STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

Case No. 15AP2019

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

Petitioners-Appellants,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, HON. MARC A. HAMMER PRESIDING

BRIEF OF RESPONDENT-RESPONDENT WISCONSIN DEPARTMENT OF REVENUE

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases Cited

WISCONSIN STATUTES CITED

WISCONSIN ADMINISTRATIVE CODE CITED

INTRODUCTION

Wisconsin imposes a sales tax on the "processing . . . of tangible personal property . . . for a consideration for consumers who furnish directly or indirectly the materials used in the . . . processing." Wis. Stat. § 77.52(2)(a)11. Petitioner-Appellant Tetra Tech EC, Inc. ("Tetra Tech") provided sediment from the Fox River to Stuyvesant Dredging, Inc. ("SDI"), which removed the sand and water from the sediment and then returned the sand, water, and remaining sediment to Tetra Tech. The Tax Appeals Commission (the "Commission") correctly ruled that SDI's activities were covered by Wis. Stat. § 77.52(2)(a)11. because they were the "processing of tangible personal property [sediment] . . . for a consideration for consumers [Tetra Tech] who furnish directly or indirectly the materials used in the . . . processing."

ISSUES PRESENTED

1. Tetra Tech's Vice President of Project Engineering and Senior Engineer on the Fox River project testified that SDI processes the sediment it indirectly receives from Tetra Tech, and the word "processing" was used in numerous documents describing SDI's services. Did SDI's services constitute the "processing of tangible personal property" such that they were subject to the sales tax under Wis. Stat. § 77.52(2)(a)11?

The Commission and the circuit court answered yes.

2. Wisconsin law provides that "[n]o determination of the tax liability of a person may be made unless written notice of the determination is given to the taxpayer . . . within 4 years of the date any sales and use tax return required to be filed." Wis. Stat. § 77.59(3). Does Wis. Stat. § 77.59(3) require the "determination of the tax liability" to list every alternative legal basis for the tax liability?

The Commission and the circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues can be adequately addressed by the briefs. The Wisconsin Department of Revenue (the "Department") believes the Court's opinion should be published because a decision would help clarify the law given that other taxpayers have raised similar arguments to the one raised in this case. *See* Wis. Stat. § (Rule) 809.23(1)(a)2.

STATEMENT OF THE CASE

I. Factual background

In response to an order by the U.S. Environmental Protection Agency, several paper companies formed Petitioner-Appellant Lower Fox Remediation LLC (the "LLC") to remediate the environmental impact of portions of the Fox River. (TAC R. 22, Zimmer Aff. Ex. 28:5–6, 21; TAC

R. 33 ¶¶ 10–12:APP. 56.)[1] The LLC hired Tetra Tech as the contractor that would conduct the remediation, and Tetra Tech hired various subcontractors to perform tasks in the course of the remediation. (TAC R. 22, Zimmer Aff. ¶ 10, Ex. 36; TAC R. 33 ¶¶ 13–14:APP. 56–57.) Tetra Tech entered into a subcontract with SDI to perform "the desanding and dewatering portions of the [r]emediation." (TAC R. 22, Morrissey Aff. ¶ 3, Ex. 15; TAC R. 33 ¶ 15:APP. 57.)

Tetra Tech and SDI submitted a plan to the EPA that stated SDI's activities "will be conducted in the sediment processing building located on the former Shell property." (TAC R. 22, Zimmer Aff. Ex. 29:DRS000573; TAC R. 33 ¶ 17a:APP. 57.) The plan included a "Process Flow Diagram" showing how SDI would process the sediment. (TAC R. 22, Zimmer Aff. Ex. 29:DRS000631, Ex. 30; TAC R. 33 ¶ 17b:APP. 57.) That diagram explained that dredged sediment would enter SDI's processing facility through dredge pipelines, go through a scalping screen, a slurry holding tank, and a slurry thickening tank, and then enter the coarse and fine sand separation processes. (TAC R. 22, Zimmer Aff. Ex. 29:DRS000631, Ex. 30; TAC R. 33 ¶ 17b:APP. 57.) The plan states that "[t]he sediment will be processed through several stages to enable efficient and effective mechanical dewatering of the fines using

[1] The record of the proceedings before the Commission is a separate box marked as R. 3.1 of the record on appeal. For simplicity, this brief cites the Commission record as "TAC R. __" and the circuit court record as "R. __."

membrane-type filter presses." (TAC R. 22, Zimmer Aff. Ex. 29:DRS000578; TAC R. 33 ¶ 17c:APP. 58.) The plan's "General Process Flow and Layout" shows two process flow diagrams "which illustrate the design flow rates through the desanding and dewatering processes." (TAC R. 22, Zimmer Aff. ¶ 4, Ex. 29:DRS000585, Ex. 30; TAC R. 33 ¶ 17d:APP. 58.)

Tetra Tech's Vice President of Project Engineering and Senior Engineer on the Fox River project testified under oath that SDI processes and changes the sediment it indirectly receives from Tetra Tech. (TAC R. 22, Zimmer Aff. ¶ 6, Ex. 32:53–54; TAC R. 33 ¶ 20:APP. 59.) An operations manager who had overseen SDI's remediation project for the Fox River likewise testified that SDI "processes" the sediment. (TAC R. 22, Zimmer Aff. ¶ 7, Ex. 33:38; TAC R. 33 ¶ 21:APP. 59.) The appellants' expert witness Walter Shields said in an affidavit that "SDI is conducting a physical separation process for Fox River sediments based on differences in grain size and specific gravity," and uses the word "process" numerous other times to describe SDI's services. (TAC R. 19, Shields Aff. ¶ 36:APP. 16; TAC. R. 33 ¶ 22:APP. 59.)

Following the desanding and dewatering process, SDI delivers the sand, water, and sediment back to Tetra Tech for re-use of the sand, treatment of the water for return to the river, and disposal of the sediment. (TAC R. 19.)

II. Procedural history

A. Proceedings before the Department of Revenue

In 2010, the Department conducted a field audit of Tetra Tech and the LLC. (TAC R. 22, Morrissey Aff. ¶¶ 1, 4, Ex. 16; TAC R. 33 ¶ 1:APP. 53.) Upon conclusion of the audits, the Department issued a Notice of Field Audit Action to each entity, one to the LLC on November 23, 2010, and one to Tetra Tech on December 2, 2010. (TAC R. 22, Morrissey Aff. ¶¶ 5–6, Exs. 17–18; TAC R. 33 ¶ 1:APP. 53.) With respect to the issue in this case, the notices listed Wis. Stat. § 77.52(2)(a)10. as the basis for the taxability of SDI's services. (TAC R. 22, Morrissey Aff., Exs. 17–18.)

The Department denied petitions for redetermination filed by Tetra Tech and the LLC with respect to the taxability of SDI's services (but granted the petitions on an issue not before this Court). (TAC R. 22, Biermeier Aff. ¶¶ 5–6, Exs. 22–23; TAC R. 33 ¶¶ 6–7:APP. 55.)

B. Proceedings before the Commission

Tetra Tech and the LLC filed a petition for review with the Commission. (TAC R. 1.) In these proceedings, the Department raised an alternative basis for taxation: that SDI's services were taxable under Wis. Stat. § 77.52(2)(a)11. as the "processing" of tangible personal property for a consumer that provided the property used in the processing. The Department raised this alternative ground prior to the proceedings before the Commission when Department

Resolution Officer Michelle Biermeier spoke with the appellants and "mentioned that perhaps this service could be taxable under s. 77.52(2)(a)11. – processing TPP for consideration for consumers who furnish the materials used in processing." (TAC R. 22, Biermeier Aff. ¶ 4, Ex. 21:2; R. 9:R-App. 006–008, 009–010.)

Before the Commission, the Department advanced the argument under Wis. Stat. § 77.52(2)(a)11. in its motion for summary judgment. (TAC R. 22, Resp. Br. at 24–26; R. 9:App. 001–005.) Thus, the appellants had the opportunity to address the argument in their response to the Department's summary judgment motion. (TAC R. 27, Pet. Br. at 30–36; R. 9:R-App. 039–047.)

The Commission ruled that SDI's services were taxable because "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(a)11." (TAC R. 33:11:APP. 62 (alterations in original).) The Commission noted that appellants' own general manager and expert "refer[red] to what SDI does as a 'process' or as 'processing.'" (TAC R. 33:11:APP. 62.) The Commission reasoned that "[t]he 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." (TAC R. 33:11:APP. 62.) The Commission relied

on one of its prior decisions, *Hammersley Stone Co. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400–383 (WTAC Aug. 17, 1998),[2] which concluded that the crushing of rock into gravel was the "processing" of tangible personal property. (TAC R. 33:12:APP. 63.)

The Commission further ruled that the requirement of a written notice in Wis. Stat. § 77.59(3) "simply means that the taxpayer must receive written notice of an adjustment, not that the Department's Notice of Amount Due or Notice Action must provide every statutory basis or legal argument for making the adjustment." (TAC R. 33:13:APP. 64.) The Commission relied on its prior interpretation of this statutory provision in *Midwest Track Associates, Inc. v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-825 (WTAC 2005). (TAC R. 33:13:APP. 64.)

C. Proceedings before the circuit court

Tetra Tech and the LLC filed a petition for review (R. 1), which was denied by the circuit court. (R. 12.) The court "fail[ed] to see why separation and processing are mutually exclusive, such that separation is *per se* not processing," particularly when the appellants "fail to offer a different definition of processing the Court should apply." (R. 12:5, APP. 109.) The Court applied the "common, ordinary definition" of the word "processing" and found the definition

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[2] Copies of the *Hammersley* decision, along with the *Midwest Track*, *Manpower*, and *Brennan Marine* decisions, are included in the Department's appendix filed in the circuit court. (R. 9:R-App. 048–87.)

from the American Heritage Dictionary used by the Commission to be "helpful to an understanding of the word." (R. 12:6:APP. 110.)

The circuit court found that SDI's services fell under that definition because it put the sediment "through the steps of a prescribed procedure, which prepares the product into separate groups for eventual reuse or disposal." (R. 12:7: APP. 111.) Thus, "[t]he plain meaning of 'processing' includes SDI's activities, such that it is subject to the retail sales tax." (R. 12:7:APP. 111.)

The circuit court disagreed with the appellants' contention that the definition of "processing" applied would turn the statute into a general sales tax. "Just because 'processing' can cover a wide range of activities does not mean the Court should not apply the correct definition and plain meaning of the term." (R. 12:7:APP. 111.)

Lastly, the circuit court held that Wis. Stat. § 77.59(3) "only requires a written notice," which was provided, but does not require the notice to list each and every statutory reason for the tax liability. (R. 12:8:APP. 112.) The court held that it would "not disrupt the Commission's interpretation" of Wis. Stat. § 77.59(3) embodied in the *Midwest Track* decision. (R. 12:8:App. 112.)

STANDARD OF REVIEW

In an appeal of "a circuit court order reviewing an agency decision," the court of appeals reviews "the decision of the agency, not the circuit court." *Lake Beulah Mgmt.*

Dist. v. State Dep't of Nat. Res., 2011 WI 54, ¶ 25, 335 Wis. 2d 47, 799 N.W.2d 73. While this Court does not "defer to the opinion of the circuit court, that court's reasoning may assist" the Court. *Sterlingworth Condo. Ass'n, Inc. v. Dep't of Nat. Res.*, 205 Wis. 2d 710, 720, 556 N.W.2d 791 (Ct. App. 1996).

In this case, the Court should apply great weight deference to the Commission's interpretation of the word "processing" in Wis. Stat. § 77.52(2)(a)11. and its interpretation of the "written notice" requirement of Wis. Stat. § 77.59(3). Under this standard, the Court should uphold an agency's interpretation as long as it is reasonable and not contrary to the statute's clear meaning, even if the court finds a different interpretation to be more reasonable. *See Wis. Dep't of Revenue v. A. Gagliano Co.*, 2005 WI App 170, ¶ 24, 284 Wis. 2d 741, 702 N.W.2d 834.

This case meets the four factors required for "great weight" deference:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

Gagliano, 284 Wis. 2d 741, ¶ 24. The Commission satisfies the first factor because "[t]he Commission is charged with interpreting and administering the tax code and adjudicating taxpayer claims, Wis. Stat. § 73.01(4)." *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of*

Revenue, 2010 WI 33, ¶ 38, 324 Wis. 2d 68, 781 N.W.2d 674. The third and fourth factors are undisputedly met because the Commission "employed its specialized knowledge or expertise in interpreting the statute," and its "interpretation will provide uniformity and consistency in the application of the statute." *Id* ¶ 35.

The Commission's interpretations of law are also "long standing." The Commission interpreted Wis. Stat. § 77.52(2)(a)11. in a similar manner since at least the *Hammersley* decision in 1998 and then continuing through the cases cited by the appellants like *Manpower Inc. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401–223 (WTAC 2009) and *Brennan Marine, Inc. v. Wis. Dep't of Revenue*, Wis. Tax. Rptr. (CCH) ¶ 401–474 (WTAC 2011). *See Gagliano*, 284 Wis. 2d 741, ¶¶ 27–29. Likewise, the Commission has interpreted Wis. Stat. § 77.59(3) consistently for ten years since the *Midwest Track* decision in 2005.

At a minimum, this Court should apply "due weight" deference, under which the Court will "sustain an agency's statutory interpretation if it is not contrary to the clear meaning of the statute and no more reasonable interpretation exists." *Milwaukee Symphony*, 324 Wis. 2d 68, ¶ 36. Due weight deference is owed when "the agency is charged by the legislature with enforcement of the statute and has experience in the area, but has not developed expertise that necessarily places the agency in a better

position than the court to interpret the statute." *Id.* The Wisconsin Supreme Court granted the Commission due weight deference in two relatively recent cases involving the sales tax due to its experience in interpreting the tax statutes. *See id.* ¶ 38; *Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 51, 311 Wis. 2d 579, 754 N.W.2d 95. As the court held in *Milwaukee Symphony*, "[t]he Commission is charged with interpreting and administering the tax code and adjudicating taxpayer claims, Wis. Stat. § 73.01(4), and this is not the first case in which the Commission has utilized its expertise and experience to interpret" the sales and use tax. 324 Wis. 2d 68, ¶ 38.

ARGUMENT

I. The Commission correctly concluded that SDI provides "processing" services covered by Wis. Stat. § 77.52(2)(a)11.

SDI's services are taxable because they fit within the "ordinary and accepted" meaning of the word "processing." This is shown by the fact that employees of SDI and Tetra Tech both described SDI's work as "processing." The legislature imposed the sales tax on a broad category of services like "processing." The appellants cannot avoid the tax by the trick of characterizing services as "separation" services and noting that the word "separation" is not listed in Wis. Stat. § 77.52(2)(a)11, or in any other taxable service listed under Wis. Stat. § 77.52(2)(a).

A. SDI's services are taxed because they fit within the "ordinary and accepted meaning" of the word "processing."

The Commission properly applied Wisconsin law when it interpreted the word "processing" in Wis. Stat. § 77.52(2)(a)11. to cover SDI's services.[3] For tax statutes, as with any statute, "when statutory language is clear and unambiguous no judicial rule of construction is permitted, and the court must arrive at the intention of the legislature by giving the language its ordinary and accepted meaning." *Wis. Dep't of Revenue v. Milwaukee Ref. Corp.*, 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). In this case, the legislative intent is found by interpreting the word "processing."

In determining the "ordinary and accepted meaning" of the word "processing," the Commission correctly looked to the way in which the appellants (through both their employees and their experts) used that word. (R. 33 ¶¶ 17, 20–23:APP. 57, 59.) For example, they referred to the plant as a "sediment processing building," (TAC R. 22, Zimmer Aff. Ex. 29:DRS000573), drafted a "Process Flow Diagram" showing how SDI would process the sediment, (TAC R. 22, Zimmer Aff. Ex. 29:DRS000631), and drafted a plan that said "[t]he sediment will be processed through several stages." (TAC R. 22, Zimmer Aff. Ex. 29:DRS000578). Further, Tetra Tech's Vice President of Project Engineering

[3] The appellants do not contest that the sediment is "tangible personal property" or that Tetra Tech was a consumer that indirectly provided the tangible personal property (sediment) to SDI.

and Senior Engineer on the project testified under oath that SDI processes and changes the sediment, (TAC R. 22, Zimmer Aff. ¶ 6, Ex. 32:53–54), an SDI operations manager testified that SDI "processes" the sediment, (TAC R. 22, Zimmer Aff. ¶ 7, Ex. 33:38), and appellants' expert witness submitted an affidavit that "SDI is conducting a physical separation process for Fox River sediments." (TAC R. 19, Shields Aff. ¶ 36:APP. 16.)

Given that the appellants repeatedly described SDI's services as "processing," SDI's services fit within the "ordinary and accepted meaning" of that term. Irrespective of where the outer limit of the word "processing" lies, the appellants understood that SDI's services were covered by the word.

The Commission also properly looked to a dictionary definition that covered SDI's services. The Commission used the definition of "processing" contained in the American Heritage Dictionary, which is "to put through the steps of prescribed procedure; or to prepare, treat, or convert by subjecting to a special process." (R. 22; Resp. Br. at 24; R. 9:R-App. 001–005.) SDI prepared, treated and converted the sediment by subjecting it to its special desanding and dewatering process.

Wisconsin law explicitly approves of looking to dictionary definitions when attempting to determine the "ordinary and accepted meaning" of a word. In the primary Wisconsin Supreme Court decision on statutory

interpretation, the court held that "the term 'refuse' (as in 'the district attorney refuses') has a common and accepted meaning, ascertainable by reference to the dictionary definition." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 53, 271 Wis. 2d 633, 681 N.W.2d 110. The court of appeals has likewise looked to dictionary definitions, including when reviewing the Commission's interpretation of tax statutes. *See Xerox Corp. v. Wis. Dep't of Revenue*, 2009 WI App 113, ¶ 63, 321 Wis. 2d 181, 772 N.W.2d 677 (referring to a dictionary when interpreting Wis. Stat. § 70.11(39)).

It is not improper to use a dictionary definition merely because the definition is broad, as suggested by the appellants. The goal of statutory interpretation is "to faithfully give effect to the laws enacted by the legislature," which "requires that statutory interpretation focus primarily on the language of the statute" and "assume[s] that the legislature's intent is expressed in the statutory language." *Kalal*, 271 Wis. 2d 633, ¶ 44. The legislature's use of a broad term like "processing," along with terms "producing" and "fabricating," shows that the legislature intended Wis. Stat. § 77.52(2)(a)11. to cover a broad range of services. *See Nat'l Amusement Co. v. Wis. Dep't of Taxation*, 41 Wis. 2d 261, 270, 163 N.W.2d 625 (1969) ("The legislature intended the phrase 'engaged in the business of preparing food or beverages' to have a broad meaning.") As the Commission noted in *Hammersley*, "[t]he language in subdivision 11—

particularly the word 'processing'—is quite comprehensive." *Hammersley* at 5. (R.9:R-App. 064.)

SDI's services are taxable because they are "specifically listed under Wis. Stat. § 77.52(2)(a)" (App. Br. 11), as "processing" services. Reading a broad and comprehensive term like "processing" narrowly, as the appellants suggest, would defeat the legislative intent expressed in using the broad term.

B. The tax on "processing" services like those provided by SDI is clear and express.

The appellants attempt to avoid the plain meaning of the statute by asserting that SDI's services are not taxed because they are "separation" services, not processing services. Contrary to the assertion on page 16 of the appellants' brief, the Commission did not find that "SDI solely performs the function of separation." Instead, the Commission found that SDI "is conducting a physical separation process." (App. Br. 16 (quoting TAC R. 33 ¶ 23).)

The fact that SDI performed a "separation" process, and thus can be characterized as providing "separation" services, does not change the fact that separation processing is covered by the broader category of "processing" services. Because SDI performed a "separation process," its services are covered as a "processing" service under Wis. Stat. § 77.52(2)(a)11. The tax on "processing" services is clear and express, regardless of whether services can be characterized as one of the many different subcategories of "processing"

services. To allow such a result "would be tax avoidance by dictionary and clearly the law does not sanction such a result." *Cellar Door N. Cent., Inc. v. Wis. Dep't of Rev.*, Wis. Tax Rptr. (CCH) ¶ 401–686 (WTAC 2013).

The decisions from the Commission relied upon by the appellants do not support their position. The cases stand for the proposition that a service is not taxed when it does not fit into one of the categories listed in the statute. Manpower provided temporary help services, but those services did not "fit into the enumerated 'services.'" *Manpower Inc. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶401–223 (WTAC 2009). Similarly, Brennan Marine provided barge fleeting services, but that service "was readily distinguishable from the two services in Wis. Stat. § 77.52(2)(a)9 that apply here." *Brennan Marine, Inc. v. Wis. Dep't of Revenue*, Wis. Tax. Rptr. (CCH) ¶ 401–474 (WTAC 2011). Separation processing services, however, are specifically covered by the category of "processing" services listed in Wis. Stat. § 77.52(2)(a)11. Thus, SDI's services fit into, and are not distinguishable from, the enumerated services.[4]

The *Hammersley* decision illustrates this principle specifically with respect to "processing" services. The Commission concluded that rock crushing services are covered by the term "processing." *Hammersley* at 5

[4] The *Hammersley, Manpower*, and *Brennan Marine* cases reinforce why the Commission is owed great weight deference. It has consistently applied its expertise in interpreting the sales tax statutes for many years, in favor of both taxpayers and the Department.

(R.9:R-App. 064). Even though these services can also be described as "crushing" services, this did not prevent these services from falling under the more general category of "processing" services.

To use an example from another subsection, the sales tax covers the sales of tickets to "amusement, athletic, entertainment, or recreational events," categories that cover many subcategories. Wis. Stat. § 77.52(2)(a)2.a. One cannot avoid the tax simply by characterizing an event as a subcategory, such as tickets to a "concert event," and pointing out that the statute does not specifically list "concert events."

Along these lines, the Department's regulation containing "examples of fabricating and processing services" does not exclude SDI's services from the statute's scope. *See* Wis. Admin. Code § TAX 11.38(2). Because the list is illustrative, not exhaustive, it does not exclude "separation" processing by not specifically listing it. The regulation actually shows the broad range of services covered by the statute, including bending glass tubes into neon signs, bookbinding, crushing rock, firing ceramics, and tailoring a suit. *See id.* The Department cannot, and need not, specifically list each and every type of service covered by the generally categories of "fabricating" and "processing."

C. The rule of construction of tax statutes does not apply because the statute's meaning is clear.

The appellants' argument relies almost entirely on the rule of construction 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." *Milwaukee Refin. Corp.*, 80 Wis. 2d at 48–49. This rule of construction requiring "clear and express language" is not a license to ignore legislative intent. This judicial rule of construction does not come into play when the statute's meaning is unambiguous. As shown above, the "ordinary and accepted meaning" of the word "processing" covers SDI's services. This is the end of the story. No rule of construction is needed.

The appellants' contention that the word "processing" is ambiguous fails because they have not offered a competing definition of the word. A statute is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more senses." *Kalal*, 271 Wis. 2d 633, ¶ 47. The Commission applied a dictionary definition of the word, but the appellants have never offered an alternative definition to the one used by the Commission, whether from another dictionary or otherwise, under which SDI's services would not be taxable. As a result, there were not two competing definitions before the Commission (and there are likewise no competing definitions before this Court).

In any event, a statute is only ambiguous when "'well-informed persons' *should* have become confused" by the statute's language. *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 21, 260 Wis. 2d 633, 660 N.W.2d 656 (quoting *Nat'l Amusement*, 41 Wis. 2d at 267). The appellants cannot contend that they were confused as to whether SDI's services were covered by the term "processing" when their own witnesses characterized SDI's services as a "process" and "processing." The appellants' attempt to read the word "processing" so as not to include SDI's services is an attempt "to search for doubt in an endeavor to defeat an obvious legislative intention." *Nat'l Amusement*, 41 Wis. 2d at 267.

D. The rule against surplusage does not limit the definition of "processing" to something less than its common meaning.

The appellants are incorrect that the Commission's definition of "processing" renders "the services "listed in Wis. Stat. §§ 77.52(2)(a)10 and (a)11 superfluous and surplusage." (App. Br. 2.) Wisconsin Stat. § 77.52(2)(a)11. lists a series of services joined by the disjunctive connector "or" ("producing, fabricating, processing, printing, or imprinting"). The legislature's "use of different words joined by the disjunctive connector 'or' normally broadens the coverage of the statute to reach distinct, although potentially overlapping sets." *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67. Thus, the fact that "processing" may overlap with some of the other terms (like "producing" or "fabricating") is perfectly normal. And even

though there could be overlap, the terms "producing" and "fabricating" cover the creation of a new product out of raw materials that goes well beyond mere preparing, treating, or converting. Further, one would not think the dictionary definition "to prepare, treat or convert by subjecting to a special process" would include "printing" or "imprinting."

In addition, the interpretation of "processing" in Wis. Stat. § 77.52(2)(a)11. does not implicate the rule against surplusage at all with respect to the services listed in Wis. Stat. § 77.52(2)(a)10., which imposes sales tax on "the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property." The services in Wis. Stat. § 77.52(2)(a)10. will always have independent meaning because they are taxed in all instances. In contrast, Wis. Stat. § 77.52(2)(a)11. imposes the tax on a narrower class of services "for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting."

II. Wisconsin Stat. § 77.59(3) does not require the Department to include every alternative legal basis supporting its determination of tax liability.

The Commission correctly concluded that the requirement of a "written notice of the determination" in Wis. Stat. § 77.59(3) "simply means that the taxpayer must receive written notice of an adjustment" but that the Department need not "provide every statutory basis or legal

argument for making the adjustment." (R. 33:13:APP. 64.) While the Department has a practice of informing taxpayers of the legal basis for the tax liability (App. Br. 23–24), the legal requirements are determined by statute and not Department policy.

The statute provides that the Department must give written notice of the determination of a "tax liability." Wis. Stat. § 77.59(3). A liability is an amount, not a legal theory. The "determination" of a "tax liability" is the determination of the amount owed by the taxpayer; it is not a detailed legal explanation of the statutory basis for the amount owed. The statute says nothing about including the relevant subsections of the Wisconsin Statutes or the relevant legal doctrines; it merely provides that "[t]he notice required under this paragraph shall specify whether the determination is an office audit determination or a field audit determination, and it shall be in writing." *Id.*

The appellants attempt to read requirements into Wis. Stat. § 77.59(3) that are not part of the statute. The appellants point to no language requiring the Department to state all of the possible legal grounds on which it tax liability is based, let alone any language that says the failure to include an alternative ground in the notice forecloses the Department from ever relying on that ground before the Commission. In fact, the Commission previously ruled that the Department is not limited in theories of tax liability it can raise before the Commission to the theories contained in

a notice of action. *Midwest Truck Assocs., Inc. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400–825 (WTAC 2005). This makes sense because Wis. Stat. § 77.59(3) is essentially a statute of limitations for the determination of tax liabilities, not a statute governing procedure before the Commission.

Lastly, there was no due process violation in the Department's raising an alternative basis for taxation before the Commission. The Department raised the issue by phone with the appellants prior to the proceedings before the Commission. (TAC R. 22, Biermeier Aff. ¶ 4, Ex. 21:2; R. 9:R-App. 006–008, 009–010.) The issue was fully briefed on summary judgment, which gave the appellants the opportunity to be heard before the Commission. This is all that due process requires, particularly when taxpayers are not limited in proceedings before the Commission to the arguments they have raised with the Department. *See Nelson Bros. Furniture Corp. v. Wis. Dep't of Revenue*, 152 Wis. 2d 746, 763–64, 449 N.W.2d 328 (Ct. App. 1989).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the circuit court, which affirmed the Tax Appeals Commission.

Dated this 21st day of January, 2016

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5122 words.

Dated this 21st day of January, 2016.

BRIAN P. KEENAN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this 21st day of January, 2016.

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