TRANSCO RAILWAY PRODUCTS, INC., Plaintiff	: IN THE COURT OF COMMON PLEAS OF : LYCOMING COUNTY, PENNSYLVANIA
vs.	: NO. 97-00,953
CITY OF WILLIAMSPORT, WILLIAMSPORT AREA SCHOOL DISTRICT	: DECLARATORY JUDGMENT

OPINION and ORDER

We are asked to decide a declaratory judgment action filed on behalf of Transco Railway Products, Inc. (hereinafter "Plaintiff") filed June 27, 1997, against Defendants City of Williamsport and Williamsport Area School District (hereinafter "Defendants"). The issue is whether Defendants can collect a business privilege tax assessed upon Plaintiff in September of 1995 for the years 1985 through 1994.

Plaintiff contends the tax may not be imposed because (1) it's activities are exempt under the manufacturing exemption of the taxing ordinance and (2) the taxation of its activities is violative of the Commerce Clause. Plaintiff also asserts that, if the tax is at all valid, Defendants can only collect the tax for the last five (5) years, due to lack of diligence in assessing and collecting the tax.

Facts

At oral argument May 17, 1999, the parties agreed upon the record the Court should determine the matter based upon the pleadings, the April 22, 1999, deposition of Ira A. Thompson (President of Transco) and the Stipulation of Facts filed April 12, 1999. From these materials, the Court finds the following facts to be established.

Plaintiff is incorporated in Delaware and has operations in several states where it conducts its business of manufacturing and installation of replacement railway freight car parts and modification and repair of railroad freight cars. This work is carried out at a leased facility in the City of Williamsport and six other facilities in the States of Ohio, New York, Indiana and Iowa. Plaintiff enjoys all benefits which result from locating its facility in Williamsport, including labor pool, public services, etc. The railroad freight cars upon which Plaintiff works at the Williamsport facility are owned by third parties.

Plaintiff's corporate headquarters are located in Bucyrus, Ohio. Certain key business functions, such as engineering and personnel, are carried out at the corporate headquarters. Plaintiff's gross receipts are received at its offices in Chicago, Illinois, where the corporation's accounting/financial and legal functions are handled. Plaintiff's sales force work out of Illinois, Ohio, Florida, Virginia and California.

The basic nature of the work done at the Williamsport facility of Transco can be divided into two categories. The first category of work (referred to as Rule "1") involves handling railroad cars which are designated by railroad lines as being "bad ordered" meaning the car is in need of repair and remediation. In that situation, the railroad company notifies the freight car owner of the defect and the freight car owner contracts with Transco for its repair and designates the facility where the car should be repaired. The railroad company transports the car to that facility for the work.

The second classification of work is referred to as program modification work. In this situation, the freight car owner desires work to be done on a large quantity of like cars that require a particular type of modification, which basically involves the construction of some type

of super-structure on a flatbed railcar. The railcar owner supplies the car and Transco produces, assembles and installs the super-structure on the flatbed. Examples would include log cars and auto carrier cars, with the log carrying structure being constructed or the car-carrying structure being constructed upon a basic flatcar frame. Transco purchases sheet metal, tubing, or similar type material and produces the necessary pieces to construct the required modification. Some of the parts used in the process of Transco at Williamsport are purchased from other suppliers and other parts are manufactured at Transco's other facilities for use and installation at Williamsport.

Typical examples of "Rule 1" work would involve a box car door that would not open, or defective wheels or other safety appliances. The program modification work (which typically may include engineering on behalf of Transco to determine how the work is to be done) would utilize parts that would be fabricated in other Transco facilities. Such work would include taking a basic flat car and making it a log car by manufacturing and installing stanchions so that the car could be used for hauling logs. In that situation, Transco would take raw steel into stanchions and construct the stanchions on top of the flatbed portion of the car.

Other work done by Transco involves repairing cars that have been damaged. The work done by Transco is paid for at rates agreed upon by its customers and those rates or prices include Transco factoring into the Williamsport labor rate engineering and overhead expenses.

Testimony was received relating to work done to coal cars. Testimony is somewhat ambiguous; however, the Court determines that in some instances coal cars are constructed with parts being super-constructed on top of a basic railcar by Transco and at other times coal cars are constructed through repair or alteration to existing coal cars. Similarly,

automobile hauling cars are sometimes altered or modified; for example, being modified from a three-tier hauler into a two-tier hauler.

Plaintiff, believing it was exempt, did not file any business privilege or mercantile tax reports since the inception of its Williamsport operation in 1985, when it acquired certain assets from Mr. Ralph Kidd, who had previously performed the same type of work for since 1976. Under Mr. Kidd's ownership the business also had filed no business privilege or mercantile tax reports with Defendants. Plaintiff has paid withholding payroll and occupational privilege taxes for employees, municipal and school income tax and other local taxes to Defendants.

Defendants discovered during an audit that Plaintiff had not filed returns concerning the disputed taxes for the years indicated. Defendants assessed Plaintiff a business privilege tax for 1990 through 1994, based upon 100% of the invoices for work performed at the Williamsport facility. Plaintiff was also assessed the tax for 1985 through 1989 based upon the auditor's estimate.

Discussion and Conclusions of Law

Defendants argue they are entitled to tax Plaintiff for both the repair work done to the rail cars, as well as the modifications made to rail cars at the facility. Plaintiff contends it is not liable for the back taxes because: (1) its revenue is derived from and related to manufacturing and the business of manufacturing and thus exempt from the business privilege and mercantile taxes; (2) its gross receipts are attributable to interstate commerce and therefore excluded from the business privilege and mercantile taxes; and (3) even if this Court should find

neither exemption nor exclusion, Defendants are precluded from collecting the delinquent taxes under the doctrine of laches and/or statute of limitations.

The Manufacturing Exemption

Defendants are authorized to impose business privilege and mercantile taxes pursuant to ordinance adopted under The Local Tax Enabling Act, 53 P.S. §6901, *et seq.* Section 6902(4) provides local authorities shall not have authority by virtue of this act to tax, *inter alia*, goods and articles manufactured in the political subdivision, the by-products of manufacture or any privilege, act or transaction related to the business of manufacturing, or any privilege, act or transaction relating to the business of processing by-products of manufacture.

> The term "manufacturing," as used in the exemption provision of the LTEA, means transformation of material or things into something different from that received, and the difference cannot be a superficial change that does not alter or change the thing; what is required is that the basic materials or goods be given a new identity that can easily be traced to the producer and that must be the product of skill and labor. The transformation must be a substantial transformation in form, qualities, and adaptability in use.

Suburban Cable TV Co., Inc. v. City of Chester, 685 A.2d 616 (Pa.Cmwlth. 1996), *allocatur denied (citation omitted).* The question here is whether the activities conducted by Plaintiff at its Williamsport facility fall under this exemption.

In ***Bindex Corp. v. City of Pittsburgh***, 475 A.2d 1320 (Pa. 1984), the Supreme Court engaged in a detailed analysis of this particular exemption. The Court began by noting there is no statutory definition for the term manufacturing; accordingly, it sought to identify the judicial definition given to it. The Court cited ***Norris Brothers v. Commonwealth,*** 27 Pa. 494 (1856), wherein it was said manufacturing "does not often mean the production of a new article

out of material entirely raw. It generally consists in giving new shapes, new qualities; or new combinations to matter which has already gone through some other artificial process." ***Bindex*** at 1322. The Court added that manufacturing…

> …[c]onsists in the application of labor skill to material whereby the original article is changed into a new, different and useful article…Whether or not an article is a manufactured product depends upon whether or not it has gone through a substantial transformation in form, qualities and adaptability in use from the original material, so that a new article or creation has emerged…If there is merely a superficial change in the original materials, without any substantial change in the original materials, without any substantial and well signalized transformation inform [sic], qualities and adaptability in use, it is not a new article or new product…

Ibid. (*citing* ***Philadelphia School District v. Parent Metal Productions, Inc***., 167 A.2d 257 (Pa. 1961)). However, in an attempt to relieve the definition "of excessive philosophic exegesis" the Court noted it is also the "popular or practical understanding of what is manufacturing that prevails and is intended." *Ibid.* The ***Bindex*** Court then engaged in its own analysis of these concepts:

> As is evident, the concept underlying the definition is the transformation of material or things into something different from that received. The difference cannot be a superficial change that does not alter or change the thing. For example, a cosmetic change performed merely to facilitate the ease of handling, storing, packing or shipping the product or material does not constitute manufacturing. What is required is that the basic materials or goods be given a new identity by the current producer, one which can be easily traced to such producer. This identity must be the product of skill and labor. Skill involves education, learning, experience or knowledge one acquires in a particular business, trade or profession; while labor is the physical characteristics and methods utilized to employ one's skills. When labor is used in conjunction with skill to produce a different product than the original, one with a new identity, manufacturing has occurred.

Ibid.

In trying to determine whether the activities at Plaintiff's Williamsport facility constitute manufacturing, we have reviewed numerous cases. We have found that bookbinding and the sewing of garments is manufacturing (***Bindex***, *supra*); however, printing of designs upon clothing is not. ***Mar-Pat Co., Inc. v. City of Allentown***, 687 A.2d 1198 (Pa.Cmwlth. 1997). Taking large pieces of cardboard and scoring, stamping, cutting and folding them into shirt boards, collar supports and other items is manufacturing. *Ibid.* Taking parts of work benches and other "vocational shop equipment" and cutting, shearing, drilling, riveting, fastening and bolting them into finished shop equipment is not. ***Business Tax Office of the School District of Philadelphia v. Parent Metal Products, Inc.***, 167 A.2d 257 (Pa. 1961). Cable television systems are not entitled to a manufacturing exemption. ***Suburban Cable TV Co., Inc. v. City of Chester***, 685 A.2d 616 (Pa.Cmwlth. 1996), *allocatur denied*. Revenues derived from inserting pre-printed advertising supplements into newspapers qualify for the manufacturing exemption. ***City of Williamsport v. Sun-Gazette***, 553 A.2d 525 (Pa.Cmwlth. 1989). Transformation of "slurry" and powdered drink mixes into juice and soft drinks is not manufacturing; converting potatoes into potato chips, milling wheat into flour and processing buttermilk and skim milk into powdered milk is, as is the transformation of water and pressurized air into snow. ***Township of Muhlenberg v. Clover Farms Dairy Co.***, 665 A.2d 544 (Pa.Cmwlth. 1995). Finally, rebuilding and reconditioning engines has been determined not to constitute manufacturing. ***Beckwith Machinery Company v. Commonwealth of Pennsylvania***, 385 A.2d 605 (Pa.Cmwlth. 1978); ***Genuine Motor Parts of Pennsylvania, Inc. v. The City of Pittsburgh, et al.***, 403 A.2d 145

(Pa.Cmwlth. 1979); ***Mack Trucks, Inc. v. Commonwealth of Pennsylvania***, 629 A.2d 179 (Pa.Cmwlth. 1993).

In attempting to reconcile these decisions in light of the principles of law stated, *supra*, this Court notes "[w]hether a specific activity constitutes manufacturing is a question of law to be resolved by the courts based on the specific facts of the case. Our courts view the term 'manufacturing' narrowly…" ***Township of Muhlenberg v. Clover Farms Dairy Co***., *supra,* at 546. With this in mind, we find the type of repair work done and "Rule 1" repairs and remediation to defective or damaged cars by Plaintiff does not constitute manufacturing. Similarly, neither does any work involving the modification of automobile haulers or coal car haulers. We cannot see how such changes are sufficiently effective to transform the product from what it was into something different. Despite Defendant's arguments to the contrary, the modification of parts involved in effecting such changes and/or repairs does not constitute more than a superficial change.[1] S*ee* ***Electric Welding Company v. City of Pittsburgh***, 145 A.2d 528 (Pa. 1958) (the steel materials received by the company remain the same except for slight changes in shape or length and certain types of minor assembly work). Essentially, the repaired coal car remains a coal car; the automobile hauler an automobile hauler. Consequently, the revenue derived from these activities is not subject to the manufacturing exemption.

The Court finds, however, that the bulk of the work that is apparently done by Transco under program modification does constitute manufacturing. Specifically, the Court

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[1] The Court notes also Plaintiff's President testified that normally, all of the materials required to do modification work are "fabbed" at the "Newton Falls" facility and shipped to the shop doing the work. N.T. 14, 19.

would find that the changing of a basic flat rail car into a log car, automobile hauler or coal car constitutes manufacturing.

The work involved in taking a rail car and attaching "stanchions" to it in order for it to function as a log hauler gives the car new shape and new qualities. Defendants' arguments notwithstanding, here Plaintiff does not start out with a rail car and end with a rail car. Rather, it starts out with a rail car and ends with a log hauler. But for the work performed by Plaintiff, the vehicle would be incapable of transporting logs. There is a new "adaptability in use" which is different from the original. ***Bindex***, *supra.* Therefore, we find revenues generated by this activity are entitled to the manufacturing exemption.

The Question of Interstate Commerce

The United States Supreme Court in ***Complete Auto Transit, Inc. v. Brady***, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) in considering "the perennial problem" of the validity of a state tax upon a business for the privilege of carrying on business within that state, where the activities are related to the operation of an interstate business, relied upon the following proposition:

> It is a truism that the mere act of carrying on business interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.'

Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 108, 95 S.Ct. 1538, 1543, 44 L.Ed.2d 1, __ (1975), *citing* ***Western Live Stock v. Bureau of Revenue***, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, __ (1938). The Supreme Court concluded that a state tax on the privilege of doing business is not *per se* unconstitutional. Rather, the question must be evaluated in terms of

whether (1) the business activity is sufficiently connected to the given state to justify the tax; (2) the tax is fairly related to benefits provided; (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly apportioned. *Id.* at __, 97 S.Ct. at 1083, 51 L.Ed.2d at __.

Plaintiff claims all of its receipts are attributable to interstate commerce. It points to its myriad of facilities in seven different states, its sales force based in four different states and its corporate offices in Ohio which include billing, engineering and other divisions to support that claim. Customer payments, Plaintiff also argues, are sent directly to its Chicago office. Plaintiff's Brief pp. 8-9. Plaintiff protests: "Clearly by taxing gross receipts for 100% of activities in which the Williamsport facility has any involvement, the Defendants are attempting to tax gross receipts which are attributable to interstate commerce." *Id.* at 9. Further, "[e]ven if the Defendants seek to limit taxation to the portion of gross receipts billed to a customer for labor involved at the Williamsport facility, the tax would still seek to tax gross receipts attributable to interstate commerce" because the labor rate charged includes engineering, quality assurance, financial services and other functions all performed in Ohio or Illinois. *Id.* at 9-10.

However, Plaintiff has not raised any of the four considerations set forth in ***Complete Auto Transit, Inc. v. Brady**, supra.* Specifically, Plaintiff does not contend the activity at its Williamsport is not sufficiently connected to the state to justify a tax; nor would this Court accept such a contention. Plaintiff makes no claim that the tax imposed is unfairly related to the benefits which are realized by it in conducting business and maintaining a facility in Williamsport. Similarly, there is no argument to support a claim the tax either discriminates against interstate commerce or is unfairly apportioned.

It is undisputed that it is "constitutionally impermissible" to impose a local, direct tax upon the privilege of conducting interstate commerce. ***Spielvogel, Inc. v. Township of Cheltenham,*** 601 A.2d 1310, 1314 (Pa.Cmwlth. 1992). However, "this prohibition does not invalidate a business privilege tax imposed by a political subdivision." *Ibid.* This is so because a business privilege tax is not a direct tax on interstate commerce but rather a tax on operating a business within a municipality; the tax is upon the privilege exercised solely within its borders. *Id.* at 1314-1315. "[M]erely because a portion of the receipts of a business is derived from interstate transactions does not preclude assessment and collection of a tax on its intrastate activities." ***G.A. & F.C. Wagman v. Manchester Tp.,***535 A.2d 702, 706 (Pa.Cmwlth. 1988) (citations omitted). "[A]lthough a transaction viewed as a whole may be one in interstate commerce, there may be certain 'intrastate events' or 'local activities' in connection therewith that permit the imposition of a State tax." ***Wieman and Ward Company v. City of Pittsburgh,*** 113 A.2d 719, 721 (Pa. 1955). The focus is on "whether there are sufficient local incidents to validate the tax, even though the total activities from which the transaction arises may have incidental interstate attributes." *Id.* at 722; *see also* **Keystone Metal Co. v. City of Pittsburgh**, 97 A.2d 797 (Pa. 1953); ***Williamsport City and School District Mercantile and Privilege Tax Office v. Thomas E. Reed***, Lycoming County No. 96-01602.

Plaintiff points out that §403(a) of Defendants' own Business Privilege Tax Regulations states receipts from transactions involving more than one state are exempt from tax and are not to be included in the tax base (Plaintiff's Brief p. 8). However, under the applicable portion of §403(b), transactions are deemed to involve interstate commerce (and therefore exempt from local taxation) *only* when they *directly* involve the sale, exchange, or transportation

of commodities between the states (emphasis supplied). The question, then, is whether Plaintiff's activities at its Williamsport facility *directly* involve the sale, exchange or transportation of commodities between the states. We conclude they do not.

Plaintiff does not engage in the transport of the commodity, but only in the repair and/or modification of the commodity (the rail car) once it arrives in Williamsport. As testified by Ira A. Thompson, Plaintiff's President, the *car owner* directs the car to one of Plaintiff's repair shops, be it Williamsport or elsewhere. N.T. 13. The Stipulation of Facts establishes it is the *railroad* company, not Plaintiff, which moves the freight car on non-revenue way bills without freight charges. Stipulation 18(c). Plaintiff has no "direct" involvement in the movement of the cars. Neither does Plaintiff "directly" sell nor exchange the rail cars between the states. Accordingly, the revenues produced by the activity in which Plaintiff does engage at its Williamsport facility are not within the meaning of interstate commerce as defined in §403(b).

Plaintiff argues the gross receipts Defendants are attempting to tax include non-taxable labor such as input from engineering services, quality assurance, etc., all functions performed outside of Pennsylvania. However, taxes imposed on income derived partly from out-of-state activities without provision for apportionment have been upheld as long as the intent of the taxing ordinance is the taxation of intrastate and not interstate receipts and the two are separable. ***Spielvogel, Inc***., *supra* at 1315.

In ***Gilberti v. City of Pittsburgh***, 511 A.2d 1321 (Pa. 1986), an architectural firm located within the city of Pittsburgh, Pennsylvania, sought to have excluded from taxation that portion of gross receipts attributable to income received from a project outside the city limits. The Supreme Court concluded the city could not properly tax this income as a "transaction"

within the city limits. The Court further noted it had previously held only receipts from intrastate commerce, as opposed to interstate commerce, could be subject to tax. *Id.* at 1325, *citing* ***O.H. Martin Co. v. Sharpsburgh Borough***, 102 A.2d 125 (Pa. 1954). However, the tax in question was a business privilege tax, incurred by the architectural firm in the exercise of the privilege of doing business within the city of Pittsburgh. "[T]he fact that the amount of tax is dependent upon the taxpayer's gross receipts, including receipts from services performed outside the City, does not undermine the legitimacy of the tax." ***Gilberti*** at 1326. *See also* ***G.A. & F.C. Wagman v. Manchester Tp.***, *supra,* wherein the Commonwealth Court found that a business privilege tax "does not impermissibly burden interstate commerce by taxing a privilege solely exercised within its borders." *Id.* at 706.

Here, Plaintiff has made no representation that its "financial services" division is incapable of determining the value of services provided by its various departments and separating these revenues from the labor provided by the Williamsport facility, only that it has not done so. "Because all sources of revenue can be included in gross receipts, the burden can be allocated to the taxpayer to demonstrate which revenues are entitled to an exemption." *Id.* at 1316. It is for Plaintiff to demonstrate the proper apportionment of its revenues.

Statute of Limitation/Laches

Plaintiff argues the doctrine of laches prevents Defendants from collecting back taxes due more than five years as both entities failed to exercise due diligence in the collection of these taxes. In reply, Defendants' joint brief states as follows:

> Transco relies to some extent on the case of ***Mar-Pat Co., Inc., v. City of Allentown***, for the proposition that the doctrine of laches bars collection beyond five years. 687 A.2d 1198 (Pa.Cmwlth., 1997), *appeal denied* 548 Pa. 640, 694 A.2d 524 (1997). However, the discussion of that doctrine in the ***Mar-Pat*** case is *obiter dicta.* The court had already determined that ***Mar-Pat*** was a manufacturer, and in fact concludes the case by stating "because ***Mar-Pat*** is, in fact, a manufacturer and exempt from payment of the business privilege tax, the doctrine of laches is not controlling." *Id.* at 1201. The *dicta* in ***Mar-Pat*** also suffers from another deficiency – it ignores the well established premise that the doctrine of laches is *equitable* in nature. ***Olson v. North American Industrial Supply, Inc***., 441 Pa. Super. 598, 658 A.2d 358 (1995). It may apply as a defense if the City and School District were bringing an action in equity, rather than seeking to enforce its tax laws. However, there is no basis for supplanting the traditional analysis of the statute of limitations with an equitable doctrine in this case.

Brief of Defendants at 7-8. We agree the Commonwealth Court's consideration of laches in ***Mar-Pat*** was not part of the actual holding of the case. Regardless, it is apparent from the "dicta" that the appellate Court applied equitable principles in making their determination. The guidance the case provides is no less instructive to this Court simply because the discussion is set forth in a separate finding.

In ***Mar-Pat***, the ordinance at issue placed no limitation on the collection of delinquent business privilege tax when no return had been filed. The City as taxing authority claimed the fact that Mar-Pat erroneously classified itself as an exempt manufacturer and failed

to file returns from 1970-1990 was the result of its own actions and not the City. The Commonwealth Court said:

> The doctrine of laches is applicable where a party exhibits a lack of due diligence in instituting a claim that results in harm to an adverse party. The question of laches involves a factual determination. In the case *sub judice*, the City did not exercise due diligence in instituting its claim against ***Mar-Pat***.
>
> ***Mar-Pat*** submitted a questionnaire in response to the City's request that it classify itself for business privilege tax purposes. Because the Ordinance did not require that self-assessed manufacturers file a business privilege tax return, it was reasonable for ***Mar-Pat*** to believe that its activities were excluded from the Ordinance's coverage and that only those businesses covered by the ordinance were required to file a return prior to the enactment of the Business Privilege Tax Regulations. Moreover, ***Mar-Pat's*** activities are classified as manufacturing for capital stock and worker's compensation purposes. The City did not audit ***Mar-Pat*** until 1991 and therefore exhibited a lack of due diligence in instituting a claim that prejudiced ***Mar-Pat***.

Id. at 1201 *(citations omitted).*

Here, the parties agree Plaintiff began operations at the facility in 1985 after acquiring assets from a Mr. Ralph Kidd, d/b/a Consolidated Inspection and Repair (CIRCO). CIRCO had been doing business similar to Plaintiff since 1976 and had never filed either business privilege or mercantile tax reports. Stipulation No. 9. We find it was reasonable for Plaintiff, considering itself to be exempt, to believe no such filings were required. Further, it is not as though Defendants lacked notice of Plaintiff's doing business within the taxable jurisdiction, as the parties agree Plaintiff has paid various other taxes during its operation over the years at the Williamsport facility. Stipulation No. 25.

Defendants' brief asserts Plaintiff is ignoring the "well established legal premise that the doctrine of laches is equitable in nature" and might apply if Defendants were bringing an

action in equity, but not where Defendants are seeking to enforce tax laws. Defendants' Brief pp. 7-8. Defendants ignore the manner in which this matter was brought before this Court- a Declaratory Judgment action filed by Plaintiff, seeking only declaratory relief. Rule 1601(a) of the Pennsylvania Rules of Civil Procedure, 42 Pa.C.S., provides that when a plaintiff seeks only declaratory relief, "[t]he practice and procedure shall follow, as nearly as may be, the rules governing the Action in Equity.[2] The Explanatory Note for Rule 1601(a) repeats that this subdivision "adopts the equity practice." Under these circumstances, we conclude equitable principles are applicable.

Our conclusion is further supported by the case of ***Lyman v. City of Philadelphia***, 529 A.2d 1194 (Pa.Cmwlth. 1987). In ***Lyman***, attorneys filed a complaint in equity in common pleas court, seeking declaratory relief that provisions of a tax code imposing business and mercantile taxes upon them were unconstitutional. The Court stated the only issue before it was "whether a substantial question of constitutionality is present so as to justify the exercise of a court's *equitable* jurisdiction under the Declaratory Judgments Act, 42 Pa.C.S. §§7531-7541, despite the existence of a statutory administrative remedy." *Id.* at 1195 (*emphasis supplied)*. We note neither Defendant in the case before us objected to Plaintiff's filing of a declaratory judgment action. Further, given the diversity of case law in interpreting exemptions under manufacturing and interstate commerce, Defendant cannot claim the particular facts of this case have not yet been decided (*cf.* ***Cherry v. City of Philadelphia***, 634 A.2d 754 (Pa.Cmwlth. 1993), wherein the Commonwealth Court found the issue being appealed had been previously decided in ***Lyman***, *supra,* was therefore no longer a substantial constitutional issue and hence not

[2] Both Defendants apparently agreed to a stay of Plaintiff's appeal of the tax assessment pending this action.

properly before the Court in a declaratory judgment action). Finally, given that Plaintiff did avail itself of available administrative remedies until such time as the parties agreed this Court should rule upon the matter, we find the Court has proper equitable jurisdiction (*cf.* ***Cherry v. City of Philadelphia***, 692 A.2d 1082 (Pa. 1997), *affirming* ***Cherry***, *supra* (wherein the Supreme Court upheld the finding of the Commonwealth Court that the matter was not justiciable (sp?) as all administrative remedies had not been exhausted).

Accordingly, the doctrine of laches is found to be applicable in the instant case. Under the facts of this case, Defendants did not act with due diligence, to the prejudice of Plaintiff. Accordingly, Defendants are precluded from collecting back taxes from Plaintiff which were assessed for any period beyond the previous five years.

DECREE NISI

AND NOW, this 30th day of July, 1999, upon consideration of the foregoing Opinion, the Court ORDERS and DIRECTS as follows:

1. Defendants are entitled to impose mercantile and business privilege taxes upon Plaintiff for gross receipts attributable to its Williamsport facility for all "Rule 1" repair work done at that facility.
2. Defendants are entitled to impose mercantile and business privilege taxes upon Plaintiff for gross receipts attributable to its Williamsport facility for all program modification work done at that facility involving modification of rail cars, which does not alter the use and function for which the rail car is suitable or does not change the basic utility of the object being modified, such as changing a three-tier automobile hauler to a two-tier hauler.
3. Defendants are precluded from imposing mercantile and business taxes upon Plaintiff for gross receipts attributable to its Williamsport facility for all program modification work done at that facility involving changing of flatbed rail cars into log haulers or manufacturing rail cars of other types in similar fashion, wherein a new function or change of use can be readily ascertained.
4. Plaintiff has the burden of producing information to Defendants which demonstrates what, if any, portion of its gross receipts are not taxable because they are attributable to non-taxed functions as determined by this Order, performed at locations other than the Williamsport facility, and thus deductible from the taxable receipts under Rule 403(b).

5. Defendants are precluded from collecting mercantile and business taxes from Plaintiff for any taxes owed upon gross receipts prior to 1990.

6. If no Exceptions are filed within ten (10) days of notice of the filing of this Decree Nisi, either party may praecipe this Court to enter a Final Decree.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Stephen W. Wiener, Esquire
Norman M. Lubin, Esquire
Fred A. Holland, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)