

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ASSOCIATED TRAINING SERVICES CORP.(P)
7190 Elder Lane
Sun Prairie, WI 53590

DOCKET NO. 03-S-286(P)

DIESEL TRUCK DRIVER TRAINING SCHOOL, INC.(P) **DOCKET NO. 03-S-287(P)**
P.O. Box 560
Sun Prairie, WI 53590,

Petitioners,

vs.

RULING AND ORDER

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

Respondent.

DAVID C. SWANSON, COMMISSIONER:

These matters come before the Commission on a Stipulation of Issues and Facts and an Additional Stipulation filed by the parties, and on a motion for summary judgment filed by petitioners.

Petitioners, Associated Training Services Corp. (ATS) and Diesel Truck Driver Training School, Inc. (Diesel), appear by Attorney Devon R. Baumbach of Melli, Walker, Pease & Ruhly, S.C., Madison, Wisconsin. Respondent, Wisconsin Department of Revenue (respondent), appears by Attorney Linda M. Mintener. Petitioners have submitted a brief and a reply brief in support of their motion. Respondent has submitted a brief and an affidavit with exhibits in opposition to the motion.

Having considered the entire record before it, the Commission finds, concludes, rules, and orders as follows:

FINDINGS OF FACT

As and for its Findings of Fact, the Commission adopts the facts as stipulated to by the parties, making non-substantive changes and omitting references to specific exhibits.

JURISDICTIONAL FACTS

1. On June 28, 2002, respondent issued sales/use tax assessments for the years 1997 through 2000 (audit period) against ATS and Diesel in the amounts of \$66,966.51 and \$89,847.62, respectively.

2. Petitioners timely filed a joint petition for redetermination with respondent on August 30, 2002, relating to the sales tax assessed on petitioners' resale of rooms or lodging services to their students and certain other sales/use taxes shown on the June 28, 2002 Notices of Amount Due.

3. By Notices of Action dated August 28, 2003, received by petitioners on August 29, 2003, respondent granted certain adjustments requested by Diesel in the petition for redetermination, but denied the petition for redetermination with respect to the other sales and use tax on both of petitioners' assessments, including petitioners' furnishing or resale of rooms or lodging services to their students.

4. On October 24, 2003, petitioners timely filed a joint petition for review with the Commission. The primary issue raised by the petition is whether sales

tax is owed under Wis. Stat. § 77.52(2)(a)1. on petitioners' resale of rooms or lodging services to their students.

MATERIAL FACTS

5. ATS is a Wisconsin corporation with its principal place of business located in Sun Prairie, Wisconsin. ATS is engaged in the business of operating an excavation and grading industry training program that involves training its students to operate certain pieces of heavy equipment (*e.g.*, bulldozers, backhoes, loaders, etc.).

6. Diesel is a Wisconsin corporation with its principal place of business located in Sun Prairie, Wisconsin. Diesel is in the business of operating a diesel truck driver training program that involves training its students to operate tractor trailers.

7. WaterTower Inn, Inc., of Sun Prairie ("WaterTower"), is a motel that furnishes rooms and lodging to the public. WaterTower's facilities include bedrooms, color TV, laundry facilities, a game room, and continental breakfast. During the audit period, Diesel and WaterTower were wholly-owned subsidiaries of Gygo Corporation ("Gygo"), but were separately organized corporations. During the first five months of the audit period, the stockholders of Gygo also owned all of the stock of ATS. From June 1, 1997 through the remainder of the audit period, the majority of ATS' stock was owned by persons who had no ownership interest in Gygo. For the entire audit period, all of the stock of Gygo and ATS was owned by members of the Klabacka family. The same person kept the financial books and records for ATS, Diesel, and WaterTower.

8. Petitioners purchased rooms or lodging services from WaterTower,

then furnished or resold those rooms or lodging to their students to use during petitioners' training programs.

9. WaterTower was the only entity from which petitioners purchased rooms or lodging services for resale to their students.

10. Petitioners' students were not required to stay at WaterTower or to otherwise purchase a room or lodging services from petitioners.

11. Petitioners did not make the rooms or lodging services that they purchased from WaterTower available to any persons other than petitioners' students.

12. Petitioners' students did not occupy all of the rooms at WaterTower. While Petitioners' students stayed at WaterTower, WaterTower also furnished rooms or lodging to other persons who had no relationship to petitioners.

13. The room fees for petitioners' students who chose to purchase rooms or lodging services from petitioners were included as a separate enumerated item in the students' contracts with petitioners. Those students' contracts also included separate charges for the training program tuition and other course fees (*e.g.*, commercial driver's license registration fee). Those students who purchased rooms or lodging services from petitioners paid petitioners directly for the rooms or lodging services. If petitioners' students stayed at WaterTower on nights that they had not purchased rooms or lodging from petitioners (*e.g.*, weekend nights for those students who only purchased weeknights from petitioners, or nights after the students completed petitioners' courses), the students paid WaterTower directly for the rooms or lodging services for those times.

14. Petitioners offered financing to assist their students with the purchase of the rooms or lodging services, course tuition, and other course fees.

15. Petitioners arranged for reservation of rooms or lodging services at WaterTower by faxing to WaterTower, the week prior to the start of a training class, a list of students who would be staying at WaterTower, specifying the number and types of rooms or lodging requested by the students. Petitioners did not request particular rooms from WaterTower. WaterTower assigned specific rooms to students when the students checked into WaterTower. When WaterTower assigned a room to a student for a given training course, the student used that room for the duration of that training course. WaterTower did not always assign the same rooms, or rooms in the same area of the motel, to petitioners' students.

16. In the audits at issue, respondent treated petitioners' purchases of rooms or lodging services from WaterTower as purchases for resale. Petitioners also considered their purchases of rooms or lodging services from WaterTower to be purchases for resale. In an audit of WaterTower that respondent conducted at the same time as the ones at issue here, respondent treated WaterTower's sales of rooms or lodging services to petitioners as purchases for resale. WaterTower did not appeal its audit.

STIPULATED ISSUES

During the period in question, were petitioners "furnishing accommodations that are available to the public" within the meaning of Wis. Stat. § 77.52(2)(a)1.?

Is sales tax owed under Wis. Stat. § 77.52(2)(a)1. on petitioners' resale or furnishing of the rooms or lodging services to their students?¹

APPLICABLE WISCONSIN STATUTES

802.08 Summary judgment.

* * *

(2) MOTION. . . . The judgment sought shall be rendered if 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. . . .

* * *

(6) JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.

* * *

77.52 Imposition of retail sales tax.

* * *

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

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

1. The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations. In this subdivision, "transient" means any person residing for a continuous period of less than one month in a hotel, motel or other furnished accommodations available to the public. In this subdivision, "hotel" or "motel" means a building or group of

¹ Petitioners and respondent dispute without explanation the possible application of use tax in the Stipulation of Facts, but otherwise focus entirely on the question of whether sales tax is owed on the resale of the services in question. (Stipulation, p. 5, n. 1). Due to our conclusion regarding the sales tax question, we do not reach the possible application of use tax under Wis. Stat. § 77.53(1).

buildings in which the public may obtain accommodations for a consideration, including, without limitation, such establishments as inns, motels, tourist homes, tourist houses or courts, lodging houses, rooming houses, summer camps, apartment hotels, resort lodges and cabins and any other building or group of buildings in which accommodations are available to the public In this subdivision, "one month" means a calendar month or 30 days, whichever is less, counting the first day of the rental and not counting the last day of the rental.

* * *

(13) For the purpose of the proper administration of this section and to prevent evasion of the sales tax it shall be presumed that all receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property or services is not a taxable sale at retail is upon the person who makes the sale unless that person takes from the purchaser a certificate to the effect that the property or service is purchased for resale or is otherwise exempt;

(14)(a) The certificate referred to in sub. (13) relieves the seller from the burden of proof only if any of the following is true:

1. The certificate is taken in good faith from a person who is engaged as a seller of tangible personal property or taxable services and who holds the permit provided for in sub. (9) and who, at the time of purchasing the tangible personal property or services, intends to sell it in the regular course of operations or is unable to ascertain at the time of purchase whether the property or service will be sold or will be used for some other purpose.
2. The certificate is taken in good faith from a person claiming exemption.

(15) If a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of the purchaser's operations, the use shall be taxable to the purchaser under s. 77.53 as of the time the property is first used by the purchaser, and the sales price of the property to the purchaser shall be the measure of the tax. Only when there is an unsatisfied use tax liability on this basis because the seller has provided incorrect information about that transaction to the department shall the seller be liable for sales tax with respect to the sale of the property to the purchaser.

77.53 Imposition of use tax.

(1) Except as provided in sub. (1m), an excise tax is levied and imposed on the use or consumption in this state of taxable services under s. 77.52 purchased from any retailer, at the rate of 5% of the sales price of those services; 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 sales price of that property;

* * *

(12) If a purchaser who gives a certificate makes any storage or use of the property or service other than retention, demonstration or display while holding it for sale in the regular course of operations as a seller, the storage or use is taxable as of the time the property or service is first so stored or used.

77.59 Deficiency and refund determinations.

* * *

(2) The department may, by field audit, determine the tax required to be paid to the state or the refund due to any person under this subchapter. The determination may be made upon the basis of the facts contained in the return being audited or upon any other information in the department's possession. The determination may be made on the basis of sampling, whether or not the person being audited has complete records of transactions and whether or not the person being audited consents. The department may examine and inspect the books, records, memoranda and property of any person in order to verify the tax liability of that person or of another person. The department may subpoena any person to give testimony under oath before it and to produce whatever books, records or memoranda are necessary in order to enable the department to verify the tax liability of that person or of another person. The determination shall be presumed to be correct and the burden of proving it to be incorrect shall be upon the person challenging its correctness. . . .

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact, and these matters are appropriate for summary judgment as a matter of law.

2. During the period in question, petitioners were "furnishing

accommodations that are available to the public" within the meaning of Wis. Stat. § 77.52(2)(a)1.

3. Petitioners' resales of the service of the furnishing of rooms or lodging services to their students during the audit period are taxable sales under Wis. Stat. § 77.52(2)(a)1.

OPINION

Summary Judgment

Summary judgment is warranted where "the pleadings, depositions, answer 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). In these cases, the parties have stipulated to the facts. Thus, there are no genuine issues as to any material fact. In addition, these matters are appropriate for summary judgment as a matter of law.

Section 802.08(6) of the Wisconsin Statutes provides that summary judgment may be granted to a non-moving party upon a showing of entitlement thereto. Based on the record before it, the Commission concludes that the facts and law show that respondent is entitled to summary judgment in these cases and not petitioners.

Standard of Review

Respondent's sales and use tax field audit assessments are presumed to be correct, and the taxpayer has the burden of proving an assessment to be incorrect. Wis.

Stat. § 77.59(2). Where there is ambiguity and doubt in the statute imposing a tax, any such ambiguity and doubt is to be resolved against the party that seeks to impose the tax. *Kearney & Trecker Corp. v. Dep't of Revenue*, 91 Wis. 2d 746, 753, 284 N.W.2d 61 (1979).

Receipts on sales of services are subject to sales tax if the service provided is enumerated in Wis. Stat. § 77.52(2)(a). In general, sales tax is imposed on sales of the service of “[t]he furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations.” Wis. Stat. § 77.52(2)(a).

Petitioners argue that Wis. Stat. § 77.52(2)(a)1. is ambiguous, and that the burden of proving its application to petitioners is therefore on respondent. Respondent argues that the statute is not ambiguous. For the reasons discussed below, we find that Wis. Stat. § 77.52(2)(a)1. is not ambiguous, and that petitioners therefore have the burden of proving respondent’s assessments to be incorrect.

Rules of Statutory Construction

When interpreting a statute, we assume that the legislature’s intent is expressed in the statutory language. Statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex. rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special

definitional meaning.” *Id.* Context and structure are also important factors, and construction should strive to avoid absurd or unreasonable results. “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.” *Id.*

“Accommodations That Are Available to the Public” Under § 77.52(2)(a)1.

Sales tax is imposed on the provision of hotel services, which are defined as follows: “The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations.” Wis. Stat. § 77.52(2)(a)1. Petitioners have abandoned any argument that their students are not “transients” within the meaning of the statute, and indeed these students appear to fall within the statutory definition. The parties stipulated that WaterTower is a motel that furnishes accommodations to the public, which is a taxable service. However, petitioners are schools, not hotelkeepers or motel operators. In these appeals petitioners argue that, as schools, they are not “other persons furnishing accommodations that are available to the public,” as required by the statute, because the accommodations they sell are available only to their students, not the “public.” Petitioners reason that their students are members of a narrow class of persons and that this class is too limited to be considered the “public.”²

² Petitioners cite a number of cases for a definition of “public” that would generally define the term as including the population or community as a whole. *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157 (1911); *Ford Hydro-Electric Co. v. Aurora*, 206 Wis. 489, 240 N.W. 418 (1932); *Sun Prairie v. Public Service Comm.*, 37 Wis. 2d 96, 154 N.W.2d 360

Respondent contends that petitioners' definition of "public" is inapplicable in this context, and its analysis is supported by two Wisconsin cases decided under Wis. Stat. § 77.52(2)(a)1.: *Ronald J. Hergert d/b/a Aero Expo Corporate Service v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-525 (2001); and *Telemark Development, Inc. v. Dep't of Revenue*, 218 Wis. 2d 809, 581 N.W.2d 585 (Ct. App. 1998). In *Hergert*, the taxpayer contracted with local homeowners in the Oshkosh area to rent their homes to attendees of the annual Experimental Aircraft Association Fly-In. The taxpayer advertised these accommodations, collected the rents from the attendees, and paid fees to the homeowners. The Commission determined that the homes were accommodations available to the public, and that the taxpayer's sales of the same were taxable under Wis. Stat. § 77.52(2)(a)1. *Hergert* was similar to the present case in that the seller of the accommodations was not the same party that was furnishing the accommodations, yet the sales were nevertheless taxable.

The Court of Appeals' holding in *Telemark* is likewise instructive. *Telemark*

(1967). But these cases concern the application of public utility statutes, which employ a very specific definition of "public" which differs from the definition that has been followed in prior cases decided under § 77.52(2)(a)1., as further discussed herein. Petitioners also cite a Michigan case, *University of Michigan Board of Regents v. Dep't of Treasury*, 217 Mich. App. 665, 553 N.W.2d 349 (Ct. App. 1996), which held that certain sales of accommodation services were not subject to sales tax in Michigan. That case, however, is inapposite. The rooms in question in that case were located in a university dormitory and were never available to the general public. Rather, those rooms were generally occupied only by students and were occasionally made available to other persons who were staying on campus for other university-related reasons. Petitioners' facts are exactly the opposite — all of WaterTower's rooms are always available to the public, unless the rooms are occupied by petitioners' students or other WaterTower guests.

concerned the application of sales tax to the initial sales of time-share units to the general public. In that case, the seller contested the application of sales tax to these initial sales, arguing that sales tax should not apply because the seller sold each time-share only once, and that, following the initial sale, a unit could not be held out for sale, rent or use by the public. The Court of Appeals held that the sales tax applied under Wis. Stat. § 77.52(2)(a)1. “The tax, of course, is imposed on the sale to the purchaser, and we agree with the department that the issue is not whether members of the general public can have access to time-share units purchased and owned by someone else, but whether the units were available to the public *at the time they were being sold.*” *Telemark*, 218 Wis. 2d at 823 (emphasis added).

Based on the stipulation and relevant case law, the accommodations provided by petitioners were “available to the public” at the time that petitioners sold these accommodations to their students. According to the stipulated facts, petitioners arranged for reservation of rooms or lodging services at WaterTower by faxing to WaterTower the week prior to the start of a training class a list of students who would be staying at WaterTower, specifying the number and types of rooms or lodging requested by the students. Petitioners did not request particular rooms from WaterTower. WaterTower assigned specific rooms to students when the students checked into WaterTower. When WaterTower assigned a room to a student for a given training course, the student used that room for the duration of that training course. WaterTower did not always assign the same rooms, or rooms in the same area of the motel, to petitioners’ students.

As in *Telemark*, each room sold by petitioners was available to the general public at the time it was being sold to one of petitioners' students (*i.e.*, when the contract was entered into by petitioners and students). The rooms did not become unavailable to the public until the students checked in. Petitioners' students did not always stay in the same rooms, or even rooms in the same area of the motel, and they appear to have been treated like any other guests of WaterTower. On these facts, *Telemark* and *Hergert* indicate that petitioners were indeed "other persons furnishing accommodations that are available to the public," as required by the plain meaning of § 77.52(2)(a)1. Thus, petitioners' sales are subject to taxation under Wis. Stat. § 77.52(2)(a)1.

This conclusion is further supported by the fact that petitioners' construction of the statute would lead to unreasonable results. Petitioners repeatedly stress the fact that they did not provide services to anyone other than their students, and that, since their students were not the "public," these sales were not taxable. But petitioners' interpretation would open a loophole in the statute "big enough to drive a truck through." According to petitioners, their resales of WaterTower's services to their students are not taxable sales because the students are too limited a class of persons to constitute the "public," as required by § 77.52(2)(a)1. However, if petitioners are correct, then any hotel or motel in Wisconsin could escape taxation on significant portions of their services by selling blocks of rooms to organizations hosting conventions or providing educational services, presumably even one-day seminars. According to petitioners' logic, attendees at these events would not be the "public," and

resales of rooms to such persons by the organizers of such activities would be exempt from sales tax, so long as “membership” in a specific organization is not required. Such an outcome is clearly not within the meaning of the statute.

Petitioners have failed to provide sufficient arguments to support their motion for summary judgment. Rather, the Commission concludes that respondent is entitled to summary judgment based upon the facts and law in these matters.

IT IS ORDERED

1. Petitioners' motion for summary judgment is denied.
2. Summary judgment is granted to respondent, and its actions on petitioners' petition for redetermination are affirmed.

Dated at Madison, Wisconsin, this 8th day of November, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

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|---|----------------------------|
| ASSOCIATED TRAINING SERVICES CORP. | DOCKET NO. 03-S-286 |
| and | |
| DIESEL TRUCK DRIVER TRAINING SCHOOL, INC., | DOCKET NO. 03-S-287 |

Petitioners,

vs.

CORRECTION

WISCONSIN DEPARTMENT OF REVENUE,

ORDER

Respondent.

On November 16, 2005, Attorney Devon R. Baumbach, counsel for petitioners, filed a letter via fax with the Commission requesting clarification of the scope of its November 8, 2005 Ruling and Order in these matters. On November 21, 2005, the Commission held a telephone conference with the parties to discuss the issues raised in Attorney Baumbach's letter. On November 23, 2005, Attorney Linda M. Mintener filed a letter on behalf of respondent in response to the November 16, 2005 letter of Attorney Baumbach. On November 28, 2005, Attorney Baumbach filed via fax a response to the November 23, 2005 letter of Attorney Mintener.

The Commission has reviewed these new submissions carefully and has determined that the scope of its November 8, 2005 Ruling and Order requires clarification.

On April 20, 2005, the parties filed a Stipulation of Issues and Facts with the Commission in which they jointly requested that the Commission decide only the stipulated issues discussed therein. The parties further agreed that “[i]f the Commission

determines that sales or use tax is owed on Petitioners' resale or furnishing of the rooms or lodging services, the amounts of the assessments related to the resale or furnishing of the rooms or lodging services will have to be determined through agreement of the parties or further litigation." Petitioners subsequently filed a motion for summary judgment. In its brief, respondent correctly noted that this motion should have been a motion for partial summary judgment, based upon the parties' agreement.

In its November 8, 2005 Ruling and Order, the Commission denied petitioners' motion and granted summary judgment to respondent. However, in that Ruling and Order, the Commission did not intend to decide any issues other than those originally stipulated by the parties, as stated on pp. 5-6 of the Ruling and Order.

Based upon a review of the record herein, the correspondence of the parties, and the November 21, 2005 telephone conference, the Commission hereby corrects page 15 of its November 8, 2005 Ruling and Order to read as follows:

"IT IS ORDERED

1. Based on the Stipulation of Issues and Facts filed by the parties, petitioners' motion for summary judgment is construed as a motion for partial summary judgment, and that motion is denied.

2. Partial summary judgment is granted to respondent, and its actions on petitioners' petition for redetermination are affirmed, insofar as they relate to the stipulated issues submitted for consideration by the Commission.

3. A **telephone status conference** will be held on **December 21, 2005 at 10:00 a.m.** to discuss how the parties wish to proceed on the remaining issues in these matters."

Dated at Madison, Wisconsin, this 28th day of November, 2005.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner