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COURT OF APPEALS OF WISCONSIN  
DISTRICT II

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

Appeal No. 2020AP000485

Plaintiffs-Appellants,

v.

WISCONSIN DEPARTMENT  
OF REVENUE,

Defendant-Respondent.

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

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

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## ARGUMENT

### I. STANDARD OF REVIEW

The Department argues that the appropriate standard of review is not de novo, but rather is abuse of discretion. (Department-Brief 11.) An abuse of discretion standard of review is only appropriate where both the Circuit Court and the administrative agency have jurisdiction. *Butcher v. Ameritech Corp.*, 2007 WI App. 5, ¶37, 298 Wis. 2d 468, 727 N.W.2d 546. Plaintiffs-Appellants Wisconsin Property Tax Consultants, Inc. and Wisconsin Manufacturers and Commerce, Inc. (collectively “WPTC/WMC”) cite *Butcher* in their standard of review for that exact point. The condition precedent to primary jurisdiction is that both bodies must have concurrent jurisdiction. The question in this case is whether that condition precedent was satisfied and whether primary jurisdiction should have applied in the first place. This is a question of law, which is subject to de novo review. *Employers Insurance Co. Inc. v. Tesmer*, 161 Wis. 2d 733, 741, 469 N.W.2d 203 (Ct. App. 1991.) The appropriate standard of review is de novo.

## II. THE CIRCUIT COURT ERRED IN APPLYING THE PRIMARY JURISDICTION DOCTRINE

WPTC/WMC have demonstrated that the Tax Appeals Commission (the “Commission”) does not have the jurisdiction to decide the issues on appeal, and as such the primary jurisdiction doctrine is inapplicable. Rather than address the Commission’s actual jurisdiction, the Department argues that the WPTC/WMC should have filed with the Commission no matter what, even if it lacked jurisdiction over the claims, and the Commission could have reserved them for the circuit court to decide on judicial review. (Department-Brief 12). The Department’s position is simply inconsistent with the plain language of the applicable statutes and best practices.

The Department’s primary argument is that the Commission has broad jurisdiction in all tax matters. (Department-Brief 12-16.) The Department asserts that the Commission is “the final authority for the hearing and determination of all questions of law and fact arising under’ *the tax code.*” (Department-Brief 13 (emphasis supplied).) The Department’s characterization of the Commission’s jurisdiction is much broader than the statute

provides. The legislature did not grant the Commission jurisdiction over all questions of law and fact arising under *the tax code*. The legislature's grant of jurisdiction is limited to questions arising under a finite list of statutes:

[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.

Wis. Stat. § 73.01(4)(a). Under this statute, the Commission's jurisdiction is limited to questions arising under the statutes listed. 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. Moreover, this Court has ruled that the Commission's powers are limited to those explicitly granted by statute.

(WPTC/WMC-Brief 16.)

The Department claims that because the rulemaking and constitutional claims pertain to a tax code provision—Wis. Stat. § 70.111(27)—the Commission would have

jurisdiction. (Department-Brief 16-19.) The Department's claim fails because the cause of action in this case arises out of Wis. Stat. § 227.40, and not Wis. Stat. § 70.111(27). In determining jurisdiction, it is irrelevant that the rule at issue pertains to Wis. Stat. § 70.111(27). Rather, what is relevant is whether the legislature has authorized the Commission to review a rule for validity, to invalidate a rule, and/or to order the agency to engage in rulemaking—all of which fall under Wis. Stat. § 227.40 and outside of the Commission's jurisdiction. In determining the Commission's jurisdiction, this Court has held that its enabling statutes are to be strictly construed to preclude the exercise of power not expressly granted and any doubt should be resolved against the Commission. *Wisconsin Dept. of Revenue v. Hogan*, 198 Wis. 2d 792, 816, 543 N.W. 2d 825 (Ct. App. 1995); *Village of Silver Lake v. Wisconsin Dept. of Revenue*, 87 Wis. 2d 463, 275 N.W.2d 119 (Wis. App. 1978).

### **III. THE DISMISSAL OF THE RULEMAKING CLAIMS WAS NOT PROPER.**

WPTC/WMC have already shown that the Commission does not have jurisdiction over the rulemaking claims. (*See, supra*, Section II.) WPTC/WMC will address the Department's remaining rulemaking arguments.

*a. Wis. Stat. § 227.40(2)(e) does not give the Commission jurisdiction.*

The Department then argues that an alternative statute gives the Commission jurisdiction. The Department argues that Wis. Stat. § 227.40(2)(e) gives the Commission the jurisdiction to decide these claims. The Department's argument is incorrect. Wis. Stat. § 227.40(2)(e) permits the validity of a rule to be determined in a Wis. Stat. § 227.52 or Wis. Stat. § 227.58 proceeding only if the rule was duly challenged in a proceeding before the agency in which the order or decision sought to be reviewed was made or entered. Here, the agency the statute is referring to is the Department. The WPTC/WMC did not nor were they required to challenge the validity of the rule before the

Department. Further, decisions of the Department are not eligible for review under a § 227.52 proceeding.

Moreover, Wis. Stat. § 227.58 proceedings allow for review of the final judgment of the circuit court by appeal to the court of appeals. Neither of these proceedings refer to the Commission, nor do they contemplate the Commission can review the validity of the Department's rule.

The Department also relies on *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, 247 Wis. 2d 589, 634 N.W.2d 593 to support its proposition that an administrative agency can hear rulemaking claims. (Department-Brief 21.) *Heritage* related to review under Wis. Stat. § 227.40(2)(e), which as discussed above does not apply to the Department of Revenue. Wis. Stat. § 27.52(1). *Heritage* is irrelevant to this dispute.

***b. The Exhaustion of Remedies Doctrine, like the Primary Jurisdiction Doctrine, is irrelevant to this case.***

The Department next relies on *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, 305 Wis. 2d 788, 741 N.W. 2d 244 to stand for the proposition that an administrative agency can rule on the promulgation of

rules. *Metz* does not outweigh the express statutory authority provided in Wis. Stat. § 73.01(4) because it has nothing to do with the Commission.

Moreover, both the exhaustion doctrine and the primary jurisdiction doctrines only apply if there is concurrent jurisdiction between both the courts and the administrative agency. *Metz*, 2007 WI App 220, ¶ 13; *Sawekja v. Morgan*, 56 Wis. 2d 70, 79, 201 N.W.2d 528 (1972). As discussed above, the Commission does not have jurisdiction, making *Metz* irrelevant.

*Metz* is also distinguishable on the facts because the Plaintiff filed his declaratory judgment action in the middle of an ongoing administrative proceeding against him. *Metz*, 2007 WI App 220, at ¶¶ 3-4. That is not the case here. Despite the Department's assertions, there is no case currently pending before the Commission that deals with the same rulemaking and constitutional issues. (WPTC/WMC-Brief 32-33.)

*c. The Department conflates statutory interpretation and rulemaking.*

The Department argues that the rulemaking claim turns entirely on whether the Department administers Wis. Stat. § 70.111(27) according to its plain language. (Department-Brief 22, 28.) The Court should reject this argument. The question is when evaluating the rulemaking claim is not “*is the Department’s interpretation of the rule valid?*” rather it is “*was the Department’s rule made in accordance with the procedures outlined in § 227?*” See, *Cholvin v. DHFS*, 2008 WI App 127, ¶ 21, 313 Wis. 2d 749, 760, 758 N.W.2d 118, 123; See, Chapter 227.

The Department argues that when an agency applies a statute’s plain terms, that does not require rulemaking. (Department-Brief 28-30.) As stated in WPTC/WMC’s brief, 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 Wis. Stat. § 70.111(27). The undisputed evidence in the summary judgment record shows that the Department has, in fact,

added requirements that that do not exist in Wis. Stat. § 70.111(27). (WPTC/WMC-Brief 28.) The Department has yet to meet this burden.

*d. WPTC/WMC's rulemaking claim is ripe.*

The ripeness claim has already been addressed by WPTC/WMC in the initial briefing at the circuit court (R.25 10-11). Ripeness requires only that the stated acts have occurred. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 667, 239 N.W.2d 313 (1967). For purposes of declaratory judgment, the Department has acted, the violations have occurred, and the claim is ripe. Moreover, the court did not dismiss for lack of ripeness. (App.1, R.30.)

**IV. THE DISMISSAL OF THE CONSTITUTIONAL CLAIMS WAS NOT PROPER.**

WPTC/WMC previously showed that the Commission lacks jurisdiction over the rulemaking claims. (*See, supra*, Section II.) The Department attempts to side-step the Commission's statutory jurisdiction by arguing that administrative agencies, such as the Commission, "undoubtedly can order their respective agencies to

administer statutes in accordance with the Wisconsin Constitution.” (Department-Brief 17.) Yet, the Department offers no authority on this point. The Department is once again ignoring the foundation of the claim—declaratory judgment.

The Department also suggests that WPTC/WMC provides no authority for the proposition that the Commission cannot evaluate whether the DOR’s administration of Wis. Stat. § 70.111(27) violates the Uniformity Clause. (Department-Brief 17.) However, WPTC/WMC have provided extensive analysis on the Commission’s statutory jurisdiction, which does not include declaratory judgment actions. (R.25 2-4; R.28 3-4; WPTC/WMC-Brief 12-21.)

The Department next argues that courts have repeatedly indicated that agencies can consider constitutional questions, and provides a slew of cases in support of that position, which WPTC/WMC will address below. (Department-Brief 17.) The Department’s argument misses the point. WPTC/WMC’s position is that the Commission cannot review the Department’s rule for constitutional violations nor can it invalidate the

Department's rule for constitutional issues. Specifically, Wis. Stat. § 227.40(4)(a) provides that "the Court shall declare the rule or guidance document invalid if it finds that it violates constitutional provisions." The sole question is whether the Department's rule or guidance document violates constitutional provisions.

The cases cited by the Department here are largely irrelevant because they deal with the determining the constitutionality of a statute, and not a rule or guidance document. Nevertheless, WPTC/WMC will address them briefly. The Department again relies on *Sawejka*, which—as WPTC/WMC explained—relied upon a statute that was repealed in 1977. (WPTC/WMC-Brief 19.)

The Department then cites a slew of cases<sup>1</sup> to illustrate that the Commission has repeatedly considered constitutional claims. (Department-Brief 18-19, n. 7.)

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<sup>1</sup> *American Family Mutual Insurance Co. v. WDOR*, 222 Wis. 2d 650, 653, 586 N.W.2d 872 (1998), *Hennick v. DOR*, Wis. Tax. Rptr. (CCH) ¶203-095, (WTAC 1989); *Republic Airlines v. WDOR*, Wis. Tax Rptr. (CCH) P203-058 (WTAC 1989); *NCR Corporation v. DOR*, Wis. Tax. Rptr. (CCH) ¶203-301, Fn.64, Fn.108 (WTAC 1992); *Hansen v. WDOR*, Wis. Tax Rptr. (CCH) ¶400-068 (WTAC 1994); *Wisconsin Steel Industries, Inc. v. WDOR*, Wis Tax. Rptr. (CCH) ¶400-191; *Superior Hazardous Waste Group, Inc. v. WDOR*, Wis. Tax Rptr. (CCH) ¶400-377 (WTAC 1998); *Arty's, LLC v. WDOR*, 2016 WL 3131450 (WTAC May 19, 2016).

Again, these cases consider the constitutionality of tax statutes, not the constitutionality of Department rules or guidance.

Lastly, the Department, relying on *Metz*, lists alternative solutions the Commission could utilize to resolve the case without declaring the statute unconstitutional. (Department-Brief 17-18.) This argument is inapplicable in this case because this case does not deal with the exhaustion doctrine, but also does not seek to invalidate an ordinance or statute. Rather, this action seeks to invalidate Department guidance and rules, and the statutes provide a clear cause of action to do that, which does not fall within the Commission's jurisdiction.

**V. THE DEPARTMENT'S POSITION WOULD EVISCERATE THE AVAILABILITY OF DECLARATORY RELIEF UNDER WIS. STAT. § 227.41.**

The Department argues that even if the Commission lacks jurisdiction, "an aggrieved taxpayer should still bring its other claims to the Commission first and reserve any rulemaking or constitutional claims for the circuit court." (Department-Brief 12, 23-25.)

Fundamentally, the Department's argument would greatly limit the availability declaratory rulings under Wis. Stat. § 227.41. WPTC/WMC do not own manufacturing property arguably subject to the exemption under Wis. Stat. § 70.111(27), they represent the interests of business who do. As such, WPTC/WMC will never have standing to file a petition for review with the Commission under Wis. Stat. § 70.995. Under the Department's argument, an environmental organization or a trade group could never bring a challenge to a policy adopted by the Department of Natural Resources arguing the DNR was obligated to engage in rulemaking until that policy became the subject of a contested case proceeding. This would eviscerate Wis. Stat. § 227.41.

Moreover, if the Commission does not have jurisdiction, it would be absurd to bring a cause of action before the Commission—assuming a person would have standing to file a petitioner for review with the Commission—when it has no jurisdiction to decide that action. This means the parties would end up in Circuit Court on judicial review. This certainly cannot be the

result that was contemplated by *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), and in fact, it is not.

*Hogan* involved claims regarding the taxation of federal retirement benefits under Wis. Stat. § 71.05(1)(a)—a statute that is expressly listed in the Commission’s jurisdiction. Moreover, *Hogan* did not determine that the Commission had blanket authority to decide jurisdictional claims, rather it decided that:

where the United States Supreme Court has held that another state’s taxing scheme, which is substantially similar to Wisconsin’s, violates federal law or the constitution, we conclude that the Department and Commission have the authority to determine whether the continued application of the Wisconsin taxing scheme also violates federal law or the constitution.

*Id.* at 21.

Contrary to the Department’s assertion, *Hogan* did not require that WPTC/WMC file with the Commission and have the Commission reserve those claims, rather *Hogan* contemplated this could happen in certain circumstances. *Id.* at 21-22. However, in this case, unlike the petitioners in *Hogan*, WPTC/WMC do not own property subject to the exemption, and, therefore, may not file a petition for review with the Commission.

Lastly, this argument flies in the face of judicial economy. By requiring the WPTC/WMC to bring these claims to the Commission—that the Commission does not have jurisdiction to hear—and asking them to reserve those claims for judicial review, the Department is advocating for claims to not be resolved all at once together, but instead, claims that fall within the Commission’s jurisdiction should be decided first. Any decision on the remaining claims would always require the petitioner to seek judicial review, wasting time and resources.

**VI. THIS COURT IS IN AS GOOD A POSITION AS THE CIRCUIT COURT TO DECIDE THE MERITS OF WPTC/WMC’S RULEMAKING CLAIMS.**

The Department argues that if this Court reverses the Circuit Court’s ruling, it should remand this matter for the Circuit Court to consider WPTC/WMC’s rulemaking claims because the Circuit Court failed to address the grounds on which WPTC/WMC seeks reversal.

(Department-Brief 25-27.) While remanding without deciding the merits of WPTC/WMC’s claims lies with the sound discretion of this Court, this Court is in as good position as the Circuit Court to decide the merits of

WPTC/WMC's rulemaking claims. As this Court has held, "we need not remand in order to allow the trial court to exercise its discretion because we believe that the application of a well-settled principle of law to an undisputed fact is itself a question of law." *State v. Pepin*, 110 Wis.2d 431, 439, 328 N.W.2d 898 (Ct. App. 1982). *See, also, State v. Gudgeon*, 2006 WI App 143, ¶19, 295 Wis. 2d 189, 720 N.W.2d 114; *State v. Jimmie RR*, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196. Because this Court is in as good a position as the Circuit Court to resolve the merits of WPTC/WMC's rulemaking claims, it should remand this matter with instructions to the Circuit Court to grant WPTC/WMC's claims.

### CONCLUSION

A condition precedent to primary jurisdiction is that both the administrative agency and the court have jurisdiction. The Tax Appeals Commission does not have authority to decide declaratory actions involving rulemaking or constitutional claims, which pertain to the validity of the Department's rule. As such, the Circuit Court erred when it dismissed all claims under the primary

jurisdiction doctrine. The authority and jurisdiction over these claims lies only with the Courts. As such, this Court should reverse the decision of the Circuit Court with instructions to grant WPTC/WMC's rulemaking claims.

Dated this 3<sup>rd</sup> day of August, 2020.

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**FORM AND LENGTH CERTIFICATION**

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I certify that this brief conforms to the rules contained in Wis. Stats. §§809.19(8)(b) and (c) for a reply brief with a proportional serif font. The length of this brief is 2,818 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 3<sup>rd</sup> day of August, 2020.

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