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DISTRICT II

WISCONSIN PROPERTY TAX
CONSULTANTS, INC. AND
WISCONSIN MANUFACTURERS
AND COMMERCE, INC.,

Appeal No. 2020AP000485

Plaintiffs-Appellants,

v.

WISCONSIN DEPARTMENT
OF REVENUE,

Defendant-Respondent.

**APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF
OZAUKEE COUNTY CASE NO. 2019CV000226
THE HONORABLE SANDY A. WILLIAMS PRESIDING**

**BRIEF OF PLAINTIFFS-APPELLANTS WISCONSIN PROPERTY
TAX CONSULTANTS, INC. AND WISCONSIN MANUFACTURERS
AND COMMERCE, INC**

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INTRODUCTION

This appeal arises from a declaratory judgment action pursuant to Wis. Stat. § 277.40 in which the Plaintiffs-Appellants Wisconsin Property Tax Consultants, Inc. and Wisconsin Manufacturers and Commerce, Inc. (collectively “WPTC/WMC”) sought a declaratory judgment finding the Wisconsin Department of Revenue’s (the “Department”) unpromulgated rule applying Wis. Stat. § 70.111(27) invalid and enjoining the Department from enforcing the unpromulgated rule in the future. (R.1.) To support its request for declaratory and injunctive relief before the Circuit Court, WPTC/WMC argued that the Department’s application of Wis. Stat. § 70.111(27):

- Is inconsistent with the language Wis. Stat. § 70.111(27).
- Represents an unpromulgated rule in violation of Wis. Stat. § 227.10(1).
- Violates the uniformity clause of the Wisconsin constitution.

Noting that the Tax Appeals Commission is considering a challenge to a personal property assessment based on the Department’s application of Wis. Stat.

§ 70.111(27) and acknowledging that the Commission lacks the authority to either order the Department to comply with its statutory rulemaking obligation or declare the Department's application of Wis. Stat. § 70.11(27) unconstitutional, the Department nevertheless argued that the Circuit Court should defer to the Commission under the doctrine of primary jurisdiction.

The Circuit Court adopted the Department's argument and dismissed WPTC/WMC's complaint solely on the doctrine of primary jurisdiction. Because the Commission lacks the authority to enjoin the Department's application of Wis. Stat. § 70.111(27), WPTC/WMC appeals the Circuit Court's decision on the basis that the Department's application violates its statutory obligation to engage in rulemaking and the uniformity clause. WPTC/WMC is not asking this Court to determine whether the Department's application of Wis. Stat. § 70.111(27) is inconsistent with the statute.

On appeal, WPTC/WMC will show that the Circuit Court improperly relied on the primary jurisdiction doctrine to dismiss the rulemaking claims—Issue No. 1—and the constitutional claims, Issue No. 2. Moreover,

WPTC/WMC will show that this Court should direct the Department to engage in rulemaking and to do so in a manner that is consistent with the uniformity clause.

STATEMENT OF ISSUES

Issue No. 1

Did the Circuit Court improperly rely on the primary jurisdiction doctrine to dismiss WTPC/WMC's rulemaking claims?

Circuit Court Answer: The Circuit Court did not address this argument.

Standard of Review: Whether a circuit court has properly applied primary jurisdiction is a question of law which this Court has reviewed de novo. *Butcher v. Ameritech Corp.*, 2007 WI App. 5, ¶37, 298 Wis. 2d 468, 727 N.W.2d 546; *Employers Insurance Co., Inc. v. Tesmer*, 161 Wis. 2d 733, 741, 469 N.W.2d 203 (Ct. App. 1991).

Issue No. 2

Did the Circuit Court improperly rely on the primary jurisdiction doctrine to dismiss WPTC/WMC's constitutional claims?

Circuit Court Answer: The Circuit Court did not address this argument.

Standard of Review: Whether a circuit court has properly applied primary jurisdiction is a question of law which this Court has reviewed de novo. *Butcher v. Ameritech Corp.*, 2007 WI App. 5, ¶37, 298 Wis. 2d 468, 727 N.W.2d 546; *Employers Insurance Co., Inc. v. Tesmer*, 161 Wis. 2d 733, 741, 469 N.W.2d 203 (Ct. App. 1991).

**STATEMENT ON ORAL
ARGUMENT/PUBLICATION**

This appeal does not meet the criteria for publication under Wis. Stat. § 809.23(1). WPTC/WMC are not requesting oral argument.

STATEMENT OF FACTS AND OF THE CASE

Background Facts

This appeal stems from the enactment of Wis. Stat. § 70.111(27) and the Department's subsequent application of this statute to manufacturers.

The MTP Exemption

Wis. Stat. § 70.111(27), was enacted in 2017 as part of 3028 Wisconsin Act 59 (2017 Wis. Act 59, § 997j) (the “MTP Exemption”). (R.1 ¶ 10; R.5 ¶ 10.) The statute exempts machinery, tools and patterns from general property taxation. The statute provides:

Beginning with the property tax assessments as of January 1, 2018, machinery, tools, patterns, not including such items used in manufacturing.

Wis. Stat. § 70.111(27)(b). The statute defines machinery as:

A structure or assemblage of parts that transmits force, motion, or energy from one part to another in a predetermined way by electrical, mechanical, or chemical means. “Machinery” does not include a building.

Wis. Stat. § 70.111(27)(a). The statute does not define manufacturing nor does it exclude manufacturers from the MTP Exemption. Wis. Stat. § 70.111(27).

The Parties

Plaintiff Wisconsin Property Tax Consultants, Inc., (“WPTC”) is a property tax consulting firm that represents scores of Wisconsin manufacturers. WPTC is a business corporation organized under the laws of Wisconsin and maintains its office and principal place of business is

located at 10206 N. Port Washington Rd., Mequon,
Wisconsin 53902. (R.1 ¶ 3; R.20 ¶¶ 3-4.)

Plaintiff Wisconsin Manufacturers and Commerce,
Inc. (“WMC”) is a statewide business trade association
headquartered in Madison, Wisconsin. WMC is organized
as a non-stock corporation under the laws of Wisconsin.
WMC is the largest business trade association in
Wisconsin with member businesses of all sizes and across
all sectors of Wisconsin’s economy. WMC’s office and
principal place of business is located at 501 East
Washington Avenue, Madison, Wisconsin 53703. (R.1 ¶
4; R.19 ¶¶ 3-5.)

The Department’s Interpretation

The Department interprets Wis. Stat. § 70.111(27)
to deny an exemption for any machinery, tools or patterns
that are owned by a manufacturer assessed under Wis. Stat.
§ 70.995. The Department has not taken any steps to
promulgate rules implementing to the MTP Exemption.
(R.5 ¶¶ 2, 24.)

While there has been no official guidance
promulgated on this issue, the Department has taken a

number of informal steps to interpret the statute and release guidance, all of which are contrary to the plain language of the statute. On November 30, 2017, the Department met with WMC to discuss implementation of the MTP Exemption. At that meeting, the Department of Revenue conveyed to WMC that the Department's position is that the MTP Exemption does not apply to manufacturers, and the Department intended to deny manufacturers the ability to claim the statutory exemption. (R.1 ¶ 11; R.5 ¶ 11.) Specifically, the Department interprets the MTP Exemption to apply only to personal property that was previously reported on the Department's "Statement of Personal Property, Schedule C – Machinery, Tools and Patterns." (*Id.*) Schedule C appears on Form PA-003 Statement of Personal Property, a form prescribed by the Department and is filed only with local assessors by businesses that have taxable personal property. (R.21 ¶ 6, Ex. D.) Manufacturers in Wisconsin do not report machinery, tools and patterns on Schedule C, but rather on the Department's Form M-P, Schedule M. Thus, under the Department's interpretation of the MTP Exemption, all personal property used at a manufacturing facility, even

machinery that is not used in manufacturing, would be subject to tax and not exempted by Wis. Stat. § 70.111(27). (See, R.1 ¶ 12; R.5 ¶ 12.)

Following this meeting, WMC asked the Department to provide clarification. (R.1 ¶ 13; R.1 Exhibit A; R.5 ¶ 13.) Then Department of Revenue Secretary Richard Chandler, responded via letter asserting that the Department has interpreted that the MTP Exemption “applies to machinery, tools and patterns as previously reported on the Statement of Personal Property, Schedule C – Machinery, Tools and Patterns.” (App. 3; R.1 ¶¶ 13, 14; R.1 Exhibit B; R.5 ¶¶ 13, 14.) The letter goes on to note, “Manufacturing properties report machinery, tools and patterns on Form M-P, Schedule M. Manufacturers should continue to report this property as they did in 2017, because *the new exemption does not apply to manufacturers.*” (Emphasis added) (App. 3; R.1 ¶ 15; R.1 Exhibit B.)

On December 15, 2017, the Department released a fact sheet regarding the MTP Exemption. (App. 4; R.21 ¶ 3, Ex. A.) The fact sheet asserted:

The exemption only applies to property that was or would be reported on Schedule C – Machinery, Tool, and Patterns, pursuant to sec. 70.30, Stats. The property is exempt starting with January 1, 2018 assessments. The exemption does not apply to manufacturing property.

The Department also revised the 2018 Wisconsin Manufacturing Personal Property Return, Form M-P, instructions with the following language:

The new machinery tools and patterns exemption, created in sec. 70.111(27), Wis. Stats., applies only to locally assessed personal property. The exemption does not apply to DOR assessed manufacturing personal property.

(App. 5; R.1 ¶ 16; R.5 ¶ 16; R.21 ¶ 4, Ex. B.)

Wisconsin Attorney General Brad D. Schimel disagreed with these interpretations. On January 3, 2019, in a letter to Assembly Speaker Robin Vos, Attorney-General Schimel provided his interpretation of the MTP Exemption, “in the hopes that [his] analysis may guide and clarify future applications of this statute to Wisconsin manufacturers.” The Schimel letter stated that “machinery, tools, and patterns are exempted from personal property tax even if a taxpayer reported those items on a different schedule in previous years.” Schimel explained:

A taxpayer’s previous use of DOR schedules is not determinative or relevant. The statute is plain and unambiguous. Nothing in the statutes provides in any way, either explicitly or implicitly, that machinery is

not defined as machinery merely because in previous tax years a taxpayer listed the item in a schedule other than “Schedule C – Machinery, Tools and Patterns.” When the Legislature added subsection 27 to Wis. Stat. § 70.111, it changed what is exempt from taxation, and in doing so it provided no language limiting the definition of machinery (except that “machinery” cannot be a “building”). If a piece of property fits the definition of “machinery,” then it is exempt from taxation, regardless of a taxpayer’s previous use of a DOR form.

(App. 21-23; R.21 ¶ 5, Ex. C.) Mr. Schimel’s letter ended by explaining, “[I]t is the Legislature’s choice to alter this language if it is not satisfied with the current text of the statute and its potential implications.” (App. 23.)

Procedural Facts

Both parties moved for summary judgment. (R.18; R.23.) In the summary judgment briefing, the WPTC/WMC argued (1) that the Department’s application of the statute violates the uniformity clause of the Wisconsin Constitution; (2) that the Department’s application of the statute exceeded its statutory authority; and (3) that the Department violated statutory rule-making procedures. (R.22.) The Department moved for summary judgment on the grounds that WPTC/WMC’s claims should be dismissed under the primary jurisdiction doctrine because the Commission had parallel pending claims.

(R.17.) WPTC/WMC responded by explaining that the primary jurisdiction doctrine did not apply, and, moreover, that the Commission does not have the authority to decide either the rulemaking issues or the constitutional claims raised in the WPTC/WMC's action. (R.25.) Without addressing the WPTC/WMC's specific arguments, the Circuit Court summarily concluded that because the Commission is considering the exact issues involved in WPTC/WMC's case, that the Commission is well-suited to determine the issues, and that the Court would not assume jurisdiction. (App. 1; R.30.)

ARGUMENT

I. THE TAX APPEALS COMMISSION LACKS THE AUTHORITY OVER RULEMAKING CLAIMS

The exclusive means of judicial review of the validity of a rule or guidance document is an action for declaratory judgment under Wis. Stat. § 227.40. There are three grounds for a declaratory judgment in such an action: (1) constitutional, (2) an agency exceeds its statutory authority, or (3) failure to comply with statutory rulemaking or adoption procedures. Wis. Stat.

§ 227.40(4)(a); *Wisconsin Federated Humane Societies, Inc. v. Stepp*, 356 Wis. 2d 326, 855 N.W.2d 491, ¶38 (2014) (Signed, unpublished); *Liberty Homes, Inc. v. Dep't of Indus., Labor and Human Relations*, 136 Wis. 2d 368, 377, 401 N.W.2d 805 (1987). This section addressed the third basis.

A. *The Circuit Court Erred In Dismissing WPTC/WMC's Rulemaking Claim On The Basis Of Primary Jurisdiction Because The Commission Has No Authority Over Rule-Making.*

Without analysis, the Circuit Court implicitly determined that the Commission has the authority or jurisdiction to require the Department to promulgate rules under Chapter 227. (App. 1; R.30.) The Circuit Court did not address this issue and, therefore, did not provide a basis for why the Commission would have authority or jurisdiction to decide statutory rulemaking procedures. (App. 1.)

Primary jurisdiction applies where both an administrative agency and the court have jurisdiction. In such cases, the doctrine provides that “where an administrative remedy is provided by statute, relief should first be sought from the administrative agency . . . before

bringing the matter to the court.” *State ex rel. Terry v. Traeger*, 60 Wis. 2d 490, 499, 211 N.W.2d 4(1973); *see also Sawejka v. Morgan*, 56 Wis. 2d 70, 79-80, 201 N.W.2d 528, 531 (1972). However, as the Wisconsin Supreme Court has said, primary jurisdiction is applied “only in cases where there is concurrent jurisdiction in the administrative agency and in the courts.” *Browne v. Milwaukee Bd. of School Directors*, 69 Wis. 2d 169, 175, 230 N.W.2d 704, 707 (1975). Hence, the Circuit Court’s initial determination should have been whether the Commission and the Circuit Court both had jurisdiction over the administrative rule process. The Circuit Court never addressed this question.

1. The Commission has No Jurisdiction Over the Rulemaking Process

The Commission is an administrative agency and is the final authority on all questions of law and fact regarding tax law. Wis. Stat. § 73.01(4)(a). The Commission’s authority and jurisdiction arises out of Chapter 73 of the Wisconsin Statutes. The Commission’s jurisdiction is explicitly provided for under Wis. Stat. §73.01(4)(a):

[T]he commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and s. 72.86 (4), 1985 stats., and ss. 70.38 (4) (a), 70.397, 70.64, and 70.995 (8), s. 76.38 (12) (a), 1993 stats., ss. 76.39 (4)(c), 76.48 (6), 77.26 (3), 77.59 (5m) and (6)(b), 78.01, 78.22, 78.40, 78.555, 139.02, 139.03, 139.06, 139.31, 139.315, 139.33, 139.76, 139.78, 341.405, and 341.45, subch. XIV of ch. 71, and subch. VII of ch. 77.

This statute clearly lists the claims subject to the Commission's authority and jurisdiction. Neither Chapter 227, nor Wis. Stat. § 227.40(4)(a) are listed. The statutes neither confer on the Commission the jurisdiction over the Department's rulemaking nor grant the Commission the authority to order the Department to engage in rulemaking.

This Court has ruled that the Commission's powers are limited to those explicitly granted by statute:

Administrative boards and commissions have no common law power. Their powers are limited by statute conferring such powers expressly or by fair implication. It is the general rule that an agency or board created by the legislature only has the powers which are either expressly conferred or necessarily implied from the four corners of the statute under which it operates. The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted.

Village of Silver Lake v. Wisconsin Dept. of Revenue, 87

Wis. 2d 463, 468, 275 N.W.2d 119, (Wis. App. 1978)

(citations omitted).

2. The Courts have Exclusive
Jurisdiction Over the Rulemaking
Process

The Courts—not the Commission—are vested with exclusive jurisdiction to review of the validity of a rule or guidance document in an action for declaratory judgment under Wis. Stat. § 227.40. Chapter 227 allows for the review of an agency’s failure to comply with statutory rulemaking or adoption procedures. Wis. Stat.

§ 227.40(4)(a). Specifically, “*the court* shall declare the rule or guidance document invalid if it finds that it . . . was promulgated or adopted without compliance with statutory rule-making or adoption procedures.” Wis. Stat.

§ 227.40(4)(a) (emphasis supplied). The declaratory judgment statute provides only the courts with the authority to declare a rule or guidance document invalid.

The plain language does not permit or contemplate that an administrative body would have the authority to declare a rule or guidance document invalid.

3. Wis. Stat. § 227.41 Does Not Provide the Commission the Authority Participate in the Rulemaking Process.

The Department will likely claim that *Sawejka v. Morgan*, 56 Wis.2d 70, 201 N.W.2d 528 (1972) and *Wisconsin Bell, Inc. v. DOR*, 164 Wis. 2d 138, 473 N.W.2d 587 (Ct. App. 1991), indicate that the Commission has authority and jurisdiction to hear this case. (*See* R.17.) These cases do not support this proposition. *Sawejka* held that the Commission and Circuit Court have concurrent jurisdiction in review of declaratory rulings from the Department. *Sawejka*, 56 Wis. 2d at 80-81. The Court's opinion contains no discussion or analysis of the Commission's role, if any, as a judicial authority on the proper promulgation of rules. *See id.* Further, the statute relied upon to determine that the Commission had authority to review the declaratory ruling was repealed in 1977. Prior to 1977, Wis. Stat. § 73.01(5)(c) empowered the Commission with a form of general jurisdiction providing that "[w]henever an appeal is taken from any determination of the secretary of revenue under sub. (4)(a) and no other procedure for appeal is specified in ch. 73 or ch. 76, the person feeling aggrieved by such determination

shall file with the clerk of the commission.” This grant of general jurisdiction—that was relied upon by the Court in *Sawejka*— was repealed by Chapter 29, Laws of 1977, § 816.

Similarly, *Wisconsin Bell* arises out of a declaratory ruling under Wis. Stat. § 227.41 not Wis. Stat. § 227.40. *Wisconsin Bell*, 164 Wis. 2d at 141. The Court’s opinion contains no discussion or analysis of the Commission’s role, if any, as a judicial authority on the proper promulgation of rules. *See id.* Neither case supports the position that the Commission has the authority or jurisdiction to declare a rule or guidance document invalid.

Finally, Wis. Stat. § 227.41 was rewritten in 2011 as it applies to the Department. 2011 Wis. Act. 68, §§46-49. While Wis. Stat. § 227.41(5)(a) now authorizes the Commission to review administrative rulings of the Department, nowhere in the statute does it grant the Commission jurisdiction or authority over the rulemaking process. Moreover, filing a petition for an administrative ruling under Wis. Stat. § 227.41(5) must defer to alternative methods of resolving disputes such as declaratory judgment pursuant to Wis. Stat. § 227.40. Wis.

Stat. § 227.41(5)(c) provides that the “department may deny the petition ... if the department determines that ... the ruling would substitute for other procedures available to the parties for resolution of the dispute.”

The focus of Wis. Stat. § 227.41 differs from Wis. Stat. § 227.40, in that the former it provides an avenue to ask the Department for an administrative ruling applying the law to a set of facts, akin to a revenue ruling that might be issued by the Internal Revenue Service. Wis. Stat. § 227.41 is not a vehicle to convince Department to order itself to promulgate and administrative rule.

At a minimum, this Court should remand this matter to the Circuit Court to consider the merits of WPTC/WMC’s claim for declaratory and injunctive relief directing the Department to promulgate administrative rules to apply the MTP Exemption.

B. On Remand This Court Should Direct The Circuit Award WPTC/WMC Declaratory And Injunctive Relief Mandating That The Department Promulgate Administrative Rules Applying The MTP Exemption.

There is no dispute of fact with respect to the lack of the Department’s rulemaking. On appeal from summary judgment, this Court is in as good a position to decide the

issue presented to the Circuit Court. *See, Precision Erecting, Inc. v. AFW Foundry, Inc.*, 229 Wis. 2d 189, 196-97, 598 N.W.2d 614 (Wis. App. 1999). Therefore, rather than merely remand this matter to the Circuit Court for consideration of WPTC/WMC's claim for declaratory and injunctive relief, this Court should direct the Circuit Court to issue an order mandating the Department to promulgate administrative rules to apply the MTP Exemption or declaring the Department's guidance invalid.

1. The Department was Obligated to Promulgate an Administrative Rule Applying the MTP Exemption.

An administrative agency's authority to issue official guidance or a "rule" is regulated by Chapter 227 of the Wisconsin Statutes. Pursuant to Wis. Stat. § 227.10(1), every State "agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wisconsin courts have interpreted Wis. Stat. § 227.10(1) to mean that "any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute must be promulgated as a rule." *See, Cholvín*

v. *DHFS*, 2008 WI App 127, ¶ 21, 313 Wis. 2d 749, 760, 758 N.W.2d 118, 123. A rule under Chapter 227 is defined as:

A regulation, standard, statement of policy, or general order of application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.

Wis. Stat. § 227.01(13). When promulgating rules, the Department must adhere to statutory rulemaking procedures provided by Wis. Stat. § 227, including but not limited to the following:

1. The preparation of a statement of scope. Wis. Stat. § 227.135 (1).
2. Approval of a statement of scope by the Governor. Wis. Stat. § 227.135 (2).
3. Following appropriate rule drafting protocols. Wis. Stat. § 227.14 (1).
4. Preparation of an economic impact analysis. Wis. Stat. § 227.137 (2).
5. Review by the Legislative Council Rules Clearinghouse. Wis. Stat. § 227.15 (1).
6. A public hearing. Wis. Stat. § 227.16 (1).
7. An initial regulatory flexibility analysis. Wis. Stat. § 227.17 (3)(f).
8. A comparison of similar provisions in neighboring states. Wis. Stat. § 227.14 (2)(a)4).

9. Submission of final draft rules to the Governor for approval. Wis. Stat. § 227.185.
10. Submission to the Legislature for its review. Wis. Stat. § 227.19.

These rule-making procedures are mandated to ensure that the legal rights and privileges of Wisconsin's citizens are protected, and that interested parties have the opportunity to participate in public hearings and commentary on the rules made by the Department and other agencies. Pursuant to Wis. Stat. § 227.40(4)(a), "the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with the statutory rule-making procedures."

The Department's interpretation of the MTP Exemption is clearly a rule within the meaning of Wis. Stat. § 227.01(13). Secretary Chandler's letter is a standard or statement of policy that was issued by the Department to interpret Wis. Stat. § 70.111(27). (App. 3; R.21 ¶ 5, Ex. C.) The letter clearly states that it is "the interpretation of the Department." The letter further states that the Department has taken action in accordance with this interpretation to update the 2018 Form M-P. (App. 3;

R.21 ¶ 5, Ex. C.) The Department has established a standard or statement of policy by communicating a consistent interpretation and updating Department Forms and Publications to reflect that interpretation. (App. 3-5; R.21 ¶¶ 3-4, Exs. A-B.) Furthermore, the Department has adopted its interpretation to govern its enforcement or administration of the statute, which alone meets the definition of a rule under Chapter 227. Thus, the Department's interpretation meets the definition of a rule under Chapter 227.

Because the Department interpretation and actions meet the definition of a rule under Chapter 227, the Department was required to promulgate the interpretation as a rule. The Department has failed to do this. The Department has not engaged in any of the rule making procedures provided in Chapter 227 related to the MTP Exemption. The failure of the Department to follow statutory rulemaking procedures has interfered with or impaired the legal rights and privileges of the WPTC and WMC to participate in the rulemaking process. Specifically, the WPTC and WMC, as well as other interested parties, did not have any notice that the

Department was engaging in rulemaking and have had no opportunity to participate in a public hearing or provide comments on the rule. (R.19 ¶¶ 7-9; R.20 ¶¶ 5-7.) Therefore, the Department's rule should be declared invalid.

The Department claims that its interpretation does not rise to the level of a rule under Wis. Stat. § 227.01(13). (R. 5 ¶¶ 24-25; *See* R.17.) Even if that were the case, Wisconsin Courts require that “any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute” to be promulgated as a rule. *See, Cholvin*, 2008 WI App 127 at ¶ 21. As such, the Department is required to promulgate as a rule this interpretation in accordance with Chapter 227.

2. The Department is Not Applying the Plain Language of the MTP Exemption.

The Department will likely argue that it need not engage in rulemaking because it is applying the statute's plain language. In order for the Department to prevail on this argument, it must prove that it is applying the plain language of the statute and that it has not adopted an

interpretation to fill any statutory gaps or supplies a standard not found in the language of the MTP Exemption.

The undisputed evidence in the summary judgment record shows that the Department has, in fact, added requirements that that do not exist in the MTP Exemption. First, the Department added the requirement that any property not previously reported on Schedule C – Personal Property Tax Return, does not qualify for the exemption. Second, the Department added the requirement that the property must not be “used by” or “owned by” a manufacturer. Neither of these requirements are found in the plain language of the MTP Exemption, yet they are found in documents issued by the Department: (1) The letter from Secretary Chandler (App. 3; R. 21 ¶ 5, Ex. C); (2) The MTP Fact Sheet (App. 4; R.21 ¶ 3, Ex. A); and (3) the instructions to the Manufacturing Personal Property Return, Form M-P (App. 5; R.21 ¶ 4, Ex. B). The Department has used these additional requirements to deny manufacturers the MTP Exemption, giving their standard the effect of law.

If this Court determines that the Department’s interpretation rises to the level of a rule under

§ 227.01(13), this Court should require the Department to promulgate its interpretation, as adopted for enforcement, as a rule in accordance with *Cholvin's* interpretation of Wis. Stat. § 227.10(1).

II. THE TAX APPEALS COMMISSION LACKS THE AUTHORITY TO DECIDE CONSTITUTIONAL CLAIMS

As indicated above, the exclusive means of judicial review of the validity of a rule or guidance document is an action for declaratory judgment under Wis. Stat. § 227.40. Of the three grounds for a declaratory judgment in such an action, this section shall deal with the basis that the agency interpretation violates the constitution. Wis. Stat.

§ 227.40(4)(a); *Wisconsin Federated Humane Societies, Inc. v. Stepp*, 356 Wis. 2d 326, 855 N.W.2d 491, ¶38 (2014) (signed, unpublished); *Liberty Homes, Inc.*, 136 Wis. 2d at 377.

A. *The Circuit Court Erred In Dismissing WPTC/WMC's Uniformity Claim On The Basis Of Primary Jurisdiction Because The Commission Has No Authority To Decide Uniformity Claims.*

The Circuit Court incorrectly assumed that the Commission has the authority or jurisdiction to decide the

constitutional claims at issue in this case. (App. 1; R.30.)

Generally, administrative agencies have no power to declare state laws unconstitutional and the determination of constitutionality is exclusively vested in the courts.

Warshafsky v. Journal Co., 63 Wis. 2d 130, 147, 216 N.W.2d 197 (1974).

In keeping with this general principle, the Commission has a long-standing policy against determining constitutional issues. *See e.g. Richard Wolfe v. Department of Revenue*, 10 WTAC 26, 27 (1974); *Vilter International Corporation v. Wisconsin Department of Revenue*, 1986 WL 25332 (Wis.Tax.App.Com.) (Commissioner R. Junceau, dissenting).¹ The Commission's authority to apply constitutional issues is limited. For example, in *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), the Supreme Court noted that the Commission might be able to decide the constitutionality Wisconsin's taxing scheme where the U.S. Supreme Court has ruled a substantially similar scheme in another state unconstitutional. Alternatively, the Court held that the

¹ A copy of cases are included in the Appendix at App.24 – App.35

constitutional issue could be reserved for the Circuit Court that hears an appeal of a Commission decision. *Id.* at 8-9.

Under *Hogan*, the only way in which the Commission and the Circuit Court would have concurrent jurisdiction is if the MTP Exemption or similar exemption had been ruled unconstitutional by the U.S. Supreme Court. That is not the case here. There is no U.S. Supreme Court ruling that relates to the MTP Exemption. Moreover, the issue in this case exclusively pertains to the constitutionality of the Department's unpromulgated rules and guidance which violates numerous constitutional provisions. (R.1 ¶ 41-42.)

The Circuit Court in its decision stated that it would not assume jurisdiction because "there are numerous similar cases pending before the Commission," in which the "Commission is considering how to interpret and apply Wis. Stat. 70.111(27)." (App. 1; R.30.) This is the exact argument the Department made to the Circuit Court and will likely make again. While this argument may apply to statutory interpretation, it certainly does not apply to the constitutionality of the Department's interpretation. In fact, of the 25 cases (54 dockets) pending at the

Commission, none seek declaratory judgments and none deal with the constitutionality of the Department's interpretation. (R.25, 3-4; R.26 ¶ 6.) Moreover, this argument completely ignores the claims of constitutionality and the authority and jurisdiction of the Commission. The Commission does not have the authority or jurisdiction to decide any issues involving the constitutional claims.

B. The Department's Application Of The MTP Exemption Violates The Uniformity Clause Of The Wisconsin Constitution.

There is no dispute of fact with respect to WPTC/WMC's uniformity claim. On appeal from summary judgment, this Court is in as good a position to decide the issue presented to the Circuit Court. *See, Precision Erecting, Inc.*, 229 Wis. 2d at 196-97. Therefore, rather than merely remand this matter to the Circuit Court for consideration of WPTC/WMC's constitutional claim, this Court should direct the Circuit Court to issue an order declaring the Department application of the MTP Exemption violates the uniformity clause of the Wisconsin constitution.

The Wisconsin Constitution requires that the rule of taxation to be uniform. Wisconsin Constitution, Article VIII, § 1. Under the uniformity clause “there is only one constitutional class – that which is taxable – and the burden of taxation must be borne, as nearly as practicable, equally among all the property within that taxable class, based on the value of the property.” *Noah's Ark Family Park v. Bd. Of Review*, 210 Wis. 2d 301, 317, 565 N.W.2d 230 (Ct. App. 1997) (quoting *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633, 641-642). A taxing authority violates the uniformity clause when its method of assessment is arbitrary or relies on improper classifications or considerations. *Noah's Ark Family Park v. Vill. of Lake Delton*, 216 Wis. 2d 387, 573 N.W.2d 852 (Ct. App. 1998). The purpose of the uniformity clause is to reinforce the importance that taxpayers receive “fair play from tax officials.” *IBM Credit Corp. v. Vill. of Allouez*, 188 Wis. 2d 143, 524 N.W.2d 132 (1994).

The Supreme Court has identified six standards to consider when enforcing the uniformity clause of the Wisconsin constitution. Three of these are:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an ad valorem basis.

* * *

6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an ad valorem basis with other taxable property.

Northwest Airlines, Inc. v. Dep't of Revenue, 2006 WI 88,

¶ 62, 293 Wis. 2d 202, 717 N.W.2d 280. The uniformity clause effectively creates two classes of property – those which are taxable and those which are not taxable. And the uniformity clause requires that there be “one class of taxable property and that all property within that class must, as nearly as practicable, be taxed uniformly.”

Northwest Airlines, 2006 WI 88, ¶ 62. What matters is whether the taxing authority’s assessment results in a taxpayer or taxpayers bearing a tax burden which is not equal with other taxable property. *See, generally, Gottlieb*, 33 Wis. 2d 408; *Noah’s Ark Family Park*, 216 Wis. 2d 387; *Northwest Airlines*, 2006 WI 88.

The Department’s interpretation of the MTP Exemption relies on improper classification or

considerations resulting in manufacturers bearing a higher tax burden, which violates the uniformity clause. The Department's interpretation taxes property used for the same purposes differently depending on who owns the property. For example, a copy machine is "an assemblage of parts that transmits force, motion, or energy, from one part to another in a predetermined way by electrical, mechanical, or chemical means." Wis. Stat.

§ 70.111(27)(a). Thus, a copy machine would be "machinery" under the statute. However, under the Department's interpretation, a copy machine owned by a manufacturer is not be exempt, while a copy machine owned by a non-manufacturer is exempt. By basing the exemption on who owns the property, the application of the statute is clearly not uniform and is unconstitutional. Because the Department's interpretation gives rise to an unconstitutional application of the statute, the Court must declare it invalid.

CONCLUSION

The Circuit Court's primary rational for dismissal is because "there are numerous similar cases pending before

the Tax Appeal Commission. The Commission is considering how to interpret and apply Wis. Stat. 70.111(27) to property owned and used by manufacturers. That is the exact issue in this case.” (App. 1; R.30.) The Circuit Court was wrong. The cases that are currently pending before the Commission are not the same as this case.

Even if the cases were the same, the Commission does not have the authority or jurisdiction to decide declaratory actions involving rulemaking or constitutional claims. The Court is the only decision making body with authority and jurisdiction to decide these issues. As such, This Court should reverse the decision of the Circuit Court and remand for the determinations mandated by Wis. Stat. § 277.40.

Dated this 9th day of June, 2020.

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COURT OF APPEALS OF WISCONSIN
DISTRICT II

WISCONSIN PROPERTY TAX
CONSULTANTS, INC. AND
WISCONSIN MANUFACTURERS
AND COMMERCE, INC.,

Appeal No. 2020AP000485

Plaintiffs-Appellants,

v.

WISCONSIN DEPARTMENT
OF REVENUE,

Defendant-Respondent.

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §§809.19(8)(b) and (c) for a reply brief and supplemental appendix with a proportional serif font. The length of this brief is 5,614 words.

I further certify that I have submitted an electronic copy of this brief 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.

Dated this 9th day of June, 2020.

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