

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

LUETZOW INDUSTRIES,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
LAURENCE C. GRAM, JR., Judge. *Reversed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. The Wisconsin Department of Revenue (the Department) appeals from a final order granting Luetzow Industries costs, as the prevailing party, under § 814.25(3), STATS. The trial court determined that the Department was not substantially justified in taking its position in Luetzow Industries' Chapter 227, STATS., judicial review of a Wisconsin Tax Appeals Commission (the Commission) decision assessing additional sales taxes against Luetzow Industries. In a previous judgment in this case, the trial court reversed

the Commission's decision, concluding that Luetzow Industries was not liable for the additional sales tax imposed by the Commission's ruling. In a separate opinion, *Luetzow Industries v. DOR*, No. 94-1819 (Wis. Ct. App. Oct. 31, 1995) (recommended for publication), we reversed the trial court's decision to overturn the DOR's assessment. Because the Department's substantive argument prevailed on appeal, it clearly was "substantially justified" in making that argument in the trial court's review of the Commission's decision. Accordingly, we reverse the trial court's award of costs to Luetzow.

In 1988, The Department notified Luetzow Industries that it was assessing the company with additional sales taxes for the company's sale of plastic garment bags to dry cleaners over the years 1984 through 1987. The Department concluded that the company improperly exempted its gross receipts from the sale of the bags. Luetzow Industries appealed to the Commission, arguing that the gross receipts were exempt under § 77.54(6)(b), STATS.¹ The Commission concluded that the Department was correct because the garment bags were not used by the dry cleaners "to transfer merchandise" to the customers. Luetzow Industries petitioned the circuit court for Milwaukee County to review the Commission's decision under Chapter 227, STATS. The trial court partially reversed the Commission's decision, concluding that it could "find[] no rational basis" to narrowly interpret § 77.54(6)(b), STATS., so that the sale of garment bags to dry cleaners was not exempt from the sales tax. The Department appealed the judgment to this court, and we reversed the trial court's determination of this issue. We stated:

The Commission's reading of § 77.54(6)(b), STATS., was both rational and correct, the gross receipts Luetzow

¹ Section 77.54(6)(b), STATS., provides a sales tax exemption for:

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

....

- (b) Containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property, if such items are used by the purchaser to transfer merchandise to customers

Industries received from its sale of the garment bags to dry cleaners are not exempt from the state sales tax. Because the Commission correctly interpreted § 77.54(6)(b), the trial court erred when it reversed the Commission's ruling on this issue.

Luetzow Industries, No. 94-1819, slip op. at 9.

Prior to the release of this court's opinion in the underlying case, the trial court, on Luetzow Industries' motion, awarded costs and fees to Luetzow Industries. The trial court concluded that the Department was not “substantially justified” in making its legal argument before the trial court. The Department now appeals from the order.

Because we agreed with the Department's underlying argument interpreting § 77.54(6)(b), STATS., we reversed the trial court's ruling on this issue. Accordingly, it is clear that the Department was “substantially justified” in making the argument before the trial court. As such, the trial court erred in awarding costs under § 814.245(3), STATS., and we reverse.²

By the Court. – Order reversed.

² Section 814.245(3), STATS., provides:

- (3) If an individual, a small nonprofit corporation or a small business is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485(6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

Section 814.254(2)(e), STATS., provides:

- (e) “Substantially justified” means having a reasonable basis in law and fact.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.