COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP818 **Cir. Ct. No. 2012CV3663**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SULLIVAN BROTHERS, INC.,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: PETER C. ANDERSON, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. In this WIS. STAT. ch. 227 proceeding, Sullivan Brothers, Inc., appeals a circuit court judgment affirming a decision of the Wisconsin Tax Appeals Commission. The Commission agreed with the state Department of Revenue that Sullivan, a contractor that buys, sells, and installs

ceiling materials, is liable for state use taxes on Sullivan's consumption of ceiling materials that it purchased and later installed at facilities owned by tax-exempt entities during the tax years 2004-07.

¶2 On appeal, Sullivan relies primarily on a narrow argument, namely, that the Commission erred in failing to hold the Department to admissions that the Department made regarding pertinent business transactions. Sullivan contends that it relied on the Department's admissions, and that these admissions defeat the Department's theory of liability. Apart from the reliance-on-admissions argument, Sullivan may also intend, as a secondary set of arguments, to challenge the substance of the Commission's decision.

¶3 We conclude that Sullivan forfeited the opportunity to raise its reliance-on-admissions argument by failing to raise it before the Commission and we reject it on that basis, while observing that this argument appears on its face to be without merit. Separately, we conclude that, to the extent Sullivan offers additional arguments, it does not carry its burden of persuading us that the Commission's interpretation is not one reasonable interpretation that is not contrary to the clear meaning of the primary statute at issue, WIS. STAT. § 77.51(2) (2011-12).[1] Accordingly, we affirm.

[1] Neither party suggests that there have been any changes in state law involving the statutes at issue in this appeal between the 2004 version of the statutes, the first tax year at issue in this case, and the 2011-12 version. Therefore, we rely on the 2011-12 version.

BACKGROUND[2]

¶4 We summarize the background in three sections below, which address: (1) pertinent tax law; (2) the liability dispute here, involving the conduct of Sullivan and a company that Sullivan calls a "sister company," Sullivan Brothers Supply ("Supply"); and (3) the alleged Department admissions.

Pertinent Tax Law

¶5 Chapter 77 of the Wisconsin Statutes addresses the state use tax, which is "an excise tax" on storage, use, or consumption of tangible personal property where a state sales tax is not charged and no exemption applies. *See* WIS. STAT. § 77.53(1) (use tax is excise tax "levied and imposed on ... the storage, use or other consumption in this state of tangible personal property ... purchased from any retailer, at the rate of 5% of the purchase price of the property …."); s*ee also* § 77.53(1b) ("The storage, use, or other consumption in this state of tangible personal property ... purchased from any retailer is subject to the tax imposed in this section unless an exemption in this subchapter applies."); *but see also* ***DOR v. Moebius Printing Co.***, 89 Wis. 2d 610, 621-22, 279 N.W.2d 213 (1979) ("Although the use and sales taxes are complementary and supplementary, the scope of the use tax is not merely a function of the scope of the sales tax. The two

[2] It is not productive, only distracting, that Sullivan injects argument into the Statement of the Case in its principal brief. For example, this portion of Sullivan's brief states in part: "Sullivan was entitled to, *and did*, rely on the Department's Pleading Admissions as being binding evidence of the validity of the sale transaction in question." (emphasis in original). Sullivan's counsel are reminded that WIS. STAT. RULE 809.19(1) requires an appellant's brief to contain a statement of the case, which does not include argument, but instead "the procedural status of the case leading up to the appeal; the disposition of the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record."

are separate taxes ... cover[ing] different events involving the same kinds of tangible personal property or services.").

¶6 Taxed transactions are described as "retail." *See* WIS. STAT. §§ 77.52(1)(a), 77.53(1). The use tax applies to purchases from a "retailer." Section 77.53(1). As pertinent here, "use" is defined in WIS. STAT. § 77.51(22)(a) to include:

> the exercise of any right or power over tangible personal property ... incident to the ownership, possession or enjoyment of the property ... including installation or affixation to real property ....

The statutes creating the sales and use taxes establish a plan "under which everything is taxable at the retail level unless specifically exempted." ***DOR v. Milwaukee Refining Corp.***, 80 Wis. 2d 44, 49, 257 N.W.2d 855 (1977).

¶7 At issue in this case are two areas of exemption: "sales for resale" and sales to tax-exempt entities.

¶8 Addressing the first area, "sales for resale," a "sale" for purposes of a sales or use tax does not generally include a transfer for purposes of resale by the transferee in the regular course of business without intervening use. *See* WIS. STAT. § 77.51(14) ("but not for resale").

¶9 Turning to the topic of tax-exempt entities, sales of tangible personal property to, and use of tangible personal property by, governmental entities and other nonprofit entities, such as religious institutions and nonprofit hospitals, are generally exempted from the sales and use taxes. *See* WIS. STAT. § 77.54(9a).

¶10 With that statutory background, the arguments raised on appeal involve the application of WIS. STAT. § 77.51(2) to Sullivan's activities. Under

§ 77.51(2), contractors such as Sullivan are deemed "the consumers of tangible personal property" for purposes of use taxes when they purchase and use materials in real property construction activities. Regarding the use of resale certificates, § 77.51(2) further provides that sales and use taxes apply to contractor purchases of such materials, and certificates are not used, unless the contractor "has sound reason to believe," at the time the contractor purchases the materials, that the contractor will not be performing construction activities with the materials.[3]

¶11 The administrative code provides guidance to contractors in this area,[4] and also clarifies the application of WIS. STAT. § 77.51(2). Most pertinent here, the codes states that a

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[3] WISCONSIN STAT. § 77.51(2) provides in pertinent part:

> (2) "Contractors" ... are the consumers of tangible personal property ... used by them in real property construction activities and the sales and use tax applies to the sale of tangible personal property .... A contractor engaged primarily in real property construction activities may use resale certificates only with respect to purchases of tangible personal property ... which the contractor has sound reason to believe the contractor will sell to customers for whom the contractor will not perform real property construction activities involving the use of such tangible personal property ....

There is no dispute in this appeal that, for purposes of interpreting Chapter 77, Sullivan is a "contractor," that the materials at issue qualify as "tangible personal property," and that, at least as a general matter, Sullivan's installation of ceiling materials for tax-exempt customers constitutes "real property construction activity."

In explanation of the phrase "resale certificates" used in WIS. STAT. § 77.51(2), we note that, under Chapter 77, "it shall be presumed that all receipts are subject to tax until the contrary is established," and sellers bear the burden of proving that a sale of tangible personal property is not a taxable sale at retail unless the seller receives a resale certificate from the purchaser. WIS. STAT. § 77.52(13), (14).

[4] For example, WIS. ADMIN. CODE § TAX 11.68(8) provides guidance for contractors who are not certain whether they will be reselling or using materials they purchase:

(continued)

> supplier who is also the contractor who uses the building materials in the ... improvement of real property for an exempt entity, is the consumer of such building materials, not the seller of personal property to the exempt entity. The sale of building materials to the [contractor, as] consumer[,] is subject to the tax.

WIS. ADMIN. CODE § TAX 11.04(4).[5]

> [S]ome construction contractors who also sell construction supplies at retail do not know when they purchase these supplies whether they will be consumed in construction contracts or resold to others. In these instances, a construction contractor may do one of the following at the time of making purchases:
>
> (a) Give an exemption certificate claiming resale to suppliers and purchase the property, item, or good without tax. If the contractor later resells the property, item, or good, the contractor shall report the sales and collect and remit the tax on the sales price to customers. If the property, item, or good is used in fulfillment of a construction contract, the contractor shall pay a use tax on its purchase price.
>
> (b) Pay sales tax to suppliers on all property, items, and goods purchased. If the property, item, or good is later consumed in fulfilling a real property construction contract, the tax obligation is taken care of. If the property, item, or good is resold at retail, the contractor shall collect and remit sales tax on these retail sales, but may take as a credit against the sales tax any tax paid to suppliers on the purchase of such property, item, or good.

[5] WISCONSIN ADMIN. CODE § TAX 11.68(9)(a) addresses the sales tax side of the same equation, namely, the sales tax implications when a contractor buys materials and then installs them at a facility owned by a tax-exempt entity. Section 11.68(9)(a) provides in pertinent part that

> [t]he sales tax exemption provided to ... [tax-]exempt entities ... does not apply to building materials purchased by a contractor for use under a construction contract to ... improve real property for the exempt entity. The sales price received from sales of these building materials to a contractor is subject to the tax if the building materials become part of real property after construction or installation.

¶12 At the same time, however, WIS. ADMIN. CODE § TAX 11.04(5) clarifies that direct sales by a supplier to a tax-exempt entity are not taxable, even if a contractor uses the materials in an installation:

> **(5)** EXEMPT SALES. A supplier's sales of building materials made directly to [a tax-]exempt entity are not taxable, even though such tangible personal property ... is used by the contractor in the erection of a building or structure, or in the alteration, repair or improvement of real property for the exempt entity. Suppliers of building materials may presume that a sale is made directly to an exempt entity if the supplier receives a purchase order from the exempt entity, and payment for such building materials is received directly from the exempt entity.

Liability Dispute

¶13 With this legal framework in mind, in dispute here are the tax consequences arising from what occurred when Sullivan installed materials, which it had earlier purchased, at the facilities of tax-exempt customers. In connection with these transactions, no sales or use taxes were paid.

¶14 The following are basic, undisputed facts about what occurred in these instances involving Sullivan and the sister company, Supply. Supply is owned in the same proportions by the same individuals who own Sullivan, and the two companies share the same location.

¶15 Sullivan bought from third parties, such as manufacturers, the materials that would eventually be used in construction, for which Sullivan paid no sales tax. Instead, Sullivan provided the sellers from whom it obtained the materials with resale certificates, attesting that the materials would be resold.

¶16 When a tax-exempt customer needed an installation, the customer would issue two sets of purchase orders. The customer would issue one set to

Supply, reflecting purported sales of materials by Supply to the customer. The customer's second set of purchase orders would go to Sullivan, reflecting an order for Sullivan to install the materials at the customer's facility.

¶17 Sullivan would complete the installations at the facilities of the tax-exempt entities, using the materials that it had bought.

¶18 Later, Sullivan would record the installed materials as having been "transferred" from Sullivan to Supply, at Sullivan's cost, as part of annual, year-end journal entries.

¶19 Sullivan did not collect and forward to the State any sales tax or pay any use tax on the materials it bought and subsequently used in installation projects for the tax-exempt customers, nor did Supply collect or pay any sales or use taxes in connection with these transactions.[6] Sullivan does not dispute the Department's position that the record contains no sales documents reflecting transfer of materials from Sullivan to Supply.

¶20 For ease of reference, for the balance of this opinion we refer to the entirety of the above described activity by these entities—from the time Sullivan would purchase the materials from third parties, through Sullivan's installations at facilities of the exempt entities, to the time Sullivan would execute the year-end journal entries reflecting transfers of materials to Supply—collectively as "the exempt-entity installation projects." Separately, we refer to a subset of this

[6] Neither party suggests that there is any issue in this case about whether Supply might be liable to collect and forward to the State sales taxes or might be liable for use taxes.

activity—the alleged resales of materials by Sullivan to Supply and by Supply to the exempt entities—as "the Sullivan-Supply-customer transactions."

¶21 In 2009, the Wisconsin Department of Revenue issued an assessment to Sullivan totaling approximately $80,000 in taxes and interest amounts due for failure to pay sales and use taxes as a contractor deemed to be a consumer of tangible personal property used by it in real property construction at the facilities of tax-exempt entities. The Department's position was then, and continues to be, that the exempt-entity installation projects were subject to a use tax under WIS. STAT. §§ 77.51(2) and 77.53(1). That is, in the terms of WIS. ADMIN. CODE § TAX 11.04(4), the Department views Sullivan as a supplier-contractor who used building materials in the improvement of real property for an exempt entity, and as such Sullivan was "the consumer of such building materials," subject to tax.

¶22 Sullivan's opposing position is that, consistent with WIS. ADMIN. CODE § TAX 11.04(5) and what it submits is a plain language interpretation of WIS. STAT. § 77.51(2), each sale or use that occurred was exempt from tax: (1) Sullivan bought the materials *for resale* from third parties; (2) Supply purchased materials from Sullivan in a similarly non-taxable purchase *for resale*, (3) Supply later, independent of Sullivan, sold the materials directly to *tax-exempt* entities, a non-taxable event, and (4) Sullivan's installation work was an independent contract that did not involve Sullivan supplying materials to the tax-exempt entities. That is, Sullivan argues that each sale or use at issue was either a non-taxable resale or a non-taxable transfer, and the Sullivan-Supply-customer transactions were each valid transactions that the Department was obligated to honor.

¶23 After Sullivan petitioned for redetermination of the assessment, which the Department denied, Sullivan petitioned for review to the Commission.

¶24 The Commission unanimously decided that the Sullivan-Supply-customer transactions lacked economic substance and a business purpose, and affirmed "the Department's decision to ignore the indirect route of the two individual steps, view the [exempt-entity installation projects] in their entireties, and treat them as transactions between Sullivan and its tax-exempt customers." More specifically, in affirming the assessment, the Commission concluded that no material facts were in dispute and that summary judgment for the Department was warranted on two grounds: (1) under the Commission's interpretation of WIS. STAT. § 77.51(2), Supply was not a genuine customer of Sullivan's in the challenged transactions; and (2) Sullivan's argument fails the "substance and realities," or "economic substance," test. In addition, the Commission concluded that support for this interpretation could be found in an opinion of this court and an opinion of the Commission, which both "tend to support" the Department's arguments. *See* ***Rice Insulation, Inc. v. DOR***, 115 Wis. 2d 513, 516-17, 340 N.W.2d 556 (Ct. App. 1983); ***Precision Metals, Inc. v. DOR***, TAC Docket No. 96-S-831, 1998 WL 8987, at *3-4 (Wis. Tax App. Comm'n Jan. 7, 1998).

Department Admissions

¶25 In substance, Sullivan now argues that, through statements or actions during the audit or before the Commission, the Department acknowledged that the Sullivan-Supply-customer transactions were valid sales for the purpose of determining use taxes. With those admissions by the Department, the argument runs, no use tax could apply, because Sullivan sold to Supply in sales for resale, and made no sales to the exempt entities. Sullivan contends that the Department

admitted that Supply made independent, direct resales of the materials to the exempt entities, as an independent supplier and as contemplated in WIS. ADMIN. CODE § TAX 11.04(5), under which no tax should be assessed with respect to Sullivan. In discussion below we summarize the four sources of alleged Department admissions cited by Sullivan.

DISCUSSION

¶26 As suggested above, at points in its briefing, Sullivan appears to limit its argument to the contention that the Commission was obligated to hold the Department to alleged admissions regarding the Sullivan-Supply-customer transactions. For example, in its only discussion addressing the standard of review that this court should apply, Sullivan argues for de novo review, because the Commission's alleged failure to give effect to Department admissions is a purely legal issue and the "central issue" on appeal. Separately, in its reply brief Sullivan calls the reliance-on-admissions question the "real issue presented here." Moreover, Sullivan's substantive arguments are frequently interwoven with references to the alleged admissions. However, because Sullivan appears to attempt to raise substantive arguments beyond its new reliance-on-admissions argument, we address separate arguments that we are able to discern, after first addressing the reliance-on-admissions argument.

Reliance-on-Admissions Argument

¶27 We review the Commission's decision, rather than the decision of the circuit court. ***DOR v. Menasha Corp.***, 2008 WI 88, ¶46, 311 Wis. 2d 579, 754 N.W.2d 95. Here, the Commission's findings of fact are not in dispute.

¶28 We need not address the standard of review because we conclude that Sullivan forfeited the underlying reliance-on-admissions argument, and therefore, on this issue, no Commission decision is properly before us.

¶29 The following is a summary of the four sources of alleged Department admissions cited by Sullivan, in chronological order:

1. Audit process statements. In comments made as part of the Department's Notice of Assessment, a Department of Revenue auditor referred to the Sullivan-Supply interactions in terms that included the following. Sullivan "sold" "untaxed purchases of materials" to Supply, "and subsequently installed" these materials "in real property construction projects performed for exempt entities[,] which purchased the materials from [Supply]."

2. Acceptance of amended returns. The second purported admission involves an alleged Department action. Sullivan contends that the Department "reaffirmed the validity of the transactions when it accepted (without challenge) the amended sales tax returns filed by Sullivan and Supply to more accurately reflect the nature of transactions with their outside suppliers, their customers, and each other."

3. Department's answer to Sullivan's petition for review. In its petition for review of the Department's decision, filed with the Commission, Sullivan stated in part:

> Among the adjustments made by [the Department during the audit period] were adjustments related to additional use tax imposed by [the Department] on [Sullivan's] untaxed purchases of tangible personal property (the "Property") which [Sullivan], in turn, resold to [Supply]. Supply then resold the Property to tax exempt entities for which [Sullivan] performed real property

> construction services under separate contracts between [Sullivan] and the tax exempt entities.

The Department answered this paragraph as follows, with emphasis now supplied to highlight the passage that is the focus of Sullivan's reliance-on-admissions argument:

> [A]dmits that the subject adjustments relate primarily to [Sullivan's] untaxed purchases of construction materials for real property construction projects for exempt entities, which *[Sullivan] subsequently sold to its related corporation, [Supply], which, in turn, sold them to exempt entities,* and which [Sullivan] subsequently consumed in its real property construction activities for said exempt entities. Since Petitioner's language in said paragraph is unclear, [the Department] is unable to understand from what the contracts are alleged to be "separate," and thus [the Department] is unable to truthfully admit or deny that [Sullivan] performed real property construction services under separate contracts between [Sullivan] and the tax exempt entities.

In Sullivan's view, the Department's answer is the "clearest" of the four sets of admissions by the Department.

4. Cross-motions for summary judgment. Sullivan asserts that the Department did not allege in its motion for summary judgment before the Commission that the Sullivan-Supply transactions could not be counted as valid sales for tax purposes, but only made this allegation for the first time in its reply brief in support of its motion.

¶30 The problem with Sullivan's reliance-on-admissions argument is fundamental. Sullivan did not present this argument to the Commission.[7]

[7] The only context in which Sullivan contended in the argument section of its Commission brief that the Department had admitted to anything did not remotely alert the Commission to its current reliance-on-admissions argument. In fact, it pointed in the opposite (continued)

Understandably enough, the Commission failed to address an argument not raised. Sullivan's forfeited contentions include, as part of its reliance-on-admissions argument, its unsupported assertion that it passed up the opportunity to engage in discovery and to submit to the Commission "evidence to support the fact that the transactions were valid" because their validity was allegedly admitted by the Department.[8]

¶31 As a general rule, "an appellate court will not consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a waiver of the right to raise the issue before a reviewing court." ***State v. Outagamie Cnty. Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376.[9] There are exceptions to this forfeiture rule that allow us to choose to address issues not properly raised to the agency. *See* ***id.***, ¶56. However, we see no valid reason to do so here. Neither party identifies Sullivan's forfeiture before the Commission in its current briefing as a potential issue, and thus Sullivan provides no argument that we should ignore its forfeiture.

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direction. Sullivan argued that the Department, in guidance, had admitted that transactions of the type at issue here "would be exempt" if sales were made by an unrelated third party to the exempt customers before a contractor performed installation. This pointed in the opposite direction from its current reliance-on-admissions argument, because it was part of Sullivan's argument to the Commission that the Department's position was that the Sullivan-Supply-customer transactions were a "sham."

[8] Separately, and inconsistently, Sullivan asserts at one point in its briefing on appeal that it "was never given the opportunity to introduce ... evidence," as opposed to passing up the opportunity to introduce evidence. We reject this assertion for multiple reasons, including the fact that Sullivan provides no support for it.

[9] While the court used the word "waiver," the current terminology for Sullivan's failure here is forfeiture, not waiver. *See* ***State v. Ndina***, 2009 WI 21, ¶¶30-31, 315 Wis. 2d 653, 761 N.W.2d 612 (distinguishing between rights forfeited when not claimed and rights knowingly relinquished).

¶32 Although we rely on forfeiture to reject Sullivan's reliance-on-admissions argument, we make two observations supporting our view that, in any case, there is no merit to the substance of this argument under any standard of review that we might apply.

¶33 First, what Sullivan calls the "clearest" source of Department admissions, namely, the Department's answer to the petition, does not contain admissions as to the legal significance of any act of Sullivan or Supply. It is not accurate to assert, as Sullivan does, that the Department's answer "admitted the Sullivan/Supply transactions were valid." We read the Department's answer to be a factual description of the methods of operation claimed by Sullivan and Supply, not a concession about the legal consequences of those facts under WIS. STAT. § 77.51(2) and applicable regulations. Simply put, the Department at most admitted that the word "sale" could be used to describe the alleged transfers of materials from Sullivan to Supply and from Supply to the exempt customers, but did not admit that such "sales" were legally valid sales for taxation purposes.

¶34 Second, it appears that any doubt that could remain regarding the significance of the Department's alleged admissions vanishes upon review of Sullivan's briefing before the Commission, in which Sullivan made statements that included the following:

- The Department's assertion of Sullivan's use tax liability depended on "disregard[ing] the form of the transactions at issue."
- The Department was alleging that the Sullivan-Supply transactions constituted "a 'tax avoidance' scheme," that relied on "'sham' transactions." (Sullivan uses the word "sham" repeatedly to characterize the Department's position regarding the Sullivan-Supply-customer transactions).

- The Department's theory was that "Sullivan knew that the materials were destined for eventual sale to customers for whom Sullivan would perform installation services."

- "[T]he Department seeks to 'Look Through' the actual sale transactions between Sullivan and Supply to tax Sullivan's installation of the property for its exempt customers."

- "The Department seeks to disregard Sullivan's purchases for resale to Supply and Supply's sales to its tax-exempt customers, essentially treating Sullivan and Supply as a single entity."

- The Department's position "disregard[s] transactions that give substance to ... legitimate tax exemptions."

¶35 In sum, we deem Sullivan's reliance-on-admissions argument forfeited, and affirm the Commission and the circuit court on that basis, while observing that the argument, in any case, appears meritless.

Additional Arguments

¶36 We discern three additional arguments by Sullivan, each challenging the Commission's interpretations of law, which we now address: that to be a taxable transaction, a contractor must have a sound reason to believe it will sell materials to customers for whom it will install the materials; that the Commission misconstrued precedent of this court and one of its own prior decisions; and that the Commission failed to understand that, as a matter of law, Sullivan cannot be deemed to have installed materials for Supply.

¶37 Sullivan takes no position on our standard of review as to these issues, and fails to reply to the Department's extensive discussion, supported by authority, contending that the "great weight" standard applies. This concedes the issue for purposes of this appeal. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶38 Under great weight review, as our supreme court has explained,

> courts sustain any reasonable agency interpretation that is not contrary to the clear meaning of the statute. Even if a more reasonable interpretation exists, courts will sustain the agency's .... [A]n agency's statutory interpretation is unreasonable if it "directly contravenes the words of the statute, it is clearly contrary to legislative intent or it is without rational basis." The party seeking to overturn the agency's interpretation has the burden of showing the interpretation is unreasonable.

DOR v. River City Refuse Removal, Inc., 2007 WI 27, ¶33, 299 Wis. 2d 561, 729 N.W.2d 396 (citations omitted).

¶39 If Sullivan intends to make additional arguments not addressed below, we conclude that they are insufficiently explained, supported, or both. This includes references made for the first time in Sullivan's reply brief that should have been presented, if at all, as developed legal arguments in the principal brief. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). As a general matter, Sullivan's briefing fails to come to grips with the uncontested fact that Sullivan acquired materials that it installed for particular exempt customers, under circumstances in which, the Commission could reasonably conclude, Sullivan did not have a sound reason to believe it would *not* install the materials for these customers. Sullivan fails to explain why we should conclude that the Commission's decision, in the words of ***River City Refuse***, "directly contravenes the words of the statute," "is clearly contrary to legislative intent," or "is without rational basis."

¶40 Turning to the first additional argument, Sullivan makes the following legal assertion: "[F]or the contractor's initial purchases of the materials to be taxable the contractor must have sound reason to believe that it will sell the property to customers for whom it will also perform real property construction

activities[.]" This is a misreading of the second sentence of WIS. STAT. § 77.51(2), which is framed as a *limitation* on the use of resale certificates:

> A contractor engaged primarily in real property construction activities may use resale certificates *only with respect to* purchases of tangible personal property ... which the contractor has sound reason to believe the contractor will sell to customers for whom the contractor will *not* perform real property construction activities involving the use of such tangible personal property ….

(Emphasis added.) Thus, Sullivan has it backwards. The language does not, as Sullivan contends, limit taxation to situations in which a contractor has sound reason to believe it will sell and construct. Rather, a contractor like Sullivan can only avoid taxation, via a resale certificate, when it has "sound reason to believe" that the materials it initially acquired would *not* be used in construction projects for its customers.

¶41 For its second additional argument, Sullivan attempts to distinguish the facts here from one aspect of the facts of the ***Rice*** and ***Precision Metals*** cases, cited by the Commission as tending to support its interpretation of WIS. STAT. § 77.51(2). At best, however, this merely establishes that these cases are not on all fours with the facts here, a fact the Commission explicitly acknowledged. Most pertinent under our standard of review, Sullivan fails to point to any statement in ***Rice*** or ***Precision Metals*** that would support a view that the Commission's interpretation of § 77.51(2) was not reasonable. Therefore, we need not address the substance of these cases.

¶42 As a third additional argument, Sullivan asserts that the fundamental question under WIS. STAT. § 77.51(2) is: did Sullivan install the materials for Supply, as Supply's installation contractor? A "no" answer to this question is dispositive under the statute, Sullivan submits, because in that case Supply was

Sullivan's "customer" in the questioned activity, and only Supply sold the materials to the exempt entities.

¶43 The Commission provided multiple responses to the question of whether Supply must be seen as Sullivan's customer in the Sullivan-Supply-customer transactions, and the Commission's responses point in the opposite direction of Sullivan's contention. Under our standard of review, it is sufficient for us to focus on what we conclude is the Commission's reasonable construction of WIS. STAT. § 77.51(2) and its conclusion under the "substance and reality" test.

¶44 The "substance and reality" of activities are determinative when considering an argument of the type presented by Sullivan. *See* ***DOR v. Sterling Custom Homes Corp.***, 91 Wis. 2d 675, 679, 283 N.W.2d 573 (1979). This analysis involves examining the "organizational structure" and "method of operation" at issue, and "on the basis of the facts viewed as a whole … it is the substance and realities of a taxpayer's activities that are determinative of the Department's power to tax." ***Id.***

¶45 In this context, the Commission provided four reasons why the Sullivan-Supply-customer transactions fail the test: (1) there was "little or no independent substance to" Supply, in that the ownership, location, and employees were identical, and its sole purpose appeared to be as a "device" to avoid the taxes at issue; (2) transactions between Sullivan and Supply were at Sullivan's cost, creating a pass-through situation; (3) "necessary entries" were made only at year end; and (4) Sullivan filed amended returns during the audit, acknowledging that Sullivan "carried all of the materials on its returns as its inventory for balance sheet purposes." These factors all led the Commission to conclude that the

Sullivan-Supply-customer transactions could "be described as indirect," and included "contrived steps."

¶46 These are pertinent factors that appear to satisfy the examination called for under the applicable case law. Therefore, we sustain the Commission's reasonable interpretation.

CONCLUSION

¶47 For these reasons, we affirm the judgment of the circuit court, which affirmed the ruling and order of the Commission.

By the Court.— Judgment affirmed.

Not recommended for publication in the official reports.