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STATE OF WISCONSIN
SUPREME COURT

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

Plaintiffs-Appellants-Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Defendant-Respondent.

Appeal No. 2020AP000485
Circuit Court Case No. 2019CV000226

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

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

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ISSUE PRESENTED FOR REVIEW

Issue: In an action by parties who lack standing to challenge an assessment by the Department of Revenue, did the Circuit Court improperly rely on the primary jurisdiction doctrine to dismiss WTPC and WMC's declaratory judgment action under Wis. Stat. § 227.40(1) when it concluded that the Tax Appeals Commission had jurisdiction to entertain the action which argued the Department's guidance is invalid because the Department failed to comply with the rule promulgation requirements of Chapter 227 in construing the exemption under Wis. Stat. § 70.111(27)?

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

Court of Appeals Answer: The Circuit Court properly dismissed WTPC and WMC's Wis. Stat. § 227.40 declaratory judgment action claim because the Tax Appeals Commission has concurrent jurisdiction to (1) determine whether the Department of Revenue has complied with the rule promulgation requirements of Chapter 227 and (2) presumably to declare invalid any rule

or guidance that was not promulgated in a manner consistent with Chapter 227.

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; *Emps. Health Ins. Co. v. Tesmer*, 161 Wis. 2d 733, 741, 469 N.W.2d 203 (Ct. App. 1991).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22 and § 809.23 the Supreme Court should grant oral argument and publish its decision in this case. Oral argument will be useful to the Supreme Court given the unique administrative procedures governing the Department of Revenue and the Tax Appeals Commission.

The Supreme Court's decision to grant review validates the importance of the issues presented and, therefore, the desirability of publication. Specifically, publication is warranted because there has been a material change in the statutes since the leading decision on primary

jurisdiction and taxation— *Sawejka v. Morgan*, 56 Wis. 2d 70, 201 N.W.2d 528 (1972)—and practitioners need guidance in light of these changes. Moreover, this Court should determine whether the Court of Appeals' interpretation of Wis. Stat. § 227.40(2)(e) effectively limits the ability of interested parties to seek enforcement of Chapter 227 rulemaking requirements. Finally, this Court should decide whether guidance and rules of the Department of Revenue should be treated differently from other agencies.

INTRODUCTION

Ultimately, the issue in this case—more formally stated above—boils down to a single question: Does the Tax Appeals Commission have jurisdiction to entertain a declaratory judgment action filed under Wis. Stat. § 227.40(1) that seeks to determine whether the Department of Revenue complied with the rulemaking requirements of Chapter 227 filed by parties that lack standing to challenge an assessment to the Commission? Neither Wis. Stat. § 73.01(4)(a)—enumerating the jurisdiction of the Tax Appeals Commission—nor Wis.

Stat. § 227.40—governing rulemaking challenges—extends the jurisdiction of the Tax Appeals Commission to declaratory judgment actions under Wis. Stat. § 227.40(1) against the Department of Revenue for rulemaking or the lack thereof.

Nevertheless, the Court of Appeals in a published decision held that the Tax Appeals Commission has concurrent jurisdiction—along with the Circuit Court—to hear Wis. Stat. § 227.40(1) declaratory judgment actions challenging rulemaking or the lack thereof. Because the Court of Appeals concluded that the Tax Appeals Commission had concurrent jurisdiction to consider and act on rulemaking claims, it affirmed the Circuit Court's decision to dismiss the complaint based on the doctrine of primary jurisdiction. It is from this single holding that Plaintiffs-Appellants-Petitioners Wisconsin Property Tax Consultants, Inc. ("WPTC") and Wisconsin Manufacturers and Commerce, Inc. ("WMC") petition this Court.

STATEMENT OF THE CASE

Plaintiff-Appellant-Petitioner Wisconsin Property Tax Consultants, Inc., ("WPTC") is a property tax consulting firm based in Ozaukee County representing scores of Wisconsin manufacturers in challenging property tax assessments of real and personal property used in the manufacturing process. (App. 15, 31-32.) Plaintiff-Appellant-Petitioner Wisconsin Manufacturers and Commerce, Inc. ("WMC") is the largest business trade association in Wisconsin with member businesses of all sizes and across all sectors of Wisconsin's economy, approximately one-half of which are manufacturers. (App. 15-16, 28-29.) While WPTC has clients that are manufacturers and WMC has members that are manufacturers, neither WPTC nor WMC themselves are manufacturers who are subject to the Department's guidance at issue. (App. 28-29, 31-32.) Consequently, WPTC and WMC lack standing to prosecute an appeal of an assessment issued by the Department of Revenue.

WPTC and WMC filed a declaratory judgment action against the Department of Revenue in Ozaukee

County Circuit Court pursuant to Wis. Stat. § 227.40(1). (App. 14-27.) The Complaint arose out of guidance that the Department of Revenue issued following the enactment of Wis. Stat. § 70.111(27) which exempted machinery, tools and patterns from the personal property tax. This statute did not apply to machinery tools and patterns "used in manufacturing." The Department of Revenue's guidance provided that the exemption "does not apply to manufacturers" regardless of whether the property was actually used in manufacturing. (App. 18, 27, 35-36.)

The complaint stated three claims for declaratory and/or injunctive relief:

The first claim ("Claim One") asserted that the Department of Revenue's guidance holding that the machinery, tools and patterns exemption in Wis. Stat. § 70.111(27) constituted a rule—albeit an unpromulgated rule—as defined by Wis. Stat. § 227.01(13) because it was "a regulation, standard, statement of policy or general order of general application which has the effect of law and which was issued to implement, interpret, or make specific legislation enforced or administered by the [Department of Revenue] to govern the organization or

procedure of the [Department of Revenue]." (App. 19-20 ¶ 24.) Based on this and other averments, WPTC and WMC sought a declaration that the Department's guidance was an invalid rule and an order enjoining the Department from enforcing its interpretation until it complied with the rulemaking requirements of Chapter 227. (App. 23-24.)

The second claim ("Claim Two") asserted that the Department of Revenue's guidance was inconsistent with the language of Wis. Stat. § 70.111(27). (App. 21-22 ¶¶ 31-37.)

The third claim asserted that the Department of Revenue's guidance violated Article I, §§ 1 and 13 and Article VIII, § 1 of the Wisconsin Constitution, as well as the Fifth and Fourteenth Amendments to the United States Constitution. (App. 23, ¶¶ 38-42.)

Following cross motions for summary judgment, the Circuit Court issued a one-page decision, dismissing the complaint based on the doctrine of primary jurisdiction, holding that the "Tax Appeals Commission can determine all questions of law and fact arising under the tax laws of the state." (App. 12.)

WPTC and WMC appealed the Circuit Court's decision to the Court of Appeals. However, WPTC and WMC did not challenge the Circuit Court's primary jurisdiction decision with respect to Claim Two (*i.e.*, the Department of Revenue's guidance is inconsistent with the language of the Wis. Stat. § 70.111(27)). On appeal, WPTC and WMC challenged the Circuit Court's deferral to the Tax Appeals Commission on Claim One (*i.e.*, failure to make rules) and the third claim (*i.e.*, constitutional claim) on the basis of primary jurisdiction. WPTC and WMC argued the Circuit Court abused its discretion in dismissing Claim One and the third claim because the Tax Appeals Commission lacks jurisdiction over the rulemaking and constitutional claims.

In a published decision, the Court of Appeals held that the Circuit Court had not abused its discretion in relying on primary jurisdiction because the Tax Appeals Commission has jurisdiction to decide whether the Department of Revenue failed to comply with the rulemaking requirements of Chapter 227 and the constitutional claims. (App. 8-9 ¶¶ 13-14.)

On petition to this Court, WMC and WPTC seek redress with respect only to Claim One of its complaint: WPTC and WMC's declaratory judgment claim that the Department failed to follow the rulemaking requirements of Chapter 227.

ARGUMENT

I. THE CIRCUIT COURT WAS OBLIGATED TO CONSIDER WPTC AND WMC'S DECLARATORY JUDGMENT ON THE MERITS BECAUSE THE TAX APPEALS COMMISSION LACKS JURISDICTION OVER WIS. STAT § 227.40(1) DECLARATORY JUDGMENT ACTIONS TO ISSUE DECLARATIONS AND INJUNCTIONS INVOLVING RULE PROMULGATION MANDATES.

A. WPTC and WMC Case in Brief

To provide context, WPTC and WMC offer this concise description of the substance of their rulemaking claim ("Claim One").

1. The Department's Guidance

The legislature enacted Wis. Stat. § 70.111(27) as part of 2017 Wisconsin Act 59. This statute exempts machinery, tools and patterns from general property taxation. The statute provides the following exemption:

> 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 exemption. Wis. Stat. § 70.111(27).

While the Department of Revenue took no steps to promulgate a rule interpreting Wis. Stat. § 70.111(27), the Department issued guidance denying an exemption for any machinery, tools or patterns owned by a manufacturer assessed under Wis. Stat. § 70.995:

- On December 15, 2017, the Department of Revenue released a fact sheet regarding the machinery tools and patterns exemption asserting:

  > 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.

  (App. 35.)

- In a letter to WMC dated January 22, 2018[1] former Revenue Secretary Chandler referred to the "interpretation of the Department" and wrote that "the new exemption does not apply to manufacturers."

  (App. 27.)

[1] The stated date of the letter is "January 22, 2107." Given that 2017 Wisconsin Act 59 was enacted on September 21, 2017, context dictates that the letter's correct date should have been January 22, 2018.

- 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. 36.)

2. *The Department of Revenue's Obligation to Promulgate Rules*

Wis. Stat. § 227.10(1) mandates that 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." This statute has been interpreted 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*, *Cholvin v. DHFS*, 2008 WI App 127, ¶ 21, 313 Wis. 2d 749, 758 N.W.2d 118.[2]

Chapter 227 defines a rule 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

[2] The Court in *Cholvin* interpreted Wis. Stat. § 227.10(1) from the 2005-06 statutes. This statute has not been subsequently revised.

> administered by the agency or to govern the organization or procedure of the agency.

Wis. Stat. § 227.01(13). Rulemaking procedures were enacted 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 comment on the rules made by agencies. Wis. Stat. § 227.40(4)(a) directs the courts to "declare the rule or guidance invalid if it . . . was promulgated or adopted without compliance with statutory rule-making or adoption procedures."

The Department of Revenue's interpretation was 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). The letter clearly states that it represents "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. 27.) Similarly, in the fact sheet and the revised form, the Department established a standard or statement of policy by communicating a

consistent interpretation. (App. 35-36.) Thus, the Department's guidance meets the definition of a rule under Chapter 227.

Because the Department of Revenue's interpretation and actions met the definition of a rule under Chapter 227, the Department was required to promulgate the interpretation as a rule under Chapter 227. It is undisputed that the Department failed to undertake the necessary steps to promulgate a rule interpreting Wis. Stat. § 70.111(27).[3]

[3] The steps to promulgate a rule include the following:

1. Preparing 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. Adhering to appropriate rule drafting protocols (Wis. Stat. § 227.14 (1));
4. Preparing 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. Comparing similar provisions in neighboring states (Wis. Stat. § 227.14 (2)(a)4);
9. Submitting final draft rules to the Governor for approval (Wis. Stat. § 227.185); and
10. Submitting the rule to the Legislature for its review (Wis. Stat. § 227.19).

B. Primary Jurisdiction Applies Only Where The Administrative Agency To Which The Court Defers Has Jurisdiction Over The Claim.

Primary jurisdiction applies where both an administrative agency and the court have jurisdiction over a claim. 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*, 56 Wis. 2d at 79-80.

Moreover, this Court has held 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 Sch. Dirs.*, 69 Wis. 2d 169, 175, 230 N.W.2d 704 (1975). Thus, in order for primary jurisdiction to apply in this case, the Tax Appeals Commission must have concurrent jurisdiction to entertain declaratory judgment actions brought under Wis. Stat. § 227.40(1) seeking redress for the failure of the Department of Revenue to engage in rulemaking. The unambiguous language of the statutes involved makes it

clear that the Tax Appeals Commissions has no such jurisdiction.

C. The Tax Appeals Commission Has No Jurisdiction Over Declaratory Judgment Actions Brought Under Wis. Stat. § 227.40(1).

As an administrative agency, the Tax Appeals Commission "has only such powers as have been expressly granted to it by the legislature or which necessarily may be implied from the statutes under which it operates..." *See*, *Jackson v. Emp. Tr. Funds Bd.*, 230 Wis. 2d 677, 688, 602 N.W.2d 543 (Ct. App. 1999). The jurisdiction of the Commission is explicit and finite:

> **(4)** POWERS AND DUTIES DEFINED. **(a)** Subject to the provisions for judicial review contained in s. 73.015, the 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). Nowhere in this statute does the Tax Appeals Commission's jurisdiction extend to declaratory judgment actions under Wis. Stat. § 227.40(1). Notably, appellate courts have repeatedly refused to extend

the Tax Appeals Commission's jurisdiction to tax controversies that do not arise from the statutes explicitly listed in in Wis. Stat. § 73.01(4)(a).

In *Village of Silver Lake v. Department of Revenue*, 87 Wis. 2d 463, 275 N.W.2d 119 (Ct. App. 1978), the Court of Appeals had to decide "whether the Wisconsin Tax Appeals Commission had subject matter jurisdiction to hear a petition by a town or a village requesting a redetermination of the 1975 state tax assessment made by the Department of Revenue pursuant to sec. 70.57 and sec. 70.575, Stats." *Id.* at 466. Despite the fact that the petition at issue constituted a clear question of law arising under the tax code, the Court of Appeals held that the Commission had no jurisdiction to entertain the petition. *Id.* at 469-70.

Similarly, the Court of Appeals in *Department of Revenue v. Hogan*, 198 Wis. 2d 792, 543 N.W.2d 825 (Ct. App. 1995), dealt with a class action suit in which the class argued that Wisconsin's income tax was inconsistent with the U.S. Supreme Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Again, despite the fact that

Hogan presented a question of tax law, the Court of Appeals held that the "Tax Appeals Commission lacks authority to entertain a class-action proceeding seeking refunds of state income taxes collected on the pension income of retired federal government employees living in Wisconsin." *Id.* at 797.

Notwithstanding Wis. Stat. § 73.01(4)(a) and case law limiting the Commission's jurisdiction to this statute, the Court of Appeals pointed to the Commission's authority to address questions of law:

> We reject WMC's argument that Wis. Stat. § 73.01(4)(a), which does not expressly mention rulemaking, effectively strips the TAC of concurrent jurisdiction to consider rulemaking challenges for several reasons. WMC fails to address the "broad" language providing the TAC with authority to address "all questions of law" arising under the tax code. *See* Sawejka, 56 Wis. 2d at 75. Whether DOR administers Wis. Stat. § 70.111(27) in a way that requires administrative rulemaking is a "question of law" arising under the tax code.

(App. 9-10, n.7.)

The Court of Appeals and, to a lesser extent, the Circuit Court relied on past decisions of this Court and of the Court of Appeals to support its holding that "case law fully supports application of the primary jurisdiction doctrine in cases involving the interpretation of the state tax code." (App. 5.) Because none of these decisions

involve a declaratory judgment action under Wis. Stat. § 227.40(1) and none of them involve litigants who lack standing to directly challenge an administrative agency's action, these cases do not support the Circuit Court's decision.

1. Past Decisions of this Court and the Court of Appeals do not Support the Circuit Court's Decision.

The question before this Court is not a question of tax law, which is the province of the Tax Appeals Commission. To be sure, the Commission is "the final authority for the hearing and determination of all questions of law and fact arising"[4] under the tax statutes mentioned in Wis. Stat. § 73.01(4)(a). The claim at issue here—Claim One from the complaint—is brought under Wis. Stat. § 227.40(1) and involved the Department's rulemaking obligations under Chapter 227. Claim One does not involve a question of tax law. In addition, Claim One is not brought by parties who have standing to seek administrative review of an assessment by the Department of Revenue or the Tax Appeal Commission. In this

[4] Wis. Stat. § 73.01(4)(a).

respect, the instant case differs materially from the decisions relied upon by the Circuit Court and the Court of Appeals.

(a) Sawejka v. Morgan

Both the Circuit Court and the Court of Appeals rely on *Sawejka*, 56 Wis. 2d 70. (App. 5, 12.) The Court of Appeals noted, "Our case law fully supports application of the primary jurisdiction in cases involving the interpretation of the ***state tax code***." (App. 5 ¶6 (emphasis supplied).) This reliance is misplaced in two respects. First, Claim One does not involve a question of tax law, but arises from a cause of action authorized in Chapter 227. Second, the Commission's jurisdiction has been materially narrowed by the legislature subsequent to the *Sawejka* decision.

Sawejka involved a challenge to a determination by the Department of Revenue that "provisions of the selective retail sales' tax (sec. 77.52, Stats.) are applicable to plaintiffs' business." *Sawejka*, 56 Wis. 2d at 75. The operative term in this passage is "sales' tax." Claim One does not involve construction of a tax statute, but rather whether the Department has complied with its obligation to

promulgate rules under Chapter 227. No part of the *Sawejka* plaintiff's claims involved the Department's obligation to engage in rulemaking.[5]

More fundamentally, the Commission's jurisdiction was much broader when *Sawejka* was decided than today. The *Sawejka* Court held that the Commission had the "authority to hold declaratory proceedings arising from such a determination by the secretary of department of revenue." *Id.* at 76. This Court could reach that conclusion based on the broad jurisdiction described in the Commission's enabling statute at the time:

> (4) Powers and duties defined. (a) Subject to the provisions for judicial review contained in the statutes, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under ***the tax laws of the state, except such as may be otherwise expressly designated***. . . .

Id. at 74 (citing Wis. Stat. 73.01(4)(a) (1969-70)) (emphasis supplied). The broad, highlighted language no longer appears in the Commission's jurisdiction but is followed by a finite list of statutes:

> **(4)** POWERS AND DUTIES DEFINED. **(a)** Subject to the provisions for judicial review contained in s. 73.015,

[5] Ironically, the *Sawejka* Court rejected the Department's argument that the Commission had jurisdiction under Wis. Stat. § 227.06 which has since been renumbered as Wis. Stat. § 227.41. As will be discussed below, the Court's holding with respect to the renumbered statute continues to be true.

> the 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). This list of statutes does not include any reference to Chapter 227 or Wis. Stat. § 227.40(1), the statute under which Claim One was brought.

Likewise, the remedies available to petitioners before the Commission today are more specific, if not more limited, than when *Sawejka* was decided by this Court. This is the statute governing petitions for review filed with the Commission at the time of *Sawejka*:

> (5) Appeals to commission. (a) Any person who has filed an application for abatement or a claim for refund with the department of revenue or assessor of incomes and who is aggrieved by a determination of the department or assessor denying such application for abatement or claim for refund, may, within 30 days after such denial but not thereafter, file a petition for review of the action of the department or assessor and 4 copies thereof with the clerk of the commission. . . .

Sawejka, 56 Wis. 2d at 74-75 (citing Wis. Stat. 73.01(4)(a) (1969-70).) Today, appeals to the Commission are specifically limited to determinations of the Board of

Assessors and appeals from the Department's actions on petitions for redetermination:[6]

> (5) APPEALS TO COMMISSION. (a) Any person who is aggrieved by a determination of the state board of assessors under s. 70.995 (8) or who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department of revenue may, within 60 days of the determination of the state board of assessors or of the department of revenue or, in all other cases, within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department of revenue and the number of copies of the petition required by rule adopted by the commission . . . .

Wis. Stat. § 73.01(5)(a). Consequently, the matters that can be appealed to the Commission under current law are Board of Assessor actions on manufacturing assessments and the Department's actions on petitions for redetermination which are filed with the Department in response to audits or assessments issued by the Department.

The Commission's current jurisdiction is limited to the statutes enumerated in Wis. Stat. § 73.01(4)(a) and is not as open-ended as it was when *Sawejka* was decided.

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[6] Petitions for redeterminations are part of the administrative appeal procedure specifically authorized in response to the Department of Revenue's audits, assessments or similar actions. *See*, *e.g.*, Wis. Stat. §§ 71.88(1) (income & franchise tax), 77.59(6)(intro) (sales & use tax). Other taxing statutes incorporate the appeal method contained in Chapter 71 that include petitions for redetermination. *See*, *e.g.*, Wis. Stat. §§ 76.39(4)(c), 76.48(6), 77.26(3), 78.22(3).

Consequently, this Court's primary jurisdiction holding in *Sawejka* cannot apply to causes of actions arising from statutes not listed in Wis. Stat. § 73.01(4)(a).

For these reasons, *Sawejka* does not support the Court of Appeals holding and the Circuit Court's decision.

(b) Butcher v. Ameritech Corp.

The Court of Appeals also relied on its decision in *Butcher*., 298 Wis. 2d 468. *Butcher* was a class action suit brought by customers of Ameritech against both Ameritech and the Department of Revenue alleging that Ameritech was collecting tax on services that do not fall within the scope of "telecommunication services" as defined in the sales and use statute. *Id.* ¶ 6. The circuit court in *Butcher* dismissed the plaintiffs' claims based on the voluntary payment doctrine and primary jurisdiction. *Id.* ¶¶ 2, 4. The Court of Appeals affirmed. *Id.* ¶ 47

Notably, the *Butcher* plaintiffs did not bring an action under Wis. Stat. § 227.40(1) and, to that extent, the *Butcher* decision does not apply to the case at hand. Moreover, the rationale used by the circuit court in *Butcher* and affirmed by the Court of Appeals makes it even clearer that *Butcher* is not controlling in the instant case. The

circuit court noted (with the subsequent approval of the Court of Appeals) that the plaintiffs could use the procedure under Wis. Stat. § 77.59(4) to obtain refunds of the sales taxes they were charged. *Id.* ¶ 39. There is no analogous procedure in chapter 70—the chapter governing the assessment of property at the local and state level—available to WPTC and WMC as neither entity owns manufacturing personal property that is subject to notice and objection procedures set forth in Wis. Stat. § 70.995(8) and consequently lack standing to petition the Commission.

The circuit court in *Butcher* held (again, with the subsequent approval of the Court of Appeals) that the plaintiffs could use the procedure under Wis. Stat. § 227.41(1) seeking a declaratory ruling on whether the services at issue were taxable. *Id.* To be sure, WPTC and WMC could have brought Claim Two—arguing that the Department's interpretation of the machinery, tools and

patterns exemption was inconsistent with the statute—under Wis. Stat. § 227.41(5)(a),[7] which provides in part:

> The department of revenue shall, on petition by any interested person, or any group or association of interested persons, issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforced by it. . . . A declaratory ruling shall bind the department and all parties to the proceedings on the statement of facts contained in the ruling, ...

Such an administrative ruling can be appealed to the Commission and then to the courts. *Id.* While WPTC and WMC could have sought a declaration from the Department that its interpretation does not conform to the statutes, nothing in Wis. Stat. § 227.41(5) entitles WPTC, WMC or any other petitioner to obtain an order declaring that the Department's guidance is an invalid rule or mandating the Department to engage in rulemaking. Moreover, 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

[7] Subsequent to the *Butcher* decision, the legislature amended Wis. Stat. § 227.41 to create subsection (5) that applies only to the Department of Revenue. *See* 2011 Wis. Act 68 §§ 46-49.

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 provides an avenue to ask the Department of Revenue 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 compel Department to order itself to promulgate and administrative rule.

Because *Butcher* does not involve a claim under Wis. Stat. § 227.40(1) and because Wis. Stat. § 227.41(5) does not provide an avenue to challenge the Department's failure to engage in rulemaking, neither supports the Circuit Court's decision.

(c) Wisconsin Bell, Inc. v. Department of Revenue.

Similar to *Butcher*, the Court of Appeals' reliance on *Wisconsin Bell, Inc. v. Department of Revenue*, 164 Wis. 2d 138, 473 N.W.2d 587 (Ct. App. 1991), is misplaced. (App. 6 ¶ 8.) *Wisconsin Bell* was a declaratory judgment action by two telecommunications plaintiffs seeking a ruling that collection services provided by one

plaintiff to the other were not subject to the sales tax. *Id.* at 140-41. Relying on primary jurisdiction, the circuit court dismissed the complaint noting that the plaintiffs could have sought an administrative ruling under Wis. Stat. § 227.41. *Id.* at 141. The Court of Appeals affirmed. *Id.* at 147.

Wisconsin Bell did not involve a demand that the Department of Revenue engage in rulemaking or otherwise include a claim under Wis. Stat. § 227.40(1). Moreover, as shown above, WPTC and WMC lack standing to pursue a petitioner for review with the Commission. For these reasons, *Wisconsin Bell* does not support dismissal of Claim One.

(d) Metz v. Veterinary Examining Board and *Heritage Credit Union v. Office of Credit Unions.*

The Court of Appeals next relies on its decision in *Metz v. Veterinary Examining Board*, 2007 WI App 220, 305 Wis. 2d 788, 741 N.W.2d 244, which cites its earlier decision in *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, 247 Wis. 2d 589, 634 N.W.2d 593, to support the Circuit Court's decision that the

Commission's jurisdiction is concurrent with the circuit court. (App. 9-10 n.7.) Again, this reliance is misplaced.

Heritage Credit Union involved an appeal by Heritage under Wis. Stat. § 186.015(5) to the Credit Union Review Board challenging a determination of the Office of Credit Unions. *Heritage*, 247 Wis. 2d 589, ¶ 5 n.4. The Credit Union Review Board sustained the decision of the Office of Credit Unions. *Id.* ¶ 6. Heritage sought review of the Board's decision in circuit court and, for the first time, argued that the decision of the Office of Credit Unions was based on an invalid rule that was not promulgated as mandated by Chapter 227. *Id.* ¶¶ 7-8. The Court of Appeals held that Wis. Stat. § 227.40(2)(e) required Heritage to raise the invalid rule issue in the appeal to the Credit Union Review Board. *Id.* ¶¶ 27-28. Wis. Stat. § 227.40(2)(e) provides:

> (2) The validity of a rule or guidance document may be determined in any of the following judicial proceedings when material therein:
>
> . . .
>
> (e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50, 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for review of decisions and orders of administrative agencies if the validity of the rule or guidance document involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

Neither Wis. Stat. § 227.40(2)(e) nor the ruling in *Heritage Credit Union* apply here. Heritage sought review under Wis. Stat. § 227.52. *Id.*, ¶ 14. As the *Heritage Credit Union* decision pointed out, in filing an action under Wis. Stat. § 227.52, Heritage had the opportunity to challenge the validity of an unpromulgated "if the validity of the rule or guidance document involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered." Wis. Stat. § 227.40(2)(e). Notably, Wis. Stat. § 227.40(2)(e) does not apply to actions under Wis. Stat. § 227.40(1) as the former does not refer to the latter.

The instant action is not appeal of an administrative proceeding, nor could there ever be such a proceeding involving WPTC and WMC. And this is the point missing from the Court of Appeals decision below. A manufacturer may appeal the Department's assessment under Wis. Stat. § 70.995 of machinery, tools and patterns the manufacturer owns by petitioning the Tax Appeals Commission and in that petition, challenge the validity of the Department's guidance as an invalid rule. This is clearly implied by Wis. Stat. § 227.40(2)(e).

However, WPTC and WMC are not manufacturers. Outside of Wis. Stat. § 227.40(1), WPTC and WMC have no avenue to challenge the Department of Revenue's unpromulgated rule. Nothing in Wis. Stat. § 227.40(2)(e) or *Heritage Credit Union* applies to WPTC and WMC and should not prevent these appellants from representing their constituents in challenging the Department's guidance.

For the same reasons, the Court of Appeals' reliance on *Metz v. Veterinary Examining Board* is misplaced. Two months after an administration proceeding was commenced against Metz, he filed a declaratory judgment action claiming that the administrative proceeding was based on a (1) statute that was unconstitutionally vague on its face and as it was applied to him and (2) policy that had not been properly promulgated as a rule. *Metz*, 305 Wis. 2d 788, ¶ 4. The Court of Appeals said the real issue was whether Metz was "entitled to fact-finding and a declaratory ruling in the circuit court (and injunctive relief if he is successful) on his claim that the statute is unconstitutionally vague as applied to him." *Id.* ¶ 11. The Court of Appeals held that Metz was obligated to exhaust his administrative remedies and first make his

constitutional claim before the Veterinary Examining Board. *Id.* ¶ 27. Metz then conceded if his constitutional claim was subject to if the exhaustion doctrine he was not entitled to declaratory and injunctive relief on his rulemaking claim. *Id.* ¶ 29. In this sense, *Metz* represents dicta as it applies to the instant case.

It is noteworthy that the *Metz* decision cited *Heritage Credit Union* for the proposition that an administrative agency has the authority to rule on rulemaking claims. *Id.* Again, WPTC and WMC lack standing to appeal to an administrative agency challenging the Department of Revenue's refusal to promulgate rules in accordance with Chapter 227.

For the foregoing reasons, the Court of Appeals decisions in *Metz* and *Heritage Credit Union* do not support the Circuit Court's dismissal of Claim One.

D. The Existence Of Tax Appeals Commission Cases Challenging The Interpretation Of The Application Of The Department Of Revenue's Actions Does Not Preclude A Declaratory Judgment Action Based On An Asserted Failure To Comply With Chapter 227.

To support its conclusion, the Court of Appeals observed that there were more than 50 cases pending before the Tax Appeals Commission concerning the exemption in Wis. Stat. § 70.111(27) and that the Commission issued a decision in one of these cases. (App. 10 ¶ 16.) The Court of Appeals goes on to note that WPTC and WMC do not own property at issue under the exemption statute. (*Id.*) The existence of these other cases and the single decision does not preclude WPTC and WMC's declaratory judgment action.

1. None Of The Cases Pending Before The Tax Appeals Commission Seek an Order Invalidating the Department Of Revenue's Un-Promulgated Rule.

First, there is no evidence in the record that any of the cases pending before the Tax Appeals Commission include a declaratory judgment claim seeking an order striking down the Department of Revenue's guidance as an

invalid rule under Chapter 227. Moreover, the singular decision of the Tax Appeals Commission cited by the Court of Appeals does not address the Department of Revenue's failure to promulgate rules. (App. 60-77.)

2. *The Court of Appeals' Decision Leaves Interested Persons Who Are Not Subject to Present Assessment By The Department of Revenue With No Redress.*

Second, the fact that WPTC and WMC do not own machinery, tools and patterns, the assessments of which can be appealed to the Tax Appeals Commission, is not only irrelevant but proves the Petitioners' point. It is undisputed that WPTC and WMC, by virtue of their clients and members, are interested persons who have standing to challenge the failure of the Department of Revenue to promulgate rules that impact those clients and members. *See, e.g., Metropolitan Builders Assoc. of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶¶ 15-16, 282 Wis. 2d 458, 698 N.W.2d 301 (Compelling public policy considerations dictate that the courts should liberally construe standing requirements to permit associational challenges). Because these entities do not

own property that is subject to the Department's guidance, WPTC and WMC lack standing to appeal an assessment to the Tax Appeals Commission. Therefore, a declaratory judgment action in circuit court under Wis. Stat. § 227.40(1) is the only route WPTC and WMC have to challenge the failure of the Department of Revenue to engage in rulemaking.

Under the Court of Appeals' holding the Department of Revenue—unlike other agencies—would be immune from declaratory judgment actions challenging its rulemaking, or lack thereof, unless or until the Department issues an assessment based on such a rule and only by those parties subject to the assessment. In permitting agencies to be subject to declaratory judgment actions under Wis. Stat. § 227.40, the legislature could not have intended such a result.

3. *The Issue Is The Commission's Jurisdiction Over Wis. Stat. § 227.40 And The Power To Enjoin The Department Not Whether The Commission Can Reject The Department's Misapplication of A Statute.*

Finally, it appears that the Court of Appeals may have misconstrued the issues presented on appeal. The Court of Appeals wrote, "[t]he question is whether the TAC has authority to review a claim that DOR interpreted and applied a statute under the tax code improperly, either under its plain language or through application of a rule, promulgated properly or not." (App. 9 ¶ 14.) Petitioners have never argued that the Commission lacks the authority to invalidate an assessment that was based on a rule or guidance that is inconsistent with the statutes. Moreover, in their initial appellants' brief, WPTC and WMC clearly stated, they were "not asking this Court to determine whether the Department's application of Wis. Stat. § 70.111(27) is inconsistent with the statute." (Appellant's Br. 2.) Rather, WPTC and WMC are seeking an order directing the Department of Revenue to engage in rulemaking in accordance with Chapter 227—so that interested parties and the legislature can have input—and

preventing the Department from enforcing the guidance until it has adopted such a rule.

For these reasons, the existence of the cases pending before the Tax Appeals Commission is not a bar to WPTC and WMC commencing a declaratory judgment action under Wis. Stat. § 227.40(1).

E. The Circuit Court Has Sole Jurisdiction Over Declaratory Judgment Actions Challenging Rulemaking, Or Lack Thereof.

The unambiguous language of Wis. Stat. § 227.40(1) limits the jurisdiction to hear declaratory judgment actions challenging the invalidity of a rule or guidance document to the circuit court:

> **227.40 Declaratory judgment proceedings. (1)** Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the ***circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business*** or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose.

Wis. Stat. § 227.40(1) (emphasis supplied). The exceptions provided in Wis. Stat. § 227.40(2) do not apply

to the facts of this petition.[8] The statute could not be clearer; the circuit court is the exclusive venue for commencing actions for declaratory judgment under Wis. Stat. § 227.40(1) and there is no opportunity to bring such an action before the Tax Appeals Commission.

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[8] Wis. Stat. § 227.40(2) provides:

(2) The validity of a rule or guidance document may be determined in any of the following judicial proceedings when material therein:

(a) Any civil proceeding by the state or any officer or agency thereof to enforce a statute or to recover thereunder, provided such proceeding is not based upon a matter as to which the opposing party is accorded an administrative review or a judicial review by other provisions of the statutes and such opposing party has failed to exercise such right to review so accorded.

(b) Criminal prosecutions.

(c) Proceedings or prosecutions for violations of county or municipal ordinances.

(d) Habeas corpus proceedings relating to criminal prosecution.

(e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50, 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 for review of decisions and orders of administrative agencies if the validity of the rule or guidance document involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

(f) Proceedings under s. 227.114 (6m).

CONCLUSION

Chapter 227 establishes requirements for rulemaking and provides procedures for interested parties and the legislature to have input into such rules. The Court of Appeals' holding would create a separate set of requirements and procedures for the Department of Revenue's rules and guidance that finds no support in the statutes. This Court should reverse the judgment of the Circuit Court with respect to Claim One and remand with directions that the Circuit Court consider WPTC and WMC's claim on the merits.

Dated this 17th day of November, 2021.

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STATE OF WISCONSIN
SUPREME COURT

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

Plaintiffs-Appellants-Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Defendant-Respondent.

Appeal No. 2020AP000485
Circuit Court Case No. 2019CV000226

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 brief and appendix with a proportional serif font. The length of this brief is 6,752 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 17th day of November, 2021.

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