STATE OF WISCONSIN | CIRCUIT COURT BRANCH V | BROWN COUNTY

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

Petitioners,

v.

WISCONSIN DEPARTMENT
OF REVENUE,

Respondent.

DECISION AND ORDER

Case No. 15-CV-132

Before the Court is Petitioners', Tetra Tech EC INC ("Tetra Tech") and Lower Fox River Remediation LLC (the "LLC"), Wisconsin Statutes section 227.52 petition for judicial review of the Wisconsin Tax Appeals Commission's (the "Commission") determination that the activities performed for the Petitioners by Stuyvesant Dredging Inc. ("SDI") to remediate the Fox River are subject to Wisconsin's retail sales tax. For the following reasons, the Petitioners' request for relief is **DENIED**.

BACKGROUND

In November 2007, the Environmental Protection Agency (the "EPA") issued an order requiring several paper companies to remediate the environmental impact of polychlorinated biphenyls ("PCBs") that were dumped in the Fox River. (WTAC R. 22, Zimmer Aff., Ex. 28.)[1] The responsible paper companies created the LLC to address the EPA order. (WTAC R. 19, Dreissen Aff. ¶ 7.) In turn, the LLC hired Tetra Tech to conduct the remediation on behalf of the LLC. (WTAC R. 19,

[1] WTAC R. indicates the record established before the Commission.

Dreissen Aff. ¶ 8.) Tetra Tech then subcontracted the "Desanding/Dewatering portion of the Remediation" to SDI. (WTAC R. 22, Morrissey Aff., Ex 15, 9.)

In 2009, Tetra Tech and SDI[2] submitted a plan to the EPA detailing SDI's the Fox River remediation. (WTAC R. 22, Zimmer Aff., Ex. 29.) A Project Manager at SDI explained that SDI's purpose is to "separate the materials [dredged from the Fox River] delivered by [a different subcontractor] into components so that they can be delivered and disposed of by Tetra Tech." (WTAC R. 19, Dreissen Aff. ¶ 10.) Particularly, "SDI removes the sand and extracts the water through the use of membrane filter presses from the finer grained sediments ("fines") left over from desanding. The remaining material ("Filter Cake") which consists of fines and PCB's is disposed of by Tetra Tech." (WTAC R. 19, Dreissen Aff. ¶ 10.) The water and sand is also sent back to Tetra Tech for treatment and possible reuse. (Pet. Br. 4.)

In January 2011, the LLC and Tetra Tech petitioned the Department of Revenue (the "Department") for a redetermination of the retail sales tax assessed on the purchase of SDI's involvement with the remediation. (WTAC R. 22, Biermeier Aff. ¶¶ 2-3.) The Department declined to change its assessment of the retail sales tax associated with SDI, (WTAC R. 22, Biermeier Aff. ¶¶ 5-6) after which the LLC and Tetra Tech filed petitions of review with the Commission.

At issue before the Commission was whether SDI's activities were subject to retail sales tax. Section 77.52(2) imposes a retail sales tax on those "selling, licensing, performing or furnishing the services described under par. (a)..." Although paragraph (a) has multiple parts, only two are relevant for SDI:

> 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 or items...

[2] The plan was also prepared by J.F. Brennan Co., Inc. and Anchor Environmental.

§ 77.52(2)(a)10, 11.

Before the Commission, the Department's principal argument was that the activities engaged by SDI constituted "cleaning" under section 77.52(2)(a)10. (Pet. App. 62.) In the alternative, the Department asserted SDI engaged in "servicing" and "alteration," under section 77.52(a)10 and "processing" within the meaning of section 77.52(2)(a)11. (Pet. App. 62.) Among other arguments, the Petitioners asserted that the "processing" argument was untimely, as it was not listed as a basis in the Department's notices. (Pet. App. 64.)

In its decision, the Commission concluded that the services provided by SDI were subject to retail sales tax in Wisconsin. (Pet. App. 64). Specifically, The Commission asserted that the services of SDI were taxable as "processing" under Wisconsin Statutes section 77.52(2)(a)11. (Pet. App. 64.) To reach this conclusion, the Commission applied a dictionary definition of processing "to put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process." Additionally, the Commission determined that the Department's failure to cite 77.52(2)(a)11 in the notices did not foreclose a subsequent argument of its applicability. (Pet. App. 64.) Subsequently, the Petitioners filed this action contesting the Commission's determination.

STANDARD

A judicial review of an administrative decision pursuant to Wisconsin Statutes Chapter 227 is limited to what is prescribed by statute. Wis. Stat. § 227.57. Accordingly, "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [Wisconsin Statutes section 227.57], it shall affirm the agency's action." Wis. Stat. § 227.57(2). When considering whether the agency acted appropriately, courts shall accord due weight to the "experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. Wis. Stat. § 227.57(10).

Among the reasons the Court may modify or remand an agency determination is if the agency: (1) erroneously interpreted provisions of law; (2) acted outside the range of discretion delegated to the agency; (3) made a determination that is inconsistent with agency practice and policy; and (4) made findings of fact not supported by substantial evidence in the record. § 227.57(5),(6),(8).

ANALYSIS

Generally, the parties agree on the facts underlying this action. Where the parties strongly disagree is on issues of law; specifically, the interpretation of the retail sales tax statute. When reviewing the Commission's interpretation of a statute, there are three possible levels of review: great weight, due weight, and *de novo*. *Wisconsin Dep't of Revenue v. A. Gagliano Co.*, 2005 WI App 170, ¶ 22, 284 Wis. 2d 741, 755, 702 N.W.2d 834, 841.

The Commission argues that the Court should accord its decision with great deference. A court should give great weight deference when:

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

Id. (citation omitted).

In opposition, the Petitioners argue that because the interpretation is not reasonable, the Court should give no deference. In the alternative, the Petitioners argue that the issue decided is not a long-standing interpretation and thus does not reach the necessary requirements to give great weight deference.

Although the Court understands and appreciates both arguments, it is not necessary for the Court to make a determination. Even if the Court afforded the lowest amount of deference, *de novo*, the Court would reach the same conclusion as if it applied great weight deference. Accordingly, the Court will review the decision *de novo* while expressly not making a determination of the appropriate amount of deference.

In support of review of the Commission's decision, the Petitioners make three arguments: (1) the Commission contravened long-standing law and precedent when it accepted the Department's broad "covers everything" definition of processing; (2) the Commission's decision sets an unrestrained precedent allowing the Department to impose a tax on any service despite the constraints of law; and (3) the Commission allowed the Department to claim an after-the-fact justification for taxation in contravention of the statutes, department policy, and actual department practice. The Court will consider each of these arguments separately

1. Broad Definition of Processing

The Petitioners argue that the Commission's decision overlooks basic tax principles. Namely, that service taxes cannot be imposed without clear and express language and that if any ambiguity exists, it should be resolved in favor of the taxpayer. In this case rather than apply these rules, the Petitioners assert that the Commission applied a "processing" definition that the Department unilaterally selected from a dictionary.

In support, the Petitioners point to the Commission's findings that SDI simply performed the function of "separation." Because "separation" is not listed as a category in the retail sales tax section, the Petitioners argue that there is no clear and express language. The Court fails to see why separation and processing are mutually exclusive, such that separation is *per se* not processing. This argument makes little sense, especially as the Petitioners fail to offer a different definition of processing the Court should apply. Instead, the Petitioners cite to the administrative code, which merely includes examples of processing, rather than excluding or otherwise defining.

Similarly, the Petitioners argument that ambiguity exists because the Department staff did not know whether SDI's services were taxable. That is not the standard. Department employees' personal interpretation of the statute is not something courts appropriately should consider when interpreting a statute. The goal of statutory interpretation is to give effect to the legislature's intent. *State ex rel.*

Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 43, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Interpretation begins with the language of the statute. *Kalal*, ¶ 45. If the language is plain, statutory interpretation also ends with the language of the statute. *Id.* Courts use a particular statutory interpretation methodology when looking at the language of a statute.

Generally, a word is given its common, ordinary, and accepted meaning. *Id.* To help ascertain the common definition of a term, a dictionary definition is often helpful. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 28-29, 341 Wis. 2d 607, 619-20, 815 N. W.2d. 367, 375. If, however, the word or phrase is technical or specially-defined, then statutory interpretation requires that it is given its technical or special definitional meaning. *Kalal*, ¶ 45.

In addition to considering the meaning of each individual word, courts consider the statute as a whole to give reasonable effect to every word. *Kalal*, ¶ 46. "Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." Id. Additionally, courts should favor an interpretation that fulfills the purpose of a statute over an interpretation that is incongruous with its objective. *Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 112, 673 N.W.2d 676, 686.

In this case, the Court must interpret "processing." Because there is no definition given in the statute, the Court will apply the common, ordinary definition. The definition suggested by the Department before the Commission is helpful to an understanding of the word. The definition, found in the American Heritage Dictionary, is "to put through the steps of prescribed procedure; or to prepare, treat, or convert by subjecting to a special process." (WTAC R. 22, p. 24.) The Court understands that there are multiple available definitions of "processing," that the Court could apply. However, because the Court is not aware of any technical meaning of the term for the tax statutes, the

Court will utilize the definition suggested by the Department, because it is consistent with the ordinary meaning of the term.

As described in the record, SDI's service in this case falls under that definition. SDI receives the untreated water from the Fox River and puts it through the steps of a prescribed procedure, which prepares the product into separate groups for eventual reuse or disposal. The plain meaning of "processing" includes SDI's activities, such that it is subject to retail sales tax.

2. Unrestrained Precedent

The Petitioners argue that the definition used for processing is so broad that it turns a selective tax into a general tax and makes all the services listed in both sections 77.52(2)(a)(10) and 77.52(2)(a)(11) superfluous. The Court disagrees with this characterization. Although processing is a broad description, it does not create superfluous all the other terms used in the statute. The terms each have a distinct meaning. The other terms, for example producing and repair, do not in every instance "convert" something using a "prescribed procedure" as the Court uses the term. Overlap certainly exists, but each retains a distinct meaning. Petitioner itself is trying to broaden an already broad definition. Just because "processing" can cover a wide range of activities does not mean the Court should not apply the correct definition and plain meaning of the term.

In further support of its position, the Petitioners cite Wisconsin Administrative Tax Section 11.38, which provides examples of processing services. The Petitioners argue that the Court should extrapolate that each of the examples of processing starts with a product and "enhances" it. The Petitioners fail to recognize that SDI "enhances" the product as well. Although the material that arrives at SDI is the same sand, water, and sediment leaves SDI, it is still enhanced into separate components. Based on the plain language of the statute, the Court finds that the Commission appropriately determined that SDI's activities were taxable as "processing."

3. After-the-Fact Justification

Finally, the Petitioners argue that the Commission wrongly allowed the Department to claim after-the-fact justification. In support, the Petitioners cite the requirement that the Department give notice about the determination of tax liability in writing:

> 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. . .

§ 77.59(3). Additionally, the Petitioners argue that a taxpayer is told to describe each item in the report you disagree with when filing an appeal, (Pet. App. 90) and that the Department's policy and practice are consistent with an interpretation of the statue requiring the basis for the determination of tax be in writing, (Pet. App. 108, 50:14-51:5.)

There is no dispute that in the notice of determination required under section 77.59(3), the Department did not indicate that section 77.52(2)(a)11 was a basis for tax liability. However, the Petitioners' argument that there is a statutory mandate that *all* justification for tax liability be listed on the notice is not consistent with the clear language of the statute. The Court fails to see why, if in general practice, the Department lists all justifications for a tax liability that requires them to do in every instance when there is no statutory requirement. *See Kamps v. Wisconsin Dep't of Revenue*, 2003 WI App 106, ¶ 26, 264 Wis. 2d 794, 814, 663 N. W.2d 306, 315 (stating that the "agency" whose decision is subject to judicial review is the Commission, not the Department). The Court agrees that section 77.59(3) only requires a written notice. That was provided to the Petitioners; therefore, there is no basis for relief.

Further, the Commission's reliance *Midwest Track Associates, Inc. v. Dep't of Revenue*, Wis. Tax Rpter. (CCH) (WTAC 2005) is not misplaced. *Midwest* clearly established a Commission precedent of allowing the Department to pursue an alternative theory not previously raised. As it is correct, the Court will not disrupt the Commission's interpretation. Accordingly, the Court concludes

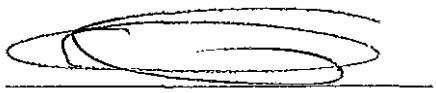
that the Department was not foreclosed from asserting that SDI's activities were taxable under section 77.52(2)(11) simply because it cited section 77.52(10) as the basis for the adjustments in the notices.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Petitioners' request for relief is **DENIED**. The Court will not supplant the Commission's decision.

Dated at Green Bay, Wisconsin, this 20 day of August, 2015.

BY THE COURT:



Honorable Marc A. Hammer
Circuit Court Judge, Branch V

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