

2009 DRAFTING REQUEST

Bill

Received: 12/18/2008

Received By: jkreye

Wanted: As time permits

Identical to LRB:

For: Administration-Budget

By/Representing: Lillethun

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Addl. Drafters:

Subject: Tax, Other - miscellaneous

Extra Copies:

Submit via email: NO

Pre Topic:

DOA:.....Lillethun, BB0299 -

Topic:

Standard of review

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/P1	jkreye 12/20/2008	bkraft 12/22/2008	mduchek 12/23/2008	_____	cduerst 12/23/2008		

FE Sent For:

<END>

2009 DRAFTING REQUEST

Bill

Received: 12/18/2008

Received By: jkreye

Wanted: As time permits

Identical to LRB:

For: Administration-Budget

By/Representing: Lillethun

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Addl. Drafters:

Subject: Tax, Other - miscellaneous

Extra Copies:

Submit via email: NO

Pre Topic:

DOA:.....Lillethun, BB0299 -

Topic:

Standard of review

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkreye	PI LJK 12/22	MD 12/22	MD 12/22			

FE Sent For:

<END>

1227

2007-09 Budget Bill Statutory Language Drafting Request

- Topic: Standard of Review
- Tracking Code: BB0299
- SBO team: Tax, Transportation and Budget Development Team
- SBO analyst: Chad Lillethun
 - Phone: 266-7597
 - Email: Chad.Lillethun@wisconsin.gov
- Agency acronym: DOR
- Agency number: 566
- Priority (Low, Medium, High): High

Intent:

Require that the Tax Appeal Commission give controlling weight deference to Department of Revenue's interpretation of DOR administrative rules.

**Legislative Proposal Summary
Wisconsin Department of Revenue
Office of General Counsel**

Date: November 19, 2008

TITLE: Standard of Review

DESCRIPTION OF CURRENT LAW AND PROBLEM

According to a recent Wisconsin Supreme Court decision, *Menasha Corp. v. Wisconsin Department of Revenue*, the Wisconsin Tax Appeals Commission (TAC) need not give any deference to the Department of Revenue's interpretation of its administrative rules. The Commission noted that:

The DOR's deference argument [that the Commission should give it controlling weight deference] is intriguing because the DOR promulgated this rule, and thus, it is, at least arguably, reasonable to argue that the Commission should give the DOR deference. However, this would ignore the boundaries that the legislature created when it gave the Commission final authority over all tax questions.

The Court's decision is at odds with the deference Wisconsin courts give other administrative agencies. The courts give "controlling weight" deference to state agencies when those agencies interpret their own regulations. In other words, a court will defer to an administrative agency's interpretation of its own rules or regulations as controlling unless the interpretation is plainly erroneous or inconsistent with the language of the rule or regulation. *Hillhaven Corp. v. Department of Health and Family Services*, 2000 WI App 20, ¶12. It seems unreasonable for the Tax Appeals Commission to give no deference to DOR's interpretation of its administrative rules when a court of law gives that deference to the interpretations of any other administrative agency.

Providing controlling weight deference to DOR on administrative rules would not undermine the TAC's ability to review tax questions. The TAC would retain the power to reject unreasonable interpretations by DOR or interpretations that are not consistent with the meaning or purpose of a rule.

RECOMMENDATION FOR ACTION

DOR recommends requiring that the Tax Appeal Commission give controlling weight deference to Department of Revenue's interpretation of DOR administrative rules – the same deference that a court would give to other administrative agencies.

Weight to Department Experience. DOR is the agency charged by the Legislature with the duty of administering the tax statutes as well as researching, creating and interpreting regulations on a daily basis. That experience should be given some weight. By contrast, the TAC is charged by the Legislature with deciding disputes between the taxpayer and DOR. The TAC may not review a regulation for the first time until many years after its issuance. It is sensible to give the department's experience creating and interpreting its own rules some weight.

Parallel Deference Compared to Other Agencies. The proposed change would give DOR the opportunity for similar deference that other state agencies receive with regard to interpretation

of their rules. The general rule of administrative code interpretation is that an administrative agency's interpretation of its own regulations is controlling "unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous." *State v. Harenda Enterprises, Inc.* 2008 WI 16, ¶ 25, 307 Wis.2d 604, 746 N.W.2d 25 (giving deference to the DNR's interpretation of its administrative rule); *Orion Flight Servs. v. Basler Flight Serv.*, 2006 WI 51, ¶ 18, 290 Wis. 2d 421, 714 N.W.2d 130 (examining DATCP interpretation of administrative rule for possible guidance); *Bergmann v. McCaughtry*, 211 Wis.2d 1, 7, 564 N.W.2d 712 (1997) (DOC interpretation of its rule could be entitled to deference if settled and relevant).

No Impact on Menasha Decision. The proposed change will not alter the result of *Menasha*, in which the courts give deference to the Tax Appeals Commission on appeal of its decisions, rather than the Department of Revenue. The change simply ensures that, in the future, the TAC will examine and consider DOR interpretations. In the *Menasha* case the TAC never examined or considered any of DOR's eight published private letter rulings and two published tax releases construing Wis. Admin. Code § Tax 11.71(1)(e) and (k).

ADMINISTRATIVE IMPACT

None

FAIRNESS /TAX EQUITY

Controlling weight for DOR administrative rule interpretations will provide taxpayers with the assurance that written guidance from DOR can be relied upon. Taxpayers will continue to retain the ability to argue that rules that are unreasonably interpreted or inconsistent with the meaning or purpose of the rules.

IMPACT ON ECONOMIC DEVELOPMENT

None

FISCAL EFFECT

None

DRAFTING INSTRUCTIONS

Section 73.01(4)(a) could be amended as follows, with new subsection (ar) created as follows:

- (a) Subject to the provisions for judicial review contained in s. 73.015 and subsection (ar), 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), 76.91, 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. Whenever with respect to a pending appeal there is filed with the commission a stipulation signed by the department of revenue and the adverse party, under s. 73.03 (25), or the department of transportation and the adverse party agreeing to an affirmance, modification, or reversal of the department of revenue's or department of transportation's position with respect to some

or all of the issues raised in the appeal, the commission shall enter an order affirming or modifying in whole or in part, or canceling the assessment appealed from, or allowing in whole or in part or denying the petitioner's refund claim, as the case may be, pursuant to and in accordance with the stipulation filed. No responsibility shall devolve upon the commission, respecting the signing of an order of dismissal as to any pending appeal settled by the department of revenue or the department of transportation without the approval of the commission.

(ar) Upon review of rules interpreted by the department of revenue, controlling weight shall be accorded to the department's interpretation unless the interpretation is plainly erroneous or inconsistent with the language of the rules or regulations.

EFFECTIVE DATE AND/OR INITIAL APPLICABILITY

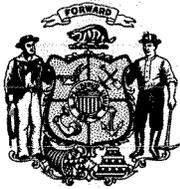
Effective upon passage.

INTERESTED/AFFECTED PARTIES

Wisconsin Tax Appeals Commission
Department of Revenue
Taxpayers

PREPARED BY

Dana J. Erlandsen
266-3974



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1227/P1

JK:.....

Lbjk

DOA:.....Lillethun, BB0299 - Standard of review

FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION

SAV
X-REFV

in 12-20-08
do not gen.

1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

TAXATION

OTHER TAXATION

>> Under this bill, for purposes of reviewing DOR's rules, the tax appeals commission must give controlling weight deference to DOR's interpretation of its rules unless the interpretation is plainly erroneous or inconsistent with the language of the rules or the statutes that govern the rules.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 73.01 (4) (a) of the statutes is amended to read:

3 73.01 (4) (a) Subject to the provisions for judicial review contained in s. 73.015
4 and par. (ar), the commission shall be the final authority for the hearing and
5 determination of all questions of law and fact arising under sub. (5) and s. 72.86 (4),
6 1985 stats., and ss. 70.38 (4) (a), 70.397, 70.64, and 70.995 (8), s. 76.38 (12) (a), 1993

1 stats., ss. 76.39 (4) (c), 76.48 (6), 76.91, 77.26 (3), 77.59 (5m) and (6) (b), 78.01, 78.22,
2 78.40, 78.555, 139.02, 139.03, 139.06, 139.31, 139.315, 139.33, 139.76, 139.78,
3 341.405, and 341.45, subch. XIV of ch. 71, and subch. VII of ch. 77. Whenever with
4 respect to a pending appeal there is filed with the commission a stipulation signed
5 by the department of revenue and the adverse party, under s. 73.03 (25), or the
6 department of transportation and the adverse party agreeing to an affirmance,
7 modification, or reversal of the department of revenue's or department of
8 transportation's position with respect to some or all of the issues raised in the appeal,
9 the commission shall enter an order affirming or modifying in whole or in part, or
10 canceling the assessment appealed from, or allowing in whole or in part or denying
11 the petitioner's refund claim, as the case may be, pursuant to and in accordance with
12 the stipulation filed. No responsibility shall devolve upon the commission,
13 respecting the signing of an order of dismissal as to any pending appeal settled by
14 the department of revenue or the department of transportation without the approval
15 of the commission.

History: 1973 c. 90; 1975 c. 39, 199; 1977 c. 29; 1979 c. 177 s. 85; 1979 c. 221; 1981 c. 20, 317; 1983 a. 27, 277; 1985 a. 29 ss. 1403 to 1411, 3202 (56) (d); 1987 a. 27
ss. 1542m, 1543m, 3202 (47) (a); 1987 a. 142, 186, 198, 312, 399, 403; 1989 a. 31; 1989 a. 56 s. 259; 1989 a. 335; 1991 a. 39, 262, 315, 316; 1993 a. 184, 213; 1995 a. 351;
1997 a. 27; 1999 a. 145; 2001 a. 16; 2003 a. 33; 2005 a. 49; 2007 a. 20.

16 **SECTION 2.** 73.01 (4) (ar) of the statutes is created to read:

17 73.01 (4) (ar) For purposes of reviewing the department of revenue's rules, the
18 commission shall give controlling weight deference to the department's
19 interpretation of ^{e its} it's rules unless the interpretation is plainly erroneous or
20 inconsistent with the language of the rules or the statutes that govern the rules.

21 **SECTION 9343. Initial applicability; Revenue.**



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1227/P1

JK:bjk:md

DOA:.....Lillethun, BB0299 - Standard of review

FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION

1 **AN ACT ...; relating to:** the budget.

Analysis by the Legislative Reference Bureau

TAXATION

OTHER TAXATION

Under this bill, for purposes of reviewing DOR's rules, the Tax Appeals Commission must give controlling weight deference to DOR's interpretation of its rules unless the interpretation is plainly erroneous or inconsistent with the language of the rules or the statutes that govern the rules.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 **SECTION 1.** 73.01 (4) (a) of the statutes is amended to read:

3 73.01 (4) (a) Subject to the provisions for judicial review contained in s. 73.015
4 and par. (ar), the commission shall be the final authority for the hearing and
5 determination of all questions of law and fact arising under sub. (5) and s. 72.86 (4),
6 1985 stats., and ss. 70.38 (4) (a), 70.397, 70.64, and 70.995 (8), s. 76.38 (12) (a), 1993

1 stats., ss. 76.39 (4) (c), 76.48 (6), 76.91, 77.26 (3), 77.59 (5m) and (6) (b), 78.01, 78.22,
2 78.40, 78.555, 139.02, 139.03, 139.06, 139.31, 139.315, 139.33, 139.76, 139.78,
3 341.405, and 341.45, subch. XIV of ch. 71, and subch. VII of ch. 77. Whenever with
4 respect to a pending appeal there is filed with the commission a stipulation signed
5 by the department of revenue and the adverse party, under s. 73.03 (25), or the
6 department of transportation and the adverse party agreeing to an affirmance,
7 modification, or reversal of the department of revenue's or department of
8 transportation's position with respect to some or all of the issues raised in the appeal,
9 the commission shall enter an order affirming or modifying in whole or in part, or
10 canceling the assessment appealed from, or allowing in whole or in part or denying
11 the petitioner's refund claim, as the case may be, pursuant to and in accordance with
12 the stipulation filed. No responsibility shall devolve upon the commission,
13 respecting the signing of an order of dismissal as to any pending appeal settled by
14 the department of revenue or the department of transportation without the approval
15 of the commission.

16 **SECTION 2.** 73.01 (4) (ar) of the statutes is created to read:

17 73.01 (4) (ar) For purposes of reviewing the department of revenue's rules, the
18 commission shall give controlling weight deference to the department's
19 interpretation of its rules unless the interpretation is plainly erroneous or
20 inconsistent with the language of the rules or the statutes that govern the rules.

21 **SECTION 9343. Initial applicability; Revenue.**

22 (1) TAX APPEALS COMMISSION; STANDARD OF REVIEW. The treatment of section 73.01
23 (4) (a) and (ar) of the statutes first applies to matters before the tax appeals
24 commission on the effective date of this subsection.

25 (END)