

APPEARANCES

The Petitioner appears by
Attorney Brian Keenan.

The Respondent appears by
Attorney Karla Nettleton.

The City of Plymouth appears by
Attorney Amy Seibel

** NOTE: All appearances are by telephone conference call.

1 **THE COURT:** This is Judge Persick. Who do I
2 have on from the Department of Revenue.

3 **ATTORNEY ERLANDSEN:** Dana Erlandsen, chief
4 counsel. But I'm waiting for my counsel, Brian Keenan, from
5 the Department of Justice.

6 **ATTORNEY KEENAN:** I'm here. This is
7 Assistant Attorney General Brian Keenan on behalf of
8 Department of Revenue.

9 **ATTORNEY ERLANDSEN:** I will not be speaking,
10 so forget I'm here really.

11 **THE COURT:** Okay. Do I have anybody on from
12 the City of Plymouth? Do I have Attorney Seibel on?

13 **ATTORNEY SEIBEL:** Yes I'm here. Good
14 morning, Your Honor.

15 **THE COURT:** Good morning. And do I have
16 Attorney Millis for Masters Gallery?

17 **ATTORNEY NETTLETON:** Your Honor, this is
18 Attorney Karla Nettleton. I'm filling in for Attorney
19 Millis.

20 **THE COURT:** Could you please spell your last
21 name for the record?

22 **ATTORNEY NETTLETON:** N-E-T-T-L-E-T-O-N.

23 **THE COURT:** All right. Thank you. This is
24 file number 22 CV 99, Wisconsin Department of Revenue versus
25 Masters Gallery Foods. Attorney Keenan's appearing for the

1 Department of Revenue. Attorney Nettleton is appearing for
2 Masters Gallery. And Attorney Seibel is appearing for the
3 City of Plymouth.

4 This is set for an oral ruling. I have read the
5 briefs of each party, and I'm prepared to jump right into the
6 oral ruling. I only have about 15 minutes set aside for
7 this, but I want to give the parties an opportunity. Is
8 there anything anyone wants to say first starting with the
9 Department of Revenue, Attorney Keenan?

10 **ATTORNEY KEENAN:** I just have one short
11 thing. This may become irrelevant, but the Masters Gallery's
12 brief argued for the Court to basically order the Commission
13 to accept the interpretation of the statute they offered to
14 the Commission. We think that's -- we didn't get a reply
15 brief to address this, but we think that's improper because
16 they haven't petitioned for a review of that decision. So if
17 they wanted their interpretation adopted, we think they
18 needed to petition for a review under 227.53, which allows a
19 person aggrieved to receive judicial review.

20 Here the Department petitioned, so we sought
21 judicial review so the Court could affirm the Commission or
22 adopt the Department's arguments; but it can't, like, adopt
23 an argument that was made in a response brief. I just wanted
24 to put that on the record.

25 **THE COURT:** I think you -- I anticipated that

1 anyway because I know that that was included in the
2 Department's initial brief, that Masters Gallery had not done
3 that.

4 Anything else starting next with Attorney Nettleton?

5 **ATTORNEY NETTLETON:** No, Your Honor. Just a
6 quick response that we believe the statutes clearly entitle
7 us to submit a position statement. We clearly articulated in
8 our position statement that we advocated for our
9 interpretation. We think the statutes allow us to argue
10 especially when it's a de novo review of the record. That's
11 all I have to say.

12 **THE COURT:** All right. And, Attorney Seibel,
13 anything else?

14 **ATTORNEY SEIBEL:** Nothing, Your Honor. I
15 think that we thoroughly set forth our positions in our
16 brief.

17 **THE COURT:** Okay. Well, the issue here is
18 the interpretation of Wisconsin Statute 70.111(27)(b), which
19 allows machinery, tools, and patterns not including such
20 items used in manufacturing to be exempt from taxation. And
21 the issue turns on how used in manufacturing is defined. The
22 Tax Appeals Commission found it means used in the production
23 process. The Department of Revenue and the City ask the
24 Court to find the exemption does not apply to any property
25 used at all in any manufacturing activity.

1 The Department of Revenue has argued that taxable
2 manufacturing property -- or they didn't argue, but they set
3 this forth in their brief -- kind of making a distinction
4 between the two types of taxable property. And taxable
5 manufacturing property is assessed by the Department of
6 Revenue instead of local assessors like most property.

7 And businesses have to ask the Department of Revenue
8 to classify their activities as manufacturing and must show
9 they use their property as manufacturing property. The
10 Department of Revenue says the definition of manufacturing
11 property includes all personal property either owned or used
12 by a person engaged in manufacturing even if it's merely
13 machinery located at the site of the activity. That does
14 leave out a provision in that definition that indicates and
15 used in the activity. But I'll get to that in a little bit.

16 Once the Department of Revenue approves a
17 manufacturing classification, the manufacturer has to report
18 its qualifying property to the Department of Revenue for
19 assessment and for taxation. At the time of the Tax Appeals
20 Commission process, during the period at issue there were
21 some stipulated facts.

22 It was stipulated that Masters Gallery is a
23 manufacturer, and per section 70.995, its property was
24 assessed by the Department of Revenue. The Department of
25 Revenue took the position that the new exemption created in

1 70.111(27) for machinery, tools, and patterns only applies to
2 locally assessed personal property, not to Department of
3 Revenue assessed manufacturing property.

4 At the Commission level, Masters Gallery claimed
5 that the Department was wrong. They argued that 70.11, the
6 original exemption statute relating to manufacturing,
7 70.11(27), already provides an exemption for machinery and
8 tools used in manufacturing. So 70.111(27) added an
9 exemption for machinery, tools, and patterns not used in
10 manufacturing.

11 I know there's this issue that the Appeals
12 Commission rejected that, and Masters Gallery didn't petition
13 for review, and so there's an argument that they can't
14 challenge that now. But I'll get to that at the end as well.

15 At the Tax Commission proceeding, the parties
16 stipulated to a list of machines and tools that don't qualify
17 under the original 70.11(27) exemption because they don't
18 meet the exclusive use requirement or they don't meet both
19 the direct use and exclusive use requirement.

20 The Department argues the issue is the meaning of
21 not used in manufacturing. The Department says that the new
22 exemption in 70.111(27) (b) uses the broad term manufacturing,
23 which is broader than production process, which is kind of
24 what the Commission felt was the correct definition.

25 The City of Wausau that was involved at the Tax

1 Commission level said that the legislative intent was to
2 exclude manufacturer owned machinery from the new 70.111(27)
3 exemption. And that does seem to make sense because another
4 part of the same act that created the new exemption
5 established a program to compensate municipalities for the
6 loss of property taxes under the new exemption.

7 And the legislature appointed -- excuse me -- the
8 legislature appropriated money to cover the payment. The
9 cost was estimated to be around 74.4 million dollars, and it
10 was arrived at by only including the value of machines owned
11 by nonmanufacturers. In other words, the legislature must
12 not have intended the exemption to apply to machines owned by
13 manufacturers since they didn't appropriate any money to
14 compensate municipalities for that.

15 The Tax Appeals Commission found the phrase used in
16 manufacturing is not expressly defined in Chapter 70 but that
17 it's not ambiguous and has a clear meaning. Again, they did
18 reject the interpretation by Masters Gallery. But the
19 Commission found that for the exemption to apply, machinery,
20 tools, and patterns can't be used in manufacturing at all.
21 And it adopted the definition of manufacturing in
22 70.11(27)(a)3 which defines the term as, quote, engaging in
23 an activity classified as manufacturing under 70.995. The
24 Commission said activity is based on the production process
25 using the definition set out in 70.11(27)(a)5.

1 The Commission with that ruling upheld the
2 Department of Revenue's denial of 70.111(27) as to machinery
3 and tools stipulated to in what was labeled Exhibit D at the
4 Commission proceeding. And those were items of property that
5 didn't qualify for the 70.11(27), the original exemption,
6 because they didn't meet the exclusive use requirement. And
7 they also upheld of Department of Revenue's denial of the new
8 exemption as to machinery and tools stipulated to in
9 Exhibit E --

10 **RECORDING OVER PHONE LINE:** This call is
11 being recorded.

12 **THE COURT:** -- in other words, those that do
13 not qualify under the original 70.11(27) exemption because
14 they do not meet both the direct use and exclusive use
15 requirement if they're used in any way in manufacturing
16 cheese and cheese-related products. So they added that
17 qualifier.

18 And I'm sorry. I heard a recording or I heard a
19 message that the call is being recorded, and that's not
20 permissible. Any sort of transcript has to come from the
21 certified court reporter. So to whoever is recording, I'm
22 going to ask that you stop. And then future proceedings, if
23 we have to have any, would be required to be in person to
24 eliminate this kind of issue.

25 So in any event, after the Commission made that

1 decision that some of the property in Exhibit E might be --

2 **RECORDING OVER PHONE LINE:** This call is no
3 longer being recorded.

4 **THE COURT:** Thank you. After the Commission
5 made that decision related to the property itemized in
6 Exhibit E, the Commission ordered the parties to work
7 together to figure out which machines, tools, and patterns on
8 that list were used in manufacturing cheese and cheese
9 products and which were not.

10 And everyone agrees that the parties tried to comply
11 and they made some progress, but they needed clarification
12 from the Commission on other property. So they reached a
13 partial stipulation on some of the property but not all of
14 the property. And then the Commission issued a final order
15 making specific findings regarding this disputed property
16 classifying each item as either taxable or exempt.

17 The Department of Revenue and the City has asked for
18 a judicial review of that Commission decision, and they've
19 asked this Court to set aside the Commission's decision
20 because they argue that it erroneously interpreted a
21 provision of the law. Because this presents an issue of law,
22 that's reviewed de novo by this Court.

23 The Department of Revenue and the City argue that
24 the Commission adopted an overly narrow definition of the
25 term used in manufacturing by essentially equating it to mean

1 used in the production process of manufacturing. The
2 Department of Revenue argued that any personal property owned
3 by a manufacturer and assessed by the Department of Revenue
4 is used in manufacturing. They further argued that the
5 legislative history supports their interpretation. And the
6 City agrees with that, again, because the estimated cost of
7 reimbursing municipalities for lost revenue was arrived at
8 only by looking at the value of machines owned by
9 nonmanufacturers.

10 In general tax exemption statutes are strictly
11 construed against granting an exemption, and the party
12 seeking the exemption has the burden to prove it qualifies
13 for the exemption. Any ambiguity is to be resolved in favor
14 of taxation.

15 The Department of Revenue went on to reiterate that
16 manufacturing property includes all personal property owned
17 or used by any person engaged in this state in any of the
18 activities mentioned and used in the activity including raw
19 materials, supplies, machinery, equipment, work in process,
20 and finished inventory when located at the site of the
21 activity. And the Department says this definition is not
22 limited to property used in the production process, that it
23 merely requires the property be owned or used by any person
24 engaged in a manufacturing activity. They kind of gloss over
25 the used in the activity clause saying that that clause

1 merely requires the property be used in the activity not in
2 the production process.

3 But that is confusing to this Court because it's
4 unclear what used in the activity means. Does it mean, as
5 the Department of Revenue suggests, to be involved in
6 manufacturing activity, or does it mean to be used in the
7 activity of manufacturing? If the latter, then the
8 Commission's interpretation that used in manufacturing means
9 used in the production process seems to be more accurate.

10 The Department argues the Commission relied on
11 definitions in section 70.11(27)(a), which only applies to
12 that subsection, and the Department of Revenue relies on
13 70.995(1)(a). But that's the section I just quoted above
14 that defines manufacturing property as all personal property
15 owned or used by any person engaged in this state in any of
16 the activities mentioned and used in the activity.

17 If that clause did not exist in the statutory
18 definition of the manufacturing property -- I'm sorry. I'm
19 hearing background noise. If you could mute your phone until
20 it's your turn to talk. Otherwise I'm going to ask the clerk
21 to disconnect the number where the background noise is coming
22 from.

23 In any event, if that clause did not exist in the
24 statutory definition of manufacturing property, I think the
25 Department would have really a slam dunk argument. If the

1 statute just read it includes all personal property owned or
2 used by any person engaged in this state in any of the
3 activities mentioned, the meaning would certainly be
4 consistent with the Department's argument.

5 But the definition doesn't end there. It goes on to
6 say and used in the activity. And as I just said, that makes
7 it confusing to the Court. So consequently, although I agree
8 with the City's brief that ambiguity is not required in order
9 for a Court to consult legislative history and I could
10 consult it regardless, I do think there's ambiguity. And I
11 disagree with the Commission about that. And so I agree with
12 the Department and the City that the legislative history is
13 worth looking into.

14 Something that wasn't clear to me when I read the
15 Department's brief, which was the one that was filed first,
16 is that when the Legislative Fiscal Bureau, which is a
17 nonpartisan agency of the state legislature, performed its
18 analysis of nonmanufacturing personal property and the tax
19 implications, it also analyzed the impact if the legislature
20 extended the new exemption to manufacturers.

21 The decision was ultimately made as shown in the
22 Legislative Omnibus Motion number 418 to exempt only the
23 machines, tools, and patterns of nonmanufacturers based on
24 the fiscal estimate prepared by the Legislative Fiscal
25 Bureau.

1 In addition, the *City of Waukesha* case cited by the
2 City of Plymouth indicates that the Wisconsin Supreme Court
3 specifically approved the use of fiscal estimates prepared by
4 the Department of Revenue to confirm the meaning of statutory
5 language. Doing so in this case, I think, clearly indicates
6 that the legislature did not intend to exempt the machinery,
7 tools, and patterns of manufacturers.

8 Interestingly and also part of the legislative
9 history is that in 2019 after the new exemption in 70.11(27)
10 was enacted, the legislature looked at expanding it to
11 include the machinery, tools, and patterns of manufacturers.
12 That proposed legislation never became law, but the fact that
13 it was proposed at all is another indication that it was not
14 included in the original version of 70.11 -- excuse me --
15 70.111(27) that was passed. As such I agree the Commission
16 misinterpreted the meaning of the statute and that 70.111(27)
17 does not provide an exemption for the machinery, tools, and
18 patterns of manufacturers.

19 If any doubt exists, I think it's erased by section
20 70.109 which requires the Court to strictly construe
21 exemptions with a presumption that the property is taxable.
22 I know Masters Gallery argued that the law only requires that
23 any doubt regarding the exemption be resolved in favor of
24 taxability, and they argue that because the Commission ruled
25 that 70.111(27) is not ambiguous and has one clear and

1 reasonable meaning there was no doubt and thus no requirement
2 that the Commission interpret the statute in favor of
3 taxability.

4 However, as I already indicated, I disagree with the
5 Commission on that point, that 70.111(27) is completely clear
6 as written not only for the reasons raised by the Department
7 of Revenue but because as noted earlier, when I initially
8 reviewed the definition of manufacturing property in
9 70.995(1), I felt it was ambiguous due to its inclusion of
10 all personal property of a manufacturer which is also used in
11 the activity. I was unclear as to what as used in the
12 activity referred to, but it does appear to the Court that it
13 has been applied in the past as relating to the manufacturing
14 activity in general, not just the production process. I also
15 think that any other construction would lead to a lot of
16 excessive litigation.

17 As in this case, after the Commission issued its
18 decision, the parties were unable to easily apply that
19 decision to a list of specific property. The Commission had
20 to intervene again and decide if refrigerators used by
21 employees, fans, cleaning supplies, batteries, and bug
22 zappers, among other things, fell under the Commission's
23 interpretation of exempt property or not.

24 I am not sure I'd go so far as to call the result
25 absurd, but it would be unworkable, I think, at least for a

1 certain portion of the personal property of manufacturers.
2 Consequently I find the Commission erroneously interpreted a
3 provision of the law, and that interpretation should be set
4 aside. And I affirm the Department's interpretation as being
5 correct.

6 I feel a little badly about this personally making
7 this decision. I love our local manufacturers. I love
8 cheese. I love Masters Gallery's slogan: Because the right
9 cheese matters. I agree with that. You know, I read
10 somewhere that Wisconsin produces 25 percent of all cheese
11 produced in the country. And in any event, I think our local
12 manufacturers drive our economy. I know so many of them are
13 owned by really wonderful people who are involved in civic
14 organizations that do so much to better our community.

15 But, you know, to paraphrase Aristotle, the law is
16 reason devoid of passion. This is how I see the law. I
17 understand there's a lot of money on the line here for
18 everyone involved. So I assume my decision will be appealed,
19 and I look forward to the final outcome. If I got it wrong,
20 I apologize, but this is how I see it. And I wish everybody
21 the best.

22 Anything else from Attorney Keenan?

23 **ATTORNEY KEENAN:** No. Would you like us to
24 prepare, like, a proposed final order that just, you know,
25 basically says for the reasons on the record, you know, that

1 kind of order?

2 **THE COURT:** Sure. If you could prepare an
3 order that would be great.

4 Attorney Nettleton, anything else?

5 **ATTORNEY NETTLETON:** No, Your Honor. Thank
6 you.

7 **THE COURT:** Attorney Seibel, anything else?

8 **ATTORNEY SEIBEL:** Nothing, Your Honor. Thank
9 you.

10 **THE COURT:** All right. Thank you. That's
11 all for this morning.

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14 ***** (End of proceedings.) *****

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