

STATE OF WISCONSIN
TAX APPEALS COMMISSION

TETRA TECH EC, INC.,

DOCKET NO. 12-S-192

AND

LOWER FOX RIVER REMEDIATION LLC,

DOCKET NO. 12-S-193

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on Cross-Motions for Summary Judgment. The Petitioners, Tetra Tech EC, Inc. ("Tetra Tech") and Lower Fox River Remediation LLC ("LLC"), are represented by Attorneys Frederic J. Brouner and Donald Leo Bach, both of the law firm of DeWitt Ross & Stevens S.C. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer. Both parties have filed briefs with exhibits and affidavits. The issue in this case is whether certain services provided to the Petitioners by Stuyvesant Dredging, Inc. ("SDI") are subject to Wisconsin sales and use tax. For the reasons stated below, we

determine that the services are taxable and, consequently, we grant summary judgment to the Department.

FACTS

Jurisdictional Facts

1. In 2010, the Department conducted a field audit of both Petitioners. In the course of the audit, both Petitioners submitted Buyer's Claims for Refund with the Department requesting a refund of the sales/use taxes Tetra Tech paid to SDI for its services based on the fact that those purchases should be exempt as a sale for resale to the LLC during the period April 2008 - September 2009. There was an additional claim for tax paid on purchases of fuel and waste reduction equipment. Both Buyer's Claims for Refund were incorporated into the Department's field audits. (Affidavit of Wisconsin Department of Revenue Field Auditor Elizabeth A. Morrissey ("Morrissey Aff.") ¶¶ 1 and 4, Ex. 16.)

2. Upon conclusion of the LLC's field audit, the Department issued a Notice of Field Audit Action dated November 23, 2010, assessing use tax on \$6,724,490.18 of the LLC's purchases of (1) the portion of Tetra Tech's remediation services that represented SDI's activities plus Tetra Tech's markup, and Tetra Tech's overhead allocated to those activities, during October - December 2009, and (2) a hauling service, during the period May 1, 2009 - December 31, 2009. The total amount due was \$404,136.33, including regular interest. The LLC's Buyer's Claim for Refund was denied because it was filed by the wrong entity. (Morrissey Aff. ¶ 5, Ex. 17.)

3. Upon conclusion of Tetra Tech's field audit, the Department also issued a Notice of Field Audit Action dated December 2, 2010, assessing (1) sales tax on \$9,523,168.19, which was the portion of Tetra Tech's sales of remediation services to the LLC that represented SDI's activities, plus Tetra Tech's markup, and Tetra Tech's overhead allocated to those activities during April - September 2009 and (2) use tax on \$251,332.21 of additional purchases during the period October 1, 2007 - September 30, 2009. The assessed sales and use tax was offset by Tetra Tech's Buyer's Claim for Refund, which was granted in part, resulting in a refund in the amount of \$2,019,439.86. Tetra Tech was issued a check for that amount on December 2, 2010. (Morrissey Aff. ¶ 6, Ex. 18.)

4. By letter dated January 21, 2011, the LLC petitioned the Department for a redetermination of the use tax assessed on its purchase of the portion of Tetra Tech's remediation services that represented SDI's activities, plus Tetra Tech's markup, and the allocated overhead. The LLC did not appeal the use tax assessed on its purchases of a hauling service or the denial of its Buyer's Claim for Refund. On January 28, 2011, the LLC placed \$404,136.33 on deposit pending the resolution of its appeal. (Affidavit of Wisconsin Department of Revenue Management Supervisor Michelle C. Biermeier ("Biermeier Aff.") ¶ 2, Ex. 19.)

5. By letter dated January 31, 2011, Tetra Tech petitioned the Department for a redetermination of the sales tax assessed on the portion of its sales of remediation services to the LLC that represented SDI's activities, plus its markup, and

the allocated overhead. Tetra Tech did not appeal its use tax assessment or the partial denial of its Buyer's Claim for Refund. (Biermeier Aff. ¶ 3, Ex. 20.)

6. By Notice of Action dated August 16, 2012, the Department granted in part and denied in part the LLC's Petition for Redetermination. The Department denied its appeal of the assessment of use tax on the portion of Tetra Tech's remediation services that comprised SDI's services but granted its appeal of the assessment of use tax on the allocated overhead, refunding a portion of the LLC's deposit in the amount of \$41,422.96. (Biermeier Aff. ¶ 5, Ex. 22.)

7. By Notice of Action dated August 16, 2012, the Department granted in part and denied in part Tetra Tech's Petition for Redetermination. The Department denied its appeal of the assessment of sales tax on the portion of its remediation services that comprised SDI's services but granted its appeal of the assessment of sales tax on the allocated overhead, refunding an additional amount to Tetra Tech of \$89,688.75. (Biermeier Aff. ¶ 6, Ex. 23.)

8. On October 12, 2012, the LLC filed a Petition for Review with the Commission appealing the Department's assessment of use tax on the portion of Tetra Tech's remediation services that comprised SDI's services. (Commission files.)

9. On October 12, 2012, Tetra Tech filed a Petition for Review with the Commission appealing the Department's assessment of sales tax on the portion of its remediation services that comprised SDI's services. (Commission files.)

Material Facts

10. On November 13, 2007, the U.S. Environmental Protection Agency ("EPA") issued an Administrative Order for Remedial Action ("106 Order") directing certain paper companies operating in Wisconsin to implement remedial action at the Lower Fox River and Green Bay Superfund site pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). (Affidavit of Wisconsin Department of Revenue Attorney Julie A. Zimmer ("Zimmer Aff.") ¶ 2, Ex. 28.)

11. For many years, Wisconsin paper companies produced carbonless copy paper that contained polychlorinated biphenyls ("PCBs") along the Fox River. These paper companies released the PCBs either directly into the Fox River or indirectly into the Fox River through publicly-owned wastewater treatment plants, thus contaminating the sediments in the Fox River and Green Bay. (Ex. 28, pp. 5-6.)

12. The EPA's 106 Order directed that "[a]ll materials removed from the Site shall be disposed of or treated at a facility approved in advance of removal by U.S. EPA's RPM [Remedial Project Manager] and in accordance with...CERCLA" and other federal, state, and local requirements. (Ex. 28, p. 21.)

13. Pursuant to the EPA's 106 Order, the paper companies were directed to submit work plans and progress reports and to hire a contractor. The contractor they hired was Tetra Tech, a Delaware corporation with its principal place of business in Pasadena, California. (Zimmer Aff. ¶ 10, Ex. 36.)

14. Tetra Tech engaged subcontractors to perform certain tasks related to the cleanup. One subcontractor was SDI, whose activities are at issue in this case.

15. SDI was engaged to perform "the desanding and dewatering portions of the Remediation" according to the Subcontract for Desanding and Dewatering Services between Tetra Tech and SDI, dated April 27, 2009. (Morrissey Aff. ¶ 3, Ex. 15.)

16. Exhibit D of SDI's Subcontract provided that one of SDI's tasks was to separate the sand out of the polluted sediment it received from Brennan and prepare it to be reused "to avoid paying for transportation or disposal for that sand." (Morrissey Aff. ¶ 3, Ex. 15.)

17. The "Lower Fox River Site Operation & Maintenance Plan for the Sediment Desanding and Dewatering Plant," dated September 2009, prepared by Tetra Tech and SDI for submission to the EPA (Zimmer Aff. ¶ 3, Ex. 29) explains SDI's process in relevant detail:

a. SDI's activities "will be conducted in the sediment processing building located on the former Shell property." (Ex. 29, p. DRS000573.)

b. According to the "Process Flow Diagram," dredged sediment from the Fox River enters SDI's processing facility through dredge pipelines. After the sediment goes through the scalping screen, slurry holding tank and slurry thickener tank, the sediment enters the coarse and fine sand separation processes. According to the Plan's description of these processes: "The Coarse Sand Separation Unit is meant to separate, wash and dewater all +150 micron sand from the sediment slurry." (Ex. 29, p. DRS000631 and Ex. 30.) "The Fine Sand Separation Unit is meant to separate, wash and

dewater all 63 to 150 micron sand from the (remaining) sediment slurry." (Ex. 29, p. DRS000632 and Ex. 30.)

c. One of SDI's Project Objectives is that the "sand fraction of contaminated sediment that is removed from OUs [Operating Units] 2 to 5 will be separated from the finer-grained dredge material, washed or otherwise treated as practicable, and beneficially reused to the extent feasible. The sediment will be processed through several stages to enable efficient and effective mechanical dewatering of the fines using membrane-type filter presses." (Ex. 29, p. DRS000578.)

d. Under the section "General Process Flow and Layout," two process flow schematic diagrams are referred to, "which illustrate the design flow rates through the desanding and dewatering processes." (Ex. 29, pp. DRS000581-582, and Zimmer Aff. ¶ 4, Ex. 30.)

e. SDI's sand separation process involves the use of a piece of equipment called an Upstream Classifier where the sand will be "polished" using clean water. "For this purpose, clean water will be injected through a series of pipes and nozzles inside the upstream classifier." (Ex. 29, p. DRS000585.)

f. Figure 2-2 shows the "2009 TSCA Dredge Material and Debris Characterization Process Lower Fox River - OUs 2 to 5" diagram, which illustrates the initial step of "Washing of Non-Porous Debris and Coarse Material > 3mm," and the part of the coarse and fine sand screening and dewatering. (Ex. 29, p. DRS000600.)

18. SDI's project objectives in part were to "provide a supply of relatively clean sand that could be sold for off-site use or used beneficially on site," and "significantly reduce dewatering, transportation and disposal costs...." Separating the sand from the contaminated sediment allowed the sand to be used beneficially rather than placed in a landfill. Dewatering the remaining polluted sediment also reduced the

volume of landfill waste. (Ex. 29, p. DRS000578; Ex. 15, p. DOR00989, No. 2; and Zimmer Aff. ¶ 7, Ex. 33, p. 12.)

19. The parties agree that the sediment dredged from the Fox River during the period under review, that was the subject of SDI's services, is tangible personal property as defined in Wis. Stat. § 77.51(20) (2009-2010). (Zimmer Aff. ¶ 5, Ex. 31.)

20. Tetra Tech's Vice President of Project Engineering and Senior Engineer assigned to the Fox River project during 2009 stated under oath that SDI processes and changes the sediment it receives indirectly from Tetra Tech. (Zimmer Aff. ¶ 6, Ex. 32, pp. 53-54.)

21. An operations manager, who had overseen SDI's remediation processes for the Fox River project since 2009, stated under oath that SDI "processes" the sediment it indirectly receives from Tetra Tech. (Zimmer Aff. ¶ 7, Ex. 33, p. 38.)

22. All of the steps used in SDI's desanding process are physical separation technologies that are considered pre-treatment technologies by EPA. (Affidavit of Petitioner's Expert Dr. Walter Shields. ("Shields Aff."), ¶ 35.)

23. SDI is conducting a physical separation process of sediments based on differences in grain size and specific gravity. (Shields Aff., ¶ 36.)

24. SDI does not add any chemicals during the desanding operations. Water is added to the classifiers in order to separate silts and clays from sand by differences in specific gravity. (Shields Aff., ¶ 37.)

25. The chemistry of the sediment or of the PCBs is not modified or altered in any way by SDI's operations. Rather, SDI's operations simply physically separate sands from the silts and clays (and associated organic matter) to which PCBs predominantly adhere. (Shields Aff., ¶ 39.)

26. The ultimate goal of the desanding/dewatering process conducted by SDI is to "separate the dredged sediment from the water slurry in the form of a filter cake and make it suitable for cost effective disposal, enabling optimal performance of the dredge production rates without interruption and thereby permitting the achievement of planned remedial action goals...." (Shields Aff., ¶ 41.)

27. While there are benefits to this separation process, that include the production of sand for potential beneficial reuse, other benefits to this process include reducing "dewatering, transportation and disposal costs associated with the production of waste filter cake, thereby reducing the flow of truck traffic on local roads and conserving local landfill disposal space." (Shields Aff., ¶ 42.)

28. The use of coarse- and fine-grained sand separation before dewatering is important to reduce the amount of equipment wear on the filter presses. (Shields Aff., ¶ 43.)

29. SDI's desanding operations do not attempt to remove PCBs from the sand. Rather, sand is simply separated from the remaining dredged sediment. PCBs adhering to sand particles before desanding operations remain adhered to the sand at the end of desanding operations. (Shields Aff., ¶ 46.)

APPLICABLE LAW

Summary Judgment

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law remain. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

Applicable Statutes

Wis. Stat. § 77.52 Imposition of retail sales tax.

(2) For the privilege of selling, licensing, performing or furnishing the services described under par. (a) at retail in this state, as determined under s. 77.522, to consumers or users, regardless of whether the consumer or user has the right of permanent use or less than the right of permanent use and regardless of whether the service is conditioned on continued payment from the purchaser, a tax is imposed upon all persons selling, licensing, performing or furnishing the services at the rate of 5% of the sales price from the sale, license, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

10. ... the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property,

11. The producing, fabricating, processing, printing, or imprinting of tangible personal property ... for a consideration for consumers who furnish directly or

indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

ANALYSIS

The Department's principal argument in support of its Motion for Summary Judgment is that the activities engaged in by SDI constitute the "cleaning" of tangible personal property under the meaning of Wis. Stat. § 77.52(2)(a)10. In the alternative, the Department maintains that SDI is engaged in the "servicing" and "alteration" of tangible personal property pursuant to Wis. Stat. § 77.52(2)(a)10, as well as "processing" tangible personal property for consideration for a consumer who furnishes the materials used in the processing, under the meaning of Wis. Stat. § 77.52(2)(a)11.

We conclude that what SDI does with the sediment is "processing ... for a consideration for consumers [Tetra Tech] who furnish directly or indirectly the materials [sediment] used in the...processing" under the meaning of Wis. Stat. § 77.52(2)(a)11. At various points in the affidavits and depositions of Petitioner's general manager and experts, they refer to what SDI does as a "process" or as "processing." That language is also used in many of the contracts between Tetra Tech and SDI. The dictionary definition of "processing" is "to put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process." SDI's activities certainly fall within that definition.

In *Hammersley Stone Company, Inc. v. Dep't of Revenue*, Wis. Tax Rptr.

(CCH) ¶400-383 (WTAC 1998), the Commission, in determining that the crushing of rock into gravel was the “processing” of tangible personal property, said:

Wisconsin imposes a retail sales tax for the “privilege of selling, leasing or renting tangible personal property” in Wisconsin. Wis. Stats. §77.52(1). This language is broad and inclusive. Consequently, a person attempting to show that a sale of tangible personal property in Wisconsin is not covered by the statute is, in most situations, immediately burdened with finding an express exemption in Wis. Stats. §77.54 or §77.55, or other language excepting the transaction from tax.

Wisconsin also imposes a retail sales tax for “the privilege of selling, performing or furnishing *the services described under par. (a)* at retail in this state to consumers or users....” Wis. Stats. §77.52(2). [Emphasis supplied.] This subsection is not broad and inclusive; it provides that the services to be taxed must be specifically enumerated. Hence, the initial focus in a sales tax case involving services is on finding clear and express language which imposes a tax.

....

The language in subdivision 11—particularly the word “processing”—is quite comprehensive. This paragraph certainly covers the service of crushing stone at issue. The “consumer” furnished the materials used. The “consumer” paid consideration for the service of “processing” the materials.

Likewise, we conclude that what SDI does to the sediment sent to it by Tetra Tech is “processing” of tangible personal property under the meaning of Wis. Stat. § 77.52(2)(a)11. Because we determine that the activities of SDI constitute taxable “processing,” we need not reach the questions of whether they are also “cleaning” or “servicing” or making an “alteration” under the meaning of Wis. Stat. § 77.52(2)(a)10.

The Petitioners argue that the Department's claim that the activities of SDI are taxable under Wis. Stat. § 77.52(2)(a)11 is untimely because Wis. Stat. § 77.59(3) requires that the Department's determination must be in writing and the only basis for taxation provided in the Department's Notice of Amount Due and the Notice of Action was that SDI's activities were "cleaning" under Wis. Stat. § 77.52(2)(a)10. Although Wis. Stat. § 77.59(3) does require that the Department's determination be in writing, this simply means that the taxpayer must receive written notice of an adjustment, not that the Department's Notice of Amount Due or Notice Action must provide every statutory basis or legal argument for making the adjustment. *See Midwest Track Associates, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-825 (WTAC 2005). Consequently, the Department is not foreclosed from asserting that the services provided by SDI are taxable under Wis. Stat. § 77.52(2)(a)11 simply because it cited Wis. Stat. § 77.52(2)(a)10 as the basis for the adjustments in the notices.

CONCLUSION OF LAW

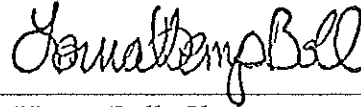
The services provided by SDI are subject to sales and use tax in Wisconsin pursuant to Wis. Stat. § 77.52(2)(a)11. Therefore, summary judgment for the Department is appropriate.

ORDERS

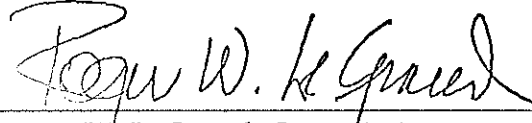
1. The Department's Motion for Summary Judgment is granted.
2. The Petitioners' Motion for Summary Judgment is denied.

Dated at Madison, Wisconsin, this 30th day of December, 2014.

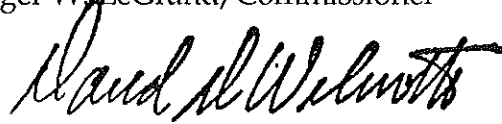
WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



David D. Wilmoth, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS
RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.