STATE OF WISCONSIN

TAX APPEALS COMMISSION

MIDWEST TRACK ASSOCIATES, INC. (P) **DOCKET NO. 03-S-50(P)**
P.O. Box 650
Delavan, WI 53115,

Petitioner,

vs. **RULING AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8907
Madison, WI 53708-8907,

Respondent.

JENNIFER E. NASHOLD, COMMISSIONER:

This matter comes before the Commission on a motion for partial summary judgment filed by petitioner, Midwest Track Associates, Inc. ("Midwest Track"). Midwest Track is represented by Attorneys Joseph A. Pickart and Douglas A. Pessefall, of Michael Best & Friedrich, LLP. The respondent, Wisconsin Department of Revenue ("Department"), is represented by Attorney Robert C. Stellick, Jr.

Based upon the submissions of the parties and the record in this matter, the Commission hereby finds, concludes, and orders, as follows:

MATERIAL FACTS

1. Midwest Track is a Wisconsin corporation that is primarily engaged in the operation of a dog racing facility located in Delavan, Wisconsin.

2. Midwest Track offers its customers live races on which the customers may place wagers.

3. Midwest Track also offers its customers the opportunity to participate in pari-mutuel wagering on live races that are simulcast from a "host" track to Midwest Track's facility and to other remote tracks. Pari-mutuel wagering is "a wagering system in which all persons who wager on any animal which finishes in any position for which wagers are taken in a race share the total amount wagered on the race," minus any allowable deductions. Wis. Stat. § 562.01(9).

4. By Notice of Field Audit Action dated April 10, 2002, Midwest Track was assessed by the Department for additional use tax, interest, and penalties in the total amount of $244,922.44, which consisted of $183,907.48 in tax, $54,048.75 in interest, and $6,966.21 in penalties for the period of January 1, 1997 through December 31, 2000.

5. Of the contested adjustments that resulted in additional tax, Midwest Track asserts that approximately 75% of those adjustments related to simulcast services and related equipment that were purchased by Midwest Track in connection with its pari-mutuel wagering activity.[1]

6. From the time it commenced its audit of Midwest Track through the time it issued its Assessment, the Department maintained that Midwest Track's

[1] The Department asserts that the "host track simulcast fees" represent approximately 68% of the amount at issue. In response, Midwest Track argues that the Department's figure of 68% does not include the "related equipment" purchases, which Midwest Track includes in its 75% approximation.

simulcast service purchases were taxable as "telecommunication services" under Wis. Stat. § 77.52(2)(a)5.

7. By petition for redetermination dated April 19, 2002, Midwest Track petitioned the Department for redetermination of the assessment, and made a payment relating to certain uncontested adjustments. With respect to the Department's determination of tax on its simulcast service purchases, Midwest Track contended that such services were not "telecommunication services" and therefore were not taxable.

8. Over the following eight months, Midwest Track and the Department exchanged information, participated in conferences, and discussed the alleged legal and factual bases underlying the Department's determination that the simulcast purchases were telecommunication services. During that time, the Department did not inform Midwest Track that the simulcast service purchases might alternatively be determined to be "cable television system services" under Wis. Stat. § 77.52(2)(a)12.

9. By Notice of Action dated December 19, 2002, the Department denied Midwest Track's petition for redetermination. The Notice of Action did not refer to any legal theory underlying the Department's assessment.

10. On January 2, 2003, the parties met to discuss the assessment and, specifically, to discuss the validity of the Department's determination that the simulcast service purchases were telecommunication services. During that meeting, the Department raised for the first time the possibility that the simulcast service purchases were cable television system services rather than telecommunication services.

11. The Department also requested additional information from Midwest Track as to whether there were more than 50 remote locations which participated in the simulcast service for any one race ¯ a threshold requirement for imposition of tax on the simulcast service purchases as cable television system services.

12. Midwest Track filed a timely petition for review with the Commission on February 17, 2003.

13. On March 13, 2003, the Department filed its Answer.

14. On June 17, 2003, the Commission issued an order directing the Department to file an amended answer which "definitely state[s] the basis or bases respondent will assert to support the assessment in this matter." The Department filed an Amended Answer on August 18, 2003, reiterating its position that the simulcast fee purchases are taxable cable television system services under Wis. Stat. § 77.52(2)(a)12.

CONCLUSION OF LAW

1. Midwest Track has failed to establish that, as a matter of law, the Department's theory of tax liability, first asserted after the Department issued its Notice of Action, must be barred as untimely.

2. Midwest Track has failed to demonstrate that, as a matter of law, the Department is equitably estopped from asserting a theory of tax liability not raised until after the Department issued its Notice of Action.

RULING

Midwest track moves for partial summary judgment on grounds that the Department is barred from advancing a theory of liability -- that the simulcast service

purchases were taxable as cable television system services under Wis. Stat. § 77.52(2)(a)12. ¯ when the assessment notice, subsequent discussions, and Notice of Action were based on the Department's initial theory that the purchases were taxable as telecommunication services under Wis. Stat. § 77.52(2)(a)5.

Summary judgment is warranted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Summary judgment procedure imposes on the moving party the burden of demonstrating both the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim. Wis. Stat. §§ 802.08 (2) and (3). The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Kraemer Bros., Inc. v. U. S. Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Any reasonable doubts as to the existence of a factual issue must be resolved against the moving party. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 563, 297 N.W. 2d 500 (1980). Summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g.*, *Peters v. Holiday Inns, Inc.*, 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979).

As shown below, the Commission concludes that Midwest Track has not demonstrated that it is entitled to judgment as a matter of law.

Timeliness

Midwest Track asserts that the Department's determination that the simulcast service purchases were taxable cable television system services is untimely. Specifically, Midwest Track contends that the Department's assertion of a new theory violates notions of fair play and the legislature's intent that taxpayers be given the opportunity to resolve disputes during meaningful administrative review.

In support of its contentions, Midwest Track relies, *inter alia*, on prior decisions by the Commission and the courts. For example, Midwest Track states that the Commission's consideration of a theory first raised by the Department after the Department issues its Notice of Action is tantamount to the Commission performing the Department's functions, which is contrary to *Department of Taxation v. Blatz Brewing Co.*, 12 Wis. 2d 615, 108 N.W.2d 319 (1961). In *Blatz*, the Wisconsin Supreme Court stated that, in an appeal before the Commission, the Commission is "reviewing the action of the [D]epartment or assessor, not performing their functions." *Id*. at 629.

Midwest Track's reliance on *Blatz* is misplaced, as the issue in that case was "whether the [Commission][2] has the power to increase an assessment over that appealed from." *Id*. at 628. The Court's precise holding was stated as follows: "We now hold the [Commission] has no power to increase an income-tax assessment over the amount determined by the department in the notice of assessment appealed from." *Id*. at 629. In so holding, the Court noted that prior to the creation of the Commission as a separate agency by ch. 412, Laws of 1939, the Commission was both the assessing and

[2] The decision refers to the Board of Tax Appeals, the former title of the Commission.

reviewing authority, but that, with the revision of ch. 71 by ch. 318, Laws of 1947, the Department, not the Commission, became the sole assessing authority. *Id*. at 628. Also persuasive to the *Blatz* court was that another provision, Wis. Stat. § 76.13(3), expressly granted the Commission the power to increase taxes of railways and public utilities over the amount fixed by the Department, while no comparable provision was found in the income tax statute. *Id*. at 629.

Contrary to Midwest Track's position, therefore, *Blatz* does not hold that the Commission may never consider a theory of tax liability first raised by the Department after its assessment or Notice of Action is issued. In stating that the Commission's authority extended to reviewing the Department's actions and not to "performing [its] functions," *id*. at 629, the Court was clearly referring to the function of increasing an assessment, not to the function of considering an argument in favor of tax liability not raised in the Department's review process.

Midwest Track also relies on three cases which do not reflect the current state of the law: *Wisconsin Department of Revenue v. Vilter Int'l Corp*., Case No. 701-733 (Milwaukee Co. Circ. Ct. 1986); *Marathon Electric Manufacturing Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-959 (WTAC 1988), *rev'd on other grounds*, Wis. Tax Rptr. (CCH) ¶ 202-997 (Dane Co. Circ. Ct. 1988); *National Family Laundry Co. v. Dep't of Tax'n*, 4 WBTA 595 (WTAC 1961). These cases hold that the Commission lacks jurisdiction to consider arguments raised by the taxpayer for the first time in a petition for review but not raised in the review process before the Department.

However, this jurisdictional bar was subsequently rejected by both the Wisconsin Court of Appeals and the Commission. As apparently conceded by petitioner (Reply Brief at pp. 10-11), current case law does not bar taxpayers from raising new defenses. This was made abundantly clear in *Nelson Bros. v. Dept. of Revenue*, 152 Wis. 2d 746, 764-65, 449 N.W.2d 328 (Ct. App. 1989), in which the Court of Appeals held:

> The commission's determination that it lacked jurisdiction to consider Nelson Brothers' claim for an equitable offset or "recoupment" was based on an earlier circuit court decision holding that the commission lacked jurisdiction to consider arguments not advanced by the taxpayer in its petition for redetermination before the department.
>
> Under sec. 73.01(4)(a), Stats. (1985-86), the commission "is the final authority for the hearing and determination of all questions of law and fact arising under [the tax code]." The statutory procedures for appealing department decisions do not specify the contents of the appeal documents, and nothing in the statutes suggests that the review must be strictly confined to the claims raised before the department.

The "earlier circuit court decision" repudiated by the Court of Appeals in *Nelson Brothers* was none other than *Vilter*, upon which Midwest Track now relies.

The holding in *Nelson Brothers* was reiterated by the Court of Appeals in *Republic Airlines, Inc. v. Dep't of Revenue*, 159 Wis. 2d 247, 258, 464 N.W.2d 62 (Ct. App. 1990): "[I]n *Nelson*, . . . we decided that even if an issue was not raised in the aggrieved taxpayer's petition for redetermination, it could be presented to the WTAC." The Court went on to hold, "In any event, we conclude that when Republic filed its petition for

review which specifically included the . . . assessment issue, WTAC became vested with jurisdiction to decide it." *Id*. at 258.

Although Midwest Track attempts to distinguish *Nelson Brothers* and *Republic Airlines* on their facts, their holdings are inescapable: the Commission may consider an issue not raised in the taxpayer's petition for redetermination.[3] Following those decisions, the Commission has likewise permitted taxpayers to raise arguments not raised before the Department. *See e.g., Burlington Northern Railroad Co. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-659 (WTAC 2003) (Commission allowed petitioner to raise never-pleaded issue of *de facto* discrimination after the Commission ruled against petitioner's prior claims of discrimination under the 4-R Act.); *Wissota Sand and Gravel Co. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-575 (WTAC 2001) (petitioner permitted to raise issue in amended petition for review not raised in original petition); *Ronald E. and Jeanette M. Wilke v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-544 (WTAC 2001) (Commission ordered petitioners, who failed to state a basis for relief in their petition for review, to file an amendment); *Mobile Transport Systems, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-293 (WTAC 1997) (failure of a petition for review to comply with the statutory requirements to set forth basis for claim within 60-day appeal period did not deprive Commission of subject matter jurisdiction over petitioner; petitioner given opportunity to cure defect by stating basis for its claim, even though basis not stated within 60-day appeal period).

[3] It is somewhat perplexing that Midwest Track strives so strenuously to distinguish these cases when they stand for a proposition that Midwest Track appears to concede, *i.e.*, that a petitioner is not barred from raising new issues to the Commission. (Reply Brief at pp. 10-11).

Midwest Track also relies on *North Star Van and Storage, Inc. v. Dep't of Revenue*, Docket No. S-9821 (WTAC 1985) for the proposition that an audit should serve to establish with finality the facts relating to the issues under audit, and that a change in theory of taxation by the Department constitutes an original determination of tax liability. At the outset, we note that *North Star* was decided prior to the Court of Appeals' decisions in *Nelson Brothers* and *Republic Airlines*. Furthermore, the ruling itself does not support Midwest Track's position that the Department may not change its theory of taxation under the facts of the current case.

In *North Star*, the Commission addressed whether a taxpayer's claim for refund was filed within two years from the Department's "determination" as contemplated by Wis. Stat. § 77.59(4)(a). The Department contended that the determination was made in its original notice of deficiency, in which use tax was assessed. The taxpayer argued that the determination was made in the Department's subsequent Notice of Action, wherein the Department changed its theory of taxation from use tax measure to sales tax measure. The Commission agreed with the taxpayer, stating that the Department's Notice of Action constituted "far more than a redetermination of taxes previously assessed – its action constituted an original determination of a [different] tax." *North Star*, Opinion, ¶ 7. The Commission stated that "[a] determination of use tax as to a certain type of transaction does not constitute a determination of sales tax on the same transaction." *North Star*, Opinion, ¶ 6. Thus, the two-year limitations period was triggered by the Notice of Action rather than the original notice of deficiency.

As stated, the Commission's ruling in *North Star* primarily addresses a statute of limitations issue. However, to the extent the ruling does address whether the Department may raise a new theory of tax liability, the case cuts against Midwest Track's position, as it implicitly permits the Department to assert a new basis of taxation:

> Respondent has argued that respondent acted properly in adjusting the sales tax at the Appellate level. The Commission does not hold that respondent's action was improper, arbitrary or capricious. In fact, under the circumstances presented, respondent's action was reasonable and logical.
>
> However, respondent's procedure of making an initial determination of sales tax [at] the appellate level was unusual, and petitioner must not be deprived of the right to file a Claim for Refund under sec. 77.59(4)(a).

North Star, Opinion, ¶¶ 17-18.

Accordingly, *North Star* does not support Midwest Track's assertion that the Department is barred from raising a new theory of liability.

In fact, those cases which more directly address whether the Department may raise a new theory of liability, demonstrate a willingness to allow it. In *Robert Neesam v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 200-660 (Dane Co. Circ. Ct. 1970), the Dane County Circuit Court analyzed whether the statutes authorize the Department, on redetermination, to change the category of tax from use tax to sales tax. The Court held that the Department's action was permissible. Midwest Track is correct that part of the basis for the Court's determination was "found in the interlocking and complementary nature of the use and sales tax statutes." However, the Court also stated in *Neesam*:

> Here there was no unfairness to taxpayer because the facts giving rise to the original determination were set forth in detail in the field audit report attached to the notice of tax determination, and there has been no showing that taxpayer would have been able to interpose any different defense which he withheld making in the redetermination proceeding if the original determination had been grounded on sales tax rather than use tax.

Relying on this language in *Neesam*, a similar conclusion was reached in *Toubl Game Bird Farms v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶ 202-120 (WTAC 1982). In *Toubl*, the Commission refused to render a portion of a sales and use tax assessment invalid because the Department's assessment had cited to fraud and an estimated assessment statute inapplicable to the case. The Commission held:

> The facts cited in the original assessment were in sufficient detail as to inform petitioner of the basis of the assessment. Petitioner has not shown that it would have been able to interpose any additional defenses if the original assessment notice had cited the correct statute. Had the correct statute been cited, petitioner would still be obliged to pay the taxes. There is no showing in this case that the taxpayer has been unfairly treated. The error was harmless in its impact. *Cf*. [*Neesam*]

Toubl, at p. 11,751.

Midwest Track also relies on Wisconsin Statutes and the Department's internal procedural manual and publications which establish the process by which audits are conducted by the Department. *See* Wis. Stat. §§ 77.59(2) and (6); Wis. Dep't of Revenue, Field Audit Manual §§ 1-12, 1-17.1 - 1.17.4, 7-8.3, 12-1.1 (8th ed. 2000); Wis. Dep't of Revenue, Field Audit of Wisconsin Tax Returns, Publication 501 (Mar. 2002); Wis. Dep't of Revenue, Taxpayers' Appeal Rights of Field Audit Adjustments, Publication 506 (Sept. 1999).

Midwest Track has not shown that any specific procedure was violated; rather, it asserts that the procedures make clear the legislature's intent that taxpayers be given the opportunity to resolve disputes through administrative review. This cannot be accomplished, Midwest Track contends, if, during that review process, the Department does not provide taxpayers with the specific theory or statutory section on which it relies for the assessment.

While Midwest Track may be correct that the legislature intended that most disputes be resolved through the administrative review process, nothing in the procedures cited by Midwest Track prohibits the Department from advancing a new theory to the Commission in support of its assessment regarding a specified activity. Based on the record, the Department complied with those procedures; it simply provided an alternative ground for its assessment after those procedures had been followed.

Midwest Track has failed to support its contention that the Department "summarily dismiss[ed] the determination procedures enacted by the Legislature . . . ." (Pet. Brief at p. 14). Simply because there is a procedure in place which facilitates the resolution of cases without litigation does not translate into a requirement that all arguments or theories be raised during those procedures. If that were true, then taxpayers would be equally prohibited from raising new arguments before the Commission, lest the intent of the legislature be thwarted. However, as shown above, both the Commission and courts have allowed taxpayers to raise arguments before the Commission which were not previously raised. It is evident, therefore, that the

administrative review procedures do not compel the conclusion that all legal theories must be raised during the Department's review process to have those theories considered by the Commission. Moreover, the Commission presumes that, as a practical matter, the Department would endeavor to avoid litigation and would present its strongest and most complete arguments early in the administrative review process to convince the taxpayer that any challenge to the assessment would be unsuccessful.

Midwest Track also asserts that its position is compelled by Wis. Admin. Code §§ Tax 1.14(2) and TA 1.15(2)(d), which establish that petitions to the Department and to the Commission, respectively, must clearly state a taxpayer's specific objections and the contentions of law upon which the taxpayer relies. According to Midwest Track, a taxpayer cannot meet the requirements of these provisions if the Department is allowed to raise a new theory in support of its assessment after issuing its Notice of Action.

As a preliminary matter, the Commission notes that, according to the Amended Answer filed by the Department, Midwest Track was first informed of the Department's view that the simulcast fee purchases were taxable as cable television system services at a meeting on January 2, 2003, approximately two weeks after it issued its Notice of Action and a month and a half prior to the February 17, 2003 due date for Midwest Track's petition to the Commission. Thus, Midwest Track had the opportunity to raise its substantive objection to this theory in its petition to the Commission in the instant case, as required by Wis. Admin. Code § TA 1.15(2)(d).

Moreover, as a taxpayer is permitted to raise new issues before the Commission even after filing petitions with the Department and Commission, these provisions have not been interpreted to impose strict requirements which, if not met, bar the taxpayer from having the Commission consider those new issues. Because a taxpayer may respond to any theory raised by the Department even if the taxpayer did not raise the argument in a petition to either the Department or Commission, it is difficult to discern how the taxpayer would be substantially prejudiced by the Department's use of a theory of assessment not relied upon during the Department's review procedure.

The Commission also notes that, pursuant to Wis. Admin. Code § TA 1.21, "[a] petitioner or respondent may amend its petition, answer or reply at any time before the commission's hearing with the consent of the adverse party or by leave of the commission upon motion duly made." Thus, the administrative rules acknowledge that the parties' positions may continue to evolve, not only after the Notice of Action is issued by the Department, but even after proceedings have commenced before the Commission.[4]

Furthermore, leave to amend pleadings shall be freely given, and the focus is on whether the opposing party has an opportunity to respond to the issue raised by the amendment:

> Section 802.09(1) of the Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given at every stage of the action when justice so requires." This power to amend pleadings is to be liberally construed, provided the amendment does not

[4] Indeed, an Amended Answer was ordered in this case.

> deprive "the opposing party of [a] timely opportunity to meet the issue created by the amendment." *D.R.W. Corp. v. Cordes*, 65 Wis. 2d 303, 308 (1974) (upholding the addition of a counterclaim on the day before trial). See also, *John v. John*, 153 Wis. 2d 343, 365 (Ct. App. 1989).

Wissota Sand, Wis. Tax Rptr. (CCH) ¶ 400-575 (2001). The Commission does not discern a meaningful difference between the situation in the instant case and those instances where a party is permitted to amend its pleadings. When leave to amend is granted, the other party presumably expends additional time and costs to respond to the issue created by the amendment, which is the harm Midwest Track alleges here. However, Midwest Track has failed to point to any authority demonstrating that such costs are sufficient to bar consideration of a new theory or issue. In fact, Wis. Admin. Code § TA 1.21, and authority construing it, suggests the opposite. As *Wissota Sand* makes clear, in determining whether amended pleadings are appropriate, the focus is on whether the opposing party has adequate opportunity to respond. The same considerations apply in this case. Midwest Track has not demonstrated that it has been deprived of the opportunity to respond to the Department's additional theory of tax liability before the Commission.

In short, none of the authority Midwest Track relies upon establishes that, as a matter of law, the Department is barred from raising an additional basis for its assessment two weeks after issuing its Notice of Action and more than a month prior to the date the petitioner's petition for review was required to be filed with the Commission.

Equitable Estoppel

Midwest also argues, in the alternative, that the Department should be equitably estopped from enforcing its new determination.

A defense of equitable estoppel consists of an action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 634, 279 N.W. 2d 213 (1979).

The doctrine of estoppel is not applied as freely against governmental agencies as it is in the case of private persons. *Id*. at 638. "'[E]stoppel should be applied against the Government with utmost caution and restraint, for it is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals.'" *Id*. at 638 (citation omitted). "[E]stoppel may be available as a defense against the government if the government's conduct would work a serious injustice and if the public's interest would not be unduly harmed by the imposition of estoppel." *Id*. "[W]here a party seeks to estop the Department of Revenue and the elements of estoppel are clearly present, the estoppel doctrine is applicable where it would be unconscionable to allow the state to revise an earlier position." *Id*. at 641 (citation omitted).

Midwest Track has failed to demonstrate that, under the facts of this case, it would be "unconscionable" to permit the Department to assert an additional or alternative basis for the tax it alleges Midwest Track owes or that Midwest Track would

thereby suffer a "serious injustice." Indeed, Midwest Track has failed to demonstrate that, as a matter of law, it suffered the type of "detriment" contemplated by the doctrine of equitable estoppel.

Cases in which the Department has been equitably estopped have typically involved situations where a taxpayer failed to collect tax the Department later contended was owing because the Department had previously informed the taxpayer that the tax was not owing. *See Department of Revenue v. Family Hospital, Inc.*, 105 Wis. 2d 250, 254-55, 313 N.W.2d 828 (1982) (as a result of taxpayer's reliance on Department memoranda which expressly listed parking receipts as nontaxable, taxpayer suffered detriment because it did not collect the tax from persons using its parking facility, could not now do so, and would be required to make the payment from its own funds); *Moebius*, 89 Wis. 2d at 635-37 (as a result of taxpayer's reliance on Department's extensive examination of taxpayer's sales records and on its representations that exemption certificates taxpayer had on file from customers were valid, taxpayer suffered detriment because it failed to collect sales tax from customers who filed exemption certificates and would be required to pay the deficiency itself); *Security Savings & Loan Association v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-387 (Milw. Co. Circ. Ct. 1984) (as a result of taxpayer's reliance on Department's letter stating that there was no liability for sales or use tax and Department's failure to take any action against taxpayer, give notice that it would collect later or advise taxpayer that any liability existed until four years following time when sales tax became due, taxpayer

suffered detriment in that it could not attempt to recoup taxes from seller who sold premiums to taxpayer).

Contrastingly, in the instant case the "detriment" Midwest Track alleges to have suffered consists of two claims. First, Midwest Track asserts that it incurred legal fees and related costs in defending against a basis for an assessment that the Department appears to have abandoned. Second, Midwest Track claims that, based on the Department's assertion of its telecommunication services theory ¯ which Midwest Track knew was meritless ¯ Midwest Track elected to forego depositing the disputed amount with the Department, thereby subjecting itself to additional 12% interest charges. Had the cable television system services theory been advanced, Midwest Track claims, it might have deposited the disputed amount to avoid the interest charges. Midwest Track has failed to cite any authority, and the Commission cannot conclude as a matter of law, that incurring legal fees under the circumstances of this case or incurring interest charges by failing to make a deposit of the disputed amount constitutes the sort of "detriment" contemplated by the doctrine of equitable estoppel.

Even assuming, however, that such effects constituted "detriment" as that term is understood in the equitable estoppel context, Midwest Track has failed to provide any evidentiary basis for its assertion that its legal expenses resulted solely from the Department's assertion of its telecommunication services theory and would not have been incurred had Midwest Track known of the cable television system services theory earlier in the administrative review process. Nor has Midwest Track substantiated its claim that it chose to forego making a deposit of the disputed amount

because of the Department's advancement of its telecommunication services theory or that it would have made a deposit had the cable television system services theory been asserted at an earlier stage in the Department's review. Summary judgment in favor of Midwest Track is therefore inappropriate because Midwest Track has not demonstrated the absence of any genuine factual dispute.

Thus, Midwest Track has failed to establish that, as a matter of law, the elements of equitable estoppel have been satisfied, much less that allowing the Department to assert its cable television services theory would result in a "serious injustice" or be "unconscionable."[5] *Moebius*, 89 Wis. 2d at 638, 641.

ORDER

1. Petitioner's motion for partial summary judgment is denied.

2. A **telephone status conference** in this matter **will be held on June 14, 2005 at 10:30 a.m.**

Dated at Madison, Wisconsin, this 10th day of May, 2005.

WISCONSIN TAX APPEALS COMMISSION

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Jennifer E. Nashold, Commissioner

[5] In view of the Commission's determinations in this case, we need not address any of the other issues raised by the parties.