STATE OF WISCONSIN

TAX APPEALS COMMISSION

TELEPHONE AND DATA SYSTEMS, INC., **DOCKET NO. 10-S-146**

Petitioner,

vs.

RULING AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent

THOMAS J. McADAMS, COMMISSIONER

This case comes before the Commission on the motions of the parties. The Petitioner has filed a Motion for Summary Judgment and the Respondent, the Wisconsin Department of Revenue ("the Department"), has filed a Motion to Dismiss. The Petitioner is represented by Attorney John R. Austin and Attorney Kristina Sommers of the law firm of Reinhart Boerner Van Deuren S.C., Milwaukee, Wisconsin. The Department is represented by Attorney Julie A. Zimmer. We see the case as having three issues. For the reasons stated below, we decide one issue in the Department's favor and order further proceedings as to the other two issues.

FACTUAL BACKGROUND[1]

A. Jurisdictional Facts

1. By letter dated December 29, 2008, the Petitioner filed a Buyer's Claim for Refund with the Department for the periods December 1, 1997, through July 31, 2008, for sales tax Petitioner had paid to the seller SAP America, Inc., on its purchases of software. The total amount of the refund requested was $768,108.09. (Exhibit 1B.)

2. By letter dated August 28, 2009, the Department granted Petitioner's claim for refund for the periods January 1, 2001, through July 31, 2008, in the amount of $515,292.33, but denied Petitioner's claim for refund for the periods December 1, 1997, through December 31, 2000, in the amount of $252,815.76 because the claim for refund for those periods was filed outside the statute of limitations ("Claim for Refund"). (Exhibit 2B.)

3. By letter dated October 21, 2009, the Petitioner filed a timely Petition for Redetermination of the denial of its Claim for Refund. (Exhibit 3B.)

4. By Notice of Action dated April 16, 2010, the Department denied Petitioner's Petition for Redetermination. (Exhibit 4B.)

5. The Petitioner timely filed a Petition for Review of the Department's action with the Wisconsin Tax Appeals Commission on May 25, 2010. (Exhibit 5B.)

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[1] For the purpose of deciding these motions only, we have included proposed facts from the parties' submissions. The jurisdictional facts are taken from the Department's affidavits and the historical facts come from the Petitioner. We have made a few edits, reflecting what we see as the issues remaining in the case.

6. The Department had conducted a field audit of Petitioner's sales and use taxes for the periods January 1, 1997, through December 31, 2000, and issued its determination by Notice of Field Audit Action dated June 25, 2002, resulting in a net refund issued on or about August 10, 2002. (Exhibit 6B.)

7. The Notice of Field Audit Action dated June 25, 2002, for the periods January 1, 1997, through December 31, 2000, was fully agreed to by Petitioner and was not protested by Petitioner's filing of a Petition for Redetermination within 60 days after receipt of the Notice of Field Audit Action.

8. TDS never filed a claim for refund during the field audit or subsequent 60-day appeal period for the sales tax paid to SAP America, Inc., on the software purchases at issue in TDS's Claim for Refund.

B. Historical Facts

1. Petitioner, Telephone and Data Systems, Inc. ("TDS"), is in the business of providing wireless, telephone and broadband services to customers nationwide. (Affidavit of Bruce Dickson ("Dickson Aff.") ¶ 2.)

2. For use in its business operations, beginning in 1994, TDS purchased (i.e., licensed) from SAP America, Inc. ("SAP"), its R/3 System software. (Dickson Aff. ¶ 3.)

3. The implementation of the SAP software occurred in the 1994 - 1995 timeframe. *Id.*

4. Subsequent to 1994, the SAP R/3 System software license was renewed, additional R/3 modules were purchased, and software maintenance costs for

the R/3 System were incurred. *Id.*

5. SAP generally charged sales tax to TDS for these purchases, which tax TDS paid. *Id.*

6. The Wisconsin Department of Revenue conducted a Wisconsin sales and use tax of TDS for the period January 1, 1997, through December 31, 2000 ("1997-2000 Audit"). (Dickson Aff. ¶ 4.)

7. In the 1997-2000 Audit, the Department reviewed purchases made by TDS, including expense (non-capital) purchases ("Expense (Non-Capital) Purchases"). *Id.*

8. The Department selected extensive samples of these Expense (Non-Capital) Purchases to review. *Id.*

9. The sampled Expense (Non-Capital) Purchases included purchases from SAP. (*Id.*; *see also* Affidavit of Kristina E. Somers ("Somers Aff.") ¶ 2, Ex. A at 10, 20, 30, and 38.)

10. Where tax had not been paid on the Expense (Non-Capital) Purchases, such as on a sale made by SAP in the amount of $346,669.00 for maintenance fees for the period January 1, 1997, through December 31, 1997, the Department determined that additional sales/use tax was due. (Dickson Aff. ¶ 5, Ex. A; Somers Aff. Ex. A at 10.)

11. The 1997-2000 Audit resulted in a determination by the Department, which was issued on June 25, 2002 ("2002 Determination"). (Dickson Aff. ¶ 5, Ex. A.)

12. Among other adjustments, the 2002 Determination, on Schedule 2, imposed for each year (1997, 1998, 1999, and 2000) additional sales/use tax on the Expense (Non-Capital) Purchases made by TDS. (Dickson Aff. Ex. A.)

13. The 2002 Determination assessed additional tax on $1,377,664.76 of Expense (Non-Capital) Purchases for the years 1997-2000. *Id.*

14. Also as part of the 2002 Determination, the Department provided TDS with certain credits for exempt printing and mailing equipment and activities ("Credits"). (Dickson Aff. Ex. A at Ex. C; Dickson Aff. ¶ 5.f., g., h.; Somers Aff. Ex. B at Resp. to Req. for Admis. Nos. 5(b)(i), 6(b)(i), and 7(b)(i).)

15. For 1997, the 2002 Determination resulted in a tax due of $9,231.74 (with interest of $4,883.46, the total due for tax year 1997 was $14,115.20). (Dickson Aff. Ex. A at Ex. A-B; Somers Aff. Ex. B at Resp. to Req. for Admis. No. 4(a).)

16. For the years 1998-2000, due to the Credits, the 2002 Determination resulted in net refunds. (Dickson Aff. Ex. A at Ex. C; Dickson Aff. ¶ 5.f., g., h.; Somers Aff. Ex. B at Resp. to Req. for Admis. Nos. 5(b)(i), 6(b)(i), and 7(b)(i).)

17. TDS did not appeal the 2002 Determination by filing a petition for redetermination with the Department's Resolution Unit. (Dickson Aff. ¶ 6.)

18. The Department conducted a sales and use tax audit of SAP. (*Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 23, 311 Wis. 2d 579, 754 N.W.2d 95.)

19. In this audit, the Department took the position that SAP's R/3 System software was subject to sales and use tax as noncustom software. *Id.*

20. SAP had paid sales/use tax on its R/3 System software to the

Department. *Id.*

21. One of SAP's customers, Menasha Corporation, chose to pay the sales tax directly to the Department and file a claim seeking a refund of such taxes paid. *Id.* ¶¶ 23, 24.

22. The Department denied Menasha Corporation's refund claim, which denial was appealed to the Wisconsin Tax Appeals Commission (the "Commission"). *Id.* ¶ 24.

23. On December 1, 2003, the Commission reached a decision in the case of *Menasha Corporation v. Wisconsin Dep't of Revenue.* Wis. Tax Rep. (CCH) ¶ 400-719 (WTAC 2003)

24. The Commission concluded that SAP's R/3 System software was custom software and, therefore, was not subject to Wisconsin sales and use taxes. *Id.*

25. The Department appealed the Commission's decision. *Menasha,* 2008 WI 88, ¶ 36.

26. While appeal of the Commission's decision was pending, anticipating the filing of numerous refund claims relating to SAP's R/3 System software, the Department prepared a form, entitled "Agreement Extending Time To File Claim For Refund" ("*Menasha* Extension"). (Somers Aff. ¶ 3, Ex. B at Resp. to Req. for Admis. Nos. 12, 14; Somers Aff. ¶ 4, Ex. C.)

27. The Department offered the *Menasha* Extension form to taxpayers as an alternative to filing refund claims based on the issue of the taxability of the SAP R/3 System software that was pending in the appeal of the *Menasha* case. (Somers Aff.

Ex. B at Resp. to Req. for Admis. Nos. 13, 14 and 16.)

28. Had taxpayers filed the refund claims themselves, rather than just the extension agreements, the Department would have been obligated to send out many extensions on the period of time it had to act on the refund claims. Wis. Stat. § 77.59(4).

29. As indicated on the form itself, the Department benefited from taxpayers filing the *Menasha* Extensions as the Department "desire[d] to avoid the necessity of processing such a claim for refund until such time that a determination of such issue ha[d] become final . . . ." (Somers Aff. Ex. B at Resp. to Req. for Admis. No. 15.)

30. The Department had an internal procedure for processing the *Menasha* Extensions ("*Menasha* Extension Review Procedures"). (Somers Aff. Ex. D at Bates Nos. 000013-000014, 000022; Somers Aff. Ex. F at Resp. to Interrog. No. 4.)

31. The *Menasha* Extension Review Procedures required the Department to verify that none of the periods were closed relating to the *Menasha* Extensions. (Somers Aff. Ex. D at Bates No. 000013.)

32. If the *Menasha* Extensions contained closed periods, the Department's *Menasha* Extension Review Procedures required the Department to send the taxpayer a rejection letter for the closed periods. (Somers Aff. Ex. D at Bates Nos. 000013, 000022.)

33. The issue of the taxability of the SAP R/3 System software was finally decided by the Wisconsin Supreme Court in 2008. *Menasha*, 2008 WI 88.

34. By a decision dated July 11, 2008, more than four and a half years

after the Commission's initial decision, the Supreme Court affirmed, holding that the purchases by Menasha Corporation of the SAP R/3 System software were not subject to Wisconsin sales/use taxes as they were nontaxable purchases of custom software. *Id.*

35. In early February 2004, TDS signed, dated, and filed with the Department two *Menasha* Extensions. (Dickson Aff. ¶ 9, Ex. B.)

36. One *Menasha* Extension related to tax years 2001 through 2003 ("2001-2003 Refund Claim Extension"). *Id.*

37. The second *Menasha* Extension related to tax years 1997 through 2000 ("1997-2000 Refund Claim Extension"). *Id.* The Claim Status assigned to the 1997-2000 Refund Claim Extension was "33," which was Status Type "Other/Pending." (Somers Aff. Ex. D at Bates No. 000028; Ex. F at Resp. to Interrog. No. 8, and Ex. G at Bates No. 000232.)

38. The Claim Status assigned to the 1997-2000 Refund Claim Extension was not "11," which was Status Type "Rejected/Denied." (Somers Aff. Ex. D at Bates No. 000028; Ex. F at Resp. to Interrog. No. 8, and Ex. G at Bates No. 000232.

39. The Department sent TDS a letter dated April 15, 2004, acknowledging receipt of the 1997-2000 Refund Claim Extension ("April 15, 2004 Acknowledgement"). (Dickson Aff. ¶ 10, Ex. C.)

40. The April 15, 2004 Acknowledgement referenced TDS' "Buyer's Claim for Refund of Sales Taxes" for the period "JAN 97 - DEC 00" with a date of receipt of "2/6/04." *Id.*

41. The April 15, 2004 Acknowledgement stated that TDS' "Claim for

Refund has been referred to this unit [sales tax office audit] for review and determination." *Id.*

42. The April 15, 2004 Acknowledgement provided that "[a]ny refund due will include interest at the rate of 9 percent per year." *Id.*

43. The April 15, 2004 Acknowledgement notified the taxpayer that during the Department's review, additional information may be requested. *Id.*

44. TDS received no further correspondence from the Department, such as a letter rejecting the 1997-2000 Refund Claim Extension. (Dickson Aff. ¶ 19.)

45. Had the Department notified TDS earlier (such as when it sent out the April 15, 2004 Acknowledgement) that it was rejecting the 1997-2000 Refund Claim Extension, TDS could have filed its refund claim relating to purchases made from SAP during the period January 1, 1997, through December 31, 2000, within two years of the audit. (Dickson Aff. ¶ 24.)

46. Once the *Menasha* case had been decided by the Supreme Court, TDS filed its refund claim with the Department, by transmittal letter dated December 29, 2008 ("2008 Refund Claim"). (Dickson Aff. ¶ 11.)

47. The 2008 Refund Claim covered purchases made from SAP during the period December 1, 1997, through July 31, 2008, which included the 1997 through 2000 tax years covered by the 1997-2000 Refund Claim Extension. *Id.*

48. On June 25, 2009, the Department requested additional information from TDS relating to the 2008 Refund Claim ("2009 Information Request"). (Dickson Aff. ¶ 13.)

49. In the 2009 Information Request, the Department did not notify TDS of its position, as it related to purchases made from SAP during the period January 1, 1997, through December 31, 2000, that TDS was not eligible for the two-year statute of limitations provided for in Wis. Stat. § 77.59(4)(b) and, therefore, that the Department was rejecting the 1997-2000 Refund Claim Extension. *Id.*

50. After TDS responded to the 2009 Information Request, the Department, by letter dated August 28, 2009 ("2009 Refund Claim Determination"), granted the refund claim on its merits for the period January 1, 2001, through July 31, 2008. (Dickson Aff. ¶ 15, Ex. G.)

51. The Department, in its 2009 Refund Claim Determination, also denied in part TDS' 2008 Refund Claim, as it related to the purchases made from SAP during the period January 1, 1997, through December 31, 2000, contending that TDS was not entitled to the two-year statute of limitations to file its refund claim (or the 1997-2000 Refund Claim Extension). (Dickson Aff. ¶¶ 15, 20.)

RELEVANT STATUTE

The section of the Wisconsin Statutes at issue here is Wis. Stat. § 77.59 (2007-2008) and the relevant subsections are (2), (3m), (4), and (6).

> **77.59 Deficiency and refund determinations.**
>
> (2) The department may, by field audit, determine the tax required to be paid to the state or the refund due to any person under this subchapter. The determination may be made upon the basis of the facts contained in the return being audited or upon any other information in the department's possession. The determination may be made on the basis of sampling, whether or not the person being

audited has complete records of transactions and whether or not the person being audited consents. The department may examine and inspect the books, records, memoranda and property of any person in order to verify the tax liability of that person or of another person. The department may subpoena any person to give testimony under oath before it and to produce whatever books, records or memoranda are necessary in order to enable the department to verify the tax liability of that person or of another person. The determination shall be presumed to be correct and the burden of proving it to be incorrect shall be upon the person challenging its correctness. A determination by the department in a field audit becomes final at the expiration of the appeal periods provided in sub. (6), and the tax liability of the taxpayer for the period audited may not be subsequently adjusted except as provided in sub. (4) (b), (8) or (8m). . . .

(3m) If the taxpayer has consented in writing to the giving of notice of determination after the time under sub. (3), the notice may be given, and the taxpayer may file a claim for a refund, at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing.

(4) (a) Except as provided in sub. (3m), at any time within 4 years after the due date, or in the case of buyers the unextended due date, of a person's corresponding Wisconsin income or franchise tax return or, if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year for which that person files a claim, that person may, unless a determination by the department by office or field audit of a seller has been made and unless a determination by office audit of a buyer other than an audit in which the tax that is the subject of the refund claim was not adjusted has been made and unless a determination by field audit of the buyer has been made, file with the department a claim for refund of taxes paid to the department by that person. If the amount of the claim is at least $50 or if either the seller has ceased doing business, the buyer is being field audited or the seller may no longer file a claim, the buyer may, within the time period under this subsection, file a claim with the department for a refund of

the taxes paid to the seller. A claim is timely if it fulfills the requirements under s. 77.61 (14). A buyer may claim a refund under this paragraph only on a form prescribed by the department, only by signing that form and only if the seller signs the form unless the department waives that requirement. If both a buyer and a seller file a valid claim for the same refund, the department may pay either claim. The claim for refund shall be regarded as a request for determination. The determination thus requested shall be made by the department within one year after the claim for refund is received by it unless the taxpayer has consented in writing to an extension of the one-year time period prior to its expiration.

(4) (b) A claim for refund that is not to be passed along to customers under sub. (8m) may be made within 2 years of the determination of a tax assessed by office audit or field audit and paid if the tax was not protested by the filing of a petition for redetermination. A claim is timely if it fulfills the requirements under s. 77.61 (14). No claim may be allowed under this paragraph for any tax self-assessed by the taxpayer. If a claim is filed under this paragraph, the department may make an additional assessment in respect to any item that was a subject of the prior assessment.

(6) Except as provided in sub. (4) (b), a determination by the department is final unless, within 60 days after receipt of the notice of the determination, the taxpayer, or other person directly interested, petitions the department for a redetermination. . . .

OPINION

This is a case where the parties dispute the timeliness of the Petitioner's refund claim for the amount of $252,815 in sales tax the Petitioner should not have paid to a retailer for custom software from 1997 to 2000. The facts set forth above are relatively complicated, but, in brief, the Petitioners filed two refund claims in 2008, one of which covered the period of 1997 to 2000 and the other which covered the period

from 2001 to 2003. After the Supreme Court of Wisconsin decided the *Menasha* case, the Department in 2009 granted a refund of $515,292 for the 2001 to 2003 period. As to the earlier period, however, the Department denied the refund claim as late, claiming primarily that under Wis. Stat. § 77.59(6) the period to file for a refund expired 60 days after the Department issued its determination in 2002.

This case requires that we apply Wis. Stat. § 77.59. The Petitioner argues that it is also entitled to the $252,815 it should not have paid as the Petitioner filed an extension request in 2004 that was within the two-year-from-audit period set forth in Wis. Stat. § 77.59(4)(b). The Department argues that Wis. Stat. § 77.59(4)(b) does not apply, and, therefore, the request is untimely and the Petitioner has no right to get the money back.

First, we will state the burden of proof. Second, we will set forth the parties' arguments. Third, we will briefly summarize statutory construction. Fourth, we will state the reasons the extension request was not valid. Finally, we will state the reasons why we need further information to decide the other two issues.

A. Burden of Proof

Determinations the Department makes are presumed to be correct, and the burden is on TDS to prove by clear and satisfactory evidence in what respects the Department erred. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). This presumption extends to field audits and denial of tax refund claims. Wis. Stat. § 77.59(2).

B. The Parties' Arguments

1. The Petitioner

TDS argues that Wis. Stat. § 77.59(4)(b) provides a two-year period within which TDS was entitled to file either the actual claim for refund or the 1997-2000 Refund Claim Extension with the Department. TDS contends that, by signing and filing the 1997-2000 Refund Claim Extension with the Department within two years of the 2002 Determination, it met the two-year statute of limitations, allowing it to include tax years 1997 through 2000 in its 2008 Refund Claim.

Alternatively, the Department is equitably estopped from denying the validity of the 1997-2000 Refund Claim Extension based on the lack of the Department's signature. If, around the time of receipt, the Department believed that a refund claim for the years 1997 through 2000 did not qualify for the two-year statute of limitations provided in Wis. Stat. § 77.59(4)(b), it could have notified TDS that it was rejecting the filed 1997-2000 Refund Claim Extension. Petitioner could then have filed an actual notice of claim and been afforded the opportunity to argue the statute of limitations issue without the onus of proving estoppel as well. The Department did not notify TDS of any such rejection. To the contrary, the Department sent TDS a letter acknowledging receipt of the 1997-2000 Refund Claim Extension.

2. The Department

The Department has two main responses. First, the Department argues that TDS's Claim for Refund does not qualify under Wis. Stat. § 77.59(4)(b) for two reasons. First, a claim for refund may only be made under Wis. Stat. § 77.59(4)(b) of a

sales or use tax *assessed by the Department and paid*, if the claim was made within two years of the audit determination and the tax was not protested by the filing of a petition for redetermination. None of the software purchases at issue in TDS's Claim for Refund were assessed sales or use tax in the prior field audit because they were paid directly to the seller, therefore Wis. Stat. § 77.59(4)(b) does not apply; and, even if it did, TDS did not file its Claim for Refund within two years of the Notice of Field Audit Action issued on June 25, 2002, as the statute requires.

The Department's second main argument is that there is no valid extension agreement that exists to extend TDS's time to file its claim for refund. After review, the Department did not sign TDS's *Menasha* Extension Agreement for taxable years 1997 to 2000 because those years had been field audited, the field audit was closed, and the Department's field audit determination was final. There is no fully-executed *Menasha* Extension Agreement in existence for the periods 1997 to 2000.

In addition, even if the Department had signed and returned TDS's *Menasha* Extension Agreement for taxable years 1997 to 2000, the Agreement would still be void under its own terms.

C. Statutory Construction

All of the issues in this case require that we interpret Wis. Stat. § 77.59. The goal of statutory interpretation is to discern the intent of the legislature. *Teschendorf v. State Farm Ins. Companies,* 2006 WI 89, 293 Wis. 2d 123, 717 N.W.2d 258. Because a legislature expresses its purpose by words, our first resort in construing a statute is to look to what is written in the statute books, not to what is unwritten; our aim in doing

so is to ascertain—neither to add nor to subtract, neither to delete nor to distort. *State v. Bruckner*, 151 Wis. 2d 833, 844, 447 N.W.2d 376, 381 (Ct. App. 1989) (quoting *62 Cases of Jam v. U.S.*, 340 U.S. 593, 596 (1951)). In statutory construction, context and structure are important factors, and construction should strive to avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004).

D. Rulings

Based on the submissions to the Commission, we see three issues in this case. First, there is the issue of whether the extension request form TDS filed in 2004, which the Department apparently declined to sign, extended the period to file so the 2008 refund claim is valid. The second issue is whether the Department should be equitably estopped from arguing that the 2004 extension request was invalid. The third issue is whether the refund provision of Wis. Stat. § 77.59(4)(b) applies. We can rule on the first issue because the law is clear. The two other issues will need further development.

1. The validity of the Petitioner's 2004 extension request

One of questions here is the validity of the Petitioner's April 2004 extension request. The Petitioner argues that its April 2004 extension request is timely because it falls within two years of the Department's audit assessment under Wis. Stat. § 77.59(4)(b). The Petitioner further claims that the extension request it filed in February of 2004 makes its 2008 claim for refund timely. On the other hand, the Department argues in this case that only the 60-day period from Wis. Stat. § 77.59 (4)(a) applied, and

thus the period for Petitioner to file a claim for refund was already closed in February of 2004. Further, the Department points out that it never signed the 2004 extension request. As to this issue, the parties seem to agree as to the basic facts. There is a disagreement, however, as to what the law requires.

There are two problems with the Petitioner's claim that its 2004 extension request is valid. First, as the Department argues, the Department appears never explicitly to have agreed to it by signing it and returning a copy to the taxpayer. Instead, the Department merely sent the Petitioner a letter in April of 2004, which we will discuss later. The Department argues that its signature is needed to validate any extension request. In order to move this case forward, we must examine this argument.

An extension agreement, although allowed by statute, is best viewed as a contract type agreement.[2] In its brief, TDS argues that Wis. Stat. § 77.59(3m) "considers just whether 'the taxpayer has consented in writing . . . .'" Petitioner's Brief at 35. It is true that one part of the statute says that. But, in our view, that is not all the statute considers. In its entirety, the relevant paragraph reads:

> **(3m)** If the taxpayer has consented in writing to the giving of notice of determination after the time under sub. (3), the notice may be given, and the taxpayer may file a claim for a refund, at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing.

[2] There is remarkably little case law in Wisconsin concerning extension agreements. The US Tax Court, however, has analyzed consents using contractual principles. *Tolve v. Commissioner,* 21 Fed. Appx. 73, 75 (3rd Cir.2002); *United States v. Hodgekins,* 28 F.3d 610, 614 (7th Cir.1994); *Ripley v. Commissioner,* 103 F.3d 332, 337 (4th Cir.1996). Thus, courts look to the "plain meaning" of the form used. *Tolve,* 21 Fed. Appx. at 75; *Hodgekins,* 28 F.3d at 614; *Stenclik v. Commissioner,* 907 F.2d 25, 27 (2nd Cir.1990).

(emphasis added).

The plain meaning of the phrases the legislature used such as "agreed upon" and "the period so agreed upon" is that the Department also gets to take part in extensions. Although we think the "plain meaning" is clear, one need only look to a recognized dictionary to confirm this understanding. For example, Webster's Seventh New Collegiate Dictionary defines "agree" in relevant part as "to settle upon by common consent" and "to achieve or be in harmony: concur."[3]

Further, this "plain meaning" is consistent with the more explicit language the legislature used in the companion income tax statute dealing with extensions, Wis. Stat. § 71.77(5), that says:

> (5) The limitation periods provided in this section may be extended by written agreement between the taxpayer and the department prior to the expiration of such limitation periods or any extension of such limitation periods.

In our view, these statutes indicate that statutory limitation periods may only be extended by mutual agreement. To us, it does not make any sense to have one rule in chapter 77 and another in chapter 71. The Petitioner does not explain any reason why that would be the case. Indeed, carried to a *reductio ad absurdum* extreme, would the Petitioner's interpretation allow a taxpayer to set the terms of the extension over the Department's objections? In our view, the legislature could not have intended such an impracticable result. Thus, it is clear that it is not the taxpayer that unilaterally gets to

[3] That particular dictionary entry also states that "agree implies unison or complete accord often after discussion or adjustment of differences."

extend a refund filing period under Wis. Stat. § 77.59, it is the Department *and* the taxpayer. [4]

The second problem with the Petitioner's argument here is that, if we view this extension request as a contract, the Department's form expressly excludes years the Department believes are closed. The exact language on the Department's form is as follows:

> [The] extension of time for filing for such a refund is intended to include only those years presently open and to exclude years which have been closed prior to the date of this agreement by the statute of limitations or by office audit assessment or field audit which has become final.

Further, paragraph 3 of the form used in this case also states as follows:

> This agreement shall not apply to any year(s) referred to in item 1 if at the date of this agreement such year(s) is closed to refund under the statute of limitations as provided in s. 77.59(4), Wis. Stats. (2001-02), or closed to refund as a result of the finality of an office audit assessment or field audit as provided in s. 77.59(4)(a), Wis. Stats. (2001-02).[5]

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[4] The federal statute, Section 6501(c)(4), provides in relevant part:

> (4) **Extension by agreement.**—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title * * * both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

[5] Wis. Stat. § 77.59(4)(a) (2001-02) is identical to Wis. Stat. § 77.59(4)(a) (2007-08) above.

In sum, both plain meaning and contract analysis dictate that both parties have to agree to a valid extension request.[6]

Having resolved this issue, we turn to the two remaining questions.

2. Equitable Estoppel

a. Summary of Equitable Estoppel Law

A party asserting estoppel must prove all of the elements by clear, convincing, and satisfactory evidence. *Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Supply Co., Inc. v. Wis. Dept. of Revenue,* 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986). Equitable estoppel is a bar to the assertion of what would otherwise be a right; it does not of itself create a right. *Murray v. City of Milwaukee,* 2002 WI App 62, ¶ 15, 252 Wis. 2d 613, 642 N.W.2d 541. The elements of equitable estoppel are (1) action or non-action by the person against whom estoppel is asserted, (2) that induces reliance by another, (3) to his or her detriment. *Dep't of Revenue v. Moebius Printing Co.,* 89 Wis. 2d 610, 634, 279 N.W.2d 213 (1979). The Commission must then balance the public interests at stake if the governmental action is estopped against the injustice that would be caused if the governmental action is not estopped.[7] *Id.* at 639.

A party's reliance on another's action or inaction must be reasonable. *Coconate v. Schwanz,* 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991); *Gonzalez v.*

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[6] It does not appear that the Commission has ever directly considered if both signatures are needed. However, in *Harnischfeger Export Corporation And Harnischfeger Corporation,* Wis. Tax Rptr. ¶203-075 (WTAC 1989), the Commission stated, "Here there was no extension agreement signed by the parties—there was only a letter signed by Department."

[7] The balancing test needs to be applied only when a party is successful in showing the basic elements of equitable estoppel. *See Independence Corrugated, LLC v. City of Oak Creek,* 2008 WI App 160, 314 Wis. 2d 508, 758 N.W.2d 22.

Teskey, 160 Wis. 2d 1, 14, 465 N.W.2d 525 (Ct. App.1990). Equitable estoppel is not as freely granted against a governmental agency as it is against private parties. *Moebius* at 638. Equitable estoppel is designed to promote equity and justice. *Rascar, Inc. v. Bank of Oregon*, 87 Wis. 2d 446, 453, 275 N.W.2d 108 (Ct. App. 1978).

b. Application of Equitable Estoppel to These Facts

As stated above, there are three elements to an estoppel claim. The Petitioner alleges that the Department not signing the extension request fulfills the first element, that being either a "non-action" or an action. Assuming that to be the case for purposes of these motions, we are not able on what is presently before us to resolve a number of seemingly important factual questions as to the second element described above. In a number of respects, the record before us is, in our view, incomplete.[8]

In no particular order, the following questions still await resolution:

1. When did the Department actually decide not to agree to the extension request for 1997 to 2000 that the Petitioner filed in February, 2004? Was it in 2004, or in 2009? We have reviewed the affidavits and not been able to determine an answer to this question.

2. Did the Department return both of the extension (one signed, the other unsigned?) requests to the taxpayer in April, 2004? Was there a separate cover letter for the 2001 to 2003 period?

[8] The attorneys involved in this case should not interpret any of the language in this decision as criticism. Obviously, the attorneys involved have worked very hard on this case. Some cases, however, are not susceptible of resolution on pretrial motions. This may be one of them.

3. Who received the form(s) back at TDS and did that person (or persons) actually believe that both of the extension requests had been accepted by the Department? Was there any follow-up done? Was any decision made at TDS not to file a refund claim at that point?

4. The Commission notes that the April 15, 2004 letter from the Department to TDS describes what the taxpayer filed in February of 2004 on more than one occasion as a "Claim for Refund," but never mentions any request for extension. (See Exhibit 3). The letter then goes on to provide information which is relevant to claims for refunds, and not to extension requests. Is that fact significant?

5. What is the Department's usual practice in answering the extension requests it receives? In particular, the extension requests it declines to agree to?

6. Was there any advantage to the taxpayer in filing an extension request in February of 2004, as opposed to a claim for refund?

7. Is there any functional difference between a claim for refund and an extension request?

The Commission is aware that the parties have invested substantial amounts of time in the prosecution of these motions. While the Commission remains open to any reasonable alternative to get answers to these questions, the Commission's preference at this point is to have a hearing to establish the facts the Commission needs.

c. Applicability of Wis. Stat. § 77.59(4)(b)

The third element of equitable estoppel is whether the Petitioner has suffered detriment. On these facts, the Petitioner suffers detriment only if, in fact, the

two-year provision was open when the taxpayer filed the extension request form in February of 2004. If only the 60-day period applied, the time to file for a refund had long expired by February of 2004 when many of the events relevant to this case occurred. As there are factual questions remaining as discussed in the previous section which still need resolution, this allows us the chance to ask additional legal questions of the attorneys related to the applicability of Wis. Stat. § 77.59(4)(b). We have questions for each party:

Requests as to the Department

Most of the Department's arguments on this issue focus on the "assessed" and "paid" language in the statute. Specifically, one of the arguments the Department makes in its brief is that Wis. Stat. § 77.59(4)(b) does not apply because "TDS's Claim for Refund was for sales taxes paid directly to the seller and not for sales taxes assessed in the prior audit." Respondent's Brief at 10.[9]

Our independent research on this issue found that the Wisconsin Court of Appeals stated the following in *Dairyland Harvestore, Inc. v. Dep't of Revenue*, 151 Wis. 2d 799, 447 N.W.2d 56 (Ct. App. 1989):

> We conclude that the 1980 amendment to sec. 77.59(4), Stats., renders it ambiguous. The relevance of income tax and franchise tax returns to claims for sales tax refunds is obscure at best. The amended statute fails to specify to whom the person filing a claim paid the tax. It fails to differentiate between the person (such as appellants) who

[9] As part of its argument, the Respondent discusses several cases the Commission decided that involved this statute, including *Gehl Co.* and *D & S Dental*. While the discussion is helpful, those cases appear to have different facts than those before us at the moment, and do not by themselves appear to resolve the questions here.

> paid it to the retailer and the retailer who paid it to the department. The statute can be read to permit either person or both to claim a refund for the tax on a single transaction. Since reasonable persons could understand the statute differently, it is ambiguous. *Kollasch v. Adamany*, 104 Wis. 2d 552, 561, 313 N.W.2d 47, 51-52 (1981).
>
> Except for the legislative history of the amended statute, the rule of deference would come into play, and we would adopt the commission's interpretation of sec. 77.59(4), Stats., after its amendment.[FN3] We conclude, however, that the commission's interpretation conflicts with the legislative history.
>
> The new statute permits a "person" to "file a claim for refund of taxes paid," having deleted the qualifying words "by such person." Consequently, the basis under the old statute for concluding that the "person" entitled to file is the same person who paid the taxes no longer exists. Because the new statute refers to the Wisconsin income tax or franchise tax return, the basis under the old statute for concluding that the "person" entitled to file is the one who filed a sales tax return no longer exists.
>
> We can only conclude that the legislature intended by its amendment to sec. 77.59(4), Stats., that all persons who have paid an excess sales tax, whether to a retailer or to the department, may file a claim for a refund. We specifically infer that the legislature intended through its amendment to permit customers who paid excess sales taxes to retailers to claim tax refunds from the department.[FN4] Because appellants could have filed claims on and after April 30, 1980 for excess sales taxes they paid to A.O. Smith, they may offset those claims against the department's assessments for additional taxes.

The question we have is whether *Dairyland* applies to this case?

The second issue we have for the Department is if the assessment referred to in Wis. Stat. § 77.59(4)(b) has to be "paid." In this case, for example, there are offsets which led to no additional tax being due, at least for some of the years at issue. The

Department appears to be arguing that the "paid" in (4)(b) requires that there be a positive number, that is, the field audit has to result in additional tax being due. This is certainly a strict construction of Wis. Stat. § 77.59(4)(b), but is it a reasonable one? Doesn't such a construction tend to defeat the purpose of this refund statute? *See, e.g., Covenant Healthcare System, Inc. v. City of Wauwatosa*, 2011 WI 80, 336 Wis. 2d 522, 800 N.W.2d 906 ("While we are required to strictly construe tax exemption statutes..., the statute need not be given an unreasonable construction or the narrowest possible construction... Moreover, it should not be so strictly construed as to defeat the legislative intent."). Doesn't a strict construction here lead to the unreasonable result that a taxpayer who pays the tax on time is in a worse position than the taxpayer who does not pay the tax? Wouldn't another (and less literal) reading of "paid" be something akin to "paid up" or "settled"?

We request that the Department submit additional briefing on these questions.

Requests as to the Petitioner

While the *Dairyland* opinion goes back to 1989 and discusses an earlier version of the statute, we note that in *Grall v. Bugher*, 193 Wis. 2d 65, 532 N.W.2d 122 (1995), the Wisconsin Supreme Court stated the following:

> Under this version of sec. 77.59(4), the taxpayers could not file a claim for a refund because they were not the parties who paid the taxes to the State as required by the statute. *See also Dairyland Harvestore v. DOR*, 151 Wis. 2d 799, 805-06, 447 N.W.2d 56 (Ct.App.1989) (construing sec. 77.59(4), 1977, a similar version of the statute).

> Since the taxpayers and the Department filed their briefs to this court, however, the statute was amended. On September 1, 1994, 1993 Wis. Act 437 § 159 came into effect which authorizes those taxpayers with claims of at least $50 to file for a refund.

As the *Dairyland* court found a version of this statute ambiguous, we are interested in the legislative history of Wis. Stat. § 77.59(4)(a) and (b), particularly the 1994 change the *Grall* court refers to. Presently, there are no legislative materials in the record before us. Therefore, we ask that the Petitioner examine the drafting records (which, if they exist, are probably with the Legislative Reference Bureau) of the most recent changes to the statute and determine if there are any legislative materials probative to this case.

CONCLUSIONS OF LAW

1. The Petitioner's April 2004 extension request is invalid under Wis. Stat. § 77.59 as the Department did not agree to it.

2. There will need to be further proceedings as to the two issues remaining in the case.

ORDERS

1. The Petitioner's Motion for Summary Judgment is denied.

2. The Department's Motion to Dismiss is also denied.

3. The Commission will contact the parties in approximately 30 days to arrange a teleconference to discuss further proceedings.

Dated at Madison, Wisconsin, this 25th day of February, 2013.

WISCONSIN TAX APPEALS COMMISSION

Thomas J. McAdams, Commissioner