COURT OF APPEALS
DECISION
DATED AND RELEASED

October 2, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0068

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

AMERITECH MOBILE COMMUNICATIONS, INC.,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Ameritech Mobile Communications, Inc. (Ameritech) appeals from a trial court order affirming a decision of the Wisconsin Tax Appeals Commission (TAC). The TAC had concluded that equipment Ameritech purchased for its cell sites between January 1, 1985 and December 31, 1988 was not exempt from sales and use tax under § 77.54(24), STATS., 1987-88.

Ameritech argues that the equipment located at its cell sites is "in central offices" as that term was used in § 77.54(24), and as such, was exempt from taxation. We conclude that the TAC's definition of "in central offices" should be accorded due deference. Because the TAC's definition is as reasonable as Ameritech's proposed definition, we affirm.

BACKGROUND

The facts are, for the most part, undisputed. Ameritech is a corporation in the business of providing cellular telephone services in Wisconsin and elsewhere. During the taxable period, Ameritech's cellular system in Wisconsin consisted of three components: (1) the mobile units (cellular telephones) used by Ameritech's customers; (2) company-owned facilities known as "cell sites," one of which was located in each of Ameritech's eighteen service areas; and (3) a single, company-owned Mobile Telephone Switching Office (MTSO) located in New Berlin, Wisconsin.[1] One of the cell sites was located in the same structure that housed the New Berlin MTSO.

Simplistically speaking, Ameritech's cellular telephone system works as follows. When a mobile unit owner wishes to place a call, the mobile unit scans the signals sent out by the various cell sites and selects the strongest signal.[2] It then sends a message back to that cell site indicating its desire to place a call. Upon receiving the message, the cell site informs the MTSO of the

[1] Subsequent to the taxable period, Ameritech roughly doubled its number of cell sites and placed in service another MTSO in Madison, Wisconsin.

[2] Each cell site sends out on a radio frequency known as a "forward setup channel" a continuous "beacon" containing various information about the system, such as the strength of signal that a mobile unit will need to communicate with the cell site.

incoming call. If the call is being directed outside of the cellular system served by the MTSO, the MTSO will set up a connection to the Public Switched Telephone Network (PSTN), which is the regular land line telephone system serving both cellular and non-cellular subscribers. If the call is being directed to a mobile unit within the MTSO's system, the MTSO will send a message over its data links to all of its cell sites, which in turn send a page to the receiving mobile unit.

During the call, the mobile unit sends a radio signal over the assigned voice channel to the cell site, which transforms the signal from analog to digital. The cell site then sends the signal over its voice trunks to the MTSO, which directs the signal back to the cell site, to a different cell site, or to the PSTN, depending on where the receiving unit is located.

If the cell site recognizes that the signal from the mobile unit has dropped below a predefined threshold, it will request a handoff and send a list to the MTSO of appropriate candidates for a handoff. This list may include other faces of the cell site's antenna and neighboring cell sites. The MTSO then selects a new channel among the candidates and informs the cell sites of its decision. The cell site then informs the mobile unit of the change and the mobile unit tunes to the new channel.

In addition to the functions already described, the cell sites use their locate radios to locate mobile units within their areas; perform fault detection, diagnosis and recovery; perform routine maintenance testing; and perform certain equipment control and reconfiguration functions. It is important to note, however, that a cell site, acting alone, is unable to connect one mobile customer to another mobile customer or a mobile customer to any land line telephone customer. All

connections between mobile units and lane line telephone users must be switched through the MTSO.

During the taxable period, Ameritech purchased equipment required for carrying on its cellular operations.[3] Ameritech did not pay sales or use tax on equipment purchased for use in its MTSO or its cell sites, claiming that this equipment was exempt from sales or use tax under § 77.54(24), STATS.

On February 10, 1992, the Wisconsin Department of Revenue (DOR) assessed additional sales or use taxes on equipment that Ameritech purchased for or used in its cell sites,[4] alleging that the equipment did not qualify for the § 77.54(24), STATS., exemption. Ameritech filed a petition for redetermination, which the DOR denied. On November 25, 1992, Ameritech filed a petition for review with the TAC.

Section § 77.54(24), STATS., 1987-88, provides that "[t]here are exempted from [sales and use taxes] … [t]he gross receipts from the sale of and the storage, use or other consumption of apparatus, equipment and electrical instruments, other than station equipment, in central offices of telephone companies, used in transmitting traffic and operating signals." The parties agreed before the TAC that the cell site equipment is "apparatus, equipment and electrical instruments, other than station equipment," that the equipment is used in

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[3] During the taxable period, Ameritech conducted its Wisconsin cellular telephone operations through two wholly-owned subsidiaries, Ameritech Mobile Communications of Wisconsin, Inc. and Ameritech Mobile Phone Services of Milwaukee, Inc. In turn, each subsidiary was the general partner of a limited partnership that owned and operated the cellular facilities. For the sake of simplicity, we refer to the subsidiaries and partnerships collectively as "Ameritech."

[4] The DOR did not tax the equipment in the cell site located at the New Berlin MTSO.

"transmitting traffic and operating signals," and that Ameritech is a "telephone company." The only issue before the TAC was whether the equipment is "in central offices," as that term is used in the statute.

The TAC concluded that the term "central office" had a clear meaning in the technical parlance of the telecommunications industry and should be construed according to such meaning. *See* § 990.01(1), STATS. ("[T]echnical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."). The TAC concluded that, in the common parlance of telephony, a "central office" is "the facility housing the switching system and related equipment that provides telephone service for customers in the immediate geographical area." The TAC also stated that a "central office" is "a place where matrix switching functions take place, implicating both functional and locational considerations in the larger context of the exemption statute for equipment that would qualify for its application." The TAC defined "switching" as the process of "interconnecting circuits in order to establish a temporary connection between two or more stations" and "matrix switching" as "the connection of multiple channel input paths to multiple output paths."

The TAC concluded that the cell site equipment was not "in central offices" and, therefore, was not exempt from sales and use tax. It reasoned:

> Expert testimony … indicated that in the context of cellular telephony, switching occurs at the MTSO level of the telecommunications link and does not take place any further "downstream" from the MTSO toward the mobile units. Because expert testimony also indicated that no switching occurs at the cell site in the technical sense, remote cell sites may not be considered to be "in central offices" as that phrase is used in § 77.54(24), Stats., and the exemption is not applicable to such cell equipment.

On November 22, 1996, the circuit court affirmed the TAC's decision. Ameritech appeals.

DISCUSSION

Ameritech argues that its cell site equipment is exempt from sales and use tax under § 77.54(24), STATS. Ameritech contends that the TAC erred in concluding that the cell site equipment was not "in central offices." We review the decision of the TAC, not that of the circuit court. *See* ***Port Affiliates, Inc. v. DOR***, 190 Wis.2d 271, 279, 526 N.W.2d 806, 809 (Ct. App. 1994).

With regard to tax exemption statutes, our supreme court recently provided:

> Tax exemption statutes "are to be strictly construed against the granting of the same, and the one who claims an exemption must point to an express provision granting such exemption by language which clearly specify the same, and thus bring himself clearly within the terms thereof." Doubts are to be "resolved against the exemption and in favor of taxability."

La Crosse Queen, Inc. v. DOR, 208 Wis.2d 439, 446, 561 N.W.2d 686, 688 (1997) (citations omitted). A strict construction is not the narrowest possible construction. Rather, we must construe the statute in a "strict but reasonable" manner. ***St. Clare Hosp. v. City of Monroe***, 209 Wis.2d 364, 369, 563 N.W.2d 170, 172 (Ct. App. 1997).

The DOR and Ameritech disagree on the standard we are to use in reviewing the TAC's decision. First, the DOR argues that the TAC's definition of "central office" is a finding that should be upheld if supported by substantial evidence. *See* § 227.57(6), STATS. Although the TAC set forth its definition of "central office" among its "findings of fact," we do not agree that its definition can

be characterized as a finding. Defining "central office" as that term is used in § 77.54(24), STATS., is a matter of statutory interpretation, which is a question of law, not one of fact. *See* ***Coutts v. Wisconsin Retirement Bd.***, 209 Wis.2d 655, 663, 562 N.W.2d 917, 921 (1997).

The DOR also contends that the TAC's interpretation of § 77.54(24), STATS., should be accorded "great weight." In support of its contention, the DOR cites ***Sauk County v. WERC***, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991), which sets forth three circumstances in which the "great weight" standard is applicable. But the standard for determining whether to accord "great weight" to an agency's decision was modified by ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 548 N.W.2d 57 (1996). Therefore, we will follow that decision, not ***Sauk County***, in determining the level of deference to be applied to the TAC's decision.

Ameritech argues, on the other hand, that we should give no weight to the TAC's decision. In support of its position, Ameritech cites ***Consolidated Freightways Corp. v. DOR***, 164 Wis.2d 764, 477 N.W.2d 44 (1991). Ameritech contends that, according to ***Consolidated Freightways***, we may give some weight to a lower tribunal's legal conclusions "only if the tribunal has given the statute in question a 'uniform interpretation over a period of time.'" We do not agree with Ameritech's reading of ***Consolidated Freightways***. That case provides that "[s]pecial deference is to be afforded to an agency where there has been a uniform interpretation over a period of time." ***Id.*** at 771-72, 477 N.W.2d at 47. It does not provide that deference will be given to an agency's legal conclusions only when there has been a uniform interpretation. And it is clear from ***UFE*** and other more recent supreme court cases that other instances exist in which we will give an agency's decision deference. Accordingly, we turn to ***UFE*** and other more recent cases.

We apply one of three distinct levels of deference to an administrative agency's conclusions of law: great weight deference, due weight deference and *de novo* review. ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996). "Which level is appropriate 'depends on the comparative institutional capabilities and qualifications of the court and the administrative agency.'" ***Id.*** (quoting ***State ex rel. Parker v. Sullivan***, 184 Wis.2d 668, 699, 517 N.W.2d 449, 461 (1994)).

We apply great weight deference to the agency's conclusion when all four of the following requirements have been met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

UFE, 201 Wis.2d at 284, 548 N.W.2d at 61.

We do not need to address each of the four requirements. Here, the TAC was interpreting "central office" as that term is used in § 77.54(24), STATS., as a matter of first impression, and the TAC had interpreted § 77.54(24), only one time prior, in ***Madison Group, Inc. v. DOR***, Wis. Tax Rep. (CCH) ¶203-041 (Wis. Tax App. Comm'n Mar. 17, 1989). "[O]ne holding hardly constitutes the type of expertise and experience needed by an agency for it to be afforded great weight deference by a court." ***UFE***, 201 Wis. 2d at 285, 548 N.W.2d at 62. Because the TAC's interpretation is not one of long-standing, its decision will not be given great weight deference.

We also disagree with Ameritech's argument that we should give no deference to the TAC's decision. If the issue before the agency is clearly one of first impression and the agency lacks any special expertise, or if the agency's position on the issue has been so inconsistent so as to provide no real guidance, then we must review the agency's conclusion *de novo*. *See* ***Tannler v. DHSS***, 211 Wis.2d 179, 184, 564 N.W.2d 735, 738 (1997); ***UFE,*** 201 Wis.2d at 285, 548 N.W.2d at 62.

This is not a case of first impression for the TAC. The TAC previously interpreted § 77.54(24), STATS., in ***Madison Group***. Although ***Madison Group*** did not decide the precise question at issue in this case, the TAC's experience in construing tax exemption statutes entitles its determination to some weight even though it may not previously have made the determination of taxability or exemption in a particular fact situation. *See* ***Zignego Co. v. DOR***, ___ Wis.2d ___, ___, 565 N.W.2d 590, 595 (Ct. App. 1997).

In addition, the agency's position has not been so inconsistent so as to provide no real guidance. Ameritech argues that the TAC's decision here was inconsistent with the decision in ***Madison Group***, making it clear that there has been no "uniform interpretation over time." But in deciding whether to review the agency's decision *de novo*, we examine not whether there has been a uniform interpretation over time, but whether the interpretation has been "so inconsistent so as to provide no real guidance." We conclude that the TAC's decision here was not so inconsistent with the ***Madison Group*** decision so as to provide no real guidance. In fact, we do not read the cases to be inconsistent.

In ***Madison Group***, the TAC concluded that a telephone company's switching equipment and managing processor equipment that was kept in separate

locations and connected by proprietary data lines was "in central offices" for purposes of the § 77.54(24), STATS., exemption. However, as noted in the TAC's decision here:

> [W]e find little in the [***Madison Group***] decision to illuminate the essential nature of the definition of "central office," other than the Commission's apparent finding that the equipment at issue functioned in total as a "central office." Discussions of the comparative switching functions of the remote processing equipment are noticeably absent to the extent dealt with in the record in this case, save to say that the equipment was part of "two interconnecting locuses of … processing and switching, which function as its [the petitioner's] central office." … Moreover, it does not appear that the "separateness" of the remote processing equipment was either raised or considered as an issue in the decision in that case.

We agree that ***Madison Group*** is factually distinguishable from this case.[5]

The TAC did repudiate a portion of the ***Madison Group*** decision in its decision in this case. Ameritech argues that this makes clear that the TAC has not interpreted the exemption statute consistently over time. We do not believe that this repudiation makes the two decisions inconsistent. It appears to us that the TAC repudiated some of ***Madison Group***'s language because it was misleading, not because its decision regarding the taxability of Ameritech's cell site equipment was inconsistent with ***Madison Group***. Because the TAC's decision here was not clearly one of first impression and because the TAC's position has not been so

[5] Ameritech argues that the ***Madison Group*** hearing transcript shows that the issues of "comparative switching functions" and "separateness" were raised before the TAC in that case. But here, the TAC distinguished ***Madison Group*** based of the lack of discussion on those issues in the ***Madison Group*** decision, not based what appears or does not appear in the ***Madison Group*** hearing transcript. Moreover, Ameritech does not present a record cite to where we might find the ***Madison Group*** hearing transcript. We do not need to sift through the record to find support for Ameritech's argument. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964).

inconsistent so as to provide no real guidance, we will not review its decision *de novo*.

The remaining standard of review for administrative decisions is due weight deference. Regarding the due weight standard of deference, the ***UFE*** court stated:

> Due weight deference is appropriate when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court. The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question.

UFE, 201 Wis.2d at 286, 548 N.W.2d at 62. "Even though an agency may never have interpreted a particular statute against facts of first impression, because the agency has prior experience in interpreting the statute, the agency's decision will be accorded due weight or great bearing." ***William Wrigley, Jr. Co. v. DOR***, 160 Wis.2d 53, 70-71, 465 N.W.2d 800, 806-07 (1991), *rev'd on other grounds*, 505 U.S. 214 (1992). Where the TAC is charged with the administration of a statute and has had at least one opportunity to analyze the statute and formulate a position, we will grant its interpretation due weight. *See* ***Zignego***, ___ Wis.2d at ___, 565 N.W.2d at 593.

In ***Zignego***, we applied the due weight standard to an appeal of a TAC determination where the TAC had only one opportunity to analyze a statute and formulate an opinion. *See* ***id.*** Here, the TAC has had at least one opportunity to analyze § 77.54(24), STATS., even though that previous opportunity did not precisely address the same issue. And the TAC has been charged with the

enforcement of § 77.54. Therefore, we will afford due weight deference to the TAC's decision in this case.

Under the due weight standard, we do not need to defer to an agency's interpretation which, while reasonable, is not the interpretation that we consider the best and most reasonable. ***UFE***, 201 Wis.2d at 286, 548 N.W.2d at 62. But we will not overturn a reasonable agency decision that comports with the purpose of the statute unless we determine that there is a more reasonable interpretation available. ***Id.*** at 286-287, 548 N.W.2d at 62.

We conclude that the TAC's definition of "central office" is as reasonable as any definition Ameritech offers in support of its position. Of primary importance to our conclusion are two maxims of Wisconsin law. First, we construe technical words and phrases according to their technical meaning. Section 990.01(1), STATS. Second, we construe tax exemption statutes strictly and resolve all doubts in favor of taxability. ***La Crosse Queen***, 208 Wis.2d at 446, 561 N.W.2d at 688.

In the context of these two maxims, we address the remainder of Ameritech's arguments. First, Ameritech argues that each cell site constitutes a "central office" in the cellular system because it performs a "switching" function, as that term is defined in a cellular context. But the TAC did not define "central office" simply as a place where "switching" occurs. It defined "central office" as "the facility housing the switching *system*" and "a place where matrix switching functions take place." (Emphasis added.) It seems to us reasonable to consider the terms "switching system" and "matrix switching" as synonymous in this context. Because the cell sites undisputedly do not connect "multiple channel input paths to multiple output paths," they do not perform "matrix switching."

Therefore, it was reasonable for the TAC to conclude that the cell sites were not "central offices."

Alternatively, Ameritech argues that its cell sites are "central offices" because they fulfill an active, direct and integral role in the cellular system's overall "switching function." But, according to the TAC, a "central office" is not any location that fulfills an active, direct and integral role in "switching." Rather, the "central office" is the place where matrix switching actually takes place. Because "matrix switching" does not occur at the cell sites, the TAC reasonably concluded that they are not "central offices," regardless of the role they play in the switching function.

Ameritech argues that the TAC should have used one of several alternative definitions of "central office," such as the definitions found in WIS. ADM. CODE § PSC 165.02(8)[6] and a 1977 Wisconsin General Sales and Use Tax Law Instruction Bulletin.[7] But in light of § 990.01(1), STATS., it was reasonable

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[6] WISCONSIN ADM. CODE § PSC 165.02(8) provides: "'Central office' means a switching unit, in a telecommunications system which provides service to the general public, having the necessary equipment and operating arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building."

[7] WISCONSIN GENERAL SALES AND USE TAX LAW INSTRUCTION BULLETIN 5 (Wis. Dep't of Rev. 8/1977) provides that the sales of "[a]ll telephone company equipment charged to the central office equipment account (No. 221) per the F.C.C. classification of accounts as of September 1, 1969" are exempt from taxation.

The record does not contain the September 1, 1969 F.C.C. classification of accounts. The record does contain FCC RULES AND REGULATIONS § 31.221 (June 1978), which defined the "central office equipment" account as follows:

> (a) This account shall include the original cost of electrical instruments, apparatus, and equipment, other than station equipment, in central offices (including terminal and test rooms), repeater stations and test stations, used in transmitting traffic and operating signals, and similar equipment in operators' schools and other centralized locations.

(continued)

for the TAC to turn to the technical meaning of "central office," not one of these other definitions, in deciding whether the equipment in Ameritech's cell sites was in "central offices" and, therefore, exempt from taxation.

Ameritech contends, and we agree, that the TAC's position here is inconsistent with the position set forth in the 1977 tax bulletin. Ameritech then cites § 227.57(8), STATS., which provides that "[t]he court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion … is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency."

We are satisfied with the explanation that the TAC provided for abandoning the 1977 interpretation. In its decision, the TAC explained that "the breadth of assets included in the central office equipment account in the cited F.C.C. regulations far exceeds those types of equipment falling within the parameters of § 77.54(24), Stats." In addition, a 1982 DOR publication entitled "Wisconsin Sales and Use Tax Information" no longer used the 1977 bulletin's interpretation of "central office." We agree with the TAC's decision to refuse to follow an interpretation that had been abandoned as early as 1982 and was inconsistent with the statutory language.

Ameritech argues that the cell sites are "central offices" because they perform essentially the same role as "end offices" in a land line telephone

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> (b) This account shall also include the original cost of operators' chairs, wire chiefs' tools, desks and tables equipped with central office telephone equipment, and other furniture, fixtures, and equipment designed specifically for use in central offices, repeater stations, etc., or installed as a part of the electrical equipment therein. (See also Note A to this account.)

system, which are regarded as "central offices." On the other hand, the DOR contends that the fact that cell sites might be similar to facilities that do engage in "switching" does not change the fact that the cell sites do not engage in "switching" themselves. In its decision, the TAC did not make any findings regarding the role of "end offices" in land line telephone systems and the similarities between "end offices" and "cell sites." Regardless, we believe that it was more reasonable for the TAC to use the technical definition of "central office" in construing the exemption than for the TAC to address the similarities between cell sites and end offices in deciding whether to exempt Ameritech's equipment from taxation.

Finally, Ameritech contends that the TAC's interpretation of the statute is strict, but unreasonable. First, Ameritech argues that the TAC's interpretation is unreasonable because, under that interpretation, the exemption would become obsolete as technological advancements enable more and more of the switching components traditionally located at the "switchboard" facility to be moved to remote sites. Second, Ameritech contends that the TAC's interpretation is unreasonable because it makes the availability of the exemption dependent upon the physical location of the equipment, so that one item of equipment would be taxable even though an identical item, performing the same function at another site, would be exempt.

Ameritech's arguments disregard the plain language of the statute. The legislature specifically included both functional and locational elements in the exemption. The equipment must be "used in transmitting traffic and operating signals." It must also be "in central offices." If the legislature thought that the exemption should accommodate technological advances and that equipment should be exempted based solely on its function, not its location, it could have

amended the statute accordingly. Instead, it has repealed the exemption. *See* 1995 Wis. Act 27, § 3485. We conclude that the TAC interpretation of the statutory language was strict, but reasonable. Therefore, the TAC reasonably concluded that Ameritech's cell site equipment was not exempt from taxation.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.