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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No.: 2015AP002019

TETRA TECH EC, INC., and

LOWER FOX RIVER REMEDIATION, LLC,

Petitioners-Appellants,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Respondent.

Appeal from the Order dated September 11, 2015
of the Circuit Court for Brown County
Honorable Marc A. Hammer, Presiding

BRIEF OF PETITIONERS-APPELLANTS TETRA TECH EC, INC. AND LOWER FOX RIVER REMEDIATION, LLC

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December 8, 2015

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INTRODUCTION

In imposing a sales tax on Tetra Tech EC, Inc. ("Tetra Tech") and Lower Fox River Remediation, LLC ("the LLC"), the Department of Revenue ("Department") ignored long-standing law and precedent. If allowed to stand, it would set a precedent which would allow the Department the unbridled ability to impose sales taxes on any service to tangible personal property despite the clear statutory limits on such tax and the manifest intent of the legislature.

In Wisconsin, sales/use tax is authorized by Wis. Stat. §§ 77.51 through 77.67. The imposition of retail sales tax 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 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 added). No services, other than those specifically "described under par. (a)," are subject to sales tax under this section. 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.

This case is about whether or not the activities performed by Stuyvesant Dredging, Inc.[1] ("SDI") (a subcontractor of Tetra Tech) to remediate portions of the Fox River are subject to taxation under Wis. Stat. § 77.52(2)(a). They are not.

[1] Now known as Stuyvesant Project Realization, Inc.

SDI simply separates the dredged materials it receives from the Fox River into individual components – sand, sediment and water. SDI does not perform any cleaning or treatment.

Initially, the Department claimed that what SDI does is "cleaning," "alteration," or "providing a service" and, therefore, taxable under Wis. Stat. § 77.52(2)(a)10. Then, in contravention of the statutes and the Department's own policy and practice that the basis of the tax be put in writing, the Department later claimed that SDI's activities were also "processing" under Wis. Stat § 77.52(2)(a)11.

The Department relied on a dictionary definition of "processing" in support of its after-the-fact justification for the tax. The Wisconsin Tax Appeals Commission ("Commission") based its decision on this definition and denied Tetra Tech's and the LLC's appeal. The Circuit Court of Brown County affirmed the Commission in its decision.

The Department's definition of "processing" improperly converts a selective and narrow sales tax on services into a general tax on services, and would enable the Department to claim that ***any*** service to tangible personal property is taxable.

The Department's action flies in the face of the legislature's intent and long-standing law, and wrongly renders the services actually listed in Wis. Stat. §§ 77.52(2)(a)10 and (a)11 superfluous and surplusage.

Accordingly, the Court should reverse the Commission's December 30, 2014 Ruling and Order and hold that Tetra Tech and the LLC are not liable for the taxes claimed by the Department.

STATEMENT OF THE ISSUES

1. Did the definition of "processing" advanced by the Department and accepted by the Commission and Circuit Court unlawfully convert a selective and narrow sales tax on services into a general tax on services?

Answered by the Commission and Circuit Court: No.

2. Are SDI's activities "processing" within the meaning of Wis. Stat. § 77.52(2)(a)11 and therefore taxable?

Answered by the Commission and Circuit Court: Yes.

3. Did the definition of "processing" advanced by the Department and accepted by the Commission and Circuit Court improperly render the legislature's selective list of taxable services located in Wis. Stat. §§ 77.52(2)(a)10 and (a)11 surplusage?

Answered by the Commission and Circuit Court: No.

4. Did the Department improperly claim an after-the-fact justification for taxation in contravention of the statutes, Department policy and actual Department practice?

Answered by the Commission and Circuit Court: No.

STATEMENTS CONCERNING ORAL ARGUMENT AND PUBLICATION

Tetra Tech and the LLC respectfully request oral argument and also recommend publication of the Court's decision. The case presents important issues regarding sales-tax-on-services and will impact all who sell, license, perform or furnish services to tangible personal property in this state.

STATEMENT OF THE CASE

This appeal arises out of the Brown County Circuit Court affirmance of the December 30, 2014 Ruling and Order of the Commission holding that Tetra Tech and the LLC are liable for sales/use tax. The circuit court denied Tetra Tech's and the LLC's Petition for Judicial Review, refusing to set aside the Commission's decision that the activities were taxable "processing" under Wis. Stat. § 77.52(2)(a)11.

The Commission and circuit court both found that the Department's dictionary definition of "processing" is not improper and that SDI's activities are covered by that term in Wis. Stat. § 77.52(2)(a)11. Further, the Commission and circuit court both found that the Department is not required to give written notice of the basis for its determination of tax liability during, or as a result of, its formal decision process.

On August 20, 2015 the circuit court issued an order captioned "Decision and Order" denying Tetra Tech's and the LLC's Petition for Review. On September 11, 2015, the circuit court issued an order captioned "Final Order" holding the same.

STATEMENT OF FACTS

A. The Appellants.

The LLC was formed for the purpose of remediating specific portions of the Fox River impaired by the release of polychlorinated biphenyls ("PCBs"). (R. 3.1:19[2]; R. 12:1, App. 2, 105) The remediation of the Fox River consists of a number of distinct activities, including: (i) dredging and capping; (ii) desanding and dewatering; (iii) water treatment; and (iv) transportation and disposal. (R. 3.1:19)

The LLC entered into a contract with Tetra Tech to remediate the Fox River. (R. 3.1:19, Driessen Aff., ¶ 8; R. 12:1, App. 2) Tetra Tech engaged two subcontractors, J.F. Brennan Company, Inc. ("Brennan") and SDI, to perform some of those remediation activities. (R. 3.1:22, Morissey Aff., ¶¶ 9, 15, Ex. 29; R. 12:2; R. 3.1:33:6; App. 106)

B. Brennan's Activities.

Brennan was engaged to perform all in-water work (dredging and capping). (R. 3.1:19) It dredges sediment from the river bottom (in a slurry form) and sends it to the plant in Green Bay, Wisconsin, where SDI is located. Brennan also performs cap/cover work whereby certain portions of the sediment in the Fox River are covered rather than removed by dredging. (R. 3.1:19)

C. SDI's Activities.

SDI separates the dredged materials which Brennan sends to the facility. (R. 3.1:33) When SDI receives the materials from Brennan it separates the sand and then extracts water from the remaining finer-grained sediments (which contain the PCBs) which leaves a "filter cake" for landfill

[2] This number refers to the document number listed in the index at R. 3.1. These documents can be found at R. 18.

disposal. (R. 3.1:19; R. 12:2; App. 3, 106) SDI simply separates the slurry of materials into its components – sand, sediment and water – and delivers those components to Tetra Tech for re-use of the sand (where appropriate), disposal of the sediment, and treatment of the water which Tetra Tech then returns to the river. (*Id.*)

The record establishes that:

- SDI separates the materials delivered by Brennan into components so that they can be delivered to and disposed of by Tetra Tech. (R. 3.1:19; App. 1-5)

- The material received by SDI from Brennan passes through SDI's operations one time only. (R. 3.1:19; App. 3)

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

- SDI does not return any of the materials to the river or to Brennan. (R. 3.1:19; App. 4)

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

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

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

- SDI separates sand from the bulk sediment and then dewaters the remaining sediment so that a filter cake of fines (including organic material) is produced. (R. 3.1:19; App. 12)

- The chemistry of the sediment or of the PCBs is not modified or altered in any way by SDI's operations. Rather, SDI's operations simply separate sands from the silts and clays to which PCBs predominantly adhere. (R. 3.1:19; App. 17)

- SDI's operations do not attempt to remove PCBs from the sand nor is the sand cleaned. Rather, sand is simply separated from the remaining dredged sediment.[3] (R. 3.1:19; App. 18)

- PCBs adhered to the sand particles before SDI's operations remain adhered to the sand at the end of SDI's operations. (*Id.*)

D. Notices Of Field Tax Audit Actions Are Issued For The LLC And Tetra Tech.

The LLC was the subject of a Sales Tax Field Audit which 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. (R. 3.1:33:2-3)

Importantly, the Department's Notices of Field Audit Action to the LLC and Tetra Tech, (R. 3.1:27; App. 63-94) signed by Rick DeBano, Chief, Field Audit Section, on the page entitled "Explanations of Adjustments on Exhibit C" (App. 71), state that Wis. Stat. § 77.52(2)(a)10 is the only basis for the tax imposed by the Department. (R. 3.1:27) The Department asserted that SDI's activities were either

[3] Sand eligible for re-use remains contaminated by PCBs at levels acceptable for certain limited purposes. In this case, reusable sand is donated by Tetra Tech to the Wisconsin Department of Transportation for use in the Highway 41 project. (R. 3.1:19; App. 3)

"cleaning," "alteration" or "service to tangible personal property," under Wis. Stat. § 77.52(2)(a)10.[4] (*Id.*) The Department did not inform either the LLC or Tetra Tech that SDI's activities were "processing" under Wis. Stat. § 77.52(2)(a)11 in the audit findings or in writing during, or as a result of, its audit process. (*Id.*) The Department did not put in writing that Wis. Stat. § 77.52(2)(a)11 was a ground for taxation until after Tetra Tech and the LLC filed their appeal with the Commission. (R. 3.1:33:13)

E. The LLC And Tetra Tech File Petitions For Redetermination.

The LLC timely filed a Petition for Redetermination of the Sales Tax Field Audit with the Department's Resolution Unit. (R. 3.1:22, Biermeier Aff., ¶¶ 2-3) The Resolution Unit issued a "Notice of Action" on August 16, 2012, which granted in part and denied in part the Petition for Redetermination. (*Id.*, App. 104) The LLC disagreed with and appealed the denial to the Commission. 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, Biermeier Aff., ¶¶ 2-3)

Similarly, Tetra Tech timely filed a Petition for Redetermination of the Sales Tax Field Audit with the Department's Resolution Unit. (R. 3.1:22, Biermeier Aff., ¶¶ 2-3) 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. 95) Tetra Tech also disagreed with and appealed the denial to the Commission. (*Id.*)

The LLC and Tetra Tech Petitions were consolidated for decision by the Commission.

[4] The Commission did not decide that SDI's activities are "cleaning," "alteration," or "service to tangible personal property," because the Commission found SDI's activities to be "processing" under Wis. Stat. § 77.52(2)(a)11. Tetra Tech and the LLC disputed that SDI's activities are "cleaning," "alteration," or "perform a service" before the Department, the Commission and Circuit Court and continue to do so.

F. The Commission Finds That SDI Performs The Function Of Separation But That SDI's Activities Are Nonetheless Subject To Wisconsin's Sales/Use Tax Because SDI's Activities Are "Processing."

On December 30, 2014, the Commission issued its Ruling and Order in Docket Nos. 12-S-192 and 12-S-193, the consolidated Petitions for Review of Tetra Tech and the LLC. (R. 3.1:33) In its Ruling and Order, the Commission concluded that SDI performs the function of separation. (R. 3.1:33; App. 59-60) The Commission found that SDI only performs separation activities. (R. 3.1:33; App. 59-65) Nonetheless, it ruled that the activities are subject to Wisconsin sales/use tax because they are "processing" under Wis. Stat. § 77.52(2)(a)11. (*Id.*)

STANDARD OF REVIEW

"When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court." *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶ 15, 293 Wis. 2d 1, 717 N.W.2d 166. The question of the scope of an agency's authority requires the interpretation of relevant statutes, which presents a question of law, which is a *de novo* review. *Andersen v. DNR*, 2011 WI 19, ¶ 25, 332 Wis. 2d 41, 796 N.W.2d 1. When interpreting the scope of an agency's authority conferred by statute, courts give no deference to the agency's interpretation of its own authority. *Id.*, ¶ 25. "Because agencies are creatures of statute, they have 'only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate[].'" *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73.

When the material facts are not disputed, as here, and only matters of law are in issue, the Court may review the record *ab initio* and substitute its own judgment for that of the Commission. *H. Samuels Co. v. DOR*, 70 Wis. 2d 1076, 1083-84, 236 N.W.2d 250 (1975). A question of whether facts found by an administrative commission satisfy a particular legal standard is one of law properly reviewable by that court. *DOR v. Smith Harvestore Prods., Inc.*, 72 Wis. 2d

60, 65, 240 N.W.2d 357 (1976). The Wisconsin Supreme has held that deference to an administrative agency is not required when the court is as competent as the agency to decide the question involved. *Id.* at 65-66; *Pabst v. DOR*, 19 Wis. 2d 313, 324, 120 N.W.2d 77 (1963).

SUMMARY OF ARGUMENT

The Court is respectfully requested to reverse the Commission's December 30, 2014 Ruling and Order and hold that Tetra Tech, Inc. and Lower Fox River Remediation, LLC are not liable for sales taxes on services for four equally compelling reasons.

First, as set forth in Section I below, the definition of "processing" selected by the Department and accepted by the Commission and Circuit Court, runs afoul of the manifest legislative intent of Wis. Stat. § 77.52(2)(a). It unlawfully turns a tax, which the legislature clearly intended to be narrow and selective, into a general tax, effectively allowing the Department to claim, contrary to the statute and clear legislative intent, that ***any*** service to tangible personal property is now taxable.

Second, as set forth in Section II below, there is, at best, substantial doubt that SDI's separation activities, for which Tetra Tech and the LLC are being taxed, are or ever were intended to be covered by Wis. Stat. § 77.52(2)(a)11 (or, for that matter, any listed activity under Wis. Stat. § 77.52(2)(a)10). Any doubt must be resolved in favor of the taxpayer and against the one who seeks to impose the tax. Accordingly, SDI's activities cannot be taxed.

Third, as set forth in Section III below, the Department's definition of "processing" is so broad that other listed categories in Wis. Stat. § 77.52(2)(a)10, or (a)11 for that matter, are simply not needed and thereby improperly rendered superfluous or surplusage.

Fourth, as set forth in Section IV below, the Department should not have been able to use its illegal definition of "processing" in any case. Wis. Stat. § 77.59(3) requires the Department to provide the taxpayer, in writing, with the specific reasons for imposition of the tax. It is simply not enough for the Department to provide just an amount or a

statement that a determination was made. Here, the Department never listed Wis. Stat. § 77.52(2)(a)11 in writing as a basis for taxation until the summary judgment briefing stage on Tetra Tech's and the LLC's appeal at the Commission. That belated rationale failed to satisfy the statute's notice requirement.

ARGUMENT

I. THE DEFINITION OF "PROCESSING" UNLAWFULLY TURNED A SELECTIVE AND NARROW TAX INTO A GENERAL TAX IN CONTRAVENTION OF LEGISLATIVE INTENT.

A. Wis. Stat. § 77.52(2)(a) Is A Narrow And Selective Tax.

There is no dispute that Wis. Stat. § 77.52(2)(a) is a limited and selective tax. Wis. Stat. § 77.52(2)(a) provides, in relevant part:

> Wis. Stat. § 77.52, Imposition of retail sales tax.
>
> ***
>
> (2) For the privilege of selling, licensing, performing or furnishing the *services described under par. (a)* at retail in this state… a tax is imposed upon all persons selling, licensing, performing or furnishing the services at the rate of 5% of the sales price from the sale, license, performance or furnishing of the services.
>
> (a) The tax imposed herein applies to the following types of services:
>
> ***
>
> 10. … the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property …
>
> 11. The producing, fabricating, processing, printing, or imprinting of tangible personal property … for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting. [Emphasis added.]

No other services other than those specifically "described under par. (a)" are subject to sales tax. 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 the service is specifically listed under Wis. Stat. § 77.52(2)(a), it is not subject to sales use/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).

B. The Definition Of "Processing" Selected By The Department And Adopted By The Commission And Circuit Court Is Inconsistent With The Manifest Intent Of The Legislature Because It Effectively Allows The Department To Claim That Any Service To Tangible Personal Property Is Taxable.

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. If the meaning of the statute is apparent in the plain language, courts must apply that language. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Courts give statutory terms their "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* "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."[5] *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 61, 350 Wis. 2d 554, 835 N.W.2d 160.

Here, the term "processing" appears in Wis. Stat. § 77.52(2)(a)11, but the term is not defined by the legislature. The Department never adopted any definition of "processing" prior to this case. In this case, the Department resorted to a dictionary to define "processing" as:

> [T]o put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process.[6]

Utilizing a dictionary only helps establish the ordinary and common meaning of a word, not the legal definition of the term, and is only permitted so long as it does not run afoul of the manifest intent of the legislature:

> Resort to a recognized dictionary is permitted to establish the ordinary and common meaning of a word. While the law commonly looks to a standard definition for guidance in defining a word in easily understood terms, such a source cannot always be relied upon…to supply or explain legal nuances. **Our 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. [Emphasis added; citation omitted.]

Therefore, 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 cautions 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

[5] And, assuredly, not with an agency. An agency's authority is limited and subscribed as authorized by the legislature. *Lake Beulah Mgmt. Dist*, 2011 WI 54 at ¶ 23.

[6] The Commission and Circuit Court adopted this definition verbatim in their decisions. (R. 3.1:33; R. 12:6-7)

> 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.0

As explained in the preceding section, there is no dispute that Wis. Stat. § 77.52(2)(a) is a limited and selective tax. That is the "manifest intent of the legislature." Only if it is clear that an activity is "specifically described" can a tax be imposed.

Here, applying the Department's definition of "processing" would allow the Department to violate these principles and claim that ***any*** service to tangible personal property is taxable. If all services to tangible personal property are taxable as "processing," the limited and selective tax adopted by the legislature would be converted to a broad general tax. That is contrary to the manifest intent of the legislature and, therefore, an unlawful interpretation of the statute.

II. THERE IS, AT BEST, CONSIDERABLE DOUBT AS TO WHETHER SDI'S ACTIVITIES ARE TAXABLE. THEREFORE, THE ACTIVITY CANNOT BE TAXED.

A. In Order For A Service To Be Taxable It Must Be Specifically Listed And There Can Be No Doubt The Activity Is Covered.

As demonstrated in Section I(A) above, Wis. Stat. § 77.52(2)(a) is a limited and selective tax. There is a presumption *against* inclusion. *Any* ambiguities must be resolved in favor of the taxpayer. As repeatedly explained in tax guides, case law, and in Commission decisions themselves, 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.

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).

Long-standing case law and decisions of the Commission have clearly established and re-confirmed these principles.

In *Kearney & Trecker Corp. v. Department of Revenue*, 91 Wis. 2d 746, 753, 284 N.W.2d 61 (1979), the Wisconsin Supreme Court stated:

> 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.[7]

The Commission itself has also made these principles crystal clear. For instance, in *Manpower, supra*, the Commission stated:

> 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.**
>
> * * *

[7] *See also, Milwaukee Refining Corp.*, 80 Wis. 2d at 48-49; *Nat'l Amusement Co. v. Dep't of Revenue,* 41 Wis. 2d 261, 266-67, 163 N.W.2d 625 (1969); *Recht-Goldin-Siegal Constr., Inc. v. Dep't of Taxation*, 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 Wisconsin Supreme Court has consistently applied two fundamental rules of statutory construction to the imposition language of taxing statutes: (1) 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; and (2) **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 Refining, supra*.]

* * *

Here, the situation does not clearly fit within Wis. Stat. § 77.52's frame of reference and we are not convinced that a taxation statute of imposition can or should be applied in such fashion. Instead, we are reminded of what Judge Learned Hand once wrote about judges:

> When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right.

When we look to the substance and realities of the transactions at issue, we conclude that "temporary help services" are not the same as the services that the legislature has enumerated in Wis. Stat. § 77.52, and we do not find that "temporary help services" fit into the enumerated "services."

In sum, applying the "Look Through" approach to the sales tax with respect to temporary help services has all of the issues described above. **For us, the problem with the Department's approach is that it goes against the rule of construction that taxes may only be imposed by clear and express language, with all doubts and ambiguities resolved in favor of the taxpayer. Wis. Stat. § 77.52 does not tax "services," it taxes specific services that the Legislature listed.** Simply put, "temporary help services" is not listed in our statutes as a taxable service, and we find that such services are distinguishable from the services enumerated in Wis. Stat. § 77.52(2). [Emphasis added; footnotes omitted.]

Similarly, in *Brennan Marine, supra*, the Commission stated:

> In 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**.
>
> * * *
>
> Last, but not least, statutes that impose taxes have to be clear and this is not. For us, the problem with the Respondent's [Department of Revenue] argument is that the arguments go against the rule of construction that taxes **may be imposed only by clear and express language, with all doubts and ambiguities resolved in favor of the taxpayer. Wis. Stat. § 77.52(2) as a general matter does not tax services, it taxes specific services.** Simply put, "barge fleeting services" is not listed in our Statutes as a taxable service, and we find that this service is readily distinguishable from the two services enumerated in Wis. Stat. § 77.52(2)(a)9 that apply here. While we can accept the Respondent's assertion that the words "storage" and "docking" might be interpreted to encompass certain aspects of barge fleeting, **we do not see the "clear and express language" required for tax imposition purposes, and under well-settled law, we must therefore resolve the doubt in favor of the taxpayer.** (Emphasis supplied.)

In *Manpower, supra*, the Commission stated:

> 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 added.]

B. SDI Engages In Separation, An Activity Which Is Not Listed In The Sales-Tax-On-Services Statute.

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

> All of the steps used in SDI's desanding process are physical separation technologies. (R. 3.1:33; App. 59)
>
> SDI is conducting a physical separation process. (*Id.*)

> SDI does not add any chemicals during the desanding operations. (*Id.*)
>
> The chemistry of the sediment or of the PCBs is not modified or altered in any way by SDI's operations. Rather, SDI's operations simply physically separate sands from the silts and clays (and associated organic matter) to which the PCBs predominantly adhere. (R. 3.1:33; App. 60)
>
> SDI's desanding operations do not attempt to remove PCBs from the sand. Rather, sand is simply separated from the remaining dredged sediment. (*Id.*)
>
> PCBs adhering to sand particles before desanding operations remain adhered to the sand at the end of desanding operations. (R. 3.1:33; App. 60)

Accordingly, the Commission has found, as proven by Tetra Tech and the LLC, and unrebutted by the Department, that SDI does nothing more than engage in separation.

However, "separation" is ***not*** listed as a category taxed in the sales-tax-on-services statutes, either in § 77.52(2)(a)10 or § 77.52(2)(a)11, or anywhere in Wis. Stat. § 77.52. Thus, there is no "clear and express" language required in either of these statutes imposing taxation on separation. Separation is 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 Tetra Tech or the LLC. Given these undisputed facts, there exists, at a minimum, ambiguity and doubt that SDI's activity is taxable. Therefore, SDI's activities cannot be taxed.

C. The Department's Definition Of "Processing" Is Also Inconsistent With Its Own Rule Interpreting Wis. Stat. § 77.52(2)(a).

The Department adopted an administrative rule, Wis. Admin. Code § Tax 11.38, which describes the types of activities that shall be treated as "processing" for purposes of Wis. Stat. § 77.52(2)(a)11:

> **(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 "separation" found.[8]

Importantly, separation is not listed in the rule and none of the activities listed in Wis. Admin. Code § Tax 11.38 can be reasonably construed to be simply "separation" or to describe SDI's separation activities.

The Commission's *Hammersley Stone Co. v. DOR*, Wis. Tax Rptr. (CCH) ¶ 400-383 (WTAC 1998) case, cited by the Department and the Commission, is factually distinguishable and actually supports Tetra Tech's and the LLC's position. First, the customer that provided the stone ended up with the same materials that it provided – in smaller pieces. It sent stone in, and got stone out, not stone separated into its various geological components. The Department admitted "the same stone went to the third-party contractor was the same stone that came back from the third-party contractor, just in smaller pieces." This is *not* what happens in SDI's case. What comes into SDI is dredged material; what comes out is the individual separated component parts of that material forwarded for appropriate disposal and handling, not smaller units of slurry.

Additionally, the decision in *Hammersley Stone* itself re-emphasizes the principle that the sales/use taxes on services is selective and restricted:

> This subsection [Wis. Stat. § 77.52(2)] is not broad and inclusive; it provides that the services to be taxed must be ***specifically enumerated.*** … [T]he initial focus in a sales tax case involving services is on finding ***clear and express*** language which imposes a tax. [Emphasis added.]

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[8] The Circuit Court stated that it "fails to see separation and processing as mutually exclusive, such that separation is *per se* not processing." (R. 12:5; App. 109) However, a determination of "mutual exclusivity" is not the test to be applied. The test is whether the activity sought to be taxed is clearly and specifically listed in the sales-tax-on-services statute. If it is not, it is not taxable. There is no dispute in this case that SDI only engages in separation. This activity is nowhere listed by the legislature in the statute. With its "mutually exclusive" and "some overlap" analysis (R. 12:7; App. 111), the Circuit Court improperly reads the statute broadly as if it were a general sales tax where everything is covered unless there is a listed exemption. This is contrary to the analysis required when the selective sales-tax-on-services is involved, as here. In that case, there is a presumption against taxation and the activity is to be taxed *only* when the activity is clearly and specifically listed.

D. Tetra Tech And The LLC Do Not Have The Burden To Provide A Definition Of "Processing."

The Department and the Circuit Court criticized Tetra Tech and the LLC for not providing their own definition of "processing."[9] (R. 8:11; R. 12:5; App. 109) However, the burden to provide a lawful definition does not lie with Tetra Tech or the LLC. As explained in Section I(B) above, the words and phrases found in Wis. Stat. § 77.52(2)(a)11 are to be given their ordinary and accepted meaning *so long as it is not contrary to the manifest intent of the legislature*. To the contrary, it is the *Department's* burden, not the taxpayers, to utilize a definition of "processing" that is consistent with its own regulations, the statute and the manifest intent of the legislature. The Department has failed to do so relying instead only on a generic dictionary definition. The issue is not whether there is another definition of "processing" available; the only issue is whether the Department's definition is lawful. It is not. No further inquiry is necessary.

III. THE DEPARTMENT'S DEFINITION OF PROCESSING IMPROPERLY RENDERS THE SERVICES LISTED IN WIS. STAT. § 77.52(2)(A) SURPLUSAGE.

The Department's definition of "processing" 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 improperly rendered superfluous or surplusage. For example, if "processing" is "put[ting] through the steps of a prescribed procedure" or "to prepare, treat, or convert by subjecting to a special process," then, for example, "painting," "coating," "alteration," "fitting," "cleaning," "maintenance," and "repair," all listed in § 77.52(2)(a)10, need not be listed – each "converts" something using a "prescribed procedure." The same is true under

[9] At the same time, however, neither the Department, Commission, nor the Circuit Court have provided any explanation for accepting the definition of "processing" arbitrarily proffered by Department over any other available definitions of the term.

§ 77.52(2)(a)11 for "producing," "fabricating," "printing," or "imprinting."[10]

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 (emphasis added.) "Statutory language is read where possible to give reasonable effect *to every word*, in order to avoid surplusage."[11] *Kalal*, 2004 WI 58 at ¶ 46 (emphasis added.) The Department's definition of "processing" cannot be sustained. If it were to be upheld, it would negate and render superfluous and surplusage the other categories the legislature enacted in Wis. Stat. §§ 77.52(2)(a)10 and (a)11.

IV. THE COMMISSION ALLOWED THE DEPARTMENT TO CLAIM AN AFTER-THE-FACT JUSTIFICATION FOR TAXATION IN CONTRAVENTION OF THE STATUTES, DEPARTMENT POLICY, AND THE DEPARTMENT'S OWN PRACTICE.

The statutes are crystal clear that the Department is required to give written notice of the basis for its determination of tax liability. That means, at a minimum, that the Department must provide the taxpayer, in writing, with the authority which supports the "determination of tax

[10] The Circuit Court, in "disagreeing" that the Department's definition of "processing" is so broad that it improperly renders all of the listed services in Wis. Stat. § 77.52(2)(a)10 and (a)11 surplusage, cited "producing" and "repair" as not converting something "in every instance" using a prescribed procedure "as the Court uses the term." (R. 12:7; App. 111) The Circuit Court, however, did not provide any examples of any such instance and did not indicate what definition of "producing" or "repair" the Circuit Court relied on as a basis for its conclusion. To the contrary, one would be hard-pressed to find *any* example of "producing" or "repair" that doesn't involve using "the steps of a prescribed procedure" *or* "to prepare, treat, or convert by subjecting to a special process." Neither function is carried out randomly; both "convert" something from one state to another using a "prescribed process."

[11] The Circuit Court's assertion that there can be "some overlap" in the statutory listings contradicts the principle that every word in a statute must be given its own and unique meaning. (App. 111) "Overlap" means one word covers the meaning of another, thus rendering the other word unnecessary, *i.e.*, surplusage.

liability" which the Department has made. Wis. Stat. § 77.59(3) states:

> (3) No **determination** of the tax liability of a person may be made unless written notice of **the determination** is given to the taxpayer … The 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**. [Emphasis added.]

Accordingly, the statute is clear: the "determination of the tax liability" means the Department's claim as the ***basis*** for taxation must be in writing, clearly stating the reason for taxation; *i.e.*, "how, when and why" the tax is claimed and upon which the audit is based. [12] [13]

The Department failed to do that here.

The Department does not, and cannot, dispute that its claim of "processing" under Wis. Stat. § 77.52(2)(a)11 was never put in writing by the Department as required during its decision process. This deprived Tetra Tech and the LLC any meaningful opportunity to participate in the audit and determination process before the Department.

The Department's formal Notice of Field Audit Action to Tetra Tech, signed by Rick DeBano, Chief, Field Audit Section, on the page entitled "Explanations of Adjustments on Exhibit C" (App. 71), specifically states that Wis. Stat. § 77.52(2)(a)10 as the basis for the tax imposed by the Department. Nowhere is Wis. Stat. § 77.52(2)(a)11 mentioned.

An earlier Department Notice of Field Audit Action addressed to the LLC, also specifies the sole citation for the taxation adjustment as Wis. Stat. § 77.52(2)(a)10. (R. 3.1:19, App. 88) In addition, it indicates that if the taxpayer appeals, the taxpayer must:

> … describe each item **in the report** that you disagree with. [Emphasis added.] (*Id.*, App. 84)

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[12] Wis. Stat. § 77.59(3) uses the word "determination" five times.

[13] Otherwise, the taxpayer would not know the reason for the tax and would be unable to decide whether to appeal or not.

The August 16, 2012 Department Notice of Action on Petition for Redetermination sent to Tetra Tech again solely cites Wis. Stat. § 77.52(2)(a)10:

> The taxpayer's receipts from the dewatering and desanding of dredged, contaminated sediment that is not returned to the river is a service to tangible personal property and taxable **per 77.52(2)(a)10**, Wis. Stat. [Emphasis added.] (R. 3.1:27, App. 95)[14]

Therefore, Tetra Tech and the LLC were never given the written notice mandated by Wis. Stat. § 77.59(3).

The Department's practice and policy are consistent with an interpretation of the statute requiring the basis and legal justification for the determination of tax due be provided in writing prior to any appeal. Revenue Administrator Diane Hardt testified:

> Q And if you wanted to -- you were telling Mr. Kuehn this is the official Department position, correct?
>
> A This is the ruling he was requesting.
>
> Q Right. **And if you were using 77.52(2)(a)11 you would have put it in this memo -- or in this letter, correct?**
>
> A **Correct.**

(Emphasis added.) (R. 3.1:27, App. 102)

As to the Notice of Field Audit Action, Ms. Hardt testified:

> RE-EXAMINATION BY MR. BACH:
>
> Q Let me ask, you would fully expect that an official document **telling a taxpayer that he could appeal or if they don't they'll be taxed, that all of the bases for that taxation** would be in that document, wouldn't you?

[14] Similarly, the LLC received a Notice of Action on August 16, 2012 solely listing Wis. Stat. § 77.52(2)(a)10 as the basis for taxation. (R. 3.1:1; App. 104)

A **Yes.**

(Emphasis added.) (R. 3.1:27; App. 103)

Department Resolution Officer Michelle Biermeier, confirmed that Wis. Stat. § 77.52(2)(a)11 was never put in writing to the taxpayer:

Q Let me ask you about (a)(11). You specifically note that (a)(11) has never been put in writing to the taxpayer, correct?

A **That's correct.**

Q **And it's the Department's practice when you inform taxpayers of what they can appeal from to put in those formal documents the basis for the taxation, correct**?

A **That's correct.**

Q And never has there been a document in this case, a formal document, that tells the taxpayer that (a)(11) is a basis for taxation, correct?

A **Nothing in writing, no.**

(Emphasis added.) (R. 3.1:27; App. 100)

Moreover, the failure to comply with the statutory mandate is made more egregious by the fact that the tax in this case – sales/use tax on services – is a special and narrow tax and one which only can be imposed if specifically listed and by "clear and express language." At a minimum, the statute requires that the taxpayer be advised, in writing, of that "clear and express" language in the statute which the Department claims is the basis for imposing the tax.

The allowance of an after-the-fact justification raises significant due process and fairness issues. After all, the Department may well be the most powerful agency in government. It demands strict compliance with the law and its procedures. In turn, the Department must be held to comply strictly with statutory mandates governing its dealings with citizens.

As Supreme Court Justice Jackson said:

> It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387-88 (1947).

The Department's[15] [16] practice in this case has been arbitrary and unfair. The officials involved in the actual tax determination claimed, and put in writing to the taxpayers, one basis for taxation and then allowed the Department to claim a different basis, which it never put into a writing to the taxpayers. That is akin to Lucy pulling the football away from Charlie Brown after she has placed it ready to be kicked. The Department's practice and misdirection in this case should not be condoned.

CONCLUSION

For the above reasons, Tetra Tech, Inc. and Lower Fox River Remediation, LLC respectfully request the Court to reverse and set aside the Wisconsin Tax Appeals Commission's December 30, 2014 Ruling and Order as well as the Circuit Court's September, 11, 2015 "Final Order" and hold that Petitioners-Appellants are not liable for sales taxes under Wisconsin sales/use tax law.

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[15] In its Ruling and Order, the Commission and court indicated that Wis. Stat. § 77.59(3) does not require that the Department provide every statutory basis or legal argument for making the adjustment, citing *Midwest Track Assocs. v. DOR*, Wis. Tax Reporter (CCH) ¶ 400-825 (WTAC 2005). *Midwest Track* is distinguishable. This is because in *Midwest Track*, the Department did not provide any legal theory underlying its tax assessment in its Notice of Action. Here, the Department did provide a legal ground in its notices upon which its determination was based but later relied on another legal ground after the determination was made.

[16] To the extent that the Commission's *Midwest Track* ruling condones the Department's ability to put a taxpayer through its internal administrative process and then change grounds for claiming taxation (which it never put in writing as required by the statutes) when the taxpayer appeals, its holding allowing the Department to do so should be disregarded.

Dated this 8th day of December, 2015.

Respectfully submitted,

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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 brief produced using the following font:

> Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,713 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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