STATE OF WISCONSIN
SUPREME COURT

Appeal No.: 2015AP002019

TETRA TECH EC, INC., and
LOWER FOX RIVER REMEDIATION LLC,

Petitioners-Appellants-Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Respondent.

Appeal from the District III of the Wisconsin Court of Appeals' December 28, 2016 decision affirming the Order dated September 11, 2015 of the Circuit Court for Brown County
Honorable Marc A. Hammer, Presiding

BRIEF OF PETITIONERS-APPELLANTS-PETITIONERS

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INTRODUCTION

This case presents a question of law regarding the proper interpretation of a Wisconsin statute, namely Wis. Stat. § 77.52(2), the "services" sub-section of Wisconsin's retail sales tax. The case underscores the impact and consequence of courts deferring to an agency's interpretation of a statute.

Tetra Tech EC, Inc. ("Tetra Tech") and Lower Fox Remediation LLC ("the LLC") (collectively, "the Taxpayers") submit that Wisconsin's practice of deferring to agency interpretations of statutes does not comport with the Wisconsin Constitution. Such practice abdicates the judicial power and duty vested by Article VII, Section 2 of the Wisconsin Constitution in the courts of this State to make such determinations. Wisconsin's Constitution grants the judicial power to the courts of this State, not to administrative agencies. The authority to interpret statutes is inherently a core judicial power. Wisconsin's Constitution unequivocally vests all such judicial power in our unified court system.

Moreover, for the reasons stated herein, the Wisconsin Tax Appeals Commission (the "Commission") was wrong when it allowed the imposition of taxes on the LLC and Tetra Tech. The Commission imposed a broad, never-before-used, dictionary definition on the term "processing" in Wis. Stat. § 77.52(2)(a)11 to impose retail sales tax on the Taxpayers. The Commission's decision will impact all of the many businesses and individuals throughout Wisconsin that provide services to tangible personal property, and would improperly subject all services to tangible personal property (no matter the activity) to taxation. This is because the Commission not only ignored long-standing law and precedent in interpreting Wisconsin's selective sales tax statute covering services to tangible personal property, but also the Commission's interpretation converts what the legislature unarguably intended to be a selective, limited, and narrow sales tax on specifically enumerated services to tangible personal property into a general sales tax on all services to tangible personal property.

If allowed to stand, the Commission's interpretation sets a precedent which would allow the Department of

Revenue ("the DOR") the unbridled ability to impose sales taxes on *any* service to tangible personal property despite the fact that the sales tax on services is a narrow and selective tax only on specifically listed services and that if there is any doubt that an activity is not included, or if the statute is ambiguous, a decision against taxation is required.

Here, Tetra Tech's subcontractor SDI[1] did not produce, fabricate, process or repair goods or other tangible personal property. Rather, SDI simply separated materials into their component parts for purposes of disposal. Nevertheless, Taxpayers were subjected to a retail sales tax because the Commission determined that SDI's separation activities were "processing" under Wis. Stat. § 77.52(2)(a)11.

In determining that SDI was engaged in "processing," the Commission relied on a dictionary definition of the term advanced by the DOR that covers any act "put[ting] through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process." This definition is so broad that it covers virtually every service to tangible personal property, contravening the Legislature's careful effort to limit the scope of Wis. Stat. § 77.52(2)(a) to only specifically listed services.

This broad definition of "processing" will have state-wide impact because it extends to all businesses and individuals that put tangible personal property "through the steps of a prescribed procedure" or subject it "to a special process." There is not a service that one could provide to tangible personal property that is not "processing" under the improper "catches-everything" definition utilized by the Commission.

The Commission's interpretation further allows the DOR to impose a tax on services to tangible personal property that the Legislature never intended to be taxed. The term "processing" appears in Wis. Stat. § 77.52(2)(a)11 along with the terms "producing," "fabricating, "printing," and "imprinting." The context of the term "processing" in the statute suggests a definition that is consistent with the other terms in the statute that suggest manufacturing and property

[1] "SDI" refers to Stuyvesant Dredging, Inc. (now known as Stuyvesant Project Realization, Inc.).

enhancement, not separation of materials into their component parts.

The DOR itself has an administrative rule (Wis. Admin. Code § Tax 11.38) that defines the types of activities to be treated as "processing" for purposes of Wis. Stat. § 77.52(2)(a)(11). Importantly, the subchapter where this rule is located is called "Subchapter VI – Manufacturers and Producers." SDI's activities do not come close to resembling any of the specifically defined activities in § Tax 11.38.

This case presents the Court with an excellent vehicle to clarify the practice of deferring to agencies. Particularly, it allows this Court to develop a rule that provides that agencies should not be given any deference when interpreting a statute. Additionally, the case affords this Court the opportunity to correct the Commission's wrongful interpretation of Wis. Stat. § 77.52(2)(a)11, as it impacts many Wisconsin individuals and businesses that produce, fabricate, process, and repair goods for a consumer at retail.

Accordingly, the Court should reverse the Court of Appeals and the Commission's December 30, 2014 Ruling and Order and hold that the Taxpayers are not liable for the taxes claimed by the DOR.

ISSUES PRESENTED

Issue 1: Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

Answered Below: Not addressed below. This Court directed the parties to address this issue.

The Taxpayers' Position: The practice of deferring to agency interpretations of statutes does not comport with Article VII, Section 2 of the Wisconsin Constitution. Interpreting statutes is a core judicial power that cannot (and should not) be delegated.

Issue 2: Does the definition of "processing" used by the Commission contravene long-standing law and precedent and, among other things, unlawfully expand a narrow,

selective sales tax on specified types of services into a general sales tax on services to tangible personal property and therefore improperly impose a sales tax on the Taxpayers?

Answered Below: Answered "no" by the Commission, circuit court, and Court of Appeals.

The Taxpayers' Position: Yes. Among other things, the Commission's interpretation of Wis. Stat. § 77.52(2)(a)11 improperly converts a limited and selective tax on specified types of services to tangible personal property into a general sales tax on all services to tangible personal property. Thus, the sales tax imposed was improper.

THE RETAIL SALES TAX STATUTE AT ISSUE

The imposition of retail sales tax in Wisconsin is essentially comprised of two component parts authorized by Wis. Stat. § 77.52.

The first part, Wis. Stat. § 77.52(1), imposes a general retail sales tax on those "selling, licensing, leasing or renting tangible personal property." Under this subsection, all retail sales on personal property are taxable unless the type of sale is specifically listed as exempt by statute. This is a general tax where sales are presumed to be taxable unless specifically listed as exempt. *This subsection is not at issue in this case.*

The second part, Wis. Stat. § 77.52(2), is at issue in this case. It imposes a selective sales tax on those "selling, licensing, performing or furnishing the *services described under par. (a)* at retail[.]" (Emphasis supplied). No services, other than those specifically "described under par. (a)," are subject to sales tax under this section. As outlined herein, in sharp contrast to the general retail sales tax, this is a selective tax and there is a presumption against inclusion. Any ambiguities must be resolved in favor of the taxpayer. If the service is not specifically listed under Wis. Stat. § 77.52(2)(a), it is not subject to sales use/tax.

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION

The Taxpayers request oral argument and submit that it is likely to be helpful to the Court's assessment of the

issues being reviewed. Publication is warranted because it will advance the Court's law-development function with respect to the issues presented.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This case involves a dispute whether sales taxes can be imposed under Wis. Stat. § 77.52(2)(a). The Court has also asked the parties to brief a constitutional issue involving whether the practice of deferring to agency interpretations of statutes comports with Article VII, Section 2 of the Wisconsin Constitution.

II. STATEMENT OF FACTS.

The underlying facts are undisputed.

A. Tetra Tech and the LLC.

The LLC was formed for the purpose of remediating portions of the Fox River impaired by the release of polychlorinated biphenyls ("PCBs"). (App. 2 ¶ 3; App. 17; App. 30-31; App. 65)[2] The remediation consisted of a number of distinct activities, including: (i) dredging and capping; (ii) desanding and dewatering; (iii) water treatment; and (iv) transportation and disposal. (App. 65-67)

The LLC entered into a contract with Tetra Tech to assist it with the remediation effort. (App. 2 ¶ 3; App. 17; App. 52 ¶ 8) Tetra Tech engaged two subcontractors, J.F. Brennan Company, Inc. ("Brennan") and SDI, to perform some of those remediation activities. (App. 2 ¶ 3; App. 18; App. 31; App. 52)

B. SDI's Activities.

Brennan dredged sediment from the river bottom (in a slurry form) and sent it to the plant where SDI is located. (App. 52-53 ¶¶ 9-10; App. 65) When SDI received the materials from Brennan it separated the sand and then extracted water from the remaining finer-grained sediments

[2] All record materials cited are in the Taxpayers' Appendix, filed simultaneously with this brief.

(which contain the PCBs) which leaves a "filter cake" for landfill disposal. (App. 18; App. 53 ¶ 10; App. 66) SDI only separated the slurry of materials into its components – sand, sediment and water – and delivered those separate components to Tetra Tech for reuse of the sand (where appropriate), disposal of the sediment, and treatment of the water, which Tetra Tech then returned to the river. (*Id.*)

The record establishes that:

- SDI separated the materials delivered by Brennan into components so that they could be delivered to and disposed of by Tetra Tech. (App. 3, ¶ 3; App. 18; App. 31-32; App. 52-54 ¶¶ 9-16; App. 65-66)

- The separated materials that were delivered by SDI to Tetra Tech were no more or less contaminated than they were when they were received by SDI from Brennan. (*Id.*)

- SDI did not change the chemical properties of the material delivered to it. (*Id.*)

- SDI's only involvement was to separate the materials it received from Brennan into components and deliver them to Tetra Tech. (*Id.*)

- What came into SDI went out of SDI; the only difference being that the materials were separated into components. (*Id.*)

- SDI separated sand from the bulk sediment and then dewatered the remaining sediment so that a filter cake of fines (including organic material) was produced. (App. 18; App. 53 ¶ 10; App. 66)

- The chemistry of the sediment or of the PCBs was not modified or altered in any way by SDI's operations. Rather, SDI's operations simply separated sands from the silts and clays to which PCBs predominantly adhere.

(R. 3.1:19; App. 18; App. 31-34; App. 54 ¶ 15; App. 67)

- SDI's operations did not attempt to remove PCBs from the sand nor was the sand cleaned. Rather, sand was simply separated from the remaining dredged sediment.[3] (App. 18; App. 31-34; App. 54 ¶¶ 14-15; App. 66-67)

C. Notices of Field Tax Audit Actions Were Issued to the LLC and Tetra Tech.

The LLC was the subject of a Sales Tax Field Audit that determined a deficiency in payment of use tax; Tetra Tech was also the subject of a Sales Tax Field Audit which determined a deficiency in payment of sales tax, both measured by sales attributable to the activities of SDI. (App. 3 ¶ 4; App. 27-28)

The DOR's Notices of Field Audit Action to the LLC, (App. 109-119), on the page entitled "Explanations of Adjustments on Exhibit C," listed Wis. Stat. § 77.52(2)(a)10 as the only basis for the tax imposed by DOR. (App. 113) The DOR asserted that SDI's activities were either "cleaning," "alteration" or "service to tangible personal property," under Wis. Stat. § 77.52(2)(a)10. (*Id.*) The DOR did not assert in the Notice of Field Audit that the LLC's activities were "processing" under Wis. Stat. § 77.52(2)(a)11. (*Id.*) The DOR did not put in writing that Wis. Stat. § 77.52(2)(a)11 was a ground for taxation until it moved for summary judgment after the Taxpayers filed their appeal with the Commission. (App. 4 ¶ 6; App. 162-64)

D. The Taxpayers Filed Petitions for Redetermination.

The LLC timely filed a Petition for Redetermination of the Sales Tax Field Audit with the DOR's Resolution Unit. (App. 28) The Resolution Unit issued a "Notice of Action" on

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[3] Sand eligible for reuse remained contaminated by PCBs at levels acceptable for certain limited purposes. In this case, reusable sand was donated by Tetra Tech to the Wisconsin Department of Transportation for use in the Highway 41 project. (App. 54 ¶ 15; App. 99)

August 16, 2012, which granted in part and denied in part the Petition for Redetermination. (App. 29; App. 171) The LLC disagreed with and appealed the denial to the Commission. (App. 29) The LLC deposited the tax and all other amounts claimed as being due by the Field Audit pursuant to Wis. Stat. § 77.59(6). (R. 3.1:22)

Similarly, Tetra Tech timely filed a Petition for Redetermination of the Sales Tax Field Audit with the DOR's Resolution Unit. (App. 28-29) The Resolution Unit issued a "Notice of Action" on August 16, 2012, which granted in part and denied in part the Petition for Redetermination. (App. 29; App. 172) Tetra Tech also disagreed with and appealed the denial to the Commission. (*Id.*)

The "Notices of Action" to the Taxpayers also did not assert that SDI's activities were "processing" under Wis. Stat. § 77.52(2)(a)11.

The Taxpayers' Petitions were consolidated for decision by the Commission.

III. PROCEEDINGS BEFORE THE COMMISSION.

A. The Taxpayers and the DOR Filed Cross Motions for Summary Judgment Where, for the First Time, the DOR Alleged SDI's Activity Was "Processing" Under Wis. Stat. § 77.52(2)(a)11.

At the Commission, the Taxpayers and the DOR each moved for summary judgment. It was in its summary judgment brief that the DOR first claimed in writing that the activities were "processing" under Wis. Stat. § 77.52(2)(a)11. (App. 162-63) It was also at the summary judgment stage that the DOR first introduced a dictionary definition of "processing" to support its contention that SDI engaged in "processing" as a basis for taxation. (App. 162)

B. The Commission Found That SDI Performed the Function of Separation but That SDI's Activities Were Nonetheless Subject to Wisconsin's Sales/Use Tax Because SDI's Activities Were "Processing."

On December 30, 2014, the Commission issued its Ruling and Order. (App. 26-40) In its Ruling and Order, the Commission concluded that SDI performed the function of separation. (App. 33-34) The Commission ruled, however, that the activities were subject to Wisconsin sales/use tax because they were "processing" under Wis. Stat. § 77.52(2)(a)11. (App. 36-37).

In finding that SDI's activities were taxable, the Commission, relying verbatim on the DOR's newly-found dictionary definition, interpreted and applied Wis. Stat. § 77.52(2)(a)11 as follows:

> We conclude that what SDI does with the sediment is "processing ... for a consideration for consumers [Tetra Tech] who furnish directly or indirectly the materials [sediment] used in the...processing" under the meaning of Wis. Stat. § 77.52(2)(a)11. At various points in the affidavits and depositions of Petitioner's general manager and experts, they refer to what SDI does as a "process" or as "processing." That language is also used in many of the contracts between Tera Tech and SDI. The dictionary definition of "processing" is "to put through the steps of a prescribed procedure; or to prepare, treat, or convert by subjecting to a special process." SDI's activities certainly fall within that definition. [App. 36]

The Commission did not decide whether SDI's activities constituted "cleaning," "alteration," or "service to tangible personal property" under Wis. Stat. § 77.52(2)(a)10[4] because the Commission found SDI's activities to be "processing" under Wis. Stat. § 77.52(2)(a)11.

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[4] Tetra Tech and the LLC disputed (and continue to dispute) that SDI's activities were "cleaning," "alteration," or "perform a service" throughout the proceedings in this matter. Those matters, however, are not before this Court.

IV. THE CIRCUIT COURT DECISION.

The Taxpayers filed a petition for judicial review to the Circuit Court of Brown County on January 16, 2015. On August 30, 2015, the circuit court affirmed the Commission's holding, denying the petition for judicial review. (App. 17-25)

The circuit court held (using the same dictionary definition proffered by the DOR and used by the Commission) that SDI's activities constitute "processing" under Wis. Stat. § 77.52(2)(a)11. (App. 22-23) The circuit court did not address whether the Commission's decision and interpretation of Wis. Stat. § 77.52(2)(a)11 was entitled to deference.

V. THE COURT OF APPEALS DECISION.

The Court of Appeals affirmed the circuit court's decision on December 28, 2016. (App. 1-16) The Court of Appeals held that the Commission's interpretation of "processing" under Wis. Stat. § 77.52(2)(a)11 (based on the identical dictionary definition used by the DOR and the Commission) was entitled to "great weight deference." (App. 9-10, ¶¶ 16-19)

ARGUMENT

I. THE PRACTICE OF DEFERRING TO AGENCY INTERPRETATIONS OF STATUES DOES NOT COMPORT WITH THE WISCONSIN CONSTITUTION VESTING THE JUDICIAL POWER TO THE COURTS OF THIS STATE.

This Court asked the parties to brief the following issue:

> Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

The answer to this question is "no."

Granting deference to an agency interpretation of a statute not only abdicates the judicial power and duty vested by Article VII, Section 2 of the Wisconsin Constitution to the

courts of this State to make such determinations, but also results in an unelected and essentially unaccountable administrative agency becoming the sole and final arbiter of what a statute means. Article VII, Section 2 of the Wisconsin Constitution grants the judicial power to the unified courts of this State, not to administrative agencies.

A. The Wisconsin Constitution Vests Judicial Power to the Courts of This State, Not to Administrative Agencies.

Article VII, Section 2 of the Wisconsin Constitution vests the judicial power of Wisconsin in a unified court system as follows:

> Art. VII. Sec. 2. The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature under section 14.

Moreover, Wis. Stat. § 15.001 provides, in part:

> The legislative branch has the broad objective of determining policies and programs and review of program performance for programs previously authorized, the executive branch carries out the programs and policies and *the judicial branch has the responsibility for adjudicating any conflicts which might arise from the interpretation or application of the laws.* It is a traditional concept of American government that the 3 branches are to function separately, without intermingling of authority, except as specifically provided by law. [Emphasis supplied.]

Article VII, Section 2 of the Wisconsin Constitution confers jurisdiction in our unified court system. This Court stated in *State v. Williams*, 2012 WI 59, ¶ 36, 341 Wis. 2d 191, 814 N.W.2d 460, that "[j]urisdiction has been interpreted to mean 'the power to hear and determine the subject-matter in controversy in [a] suit before [a] court.' In this sense, analogy to the federal Constitution suggests that the judicial power is the power to hear and determine controversies between parties before courts. Under this theory, *the judicial power is the ultimate adjudicative authority of courts to finally decide rights and responsibilities as between*

individuals." (Internal citations and footnotes omitted) (emphasis supplied).

As Chief Justice John Marshall stated in *Marbury v. Madison,* 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803): "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

This proposition was reinforced in the Court's recent case, *Operton v. Labor & Industry Review Commission,* 2017 WI 46, ¶ 78, ___ Wis. 2d ___, ___ N.W.2d ___ (Grassl Bradley, J., concurring):

> No less than in the federal system, in Wisconsin "[i]t is emphatically the province and duty of the judicial department to say what the law is."[5]

As Chief Justice Roggensack stated in her extensive law review article entitled, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort?*, 89 Marq. L. Rev. 541, 547 (Spring 2006):

> Declaring what a statute means is a *core function* of the courts for which an agency has no greater level of expertise." [Emphasis supplied; citation omitted.]

B. The Judicial Power of the Courts of This State Cannot and Should Not Be Delegated.

In the recent case *State ex rel. Universal Processing Services of Wisconsin, LLC v. Circuit Court of Milwaukee*

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[5] This has been a longstanding theme of the Court: "What the statute means is a matter of law for the court to determine." *Wisconsin Dep't of Taxation v. Miller,* 239 Wis. 507, 513, 2 N.W.2d 362 (1942); "Independent review [of a statute] is the appropriate standard in these circumstances [agency authority to promulgate rule] because it preserves the ultimate authority of the judiciary to determine questions of law, seeking to discern and fulfill the intent of the legislature." *Seider v. O'Connell,* 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 612 N.W.2d 659; "Some cases, however, mistakenly fail to state, before launching into a discussion of the levels of deference, that the interpretation and application of a statute is a question of law to be determined by a court." *Racine Harley-Davidson, Inc. v. Div. of Hearings & Appeals*, 2006 WI 86, ¶ 14, 292 Wis. 2d 549, 717 N.W.2d 184.

County, 2017 WI 26, ¶¶ 76-77, 374 Wis. 2d 26, 829 N.W.2d 267, a circuit court judge appointed a retired judge as a referee and granted the referee authority over nearly all aspects of the case with limited review by the circuit court. This Court determined that doing so impermissibly delegates constitutional judicial power:

> Because courts *cannot delegate their judicial power,* the reasoning of the federal and state cases *barring courts from delegating core judicial powers*—that is, powers to conduct trials, decide dispositive motions, or determine fundamental rights—provides a compelling measuring stick to determine whether the circuit court in the instant case impermissibly delegated judicial power to the referee.
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> In the instant case, as we stated previously, the Order of Reference enables the referee to hear and decide all motions filed, whether discovery or dispositive, subject to review under the standard of erroneous exercise of discretion. We conclude that this Order *impermissibly delegates constitutional "judicial power" to a referee,* prohibiting the circuit court from freely rejecting the referee's rulings and conducting its own independent inquiry and reducing the function of the circuit court to that of a reviewing court. [Emphasis supplied.]

Similarly, when courts grant deference, without independent review, to an agency interpretation of a statute, courts *are* delegating a core judicial power and function. This is especially true when they grant "great weight" deference to the agency interpretation. In such a case, the court allows an agency statutory interpretation to stand *even if* the court is presented with or finds a more reasonable interpretation of the statute. This deprives the public of benefiting from the best or better interpretation and the reasoning why such interpretation is just and fair.[6]

This Court does not grant deference to the elected judges of the circuit courts and Court of Appeals when they interpret statutes. This Court and the lower courts should

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[6] While this Court noted that due weight deference and no deference "are similar," the doctrine of due weight deference still requires courts to defer "even when an alternative statutory interpretation is equally reasonable to the interpretation of an agency." *Racine-Harley Davidson*, 2006 WI 86, ¶ 20. This again deprives the public and the law of courts' views and interpretations.

therefore not grant deference to non-elected administrative agency interpretations of statutes.

C. Although an Agency May Have the Ability to Interpret Statutes, Such Interpretations Are Subject to the Core Power of the Courts to Independently Review Such Interpretations.

An agency's ability to interpret and apply a statute may have been granted to it by the legislature. In this case, for instance, the Commission was delegated certain limited powers by the legislature as set forth in Chapter 73 of the Wisconsin Statutes. There is nothing in Chapter 73 that requires the courts to defer to the Commission. Wis. Stat. § 73.01(4), provides:

> POWERS AND DUTIES DEFINED. (a) *Subject to the provisions for judicial review* contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact.... [Emphasis supplied.]

Thus, although the Commission is the "final authority for ... all questions of law and fact," such authority is "*subject to review* in the manner provided in ch. 227." Wis. Stat. § 73.015(2) (emphasis supplied).

Importantly, there is nothing in Chapter 227 of the Wisconsin Statutes that requires courts to defer to agencies such as the Commission in interpreting statutes. Indeed, Wis. Stat. § 227.57(5) directs the courts to, among other things, "set aside" incorrect agency interpretations of statutes:

> The court *shall* set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law. [Emphasis supplied.]

Additionally, Wis. Stat. § 227.57(10) provides that courts shall give agencies "due weight," *but only to the* "experience, technical competence, and specialized knowledge of the agency involved." Nowhere is it required that courts give "due weight" – or any weight – to an agency's interpretation of a statute.

Therefore, although an agency may have the ability to interpret statutes, such interpretations are subject to independent judicial review.

D. Granting Deference to Administrative Agency Interpretations of Statutes Does Not Comport with Article VII, Section 2 of the Wisconsin Constitution

Granting deference to agency interpretation of statutes allows a non-elected administrative body to act as the highest judicial tribunal interpreting the laws of this state. It allows agencies to impose their own views and policy on existing law knowing that their interpretation is likely to be granted deference.

Article VII, Section 2 of the Wisconsin Constitution does not, however, grant such powers to administrative agencies; instead it vests the judicial power and duty to interpret the law to the courts of this State. Deferring to agency interpretation does not comport with that grant of power. If courts do not independently review agency interpretations of statutes, they have transferred that grant of core judicial power to an administrative agency.

Modifying the practice of deference relating to agency interpretation of statutes to establish that such interpretations are not granted deference upon judicial review does not mean an agency is precluded from engaging in such interpretation; it only means that when judicial review is sought, the court will review the statute at issue independently and *de novo* in accordance with the judicial power granted by Article VII, Section 2 of the Wisconsin Constitution.

The Taxpayers respectfully request this Court to declare that the practice of deferring to agency interpretations of statutes does not comport with Article VII, Section 2 of the Wisconsin Constitution.

E. The Practice of Deferring to Agency Interpretations of Statutes Is a Judicially-Created Doctrine That This Court Should Change Even If the Court Does Not Wish to Address the Constitutionality of Such Practice.

The Taxpayers submit to this Court that the practice of deferring to agency interpretations of statutes does not comport with the Wisconsin Constitution. If this Court decides not to reach the constitutional issue, the Court still may modify such practice to hold that agency interpretations of statutes will be given no deference upon judicial review.[7]

Why the courts should not grant deference to agency interpretation of statutes is well expressed in the concurring opinion of Justice Rebecca Grassl Bradley in *Operton,* 2017 WI 46, ¶¶ 73, 78-80:

> The doctrine of deference to agencies' statutory interpretation is *a judicial creation* that circumvents the court's duty to say what the law is and risk perpetuating erroneous declarations of the law.
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> * * *
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> The prevailing scheme of deference hamstrings a court of last resort—with self-imposed shackles—from independently interpreting the law, thereby thwarting the constitutional structure of dispersing power among the three branches of government. Because this structure has long been recognized as the essential safeguard of individual rights and liberty, this court should reinforce that structure as a check against the concentration of power in the executive branch.
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> * * *
>
> Acknowledging respect for a longstanding interpretation of a statute is a far cry from a judicial doctrine of "great weight" deference that relinquishes the court's

[7] This Court's practice has been to afford agency interpretations of statutes one of three levels of deference: great weight, due weight, or no weight. *Racine Harley-Davidson*, 2006 WI 66, ¶¶ 13-20. The history and progression of deference to agencies is well laid out in Chief Justice Roggensack's article *Elected to Decide*, 89 Marq. L. Rev. at 548-61, and in the concurring opinion of Justice Rebecca Grassl Bradley in *Operton*, 2017 WI 46, ¶¶ 74-80.

> responsibility to independently interpret statutes. Equally troubling is the possibility that seven elected justices—or, indeed, any elected judge accountable to the people of Wisconsin—might give "great weight" deference to an agency decision by a single, unelected administrative law judge or hearing examiner against whom the people have no recourse. Administrative rule making already shifts some lawmaking power to unelected officials and away from the processes of passage and presentment contemplated by our constitution. Judicial deference to executive interpretation further widens the gap between the people and the laws that govern them.
>
> ... [W]hen the legislature delegates broad authority to an executive agency, which in turn interprets and enforces that delegated authority, the judiciary risks the liberty of all citizens if it abdicates its constitutional responsibility to check executive interpretations of the law. [Emphasis supplied.]

Moreover, in footnote 4 to her concurring opinion, Justice Rebecca Grassl Bradley references U.S. Court of Appeals (now U.S. Supreme Court Justice) Judge Neil Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch,* 834 F.3d 1142 (10th Cir. 2016). Judge Gorsuch's observations in that opinion relating to the *Chevron* case[8] are instructive when considering the issue of courts granting deference to agency interpretations of statutes:

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.
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> * * *
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> For whatever the *agency* may be doing under *Chevron,* the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty

[8] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

> expressly assigned to them by the APA and one often likely compelled by the Constitution itself.
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> * * *
>
> All of which raises this question: what would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*. Of course, courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute. But *de novo* judicial review of the law's meaning would limit the ability of any agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election.

834 F.3d at 1149, 1152-53, 1158 (Gorsuch, J., concurring) (italics original).

The Taxpayers respectfully request this Court to adopt a rule establishing that no deference is afforded to agency interpretations of statutes.

II. THE SALES TAX IMPOSED ON TETRA TECH AND THE LLC WAS IMPROPER.

A. The Commission's Decision Is Not Entitled to Any Deference.

As set forth in Section I above, the Commission's decision is not entitled to any deference because deferring to an agency's interpretation of a statute does not comport with the Article VII, Section 2 of the Wisconsin Constitution.

However, in any case, and regardless of the issue of the constitutionality or propriety of deferring to agency

interpretations of statutes, the Commission's decision here is entitled to no deference, as outlined herein.[9]

As explained herein, an agency's decision is not entitled to any deference if it is unreasonable. *Operton*, 2017 WI 46 at ¶ 26 (quoted source omitted). Additionally, courts do not give deference if *any* of the following conditions are met: (1) the issue is a matter of first impression; (2) the agency has no experience or specialized knowledge relevant to the legal issue presented; or (3) the agency's position on the issue is not longstanding. *See Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶ 37, 324 Wis. 2d 68, 731 N.W.2d 674.

1. The Commission's Decision Is Unreasonable Because the Definition of "Processing" Adopted by The Commission Improperly Converts a Narrow and Selective Tax Into a General Tax On Services to Tangible Personal Property.

In *Operton*, 2017 WI 46 at ¶ 26 (quoted source omitted) this Court stated that the issue of deference need not be decided if an agency's statutory interpretation and application is unreasonable:

> "[W]e need not decide the applicable standard of review here because LIRC's statutory interpretation and application is unreasonable, and therefore, it will not withstand any level of deference."

This Court also stated in *Racine Harley-Davidson*, 2006 WI 86 at ¶ 17, that an agency's unreasonable conclusion of law may be reversed by a reviewing court:

> An agency's conclusion of law is unreasonable and may be reversed by a reviewing court if it directly contravenes the statute or the federal or state constitution, if it is clearly contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis.

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[9] This Court has held that when it is reviewing a decision of an administrative agency, it reviews the agency's decision and not the decision of the court of appeals or trial court. *Racine Harley-Davidson*, 2006 WI 86 at ¶ 8 n.4.

Here, the Commission's interpretation of Wis. Stat. § 77.52(2)(a)11 is unreasonable and without a rational basis because, among other things, it improperly converts a limited and narrow sales tax on specified types of services to tangible personal property into a general sales tax on all services to tangible personal property, in contravention of longstanding law and legislative intent.

Because "[o]nly reasonable agency interpretations are given any deference," the Commission's decision here is not entitled to any deference. *Racine Harley-Davidson*, 2006 WI 86 at ¶ 15.

a. Wis. Stat. § 77.52(2)(a) Is a Limited, Selective Tax.

There is no dispute that the Legislature intended Wis. Stat. § 77.52(2)(a) to be a limited and selective tax on services.

No services other than "the services" specifically "described under par. (a)" are subject to sales tax. Wis. Stat. § 77.52(2). In marked contrast to the general retail sales tax (Wis. Stat. § 77.52(1)), the sales tax on services under Wis. Stat. § 77.52(2) is selective and narrow. Thus, unless a service is specifically listed under Wis. Stat. § 77.52(2)(a), it is not subject to tax. *See, Brennan Marine, Inc. v. DOR*, Wis. Tax Rptr. (CCH) ¶ 401-474 (WTAC 2011); *DOR v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977), cited in *Manpower Inc. v. DOR*, Wis. Tax Rptr. (CCH) ¶ 401-223 (WTAC 2009) ("[O]nly sales of the specific services listed in Wis. Stat. § 77.52(2) are similarly subject to sales tax. Sales of services not listed in that section are not taxable.")

Here, the Commission accepted the definition of "processing" advanced by the DOR without analysis or consideration of its impact. The DOR defined "processing" as:

> "[T]o put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process."

The Taxpayers cannot conceive of any service to tangible personal property that does not fit inside this

definition. This means that all services to tangible personal property would be subject to sales tax. The statute, however, is a narrow, selective sales tax – not all services to tangible personal property are taxable.[10]

b. The Definition of "Processing" Adopted by the Commission Conflicts With the Manifest Intent of the Legislature to Create a Narrow, Selective Sales Tax.

The definition of "processing" used by the Commission allows the DOR to impose a tax on services to tangible personal property that the legislature never intended to be taxed. Therefore, the definition is incorrect and cannot be sustained.

In Wisconsin, words and phrases must be given their common and approved usage "unless such construction would produce a result inconsistent with the manifest intent of the legislature." Wis. Stat. § 990.01.

Statutory interpretation begins with the words chosen by the legislature. Statutory interpretation requires courts to determine the statute's meaning, which is assumed to be expressed in the language chosen by the legislature. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 20, 309 Wis. 2d 541, 749 N.W.2d 581. "When a statute fails to address a particular situation, the remedy for the omission does not lie with the courts. It lies with the legislature."[11] *Bostco LLC v. Milwaukee Metro. Sewerage Dist.,* 2013 WI 78, ¶ 61, 350 Wis. 2d 554, 835 N.W.2d 160.

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[10] The Court of Appeals characterized the Taxpayers' argument as follows: "They assert the broad dictionary definition … [transforms] the narrow and selective sales and use tax on specific, enumerated retail services into a *general sales and use tax on all retail services*." (App. 10 ¶ 18) (emphasis supplied). This was not, and is not, the Taxpayers' argument. The broad definition causes all services to *tangible personal property* to be taxable – it does not convert the tax into a "general sales and use tax on all retail services."

[11] And, assuredly, not with an agency. An agency's authority is limited and prescribed as authorized by the legislature. *Lake Beulah Mgmt. Dist. v. DNR,* 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73.

Utilizing a dictionary is only permitted so long as it does not run afoul of the manifest intent of the legislature. The courts' "focus must remain on ascertaining the *legal* definition consistent with the legislative intent. A standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." *State v. Harvey*, 2006 WI App 26, ¶¶ 16-17, 289 Wis. 2d 222, 710 N.W. 2d 482. (Italics original.)

Put another way, it is only appropriate to apply a dictionary definition if it is not "contrary to the manifest intent of the legislature." *Industry to Industry, Inc. v. Hillsman Modular Molding, Inc.*, 2002 WI 51, ¶ 18, 252 Wis. 2d 544, 644 N.W.2d 236.

The Commission itself has cautioned on the use of dictionary definitions:

> It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.
>
> A word may have a variety of meanings and its precise meaning must be found in its context and relation to the subject matter.

Delco Corp. v. DOR, Wis. Tax. Rptr. (CCH) ¶ 203-145 (WTAC 1990) (citations omitted).

There is no dispute that Wis. Stat. § 77.52(2)(a) is expressly intended by the legislature to be a narrow, selective sales tax on services to tangible personal property. That is the "manifest intent of the legislature." *Hillsman*, 2002 WI 51 at ¶ 18. Only if it is clear that an activity is "specifically described" can a tax be imposed.

The expansive definition of "processing" used by the Commission does not appear anywhere in the sales tax statute. It is not in any administrative rule (including the DOR's own rule on "processing"[12]). It has not been recognized in any decision of any sales tax case known to the

[12] *See* Section B below.

Taxpayers. It is simply a definition unilaterally selected from a dictionary and applied here to separation activities. Furthermore, it contravenes the legislature's intent that if an activity is not specifically listed it cannot be taxed, and any ambiguity or doubt goes to the taxpayer.

c. The Imposition of Sales Tax by the Commission Conflicts with Longstanding Tax Law That in Order for a Service to Be Taxable There Must Be No Doubt the Activity to Be Taxed Is Specifically Listed in Wis. Stat. § 77.52(2)(a).

Consistent with the narrow, selective nature of the sales tax on services, there is also a presumption *against* taxation under Wis. Stat. § 77.52(2)(a). *Any* ambiguities must be resolved in favor of the taxpayer. As repeatedly explained in tax guides, case law, and in Commission decisions, to be a service taxable under Wis. Stat. § 77.52(2)(a):

1. The activity must be *specifically listed* to be taxed;

2. There *can be no doubt the activity is specifically covered.* If there is any doubt that the activity is not included, or if the statute is ambiguous as to the activity being reviewed, a decision in favor of the taxpayer *must be made that the activity is not taxable;*

3. If a service is not specifically listed in the statute, it is *not taxable* and there is *no need* to fit within an exemption. [Emphasis supplied.]

See, Timothy G. Schally & Robert A. Schnur, *The Complete Guide to Wisconsin Sales and Use Taxes* § 1.6 "Overview of Sales Tax on Services" at 13 (2008).

Longstanding case law and decisions of the Commission and this Court have clearly established and re-confirmed these principles. For example, in *Kearney &*

Trecker Corp. v. DOR, 91 Wis. 2d 746, 753, 284 N.W.2d 61 (1979), this Court emphasized:

> When the legislature imposes a tax, it must do so in clear and express language with all ambiguity and doubt in the particular legislation being resolved against the one who seeks to impose the tax.[13]

Similarly, in *Brennan Marine, Inc. v. DOR*, Wis. Tax Rptr. (CCH) ¶ 401-474 (WTAC 2011), the Commission stated that "[i]n Wisconsin, goods are presumed by statute to be subject to the sales tax, but the same *cannot be said of services. Unless a service is specifically listed in the sales tax statute, the service is not subject to the sales tax.*" (Emphasis supplied.) The Commission confirmed that in the absence of "the 'clear and express language' required for tax imposition purposes, ... under well-settled law, we must therefore resolve the doubt in favor of the taxpayer." *Id.*

Likewise, in *Manpower Inc. v. DOR*, Wis. Tax Rptr. (CCH) ¶ 401-223 (WTAC 2009), the Commission stated that "a tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." The Commission further made clear that:

> In Wisconsin, all sales of goods are subject to sales tax unless an exception applies; *however, only sales of the specific services listed in Wis. Stat. § 77.52(2) are similarly subject to sales tax. Sales of services not listed in that section are not taxable.* [Emphasis supplied.]

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[13] *See also, Milwaukee Refining Corp.,* 80 Wis. 2d at 48-49; *Nat'l Amusement Co. v. Dep't of Taxation,* 41 Wis. 2d 261, 266-67, 163 N.W.2d 625 (1969); *Recht-Goldin-Siegal Constr., Inc. v. DOR,* 64 Wis. 2d 303, 305-06, 219 N.W.2d 379 (1974); *SSM Health Care v. DOR,* Wis. Tax Rptr. (CCH) ¶ 400-593 (WTAC 2002).

The Commission concluded:

> Considering these two basic rules of construction, it would appear that a party can escape the imposition of tax *by pointing to any ambiguity and doubt* in the statute creating the tax. [Emphasis supplied.]

The decision to impose sales tax here conflicts with the controlling opinions of this Court (and the Commission itself) that in order for a service to be taxable under Wis. Stat. § 77.52(2)(a) there must be no ambiguity or doubt that the service is taxable. Additionally, the Commission (and Court of Appeals) relied on a dictionary definition of "processing," which underscores the ambiguity and doubt present.

d. The Definition of "Processing" Improperly Renders the Specific Taxable Services Listed In Wis. Stat. § 77.52(2)(a) Surplusage.

The definition used by the DOR and the Commission is so broad that other listed categories in Wis. Stat. § 77.52(2)(a)10, or in (a)11 for that matter, are simply not needed and thereby rendered superfluous or surplusage. For example, if processing is "putting through a prescribed procedure" or "to prepare, treat, or otherwise convert by subjecting to a special process," then "painting," "coating," "alteration," "fitting," "cleaning," "maintenance," and "repair," all listed in Wis. Stat. § 77.52(2)(a)10, need not be listed – at a minimum, each "converts" something using a "prescribed procedure." The same is true under Wis. Stat. § 77.52(2)(a)11 for "producing," "fabricating," "printing," or "imprinting."

A basic rule in construing statutes "is to avoid such constructions as would result in any portion of the statute being superfluous." *Milwaukee Refining Corp.,* 80 Wis. 2d at 52. "Statutory language is read where possible to give reasonable effect *to every word*, in order to avoid surplusage." *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. (Emphasis supplied.)

The DOR and Commission's definition of "processing" cannot be sustained. If it were, it would

improperly negate and render superfluous and surplusage the other categories the legislature enacted in Sec. 77.52(a)(2)10.

2. The Commission Did Not Employ Its Expertise or Specialized Knowledge.

The fact the Commission relied on a dictionary definition of "processing" in support of taxation by itself illustrates the Commission did not utilize any special knowledge or expertise, much less precedent.

Nowhere in its decision did the Commission demonstrate specialized knowledge or expertise. The Commission only provided two pages of analysis in its decision and that analysis contained only three paragraphs discussing "processing." (App. 36-37) In those three paragraphs, the Commission simply: (1) adopted the DOR's dictionary definition of "processing" verbatim; (2) cited selected (but did not identify or quote) portions of deposition testimony and affidavits; and (3) cited the Commission's 1998 decision in *Hammersley Stone Co. v. DOR,* Wis. Tax Rptr. (CCH) ¶ 400-383 (WTAC 1998). (*Id.*)

3. The Commission Failed to Provide an Articulated Interpretation of Wis. Stat. § 77.52(2)(a)11.

In *Operton,* 2017 WI 46, ¶ 23 n.11, the Court stated:

> ... [P]erhaps our standard of review analysis in cases involving an agency's interpretation of a statute should include a threshold determination of whether the agency has articulated its interpretation of the statute. If an agency has not provided the court with an articulated interpretation of the statute, then the level of deference the agency is afforded is not at issue; we simply interpret and apply the statute.

The Commission did not explain why it accepted the DOR's dictionary definition or why it was reasonable and appropriate. The Commission did not review the context and intent of the statute and the DOR's administrative rule pertaining to "processing." The Commission did not address the impact of its decision to use the DOR's definition, including whether it converted a selective tax on service to a general tax on tangible personal property; rendered other

provisions of the statutes surplusage; or was in conflict with long-standing law and precedent that sales taxes on services must be strictly construed and *any* doubt or ambiguity in coverage must be resolved in favor of the person or entity against whom the tax is sought to be imposed.

4. The Issue Was a Matter of First Impression.

This Court has stated that reviewing courts give no deference to an agency's interpretation of a statute when, among other things, "the issue presents a matter of first impression." *Milwaukee Symphony,* 2010 WI 33 at ¶ 37. This Court noted that "[n]o deference is due an agency's conclusion of law when an issue before the agency is one of first impression or when an agency's position on an issue provides no real guidance." *Brown v. LIRC,* 2003 WI 142, ¶ 14, 267 Wis. 2d 31, 671 N.W.2d 279. (Citation omitted.)

There is no prior case known to the Taxpayers addressing "separation" under Wis. Stat. § 77.52(2)(a)11. Indeed, the Commission resorted to a dictionary definition and out-of-context remarks of representatives of Tetra Tech and the LLC in which they used the words "process" or "processing" to support its decision to impose a tax.

The DOR also admitted this was a matter of first impression, the issues were not straightforward, and that ambiguity and doubt existed:

- When asked if this was a matter of first impression, DOR Auditor Sue Alseth admitted that it was. (App. 49 at p. 35)
- Auditor Morrissey confirmed that the "items adjusted" were not straightforward and that there was no "adequate material" published by the DOR discussing the "tax errors discovered." (App. 46 at pp. 49-50)
- The DOR Resolution Officer Michelle Biermeier also conceded the issues were not "straightforward." (App. 43 at pp. 38-39)

The fact the Commission utilized the DOR's proffered dictionary definition of "processing" without any sort of

meaningful analysis or explanation, despite the DOR admitting the issue was not straightforward and a matter of first impression, highlights why the Commission should not be afforded any deference.

5. The Commission's Interpretation of "Processing" Is Not Longstanding.

The Commission relied on *Hammersley Stone* in ruling that SDI's separation activities constitute "processing" under Wis. Stat. § 77.52(2)(a)11. That reliance is misplaced.

The primary focus in *Hammersley Stone* was not about whether the activities at issue constituted "processing" or what "processing" means under Wis. Stat. § 77.52(2)(a)11. Rather, the focus was on whether "the service was sold at retail." A definition of "processing" was not introduced by the DOR, Commission, or taxpayer. In fact, the taxpayer conceded that the activities were "processing." Thus, *Hammersley Stone* does not support the way it was used by the Commission because it does not represent an example of how the DOR or the Commission has a longstanding interpretation of "processing."

Hammersley Stone is factually distinguishable as well. There, the customer that provided the stone ended up with the same materials that it provided – in smaller pieces. No separation occurred. It sent stone in, and got stone out, not stone separated into its various geological components. This is *not* what happens here. What comes into SDI is dredged material; what comes out is the individual separated component parts of that material, not smaller units of slurry.

B. SDI's Activities Do Not Constitute "Processing" Under Wis. Stat. § 77.52(2)(a)(11).

1. SDI Separates Materials – It Does Not "Process" Materials.

The Taxpayers established before the Commission that:

- SDI separates the materials delivered by Brennan into components so that they

can be delivered to and disposed of by Tetra Tech. (App. 53 ¶ 10)

- SDI's only involvement is to separate the materials it gets from Brennan into components and deliver them to Tetra Tech. (App. 54 ¶ 16)

- What comes into SDI goes out of SDI; the only difference being that the materials are separated into components. *Id.*

In its Ruling and Order, the Commission itself concluded that SDI performs the function of separation:

- "All of the steps used ... are physical separation technologies." (App. 33 ¶ 22)

Accordingly, the Commission found that SDI does nothing more than engage in separation.

"Separation" is not listed as a category taxed in the narrow, selective sales tax on services statutes, either in Wis. Stat. § 77.52(2)(a)10 or Wis. Stat. § 77.52(2)(a)11, or anywhere in Wis. Stat. § 77.52(2)(a). There is no "clear and express" language imposing taxation on separation.

"Separation" is also not listed in any rule or administrative code. Separation has not been held as a taxable service in any Commission case or court case known to the Taxpayers.

Thus, not only is "separation" not listed in the statutes, but there is considerable ambiguity and doubt that it is, or was ever, intended to be covered. Thus, SDI's activities are not taxable.

2. The Term "Processing" Is Defined In Wis. Admin. Code § Tax 11.38.

The DOR has an administrative rule that lists the types of activities to be treated as "processing" for purposes of Wis. Stat. § 77.52(2)(a)(11). Importantly, separation is not listed in the rule and does not fit within what the rule implicitly describes: taking a product and enhancing it but not changing its essential nature.

Wis. Admin. Code § Tax 11.38 defines fabricating and processing services as follows:

> **(2)** EXAMPLES OF FABRICATING AND PROCESSING SERVICES. Fabricating and processing services, where materials are furnished directly or indirectly by the customer, that are subject to Wisconsin sales or use tax include, except as provided in sub. (1) (a) through (c):
>
> **(a)** Application of coating to pipe.
>
> **(b)** Assembling kits to produce a completed product.
>
> **(c)** Bending glass tubing into neon signs.
>
> **(d)** Bookbinding.
>
> **(e)** Caterer's preparation of food.
>
> **(f)** Cleaning used oil.
>
> **(g)** Cutting lumber to specifications and producing cabinets, counter tops or other items from lumber for customers, often called "millending."
>
> **(h)** Cutting or crushing stones, gravel or other construction materials.
>
> **(i)** Drying, planing or ripping lumber.
>
> **(j)** Dyeing or fireproofing fabric.
>
> **(k)** Fabricating steel which may involve cutting the steel to length and size, bending and drilling holes in the steel to specifications of a particular construction job.
>
> **(l)** Firing of ceramics or china.
>
> **(m)** Heat treating or plating.
>
> **(n)** Laminating identification cards.
>
> **(o)** Making a fur coat from pelts, gloves or a jacket from a hide.
>
> **(p)** Making curtains, drapes, slip covers or other household furnishings.
>
> **(q)** Production of a sound recording or motion picture.
>
> **(r)** Retreading tires.
>
> **(s)** Tailoring a suit.
>
> **(t)** Threading pipe or welding pipe.

Nowhere is simple "separation" into components found. Further, none of these activities can be reasonably construed to describe the activities of SDI.[14]

In each of the DOR's twenty examples listed above, "processing" starts with a product and enhances that product in some way. This is further underscored by the subchapter in which this rule is located – "Manufacturers and Producers." SDI's function is not to "manufacture" or "produce" anything. Instead, SDI simply separates material into its component parts. After SDI separates the slurry received into its individual components – sand, water and sediment – the slurry no longer exists. What comes in to SDI is a slurry consisting of sand, water and sediment. What leaves SDI is that same sand, water and sediment, but now separated into their respective components.

The Taxpayers anticipate the DOR will argue Wis. Admin. Code § Tax 11.38 is a non-exhaustive list of "examples" of what might constitute "processing" or "fabricating." However, this ignores the doctrine of *expression unius est exclusion alterius* ("the expression of one thing excludes another.") Under the "*exclusion*" doctrine, "courts may read 'includes' as a term of limitation or enumeration, so that a statute encompasses *only those provisions or exceptions specifically listed.*" *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 17 n.11, 270 Wis. 2d 318, 677 N.W.2d 612 (emphasis supplied; internal citations omitted). "Under the doctrine of *expressio unius est exclusio alterius*, 'the express mention of one matter excludes other similar matters [that are] not mentioned.'" *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733 N.W.2d 287 (alteration in original) (*quoting Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶ 12, 239 Wis. 2d 26, 619 N.W.2d 123).

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[14] The Court of Appeals stated the Taxpayers failed to "offer any alternative, proposed interpretation of the term used within Wis. Stat. § 77.52(2)(a)11." (App. 10 ¶ 19) This, however, improperly shifts the burden from the DOR and Commission to the purported taxpayer to establish that taxation is based on a statutory section clearly and expressly establishing taxation and without any ambiguity or doubt. Additionally, the Taxpayers have provided a definition of "processing" by pointing to Wis. Admin. Code § Tax 11.38 and showing that the activities of SDI do not fit under DOR's rule.

Additionally, "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*)." *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶ 66, ___ Wis. 2d ___, ___ N.W.2d ___ (Ziegler, J., dissenting). This means that "'a matter not covered is to be treated as not covered.' Scalia & Garner, supra, at 93 (describing this as the "Omitted-Case Canon")". *Id.* Under the "Omitted-Case Canon," judges should not "elaborate unprovided-for exceptions to a text." *Id.; see also id.* ("[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." (alterations in original) (*quoting Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting))).

Here, Wis. Admin. Code § Tax 11.38 uses the word "include" before listing the activities that constitute "processing." Concluding that SDI's separation activities constitute "processing" contradicts the doctrine of "exclusion" and the 'Omitted-Case Canon."

CONCLUSION

For the reasons given, the Taxpayers respectfully request the Court to reverse and set aside the Court of Appeals' September 11, 2016 decision and the Wisconsin Tax Appeals Commission December 30, 2014 Ruling and Order and hold that Tetra Tech and the LLC are not liable for sales taxes under Wisconsin Sales/Use Tax law.

Dated this 19th day of May, 2017.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 9,749 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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