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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

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

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INTRODUCTION

The Department's use of a dictionary definition of "processing" is improper for several reasons. First, the Department illegally converts a selective tax into a general tax, contrary to legislative intent. Second, the selected definition renders the services listed in Wis. Stat. § 77.52(2)(a)10 and (2)(a)11 superfluous. Third, the definition is at odds with the Department's own rule Wis. Admin. Code § Tax 11.38 which interprets Wis. Stat. § 77.52(2)(a)10 and 11.

To be taxable under the indisputably narrow scope of Wis. Stat. § 77.52(2), the activity must be clear, express and, importantly, specifically listed. Unlike Wis. Stat. § 77.52(1) which imposes a general tax on the sale or other listed dispositions of tangible personal property, under Wis. Stat. § 77.52(2), there is a presumption against taxation of services unless they are specifically listed. Any ambiguity is to be resolved in the taxpayer's favor. Here, there is considerable doubt as to whether the activities are taxable. The fact the Department resorted to a dictionary to try to find a rationale to impose a tax further illustrates that there is no "clear and express" language by which to impose a tax in this case.

Finally, the Department's response inappropriately rewrites Wis. Stat. § 77.59(3), the statute requiring the Department to provide a notice of the determination of a purported tax liability in writing, to simply requiring that the Department need only give written notice of an "amount due," despite the statute's clear language and the conceded policy and practice of the Department.

ARGUMENT

I. THE BASIS UPON WHICH THE PETITIONERS-APPELLANTS WERE TAXED WAS ILLEGAL AND IMPROPER.

A. The Decision To Impose The Tax Was Based On The Department's Improper Reliance On A Dictionary Definition Of The Term "Processing."

1. <u>The arbitrarily-selected definition turns a selective tax into a general tax.</u>

Utilizing a dictionary definition may be permitted to establish the ordinary and common meaning of a word, but it "may not unfairly or inaccurately state[] the law or misconvey[] the legislative intent." *State v. Harvey*, 2006 WI App 26, ¶¶ 16-17, 289 Wis. 2d 222, 710 N.W. 2d 482. In this case, the Department utilized a dictionary definition that "unfairly" and "inaccurately states the law" and "misconveys the legislative intent."

The chosen dictionary has definitions of "processing" other than the Department's arbitrarily-selected definition. For instance, it defines "processing" as "[t]o gain an understanding or acceptance of, come to terms with," "to move along in a procession," and to "straighten by a chemical process[.]" Its example of "[t]o put through the steps of a prescribed procedure" is "processing newly arrived immigrants" or "process an order." Neither the Department nor the Commission provided any analysis or explanation as to why the selected definition embodies the term "processing" as that term is used in the statute. It would seem the Department simply selected a definition that appeared to provide a basis upon which to impose a tax.

In addition, this selected dictionary definition of "processing" is so broad that it turns what the legislature intended to be a selective and narrow tax into a general tax. The statute provides that no other services other than those specifically "described under par. (a)" are subject to tax. *See* Wis. Stat. § 77.52(2)(a). Unless the service is specifically listed under Wis. Stat. § 77.52(2)(a), it is not subject to sales 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).

Here, one would be hard-pressed, and likely unable, to find ***any*** activity in which something is done to tangible personal property that would ***not*** be a "process" or "processing." Its breadth is that boundless. Importantly, the Department has not identified any service to tangible personal property which would not be subject to taxation.

2. The definition renders Wis. Stat. §§ 75.52(2)(a)10 and (2)(a)11 surplusage.

The Department's definition of "processing" cannot be sustained as it negates and renders surplusage the other categories listed by the Legislature. For example, if processing is "to put through the steps of a prescribed procedure" or "to prepare, treat, or otherwise convert by subjecting to a special process," then the Legislature need not have separately identified "painting," "coating," "alteration," "fitting," "cleaning," "maintenance," and "repair," all of which the Legislature listed in § 77.52(2)(a)10 or "laundering" and "photographic services" listed in Wis. Stat. § 77.52(2)(a)6 and 7. The same is true under § 77.52(2)(a)11 for "producing," "fabricating," "printing," or "imprinting." Each "converts, treats or prepares" something using a "prescribed procedure."

The Department's argument that there can be overlap within the subsections of Wis. Stat. § 77.52(2)(a)10 and in (a)11, is misplaced. The Department's proffered definition effectively eliminates those categorical subsections completely. Petitioners-Appellants are not arguing that there can be absolutely no overlap between "alteration" and "maintenance" or between any of the other terms in Wis. Stat. § 77.52(2)(a)10, and in (a)11. The Department cannot, however, completely – and arbitrarily – replace those statute sections with a dictionary definition which renders them superfluous.

The Department asserts the services listed in Wis. Stat. § 77.52(2)(a)11 are narrower than the services listed in Wis.

Stat. § 77.52(2)(a)10 because the services listed in Wis. Stat. § 77.52(2)(a)11 are only taxed when the materials are furnished to a third party, whereas the services listed in Wis. Stat. § 77.52(2)(a)10 will be "taxed in all instances." The Department's logic is flawed because, although not specifically stated in Wis. Stat. § 77.52(2)(a)10, those services can only be taxed when they are provided to a third party who has provided the materials with respect to which a service is performed. One cannot be taxed, of course, for "repairing" one's own vehicle or "towing" one's boat to the marina. A tax is only imposed under Wis. Stat. § 77.52(2)(a)10 if a third party provides the vehicle or boat and is charged for "repairing" that vehicle or "towing" that boat. Therefore, there is no difference between 77.52(2)(a)10 and 77.52(2)(a)11, and the definition of "processing" used in this case does in fact eliminate the need for Wis. Stat. § 77.52(2)(a)10 completely.

3. The Department's definition of processing is inconsistent with its own rule.

Wis. Admin. Code § Tax 11.38 interprets the statute and describes activities that are to be considered examples of "processing" under Wis. Stat. § 77.52(2)(a)11. The activity at issue here – separating materials dredged from the Fox River into their component parts – does not come close to approximating any of the more than 20 examples provided by the Department in 11.38.

The Note at the end of 11.38 states clearly that "Section Tax 11.38 interprets ss . . . 77.52(a) 10 and 11 . . . ." The Department does not even mention 11.38 or its own Note or rely on any analysis of 11.38 whatsoever to interpret "processing." Instead, the Department relies exclusively on a dictionary definition.

B. Out-Of-Context Descriptions Of SDI's Activity Do Not Make It Subject To Taxation.

The issue here, of course, is not what "processing" might mean to the general public, in common parlance, or

even how it is generally described by SDI or the Department.[1] *The issue is what the Legislature intended processing to mean under the tax statutes*. What someone says in general conversation or in a general description does not make a service taxable. For a service to be taxable, the activity not must be clearly and expressly listed in the statutes. The Commission in *Manpower, Inc. v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-223 (Wisconsin Tax Appeals Commission 2009), made this clear when it ruled that "temporary help services" were not taxable "services" despite the fact that the word "services" was used to describe the activity:

> While we can accept the Respondent's assertion that the word "services" might be interpreted to encompass certain aspects of temporary help services, *we do not see the "clear and express language" required for tax imposition purposes, and under well-settled law*, we must therefore resolve the ambiguity in favor of the taxpayer. [Emphasis supplied.]

The Department's claim that separation is a "subcategory" of processing and that the "tax on 'processing' services is clear and express" is without merit. (Department Brief, p. 15) Separation is not listed as a taxable category in the statute. It is not listed in the Department's own rule. Moreover, if the tax were so "clear and express," why did the Department and the Commission have to resort to a dictionary definition to find a basis for taxation?

The Department further asserts on page 11 of its brief that, "[T]he appellants cannot avoid the tax by the ***trick*** of characterizing services as "separation …" [Emphasis added]. The Department cannot argue, on the one hand, that SDI is engaged in "processing" because SDI used the terms "process" and "processing" in common parlance, but, on the other hand, argue that SDI is engaged in "trickery" when it uses the term "separation." The dispute here is whether the activity is covered by the narrow and selective sales tax on

[1] On page 3 of its Brief, the Department refers to the facility as a "processing plant." The Department knows full-well that the facilities are co-located in a very large building located along the Fox River in Green Bay. The Commission itself found that SDI's activities are "conducted in the sediment processing building located on the former Shell property." (R 3.1:33).

services not on how the activity was described in every day vocabulary. To be clear, Wis. Stat. § 77.52 does not tax all generic "processes;" it taxes specific activities that clearly and expressly are "processing."

II. THERE IS AMBIGUITY AND DOUBT THAT THE SEPARATION ACTIVITY OF PETITIONERS-APPELLANTS IS "PROCESSING" WITHIN THE MEANING OF WIS. STAT. § 77.52(2)(A)11.

Taxes can only be imposed by clear and express language and services can only be taxed if specifically listed. *Any* ambiguity or doubt is resolved in favor of the taxpayer and against the one who seeks to impose the tax. Accordingly, provisions in the sales/use tax statutes must be *construed narrowly,* not broadly. In *Brennan Marine, supra,* the Commission stated:

> "**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's] arguments 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**. [Emphasis added.]

Id. at 38, 668-38, 669.

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

> 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**. [Emphasis added.]

The Department states that the "judicial rule of construction does not come into play when the statutes' meaning is unambiguous." (Department's Brief, p. 18). This is an incomplete recitation of the law. The case cited by Respondent goes on to say:

> This court has consistently applied two fundamental rules of 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.** *Wisconsin Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977) [emphasis added.]

The facts in this case as to what SDI does, and SDI does not do, renders doubtful and ambiguous the claim that Wis. Stat. § 77.52(2)(a)11 "processing" covers separation. There is no "clear and express language" in Wis. Stat. § 75.52(2)(a)11 that specifically lists the character of SDI's activity. If it is so "clear" that SDI's activities constituted "processing" then why did the Department fail to put that claim in writing? Why didn't the Department mention the term in any of the audit documents? Why was the term not contained in the formal Notice of Resolution on Petition for Redetermination issued by the Department's Resolution Officer Michelle Biermeier? Why did the Department first cite and rely on a dictionary definition of "processing" only when it moved for summary judgment to the Commission?

The Department claims that Petitioners-Appellants' contention that the term "processing" is ambiguous fails because they have not offered a competing definition. This improperly shifts the burden from the Department to establish that taxation is based on a statutory section clearly and expressly establishing taxation and without any ambiguity or doubt.

Thus, because the activity at issue here is not specifically listed by "clear and express" terms, and because there is doubt the activity is covered, the Court must find that Petitioners-Appellants are not subject to tax.

III. THE COMMISSION ALLOWED THE DEPARTMENT TO IMPROPERLY CLAIM AN AFTER-THE-FACT JUSTIFICATION FOR TAXATION.

The Department concedes Wis. Stat. § 77.52(2)(a)11 was not put in writing to the taxpayer or its representatives and, in fact, was never mentioned when the Department made its determination in its formal rulings that SDI's activities were taxable. The Department further concedes that it is the Department's practice to inform "taxpayers of the legal basis for the tax liability." (Department's Brief, p. 21)

The Department leaves out the critical words "*determination*" and "*tax liability"* when citing Wis. Stat. § 77.59(3). The words "determination" and "tax liability" cannot just mean simply that an "adjustment" was made. "Determination" and "tax liability" encompass not only the amount owed ("the adjustment"), but, importantly, also the legal justification for that amount. Absent the legal justification for the imposition of the tax, the taxpayers would not be able to file a proper Petition for redetermination as required by Wis. Admin. Code § Tax 1.14(2) ("The petition for redetermination shall be in writing and ***shall set forth clearly and concisely the specific grievances to the assessment***, reduced credit, refund or denial of a refund, ***including a statement of the relevant facts and propositions of law upon which the grievance is based.***) [emphasis added.]

The Department's argument that Petitioners had "prior notice" that "processing" could be a basis for taxation and. therefore negates the Department's responsibility to put the basis of its determination in writing, is totally without merit.

The discussion during which Department Resolution Officer Michelle Biermeier "mentioned that *perhaps* the service *could be* taxable under s. 77.52(2)(a)11" is surely *not* a clear and express determination that it was so taxable under that statute. Importantly, after making that informal statement, Ms. Biermeier did not list Wis. Stat. § 77.52(2)(a)11 as a basis for taxation in her follow-up August 16, 2012 written Notice of Action on Petition for Redetermination.

Finally, the fact that the Department "brought up this issue" at the Commission and that the Petitioners-Appellants "had an opportunity to be heard on the same" does not remedy the Department's violation of the statute or of due process.

Not putting the determination for tax liability in writing until the Department's summary judgment response brief prejudiced Petitioners-Appellants because it undermined the audit process and the taxpayer's ability to address the Department's contentions at that stage. Importantly, Petitioners-Appellants never had the opportunity to engage in meaningful discovery related to the Department's claim of "processing."

IV. NO DEFERENCE SHOULD BE GIVEN TO THE COMMISSION'S DECISION.

The court should not afford the Commission's decision any deference because the Department exceeded its authority by converting the selective tax to a general tax. Additionally, the Department and Commission did not rely on experience or apply any expertise relevant to the legal issue presented. Instead, the Department and Commission relied solely on a dictionary definition.

In *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue,* 2010 WI 33, ¶ 33, 324 Wis. 2d 68, 781 N.W.2d 674, the Court stated that reviewing courts give no deference when certain conditions are present:

> Reviewing courts give no deference to an agency's statutory interpretation when any of the following conditions are met: (1) the issue presents a matter of first impression; (2) the agency has no experience or expertise relevant to the legal issue presented; or (3) the agency's position on the issue has been so inconsistent as to provide no real guidance.

The Court went on to hold that, when a reviewing court gives no deference, it must adopt the most reasonable interpretation of the statute:

> A court giving no deference to an agency's interpretation of a statute benefits from the agency's analysis but interprets the statute independent of the agency's interpretation and in effect adopts an interpretation that

> the court determines the most reasonable interpretation. *Id.*

Here, neither the Department nor the Commission applied special knowledge or expertise in analyzing whether Petitioners-Appellants are subject to taxation. Instead, the tax was based on a dictionary definition. The most reasonable interpretation of the statute is one that does not convert the narrow tax into a general tax, does not render other portions of the statute surplusage, and is not inconsistent with the rule interpreting the statute.

CONCLUSION

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.

Dated this 8th day of February, 2016.

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 briefs 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 2,965 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.

/s/ Frederic J. Brouner
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