities.” In other words, in order to be either a waste reduction activity or a recycling activity, the activity must be directed at one of the five goals in the clause.

¶19 We also conclude the commission’s construction of “reducing the amount of solid waste generated” to exclude reducing the volume of solid waste already generated is reasonable. The commission’s construction gives meaning to the word “generated,” which commonly refers to the process by which something comes into being⁵ (in this case, solid waste), rather than the process by which something already in existence is changed in some way.

⁵ THE AMERICAN HERITAGE COLLEGE DICTIONARY 567 (3d ed. 1993) defines generate as:

generate **1.a.** To bring into being; give rise to. **b.** To produce as a result of a chemical or physical process. **2.** To engender (offspring); procreate. **3. Math.** To form (a geometric figure)

(continued)

¶20 Browning-Ferris appears to agree that the clause modifies both waste reduction and recycling, and asserts that the disputed items are directly used in waste reduction activities which “reduce the amount of solid waste generated.”⁶ It does not explain what is unreasonable about the commission’s construction, and, in particular, does not discuss the meaning of “generated.” Instead it first refers to a dictionary in defining “waste reduction” as “the diminishment in the amount of refuse from people’s homes,”⁷ and then to WIS. STAT. § 287.05(3) and (4m) to further define waste reduction activities. Section 287.05(3) and (4m) provide:

The following are declared to be policies of the state concerning the reduction of the amount of solid waste generated, the reuse, recycling and composting of solid waste and resource recovery from solid waste:

....

(3) That encouragement and support should be given to individuals, collectors, handlers and operators of waste facilities to separate solid waste at the source, in processing or at the time of disposal in order to facilitate reuse, recycling, composting or resource recovery.

....

(4m) That the initiatives of current recyclers which facilitate reuse and recycling through separation, collection and processing of substantial volumes of scrap and waste material, reducing the amount of mixed solid waste that is disposed of in landfills or burned without energy recovery in incinerators, should be encouraged.

by describing a curve or surface. 4. *Comp. Sci.* To produce (a specialized program) by instructing a computer to follow given parameters that select or complete parts of a general program.

⁶ Browning-Ferris does not argue that any of the other four categories in the clause apply.

⁷ Browning-Ferris relies on WEBSTER’S NEW COLLEGIATE DICTIONARY (1981) for the definition of “waste” as “refuse from places of human or animal habitation,” p. 1312, and “reduce” as “diminish in size, amount, extent or number,” p. 962.

¶21 We do not see how either of these subsections furthers the distinction between waste reduction and recycling that Browning-Ferris is attempting to draw or explains why the commission's construction of "reduce the amount of solid waste generated" is unreasonable. The separation of solid waste at its source, in processing, and at disposal that handlers and collectors of solid waste, among others, are encouraged to do in WIS. STAT. § 287.05(3) is for the purpose of facilitating reuse, recycling, composting, and resource recovery. The separation, collection, and processing of scrap and waste material that recyclers are encouraged to do in § 287.05(4m) is for the purpose of facilitating reuse and recycling, thereby reducing the amount of solid waste that is disposed of in landfills or burned without energy recovery. We recognize that these subsections may be a basis for arguing that the separation, collection, and transporting of scrap and waste material is an integral part of recycling for purposes of WIS. STAT. § 77.54(26m), but that argument is foreclosed by *Parks-Pioneer*.

¶22 We conclude that Browning-Ferris has not offered an interpretation of "directly used for waste reduction ... activities which reduce the amount of solid waste generated" that is more reasonable than that employed by the commission. Accordingly, we affirm the trial court's decision and order affirming the decision of the commission.

By the Court.—Order affirmed.

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