

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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STUBHUB, INC.,

DOCKET NO. 16-S-268

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING & ORDER**

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**JESSICA ROULETTE, COMMISSIONER:**

This case comes before the Commission on Summary Judgment motions filed by both parties. Petitioner, StubHub, Inc. (“StubHub”), is represented by Attorneys Don M. Millis and Sara Stellpflug Rapkin of Reinhart Boerner Van Deuren S.C. and Charles K. Schafer and Scott J. Heyman of Sidley Austin LLP. Respondent, Wisconsin Department of Revenue (“the Department”), is represented by Attorneys Jenine E. Graves, Mark S. Zimmer, and Dana J. Erlandsen. The issue presented in this appeal is whether sales tax is due for secondary sales of tickets to sporting and entertainment events, and if so, whether StubHub was responsible to collect and forward such sales tax to the Department. Both parties have filed briefs in this matter and have filed a Stipulation of Facts on December 28, 2020, as follows:

## STIPULATED FACTS<sup>1</sup>

1. Petitioner, StubHub, was a corporation incorporated under the laws of the State of Delaware with its principal place of business in San Francisco, California. (Stipulation of Facts "SOF," ¶ 4.)

2. StubHub was audited by Respondent Wisconsin Department of Revenue ("Department") for the period January 1, 2008, through December 31, 2013 ("Audit Period"). (SOF ¶ 1.)

3. StubHub was a subsidiary of eBay, Inc. (SOF ¶ 3.)

4. StubHub had no permanent offices or locations in Wisconsin, and it did maintain a number of other offices throughout the country, including an office in Chicago, Illinois. (SOF ¶¶ 5 and 6.)

5. StubHub operated an online marketplace where tickets to sporting events, concerts, theater and other live entertainment services were bought and sold. (SOF ¶ 7.)

6. StubHub participated in other ancillary business activities to promote its online marketplace for the purchase and sale of tickets. (SOF ¶ 8.)

7. The Department timely issued an assessment to StubHub for the Audit Period in the amount of \$8,495,937.50 in additional sales and use tax, plus \$8,567,136.15 in interest, penalties, and fees. (SOF ¶ 10, Ex. 62.)

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<sup>1</sup> All Stipulated Facts refer to the Audit Period unless specifically noted.

8. StubHub filed a timely Petition for Redetermination to the Department. (SOF ¶ 11, Ex. 63.)

9. The Department timely issued a Notice of Action denying StubHub's Petition for Redetermination. (SOF ¶ 12, Ex. 64.)

10. StubHub filed a timely Petition for Review to the Commission, and the Department timely filed an Answer to the Commission. (SOF ¶¶ 13, 14.)

11. StubHub claimed, and continues to claim, that it did not owe sales or use tax to Wisconsin for any sales made during the Audit Period. (SOF ¶ 15.)

12. The Department claimed, and continues to claim, that StubHub owes sales or use tax on the full purchase price of all tickets sold to events in Wisconsin during the Audit Period, with the following total sales amounts per year:

2008: \$17,063,547.74

2009: \$18,221,690.32

2010: \$19,090,025.32

2011: \$34,953,399.53

2012: \$31,923,611.74

2013: \$32,299,811.57

which comprise total sales of \$153,551,286.22. (SOF ¶¶ 16, 17.)

13. The parties do not know whether or not any ticketholders paid any sales or use tax at the time they originally purchased the tickets from the original vendors, although they agree it is highly likely such tax was paid at the time of the original

purchases. The parties also do not know whether or not any ticket buyers paid any sales or use tax on the purchase made from the StubHub online marketplace. (SOF ¶ 19.)

14. During the Audit Period, StubHub did not register for a Seller's Permit or Use Tax Certificate, did not file Wisconsin sales or use tax returns, and paid no Wisconsin sales or use tax. (SOF ¶ 20.)

15. In March 2007, StubHub entered into a Services Agreement with its wholly-owned subsidiary, Last Minute Transactions, Inc. ("LMT"), pursuant to which LMT provided various services to StubHub, including "Last Minute Services," a program where "tickets to events are held by [LMT] and dropped off and/or picked up in person by purchasers at a location designated by LMT or sent via Federal Express or other carrier to ticket buyers as indicated by StubHub." (SOF ¶ 23.)

16. LMT and StubHub had two agreements, which have not been provided to the Commission, which were in place between March 1, 2007 and throughout the Audit Period. These agreements are called "the Services Agreement" and "the General & Administrative Services Agreement." Under the Services Agreement, LMT's Service Provider Territory consisted of the United States of America and Canada. Under the Services Agreement, LMT was obligated to provide last minute services to StubHub which consisted of a program where tickets to events are held by LMT and dropped off and/or picked up in person by purchasers at a location designated by LMT or sent via Federal Express or other carrier to ticket buyers as indicated by StubHub. LMT was obligated to maintain permanent and temporary facilities to provide these last minute services. LMT was obligated to accept and hold tickets for StubHub users and to return

unsold tickets as instructed by StubHub. Pursuant to the Services Agreement, StubHub compensated LMT for "Last Minute Services" provided by LMT in numerous states, including Wisconsin. LMT was granted by StubHub a non-exclusive, royalty-free license to use to StubHub Marks to provide the Services. "StubHub Marks" means the StubHub domain names, trademarks, logos and other branding elements. (SOF ¶¶ 24, 25, Supplemental Stipulation of Facts "SSOF" ¶ 108.)

17. Under the Services Agreement, LMT was obligated to perform duties for StubHub, at StubHub's discretion as follows:

- (1) Preparing and discussing budgets or other similar matters relating to the Service Provider Territory and provide market data, and
- (2) Furnishing such reports and information relating to its activities as requested by StubHub.

(SSOF ¶¶ 107, 109.)

18. Under the Services Agreement, StubHub's duties included:

- (1) Providing LMT with such training in StubHub's online environment necessary for it to perform its duties under the Service Agreement<sup>2</sup>;
- (2) Providing LMT with timely and accurate information regarding the Last Minute Services that were to be fulfilled by LMT. Under the Services Agreement, "Last Minute Services: meant a program where tickets to events are held by LMT and dropped off and/or picked up in person by purchasers at a location directed by LMT or sent via Federal Express or other carrier to ticket buyers as indicated;
- (3) Continuing the development and enhancement of the StubHub Online Environment; and

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<sup>2</sup> It is unclear what Service Agreement the parties refer to in this stipulated fact.

(4) Granting to LMT a non-exclusive, royalty-free license to use StubHub's domain names, trademarks, logos and other branding elements to provide the services described in the agreement.

(SSOF ¶ 110.)

19. Both the Services Agreement and the General & Administrative Services Agreements state that the addresses of both StubHub and LMT are located at 55 Second Street, Suite 300, San Francisco, California 94015. (SSOF ¶¶ 105, 113.)

20. Under the Services Agreement, StubHub compensated LMT at the rate of 105 percent of the actual costs of operations, excluding interest, income taxes, and pass-through expenses of third-parties and such other expenses as determined by the parties in the annual budget preparation process. (SSOF ¶ 111.)

21. The Services Agreement contains the following contractual provisions:

(1) The contractual relationship between StubHub and LMT consisted solely of the provision of services specified in the Services Agreement to StubHub;

(2) LMT was an independent contractor and had no authority of any kind or nature whatsoever to represent StubHub in the Service Provider Territory as agent or otherwise;

(3) LMT did not have the right or authority to assume or create any obligation of any kind, either express or implied, on behalf of StubHub, except as expressly provided for in the Services Agreement;

(4) The Services provided by LMT to StubHub under the Services Agreement were not exclusive;

(5) LMT could also provide Last Minute Services to parties other than StubHub in the Service Provider Territory; and

(6) StubHub could contract with a party other than LMT to provide services similar to those set forth in the Services Agreement.

(SSOF ¶ 112.)

22. The General & Administrative Services Agreement provides that StubHub will provide all human resources services, information technology support services, legal services, accounting services, and such other services as LMT requests.

(SSOF ¶ 114.)

23. StubHub's compensation for performing services under the General & Administrative Services Agreement was equal to 105% of all costs and expenses other than third-party expenses, plus any applicable sales and use tax, incurred by StubHub in providing those services. (SSOF ¶115.)

24. The Services Agreement states that LMT "is the operator of facilities where tickets to events may be dropped off and/or picked up by marketplace participants." (SSOF ¶ 106.)

25. LMT did not have a permanent presence in Wisconsin at any time during the Audit Period. LMT's closest office was at 946 W. Randolph Street in Chicago, Illinois, where it leased space from May 2008 through the end of the Audit Period. (SOF ¶ 26.)

26. LMT had an employee, Rechelle C., who resided in Wisconsin and did business for LMT in Wisconsin out of her home in Wisconsin, pursuant to the Services Agreement with StubHub. While doing so, she used a StubHub email address and held herself out as Regional Operations Coordinator of StubHub LMT, Inc. Rechelle C. allowed her Wisconsin home address to be used to mail and personally drop off tickets

to then be distributed by LMT pursuant to the Services Agreement with StubHub. (SOF ¶ 27.)

27. Employees and contractors of LMT were physically present in Wisconsin throughout the Audit Period and used a StubHub email address and phone number during such presence in Wisconsin. While present in Wisconsin, employees and contractors of LMT distributed physical tickets to buyers who previously purchased those tickets through StubHub's online marketplace, arranged in-person delivery of tickets through LMT, and assisted customers in purchasing tickets through StubHub's online marketplace either on the customers' own phones or using computers or tablets LMT had on site in Green Bay and Milwaukee Wisconsin for such use. (SOF ¶¶ 28, 30.)

28. Employees and contractors of LMT rented hotel rooms in Green Bay and Milwaukee, Wisconsin in StubHub's name and often displayed StubHub's logo, advertising and other branding elements. StubHub had knowledge of and consented to LMT's use of its name, logo advertising and other branding elements. (SOF ¶¶ 31, 32, 33.)

29. Between August of 2008 and June 30, 2016, StubHub had a series of agreements, which have not been provided to the Commission, with Learfield Sports ("Learfield"), who was the multi-media rights partner for the University of Wisconsin-Madison ("the UW"). These agreements provided StubHub certain promotional and advertising opportunities during UW football, men's basketball, and men's hockey games. One agreement provided that StubHub would be the exclusive secondary ticketing provider of the UW during the term of that agreement. For some or all of the period prior to July 1, 2013, the UW was required to provide StubHub with an on-site



location for all home football games. Under the agreement, "StubHub will host a VIP tailgate event" each season near Camp Randall Stadium. (SOF ¶ 36.)

30. During the Audit Period, multiple employees of StubHub met annually with the UW and Learfield in the fall of various years to ensure maximum return for StubHub's advertising dollars. (SOF ¶¶ 37, 38, 39, 40, 41.)

31. In October 2010, Allison B. participated in a "Wisconsin Loyalty Event," in which the UW rewarded StubHub for being a loyal advertiser by permitting it to use a 10 X 10 space near the Camp Randall football stadium to promote StubHub services. At that event, Allison B. purchased apparel at a local store both to wear and to hand out to fans before the UW Badgers football game. (SOF ¶ 42.)

32. StubHub's Sponsorship Agreements with the University of Wisconsin-Madison included payments from StubHub to the University of Wisconsin-Madison up to \$100,000 per year, and the following provisions:

(1) StubHub was designated as the "Preferred Fan to Fan Ticket Marketplace of Wisconsin Athletics" and "Preferred Fan to Fan Ticket Marketplace of the Wisconsin Badgers";

(2) StubHub received advertising on the University of Wisconsin Athletic Department's websites, Facebook and Twitter messages, and in-stadium display promotional advertising during UW home football games, men's and women's home basketball games, men's and women's hockey games, and other special events and other games held at Camp Randall Stadium;

(3) StubHub was allowed to host an annual tailgate event near Camp Randall Stadium during a football game;

(4) The University was not allowed to accept advertising from other companies whose business includes the resale of tickets on the internet; and

(4) The University of Wisconsin-Madison was required to provide StubHub with an on-site location for will call pick up and drop off of previously purchased ticket<sup>3</sup> at home football games and to use its best efforts to provide such an on-site location for will call pick up and drop off of previously purchased tickets at home men's basketball games.

(SSOF ¶¶ 118, 119.)

33. In December 2009 and February 2012, StubHub entered into Sponsorship Agreements, which have not been provided to the Commission, with the Milwaukee Brewers Baseball Club, Limited Partnership (Brewers) for advertising and sponsorship. For the 2010 and 2012 baseball seasons, StubHub also had specific Sponsorship Agreements with the Brewers, which have not been provided to the Commission. The 2010 and 2012 Sponsorship Agreements provided that StubHub would be the Brewers' "exclusive secondary ticketing services provider and marketing partner, in accordance with all parameters of relevant Major League Baseball Advanced Media agreements." The 2010 and 2012 Sponsorship Agreements also provided that subject to certain terms and conditions, the Brewers agreed to participate in the secondary ticket online arrangement vis the StubHub-MLB.com ticket resale portal. (SOF ¶ 46.)

34. StubHub's Sponsorship Agreements with the Brewers included payments from StubHub to the Brewers between \$100,000 and \$150,000 each year, and the following provisions:

(1) StubHub received regular in-stadium display promotional advertising during Brewers home games;

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<sup>3</sup> The parties stipulated to the singular "ticket" in the Supplemental Stipulation of Facts. Without access to the referenced Sponsorship Agreements, the Commission reproduces this fact as it was stipulated to by the parties.

(2) StubHub was designated as the Brewers' "Official Secondary Ticketing Partner of the Milwaukee Brewers" and later as "Official Fan to Fan Ticket Marketplace of the Milwaukee Brewers;"

(3) StubHub was the Brewers' exclusive secondary ticketing services provider and marketing partner; and

(4) StubHub was to receive the use of one Club level luxury suite for one Brewers 2012 regular season home game, and was allowed one representative to throw out a ceremonial first pitch before that game.

(SSOF ¶¶ 116, 117.)

35. Between October of 2008 and May 2013, various StubHub employees visited Milwaukee, Wisconsin to support StubHub's relationship with the Milwaukee Brewers, including attending Brewers' games at a luxury suite at Miller Park. (SOF ¶¶ 43, 44, 45, 47.)

36. The sponsorship agreements with the Milwaukee Brewers or the University of Wisconsin-Madison do not contain any provisions preventing ticketholders to Brewers games or University of Wisconsin athletic events from selling their tickets on an online marketplace other than StubHub. (SSOF ¶ 120.)

37. Before a ticketholder could list tickets on StubHub's online marketplace, and before a buyer may purchase tickets on the online marketplace, each must have had a registered account with StubHub. In order to register an account, ticketholders and ticket buyers were required to have a valid credit card, debit card or PayPal account on file, and to accept StubHub's terms and conditions in the User Agreement and other policies posted on the StubHub online marketplace. (SOF ¶ 49.)

38. The User Agreement, related documents, and policies posted on the StubHub online marketplace governed the relationship between StubHub, ticketholders, and buyers. These are the exclusive agreements governing the relationship between StubHub, ticketholders, and ticket buyers. (SOF ¶ 50, Ex. 75.)

39. The only tickets sold via StubHub's online marketplace were tickets listed by ticketholders on the online marketplace. This process required ticketholders to: 1) identify the event on the online marketplace or request that the event be added to the online marketplace event catalog by providing event information to StubHub, 2) enter the ticket details on the online marketplace, such as venue, date, time, seat location, any additional ticket features, required disclosures (such as limited view, wheelchair only, and so on), delivery method and timing, and 3) set the price of the ticket. (SOF ¶ 51.)

40. The buyers made one payment to StubHub, which consisted of the ticket price set by the ticketholder and the fees charged to the buyer by StubHub. StubHub next paid itself the fees due it from the ticketholder and then sent the remaining monies paid by the buyer to the ticketholder. (SOF ¶¶ 51, 52, 53.)

41. StubHub charged ticket buyers and ticketholders a fee based on a percentage of the ticket price, as well as a logistics fee. The logistics fee varied depending on the year in question and the method of delivery selected. (SOF ¶ 54.)

42. No order was complete until payment for the tickets was received from the buyer. Most ticketholders who listed their tickets for sale on the StubHub online marketplace simultaneously were able to list their tickets for sale elsewhere, including on other websites, and could change the price of the tickets or remove those tickets from the

StubHub online marketplace at any time before a purchase was completed. Ticketholders who chose to use Instant Download delivery were required to list their tickets exclusively with StubHub; however, those ticketholders were still able to delete or modify the ticket listing up to the point the tickets were sold. (SOF ¶¶55, 57.)

43. StubHub did not pay ticketholders for any tickets on its own behalf or to hold for future sales. StubHub had no inventory of tickets, nor did it own any of the tickets listed for sale through the online marketplace. For sales where tickets were delivered via LMT, LMT had physical possession of the tickets at the time the ticket buyers purchased the tickets through StubHub's online marketplace. LMT had no ownership interest in the tickets it had physical possession of. (SOF ¶ 58.)

44. If a ticket listed on StubHub's online marketplace did not sell, the ticket remained the property of the ticket holder. StubHub received no fees and booked no losses with respect to unsold tickets. (SOF ¶ 59.)

45. StubHub had no agreements with event providers or promoters for events to take place in Wisconsin where StubHub agreed to sell tickets directly for the event provider's or promoter's customers. (SOF ¶ 60.)

46. During the Audit Period, StubHub had in place a FanProtect Guarantee for both buyers and ticketholders. In general, the FanProtect Guarantee for buyers guaranteed that the buyer would receive the tickets they ordered in time for the event, and that the tickets would be valid for entry. If any of these things did not occur, StubHub agreed to find suitable replacement tickets or issue a full refund. If the event was cancelled and not rescheduled, the buyer would get a refund. In general, the

FanProtect Guarantee for ticketholders guaranteed that ticket buyers or prospective buyers were not permitted to contact the ticketholder, the ticketholder could adjust the ticket price any time before the ticket sold, and the ticketholder would receive payment for all tickets sold and delivered in accordance with the StubHub User Agreement. (SOF ¶ 61, Ex. 89.)

47. Some ticket holders who sold on StubHub's website were businesses in the business of buying and selling tickets, and some of those large volume sellers were subject to different rules than ordinary sellers in an agreement referred to as the LargeSellers Handbook or Top Sellers Handbook. (SOF ¶¶ 62, 63, Ex. 87.)

48. At least one of the large volume sellers sold \$965,241 in 2008, \$927,810 in 2009, \$1,662,557.64 in 2010, \$1,924,897.84 in 2011, \$2,096,658.53 in 2012, and \$1,197,972 in 2013 for Wisconsin events through the StubHub marketplace. (SOF ¶ 64.)

49. After ticket buyers purchased hard copy tickets, StubHub instructed ticketholders how to mail or otherwise deliver the tickets to ticket buyers or LMT for delivery to ticket buyers. When ticketholders transferred hard copy tickets to buyers, StubHub provided the ticketholders with mailing labels and instructions on how to send the tickets to the buyers through FedEx from 2008 to a part of 2013 and through UPS for the remainder of 2013. (SOF ¶¶ 66, 75.)

50. After ticket buyers purchased .pdf tickets, ticketholders uploaded .pdfs of their tickets to StubHub's online marketplace either before or after a buyer purchased the tickets. If uploaded before a purchase, ticketholders could delete their listings at any time before a sale. After a buyer purchased the tickets, StubHub made

those .pdf tickets available to ticket buyers via a portal on its online marketplace. (SOF ¶ 67.)

51. StubHub had “barcode integration” with a limited number of Wisconsin teams during the Audit Period: the Milwaukee Brewers and the University of Wisconsin football, basketball, and hockey teams. StubHub, at times, referred to those teams as “integrated partner teams and venues.” (SOF ¶ 68.)

52. “Barcode integration” meant that ticketholders needed to upload only the barcode numbers for their tickets either before or after buyers purchased the tickets. Once the barcode was uploaded, StubHub would either generate a new ticket using a template from its integrated partner or instruct that a new ticket be generated. (SOF ¶ 69.)

53. StubHub took steps to ensure that a new ticket was issued only after a buyer purchased a ticket, irrespective of when the ticketholder uploaded the barcode number. (SOF ¶ 70.)

54. For Milwaukee Brewers tickets, StubHub contacted the Brewers after a purchase to have the Brewers issue a new barcode for the seats purchased. When the ticket buyer requested to see the tickets through the My Account portal on the StubHub online marketplace, StubHub’s computer system generated new versions of those tickets in .html format, using a template StubHub created for Brewers tickets and the new barcode provided by the Brewers after the purchase. (SOF ¶ 71.)

55. For tickets to University of Wisconsin football, basketball, and hockey games, after ticketholders sold tickets to these events to ticket buyers via

StubHub's online marketplace, StubHub provided the barcode information for the already purchased tickets to Paciolan, Inc. ("Paciolan"), a computer software company hired by the University. Paciolan, at the University's direction, cancelled the ticketholders' tickets and/or barcodes and reissued tickets to the ticket buyer, generating new .pdf tickets. A Master Agreement governed the relationship between Paciolan and StubHub. (SOF ¶ 72, Ex. 90.)

56. Prior to 2012, Paciolan emailed new .pdf tickets directly to the ticket buyers. Beginning in 2012, Paciolan used a new process: Paciolan sent the new .pdf tickets to StubHub, and StubHub made the new .pdf tickets available to ticket buyers on the My Account portal of the StubHub online marketplace. (SOF ¶ 73.)

57. StubHub maintained its online marketplace on servers that it owned and operated. (SOF ¶ 74.)

58. During the Audit Period, the tickets were transferred as follows:

	Delivery from Ticketholder Via FedEx or UPS	Electronic Delivery	In Person Delivery Via LMT
2008	71%	17%	12%
2009	25%	73%	2%
2010	25%	73%	2%
2011	17%	82%	1%
2012	19%	78%	3%
2013	18%	80%	2%

(SOF ¶ 76.)

59. Some tickets were sold on StubHub's online marketplace for more or less than face value. In most cases, StubHub did not know the face value of the tickets sold on its online marketplace. (SOF ¶ 77.)



60. StubHub charged the following fees to buyers and ticketholder for events that occurred in Wisconsin during the Audit Period:

a. 2008: \$4,337,688

b. 2009: \$4,504,315

c. 2010: \$4,679,534

d. 2011: \$8,581,130

e. 2012: \$7,947,414

f. 2013: \$8,306,415

Total: \$38,356,496 (SOF ¶ 78.)

61. When a buyer purchased a ticket, the buyer paid the price set by the seller, plus StubHub's buyer fee and a logistics fee. To purchase the ticket, the ticket buyer was required to pay both the amount set by the ticketholder, as well as StubHub's fees. In no circumstances would a ticket be sold without the addition of StubHub's fees. The buyer fee charged by StubHub was based on a percentage of the ticket price set by the ticketholder, ranging during the Audit Period from 11 - 12%. The logistics fees depended upon the method of delivery selected, and those fees changed over the course of the Audit Period. (SOF ¶ 79.)

62. Between 2008 and 2012, StubHub charged logistics fees to buyers on a per-order basis for all categories of tickets as follows: \$4.95 per order for electronic delivery of tickets, \$15.00 per order for in-person delivery of hard copy of tickets via Last Minute Services, \$9.95 per order for Two-Day delivery of hard copy tickets, \$16.95 per

order for Standard Overnight delivery of hard copy tickets, and \$19.95 for Priority Overnight delivery of hard copy tickets. (SOF ¶ 80.)

63. In 2013, StubHub began changing the method by which it calculated its logistics fees to charge them on a per-ticket basis, rather than a per order basis, for certain sports leagues. In early 2013, StubHub began charging \$3.50 per ticket for tickets to Major League Baseball games. In late 2013, StubHub began charging per ticket logistics fees for National Hockey League, National Basketball Association, and National Football League games, charging \$2.50 per ticket for electronic orders and \$5.00 per ticket for shipping and Last Minute Services delivery. All other logistics fees remained the same as they were between 2008 and 2012. (SOF ¶ 81.)

64. The seller fee charged by StubHub was based on a percentage of the ticket price set by the ticketholder. During the Audit Period the rate that determined that fee ranged between 14 and 17%. If the ticket listed by the ticketholder did not sell, StubHub did not charge the ticketholder any fees. StubHub charged the buyer's applicable method of payment for the total price of the transaction. From the amount collected by StubHub from the buyer, StubHub retained the buyer fee, the logistics fee, and a seller fee, and remitted the remaining amount to the ticketholder. (SOF ¶ 82.)

65. StubHub recognized only buyer fees, seller fees, and logistics fees that it collected as revenue. StubHub did not recognize the sale price of the ticket or anything else as revenue. (SOF ¶ 83.)

66. The Department audited StubHub for the tax years 2008 – 2013, and the audit report includes the sales and use tax adjustment of StubHub pursuant to Wis. Stat. § 77.58(3)(a). (SOF ¶¶ 85, 86, Ex. 78.)

67. The Department informed StubHub by letter dated February 10, 2014 that it would be auditing StubHub’s sales and use tax payments. (SOF ¶ 87, Ex. 79.)

68. By letter dated September 10, 2014, the Department informed StubHub that it had “gathered sufficient evidence to determine that StubHub, Inc. has sales/use tax nexus in Wisconsin” for the Audit Period, that it had “reviewed and discussed StubHub, Inc.’s business model and [] confirmed that StubHub, Inc. is the retailer of the tickets sold on its website,” and that it planned “to proceed with the field audit” of StubHub at that point. (SOF ¶ 88, Ex. 80.)

69. StubHub provided the auditor all information requested during the audit. (SOF ¶ 89.)

70. The auditor cited Wisconsin Tax Bulletins 114 and 172 as providing “clear guidance . . . that ticket brokers such as StubHub, Inc., were retailers of admission tickets and parking passes and should charge Wisconsin Sales or use tax.” (SOF ¶90, Ex. 3.)

71. The auditor determined the taxable sales by adding the “buyer fees, the logistics fees and the selling price of the tickets,” but not “the fees charged to the seller,” because those were “not part of StubHub’s ticket sales prices to their customers.” (SOF ¶ 91, Ex. 3.)

72. In its March 10, 2016 Audit Report, at Exhibit A - B, the Department made the following comments: a) StubHub "is primarily engaged in selling admission tickets and parking passes to athletic and entertainment events throughout the United States;" b) StubHub does "not have any permanent locations in Wisconsin but do[es] operate in Wisconsin through their representative and sister corporation, Last Minute Transactions, Inc. on a regular basis; c) "Pursuant to sec. 77.51(13g) Wis. Stats., StubHub, Inc. is a retailer engaged in business in Wisconsin and has nexus for Wisconsin sales and use tax purposes;" d) "Pursuant to sec. 77.51(13)(a) and (c), Wis. Stats., StubHub, Inc. is a retailer in Wisconsin. (SOF ¶ 92, Ex. 62.)

73. The Department imposed a 25% negligence penalty on StubHub based on the following assertions in the Audit Report, each of which StubHub disputes:

- (1) The company failed to file the required Wisconsin sales/use tax returns
- (2) Wisconsin Department of Revenue published clear guidance in Wisconsin Tax Bulletins 114 and 172 indicating that ticket brokers such as StubHub, Inc. were retailers of admission tickets and parking passes and should charge Wisconsin sales or use tax
- (3) The amount of additional sales or use tax owed to Wisconsin is over \$8,400,000
- (4) The company failed to register for a Sales and Use Tax Certificate or Permit in order to collect sales or use tax on future Wisconsin admission ticket and parking pass sales as requested by the Wisconsin Department of Revenue.

(SOF ¶ 93.)

74. The deposition of James Hintz, the Resolution Officer assigned to this matter, was taken on October 23, 2019. The deposition utilized Exhibits 1 and 2. (SOF ¶ 99, Ex. 86.)

75. The deposition of Jerry Droessler, the auditor assigned to this matter, was taken on October 24, 2019. The deposition utilized Exhibits 3 through 10. (SOF ¶ 94, Ex. 81.)

76. The deposition of Julie Christensen, Jerry Droessler's supervisor, was taken on October 24, 2019. The deposition utilized Exhibits 1, 3, 4, 7, 8, and 11. (SOF ¶ 95, Ex. 82.)

77. The deposition of Diane Hardt was taken on November 26, 2019. Throughout the Audit Period and continuing until at least December 23, 2020, Ms. Hardt has been the Administrator of the Division of Income, Sales and Excise Tax of the Department, the person responsible for administering the sales tax in the State of Wisconsin, and she was ultimately responsible for the audit determinations made by the Department in this matter. The deposition utilized Exhibits 12 through 30. (SOF ¶ 96, Ex. 83.)

78. The deposition of John M. Gilchrist, a former Wisconsin Department of Administration employee involved in drafting marketplace facilitator legislation in the State of Wisconsin, was taken on January 14, 2020. The deposition utilized Exhibits 31 through 51. (SOF ¶ 97, Ex. 84.)

79. The deposition of Bradley R. S. Caruth, a Department of Revenue employee involved with generating fiscal estimates for legislation, was taken on February 14, 2020. The deposition utilized Exhibits 52 through 61. (SOF ¶ 98, Ex. 85.)

## INTRODUCTION

This case concerns unpaid sales tax deriving from the sale of tickets for athletic and other events located in Wisconsin, which were sold from January 1, 2008, through December 31, 2013, on the website marketplace owned and maintained by StubHub. All of the ticket sales at issue were secondary sales.<sup>4</sup> Some of the tickets sold on the StubHub website were initially bought with the express intention of resale. It is highly likely that sales tax was paid at the time the tickets were originally sold to their initial purchasers. Neither StubHub nor the individuals and businesses who placed the tickets in the online marketplace for sale collected sales tax on the online ticket sales. The Department issued an assessment to StubHub for sales and use tax, plus interest, penalties, and fees for the ticket resales that took place on its online marketplace. The primary issue in this case is whether StubHub sold tickets for admission to entertainment or athletic events at retail in Wisconsin on its online marketplace, and whether StubHub is thereby liable for the sales tax under Section 77.52(2)(a)2 Wis. Stats. The secondary issue, if StubHub is liable for sales tax under Section 77.52(2)(a)2 Wis. Stats., is whether StubHub is properly subject to the 25% negligence penalty imposed by the Department. We hold that StubHub is liable for sales tax under Section 77.52(2)(a)2 Wis. Stats. but is

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<sup>4</sup> For purposes of this opinion, “secondary sales” means resales of tickets initially bought from another source.

not subject to a negligence penalty of 25% and so grant summary judgment in part to the Department and in part to StubHub.

## WISCONSIN STATUTES

### 77.51 Definitions.<sup>5</sup>

(10) "Person" includes any natural person, firm, partnership, limited liability company, joint venture, joint stock company, association, public or private corporation. . . , personal representative, any other fiduciary, (and) any other legal entity. . . .

(13g) Except as provided in sub. (13h), "retailer engaged in business in this state", for purposes of the use tax, means any of the following:

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<sup>5</sup> This is the version of the statute in effect for tax year 2009 through 2013. The 2008 version of this statute reads in pertinent part as follows:

77.51 (10) "Person" includes any natural person, firm, partnership, limited liability company, joint venture, joint stock company, association, public or private corporation, . . . estate, trust, receiver, personal representative, (and) any other fiduciary. . . .

(13g) Except as provided in sub. (13h), "retailer engaged in business in this state", unless otherwise limited by federal statute, for purposes of the use tax, means any of the following:

(a) Any retailer owning any real property in this state or leasing or renting out any tangible personal property located in this state or maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in this state.

(b) Any retailer having any representative, agent, salesperson, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering or the taking of orders for any tangible personal property or taxable services.

(14) "Sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services and includes:

(m) A transaction for which a person's books and records show the transaction created, with regard to the transferee, an obligation to pay a certain amount of money or an increase in accounts payable or, with regard to the transferor, a right to receive a certain amount of money or an increase in accounts receivable.

(a) Any retailer owning any real property in this state or leasing or renting out any tangible personal property, or items or property under s. 77.52 (1)(b) or (c), located in this state or maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in this state.

(b) Any retailer having any representative, agent, salesperson, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering or the taking of orders for any tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d), or taxable services.

(c) Any retailer selling tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d), or taxable services for storage, use, or other consumption in this state, unless otherwise limited by federal law.

(14) "Sale" includes any of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property, or items, property, or goods under s. 77.52(1)(b), (c), or (d), or services for use or consumption but not for resale as tangible personal property, or items, property, or goods under s. 77.52(1)(b), (c), or (d), or services and includes:

(m) A transaction for which a person's books and records show the transaction created, with regard to the transferee, an obligation to pay a certain amount of money or an increase in accounts payable or, with regard to the transferor, a right to receive a certain amount of money or an increase in accounts receivable.



**77.52 Imposition of retail sales tax.<sup>6</sup>**

(2) For the privilege of selling, licensing, performing or furnishing the services described under par. (a) at retail in this state, as determined under s. 77.522, to consumers or users, regardless of whether the consumer or user has the right of permanent use or less than the right of permanent use and regardless of whether the service is conditioned on continued payment from the purchaser, a tax is imposed upon all persons selling, licensing, performing, or furnishing the services at the rate of 5 percent of the sales price from the sale, license, performance or furnishing of the services.

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

2. Except as provided in subd. 2.b. and c., the sale of admissions to amusement, athletic, entertainment or recreational events or places . . . and the furnishing for dues, fees or other considerations, . . . the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities, including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, including but not limited to membership rights, vacation services and club memberships.

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<sup>6</sup> This is the version of the statute in effect for tax year 2009 through 2013. The 2008 version of this statute reads in pertinent part as follows:

77.52(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:

2.a. Except as provided in subd. 2.b., the sale of admissions to amusement, athletic, entertainment or recreational events or places . . . and the furnishing, for dues, fees or other considerations, the . . . privilege of having access to or the use of amusement, entertainment, athletic or recreational devise or facilities, including the sale or furnishing of use of recreational facilities on a periodic basis or other recreational rights, including but not limited to membership rights, vacation services and club memberships.

## DECISION

This comes before us on Cross-Motions for Summary Judgment. Summary judgment must be granted 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. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980), citing Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law are before the court. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

Both parties stipulated to many of the facts and filed affidavits which pertained to many others. The only issue is whether Wis. Stat. § 77.52(2)(a)2 applies to StubHub, and if so, should a 25% negligence penalty be imposed on Stubhub. The Commission concludes that the case can be resolved under the summary judgment standard.

Wisconsin Statute § 77.52(2)(a)2 imposes a sales tax upon all persons selling at retail admissions to entertainment events. The five elements of the applicable statute

require a determination as to whether: 1) StubHub was a person, 2) StubHub was selling, 3) StubHub was selling at retail, 4) StubHub was selling at retail in Wisconsin, and 5) StubHub was selling at retail in Wisconsin admissions to amusement, athletic, entertainment or recreational events.

StubHub is a person under Wisconsin law. "'Person' includes any . . . public or private corporation. . . ". Wis. Stat. § 77.51(10). The parties have stipulated that StubHub is a corporation incorporated under the laws of the State of Delaware with its principal place of business in San Francisco, California.<sup>7</sup> Accordingly, StubHub is a "person" as that word is used in Wis. Stat. § 77.52(2)(a)2.

The analytical gap between the parties is the question of who was selling the tickets on StubHub's website. StubHub argues that the online marketplace was akin to an open-air market, and that the "seller" of any particular ticket was the "ticketholder," or individual or business listing the admission ticket for sale on the online marketplace, who had the functional role of a peddler in an open-air market. StubHub argues that the statutory definition of sale requires the transfer of property or specifically enumerated services to another. StubHub then asserts that StubHub transfers neither property nor services. StubHub's argument is that, because the sales took place between the ticketholder and the ticket buyer through the medium of StubHub's online marketplace, StubHub did not transfer property or taxable services in connection with the transactions made through the online marketplace. StubHub further compares the sale of tickets for

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<sup>7</sup> SOF ¶ 4.

admissions on the marketplace to the sale of prepaid telephone cards (where tax is not collected because the telephone services are furnished by another entity), and to sales at auction where an auctioneer “calling” an auction has no obligation to collect and remit sales tax. StubHub characterizes its role as “entirely passive in the sales process via its online marketplace.” The Commission finds that StubHub’s role in the sales is not entirely passive, that StubHub adds fees on a per transaction basis, and that StubHub has agents who are involved in the physical mailing of tickets as well as proprietary software that can issue new QR codes for electronic tickets sold on the online marketplace. All of these activities go further than what the Commission would consider the passive role of an auctioneer at an auction.

StubHub argues that, during the audit period, it was neither a retailer nor a seller under Wisconsin law.<sup>8</sup> The definition of “retailer” that StubHub focuses on is from Wis. Stat. § 77.51(13)(a): “[e]very seller who makes any sale, regardless of whether the sale is mercantile in nature, of tangible personal property, or items, or goods under s. 77.52(1)(b), (c), or (d), or a service specified under s. 77.52(2)(a).” StubHub further argues that StubHub is not acting as the agent of the seller, because the User Agreement specifically disclaims any agency relationship between StubHub and its customers. The contract language in the User Agreement, StubHub asserts, is the crucial fact which distinguishes this matter from the transactions analyzed in the *NEJA* case (see discussion, *infra*, pp. 37-39). StubHub also argues that, under the User Agreement, StubHub had the

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<sup>8</sup> The Wisconsin Legislature passed Wis. Stat. § 77.51(14)(n)7 in 2019. That statute is not applicable to this case as it was passed after the audit period.

same relationship to both ticket holders and ticket buyers, which means that StubHub could not be acting as either party's agent. According to StubHub, during discovery, the Department stated that it considered StubHub a retailer under Wis. Stat. § 77.51(13)(c), which allowed the Department to regard StubHub as an agent for the efficient administration of subchapter III of Chapter 77. StubHub argues that this is a reductive, conclusory statement which cannot be a basis for taxation of the transactions at issue.

The Department argues as follows. Under the definition of sale provided at Wis. Stat. § 77.52(14)(m), StubHub was selling the tickets. Wisconsin sales tax is a transaction tax, and only requires that there be a transfer of ownership or enjoyment of services for use or consumption. The statutory definition of sale does not require that the seller owns the property or services being transferred. Accordingly, when StubHub transferred ownership of the admission ticket from the ticketholder to the buyer, it conducted a sale on which tax is due. Precedent in the Department's Private Letter Ruling 952006 regarding the sale of pre-paid telephone cards is inapposite, because the sale of such cards is the sale of an intangible right, which is not subject to Wisconsin sales or use tax under Wis. Stat. § 77.52(1) or (2)(a). Precedent relating to auctioneers is not germane to this appeal, because an auctioneer who merely calls an auction, and does not clerk the auction, have primary responsibility for the sale proceeds, down payments, earnest money deposits, and other trust funds is clearly in a different position vis a vis the sale transaction than StubHub is here. Finally, under common law principles of agency, upheld by the Wisconsin Supreme court in *Benjamin Plumbing v. Barnes*, 162 Wis.2d 837, 848-849 (1991), "an agent will be considered a party to the contract and held liable for its

breach where the principal is only partially disclosed. A principal is considered partially disclosed where, at the time of contracting, the other party has notice that the agent is acting for a principal but has no notice of the principal's corporate or other business identity." The unidentified ticketholder who lists a ticket on the online marketplace is a partially disclosed principal, because the buyer knows there is a ticketholder but has no information about the ticketholder's identity. This anonymity of the ticketholder means that under Wisconsin law, StubHub is a party to the sale contract and further is a seller of admissions. Despite the User Agreement's specific disclaimer of agency relationship, StubHub must be acting as an agent of the ticketholder, because the sale could not be concluded if it were not so acting. The facts cited by the Department to support this argument are that, for the benefit of and on behalf of the ticketholder: StubHub follows the ticketholder's instructions, StubHub places tickets for sale at the time and the ticket price designated by the ticketholder, StubHub communicates the buyer's acceptance of the ticket price to the ticketholder, StubHub accepts funds from the buyer and ensures transfer of net funds to the ticketholder, StubHub either directly arranges for the transfer of the ticket or provides the ticketholder with a prepaid label for a common carrier to ship the ticket. StubHub argues that the "partially-disclosed principal" doctrine cannot be applied in this appeal for two reasons: 1) there is no underlying failure of any principal to meet any contractual obligations to any buyer, and 2) the doctrine applies only to actual "agents" and operates to treat them as parties to the agreement, and, further, does not permit treating any entity that is not already an agent as an agent. StubHub's first point would only be valid if it could be shown that the FanProtect Guarantee has never been

invoked. StubHub's second point essentially argues that the doctrine only addresses liability, and whether a party can be considered an agent for liability purposes, and further posits that only a party that was already an agent can be considered an agent for liability purposes. StubHub does not persuade the Commission on this point.

Determining whether StubHub can be considered to have sold the tickets listed on its online marketplace is the key to resolving the parties' dispute. The Commission starts with the plain language of a statute. If the plain language can be read without resort to other sources, we do not turn to extra-statutory sources in our analysis. StubHub first presents argument about the purpose of Wis. Stat. § 77.52(14)(m). StubHub then argues that the plain language of Wis. Stat. § 77.52(14)(m) does not apply to StubHub. StubHub further argues that application of Wis. Stat. § 77.52(14)(m) would lead to absurd results. The Commission disagrees. The statute allows the Department to collect the applicable tax from multiple sources, by design. The Legislature may design the applicable law to account for the need to administer the law in as efficient a way as possible. The Commission finds that this is what the Legislature has done in writing Wis. Stat. § 77.52(14)(m) as it stands.

StubHub is transferring both the enjoyment of admissions as well as possession of the tickets which represent the right to admissions, which in the case of admissions to events are one and the same for taxation purposes. A ticket representing the right to admission is not what is purchased by the consumer: the consumer purchases the right to admission, which is represented by the ticket. The Supreme Court addressed the tax statutes as they apply to the sale of tickets for admission to athletic events in

*Wisconsin Department of Revenue v. Milwaukee Brewers Baseball Club*, 111 Wis.2d 571, 331 N.W.2d 383 (1983). In the *Brewers* case, the dispute centered on who was responsible for the sales and use tax for the cardboard tickets (issued to all attendees of events) and promotional items (issued to some attendees of some events). The court held that the price paid by the consumer was for the admission to the event, which was subject to tax under Wis. Stat. § 77.52. The court further held that the cardboard tickets and promotional items were used by the Brewers Baseball Club, and so were subject to tax under Wis. Stat. § 77.51(4), which was properly due and owing from the Brewers Baseball Club. StubHub's arguments that StubHub only transfers physical (or electronic) tickets, and that this is somehow separate from the admissions, which are provided or furnished by another party, fails under binding Supreme Court precedent given in the *Brewers* case. StubHub's position that only venues can transfer admission to consumers, would mean that only venues could be subject to the tax under Wis. Stat. § 77.52. This novel argument is not persuasive to the Commission, and the Commission declines to upend years of precedent.

The parties offer opposing viewpoints on whether the FanProtect Guarantee offered by StubHub proves that StubHub was selling tickets, or that StubHub was not selling tickets. StubHub argues that "what StubHub guaranteed was that *if the sellers* sent tickets that were not valid or were inconsistent with the descriptions those sellers provided on the marketplace, or if the sellers failed to send tickets at all, StubHub would take steps to make it right for the buyer – either by finding replacement tickets for the buyer or providing a refund." (Emphasis in original.) StubHub argues that its User



Agreement required ticketholders to reimburse StubHub for all costs associated with implementation of the FanProtect Guarantee. This point misses the mark, however. The FanProtect Guarantee did not offer a buyer that the ticketholder would send another ticket, or send payment to the buyer. Rather, the FanProtect Guarantee offered the buyer that StubHub would find replacement tickets or offer a refund. The details of how the User Agreement contemplated that StubHub would be made whole for costs associated with the FanProtect Guarantee do not change the role StubHub itself plays in the value the FanProtect Guarantee adds to sales transactions. The Department argues, by rhetorical question, that the FanProtect Guarantee is precisely the sort of guarantee offered by many reputable merchants: in essence, if the product being sold is not usable for its intended purpose, or goes astray during the shipping process, the merchant will take steps to make the consumer whole, either by replacing the product with a functional one, or by refunding the purchase price to the consumer. The Department further argues that a passive marketplace would never make such a guarantee, and the Commission finds this point persuasive: no open-air market with which the Commission is familiar offers, on behalf of a stall holder in the market, replacement products or refunds for items which prove unsatisfactory to consumers.

The parties offer opposing conclusions about StubHub's role in the transactions at issue, and whether that role means that StubHub is selling tickets for admission under Wisconsin law. The Department argues that there is no requirement that the seller or retailer be the owner of property or services in order to be liable for

collection of sales taxes on sales, citing *Hargarten*<sup>9</sup> and *Dixon, Inc.*<sup>10</sup> The Department further argues that StubHub unilaterally set its own fees, which it added to the price set by the ticketholder, and in so doing, StubHub determined the final sales price, which was the relevant price for sales tax purposes. Finally, under Wis. Stat. 77.51(14)(m), the definition of “sale” is “[a] transaction for which a person’s books and records show the transaction created, with regard to the transferee, an obligation to pay a certain amount of money or an increase in accounts payable or, with regard to the transferor, a right to receive a certain amount of money or an increase in accounts receivable.” The Commission agrees that StubHub’s books and records show the transaction created for both the transferee and for the transferor as described in the statute, and the creation of this transaction in StubHub’s marketplace constitutes a sale under Wisconsin law.

The Department offers a line of “vending machine” cases as useful to the Commission in analyzing StubHub’s role in the sales transactions at issue in this appeal. The Wisconsin Supreme Court examined a case involving a corporation (Servomation) whose business was placing its coin vending machines in various locations to dispense a variety of commodities for sale. *Servomation Corp. v. Dept. of Revenue*, 106 Wis. 2d 616, 317 N.W.2d 464 (1982). Servomation had contracts with secondary schools and hospitals to place its vending machines in their facilities. Servomation agreed to pay the institutions a fixed percentage of the gross receipts from products sold through the vending machines. The facilities determined the prices charged for the products in the machines,

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<sup>9</sup> *Hargarten v. Wisconsin Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-369 (WTAC 2/9/1977), aff’d Wis. Tax Rptr. (CCH) ¶ 201-430 (Dane County Cir. Ct. 10/10/1977).

<sup>10</sup> *Dixon, Inc. v. Wisconsin Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 201-227 (WTAC 4/29/1976).

were responsible for damage to machines, and controlled consumer access to the machines. Servomation owned the machines, and its personnel possessed the only keys to the machines, loaded and unloaded the machines, removed gross receipts from the machines, and took the receipts to Servomation's offices. Servomation counted the receipts, gave an accounting to the facilities, and paid the facilities the agreed upon commission. Servomation provided a larger share of receipts to hospitals and schools where its machines were located than did other locations, due to an understanding that no sales tax would be due from Servomation on gross receipts. The Supreme Court noted that Servomation had a lease arrangement with the institutions allowing its machines to be placed in the institutions and bore the cost of spoiled or defective products, and further that the vending machines were not leased to the institutions in furtherance of medical or educational functions and so the retail sales made through the use of the vending machines were not tax-exempt under any provision of Wis. Stat. § 77.54. Ultimately, the Supreme Court held that Servomation was clearly the seller of the products in the vending machines for which its employees had the keys, loaded stock, and collected the gross receipts for accounting.

To the extent the vending machines cases are instructive, StubHub's marketplace would be considered the vending machine, and admissions tickets would stand in the place of a can of Pringles in the vending machine, for example. The analogy is admittedly strained due to the vast difference between vending machines and internet marketplaces. However, in applying the Servomation analysis, the Commission sees the ticket holder as analogous to the person placing stock in the vending machine, the marketplace as the

vending machine, and StubHub as Servomation. Due to StubHub's complete control over the ultimate purchase price paid by the ticket buyer, as well as StubHub's control over the receipt and accounting of payment made by the ticket buyer, the Commission considers StubHub to be liable for collecting and remitting sales tax in the same way that Servomation was found to be liable for so doing.

The Court of Appeals heard another "vending machine" case in the *Fuchs Agency* case.<sup>11</sup> This case involved a taxpayer (Fuchs Agency) who sold and rented photocopy machines, copy machine paper, and equipment, and whether Fuchs Agency was liable for sales tax on amounts collected from users of its machines located in municipal public buildings, or whether it was exempt from such tax under an exemption from taxation for sales to a municipality found in Wis. Stat. § 77.54(9a). The Court of Appeals held that there was no evidence that the municipality was buying services and/or equipment from the seller. The buyer, in the court's view, was the individual making copies. The Court of Appeals held that Fuchs Agency was responsible for installing, servicing, and removing the machines, and Fuchs Agency was actually paying the municipality to place its machines on municipal property, which was further evidence that Fuchs Agency was not selling anything to the municipality. The Court of Appeals also addressed taxability of transactions under Wis. Stat. §§ 77.51(4r) and 77.51(11), which is not relevant here and so is not discussed further.

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<sup>11</sup> *Harold W. Fuchs Agency, Inc. v. Dept. of Revenue*, 91 Wis. 2d 283, 282 N.W.2d 625 (Ct. App. 1979).

In the appeal before the Commission in this matter, the online marketplace would take the position of the copy machine, and the analysis would focus on whether ticket buyers were the same as individuals making copies on the copy machines. If so, then the owner of the marketplace would be liable to sales tax on each ticket sale in the same way that Fuchs Agency was liable for sales tax on each copy made.

Both parties address the *NEJA Group* case in multiple briefs.<sup>12</sup> In that case, the Walworth County Circuit Court examined Wis. Stat. § 77.52(2)(a)2. The Court found that Ticketmaster sold tickets as NEJA Group's exclusive agent, while NEJA retained rights to sell tickets so long as it did not use services of any third party computerized or electronic ticketing service or entity to conduct those sales. Sales tax was collected and paid on face value of tickets, maintenance fees, parking fees, and delivery fees for Ticketmaster sold tickets. Sales tax was not collected and paid on Customer Convenience Charges or handling fees charged by Ticketmaster. The Circuit Court found that Customer Convenience Charges and convenience fees are part of the "gross receipts" from sale of admissions, pursuant to Wis. Stat. § 77.51(4)(a) and (c)2. The Circuit Court further affirmed the Commission's finding that NEJA Group and Ticketmaster were both "retailers" under Wis. Stat. § 77.51(13)(c) and that NEJA Group contracted with Ticketmaster to allow Ticketmaster to act as a ticketing agent. NEJA Group and Ticketmaster mutually agreed on the amount of service charges to be collected by

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<sup>12</sup> *NEJA Group, LLC v. Dep't of Revenue, State Tax Rptr. (CCH) ¶ 401-815* (WTAC Jan. 13, 2014); *NEJA Group v. Dep't of Revenue, State Tax Rptr. (CCH) ¶ 401-874* (Walworth Cty. Cir. Ct., August 22, 2014)

Ticketmaster. That agreement was an exercise of control over the ultimate purchase price, and the gross receipts were properly taxable.

StubHub argues that both NEJA Group and Ticketmaster did far more than facilitate the sale of tickets, and so the precedent of NEJA Group is not controlling in this appeal. For example, NEJA Group operated and controlled access to the venue and promoted live music events at the venue, while StubHub did not own or operate any venue, nor did it promote any events. StubHub also notes that NEJA Group granted Ticketmaster the exclusive right to sell tickets on NEJA's behalf, controlling and holding the tickets as inventory, while StubHub did not purchase, control, or hold tickets as inventory, further noting that ticketholders, *in most cases*, were permitted to list those tickets simultaneously through other sales channels. (Emphasis added.) NEJA Group determined the face value of the ticket. NEJA Group recognized revenue from ticket sales, while StubHub did not recognize gross sales revenue from the sale of tickets: StubHub notes that it recognized as revenue only buyer fees, seller fees, and logistic fees on ticket sales. NEJA Group had an agency relationship with Ticketmaster and provided the taxable service of selling concert tickets through its agent. StubHub argues it expressly disclaimed an agency relationship with either party in the sales transaction, and that the StubHub contract specifically provided that ticket sellers and ticket buyers were entering into transactions that constituted binding agreements with each other. Finally, StubHub argues that NEJA Group sold tickets directly to event attendees through Ticketmaster, while StubHub is a marketplace to facilitate transactions between buyers and sellers of tickets which never engaged in single-party transactions. The Commission holds that

StubHub, similar to NEJA Group, by imposing a series of fees and charges, determined the ultimate sale price of each ticket, which was always greater than the sale price chosen by the ticketholder.

The Department argues that *NEJA* essentially stands for the proposition that more than one entity can be considered the seller for Wisconsin tax purposes. According to the Department, in the same way that both NEJA Group and Ticketmaster were retailers and therefore liable for the collection of sales tax, the Commission should find StubHub similarly liable in the alternative to the individual ticket holders.

The Circuit Court's conclusion in *NEJA* that service charges were part of gross receipts because they were part of the total sales price paid by buyers, and were related to the sale, is controlling in the Commission's analysis of the transactions at issue in this appeal. Some sellers were not permitted to simultaneously list tickets for sale on StubHub's Marketplace and other sites. Additionally, StubHub controlled the ultimate sales price of the tickets by adding fees and charges to the sale price the ticket holder initially chose for the ticket. The analysis in *NEJA* supports the taxability of the transactions at issue in this appeal.

Both parties address the imposition of sales tax examined in the *Cellar Door* case.<sup>13</sup> *Cellar Door North Central, Inc.* ("Cellar Door") and New Riverside Corporation ("Riverside") co-promoted approximately sixty-four events which took place at the Riverside Theatre, an event venue in Milwaukee. Sales tax was collected on the sale of

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<sup>13</sup> *Cellar Door North Central, Inc. v. Wisconsin Department of Revenue*, CCH ¶ 401-686 (January 22, 2013); *Cellar Door North Central, Inc. v. Wisconsin Department of Revenue*, CCH ¶ 401-736 (August 26, 2013).

admissions and merchandise for the events, but the collected tax was never sent to the Department. This discussion will not delve further into the taxation of merchandise sales, since that portion of the decision is not germane to the dispute before the Commission. The Department issued a sales/use tax assessment in the alternative to Cellar Door and Riverside. Neither party argued that sales/use tax was not due for the transactions at issue. Rather, the issue for decision was whether Cellar Door had sold admissions to events at the Riverside Theatre, and whether selling such admissions meant that Cellar Door would be liable for sales and use tax for the admissions. The Circuit Court accepted the Commission's conclusion that Cellar Door sold admissions to the events in question through its box office and through its agreement with the Ticketmaster system. The Circuit Court found substantial evidence in the record to support the Commission's conclusion that Cellar Door was a "retailer" selling taxable admissions to events. The remainder of the Circuit Court's decision discusses the issuance of an alternative assessment, which is also not germane to the dispute at hand, and so will not be discussed further.

StubHub argues that *Cellar Door* is not helpful to the analysis of the facts presented in this appeal, because Cellar Door was the actual agent of Ticketmaster, while StubHub was not responsible in any way for the events for which tickets were sold, and so the control StubHub had was not the same as the control Cellar Door had.

The Department argues that *Cellar Door* allows the Department to deem StubHub a retailer under Wis. Stat. § 77.51(13)(c) because the statute allows this either when an entity operates under a dealer or when an entity obtains tangible personal



property from a dealer. In the appeal at hand, the sales at issue are of admissions to events, not of tangible personal property. Ultimately, *Cellar Door* is not instructive to the Commission due to the different statutes examined, and the wholly different issue decided by the Commission in *Cellar Door*.

Both parties provided the Commission with extensive argument about the *Orbitz* case.<sup>14</sup> The Court of Appeals examined the taxability of Orbitz's reservation facilitation services under Section 77.52(2)(a)1. of the Wisconsin Statutes. Orbitz accessed an online inventory of hotel rooms and made reservations on behalf of travelers for specific dates chosen by the traveler (buyer). The fee for the room consisted of two parts: 1) the net rate the hotel retained plus a markup amount retained by Orbitz, and 2) taxes and fees, which included an estimate of taxes payable on the hotel's net rate and any other service and or applicable fees. The buyer paid Orbitz upfront for the charge (which consisted of two parts). When the traveler checked into the hotel, Orbitz forwarded the hotel's net rate, taxes due on the net rate, and any hotel-imposed fees. The hotel then remitted the tax on the net room rate to the taxing authority. No sales tax was collected from buyers or remitted to the taxing authority on the markup amounts collected by Orbitz during the audit period. The Department assessed tax, interest, and late filing fees on the markup imposed by Orbitz on the net room rate under the theory that Orbitz was an "internet lodging provider" and owed such tax under Wis. Stat. § 77.52(2)(a)1. Under that section of the statutes, tax is due on activities which constitute the furnishing of

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<sup>14</sup> *Orbitz, LLC v. Wisconsin Department of Revenue*, CCH ¶ 401-844 (May 14, 2014); *Wisconsin Department of Revenue v. Orbitz, LLC*, CCH ¶ 401-896 (December 15, 2014); *Wisconsin Department of Revenue v. Orbitz, LLC*, CCH ¶ 402-040 (Ct. App. February 11, 2016).

rooms or lodging. The Court of Appeals agreed with the Circuit Court and Tax Appeals Commission's conclusion that Orbitz was not furnishing rooms or lodging, because it did not own hotels or motels, did not check people in, or provide people with access to rooms, and did not provide cleaning, room, or maintenance services. The Court of Appeals also held that Orbitz's service of making reservations with entities which furnish lodging was not expressly subject to taxation under Wis. Stat. § 77.52(2)(a)1. The Court of Appeals held that Orbitz was making reservations with the hotels on behalf of the travelers, and that Orbitz did not act as an agent of the hotels, and ultimately that for those reasons, the Department's argument that Orbitz should be liable for tax as the agent of the seller was not persuasive.

StubHub argues that it facilitates sales of tickets in the same way that Orbitz facilitated the sale of lodging actually provided by unaffiliated hotels. StubHub notes that it had no control over events or facilities putting on events, did not buy tickets from performers, event providers, or promoters, and did not pay for any tickets on its own behalf or to hold for future sales. StubHub notes that it was not responsible for putting on events for which tickets were sold, and that StubHub held no inventory of tickets. In this way, StubHub argues its marketplace functioned in the same way that Orbitz's website functioned. StubHub also notes that its fees were set (some as a percentage of the sale price chosen by the ticket holder) and disclosed, while Orbitz's fees were not disclosed. StubHub argues that this means that StubHub did not control the ultimate sales price in the same way that Orbitz did. StubHub asserts that it does not recognize gross sales revenue from tickets sales, which it argues makes it like Orbitz. StubHub

reiterates the arguments it made regarding agency in the *NEJA* discussion above. (*Supra*, pp. 37-39.) StubHub notes that its User Agreement provided that sellers and buyers entered into a binding agreement with each other, not with StubHub, which makes it unlike Orbitz, which contracted with hotels to facilitate transactions for travelers. Finally, StubHub argues that its transactions were not single-party transactions and were, like Orbitz's, facilitated transactions between buyers and sellers of tickets. When StubHub addresses the disputed legal issue in this appeal, it argues that StubHub is facilitating the sale of tickets for admission, while the actual admissions are furnished by another party.

The Department argues that the furnishing of rooms or lodging, under Wis. Stat. § 77.52(2)(a)(1) is materially different from the sale of admissions under Wis. Stat. § 77.52(2)(a)2.a because of the differences in the language of the statutes. The *Orbitz* precedent turned upon a finding by the Commission that Orbitz was facilitating the sale of reservations for lodging which was ultimately provided by another entity. The Commission made this finding in *Orbitz* because the applicable statute makes the distinction.

We hold that StubHub's position fundamentally misunderstands and blends two separate issues. First, a ticket for admission *is* an admission, under the *Brewers* case. Second, Wis. Stat. § 77.52(2)(a)(1), examined in *Orbitz*, makes the distinction between sale and furnishing of lodging, while Wis. Stat. 77.52(2)(a)2.a. does not distinguish between sale and furnishing of admissions. The Commission determines that *Orbitz* supports the taxation of the transactions at issue in this appeal.

StubHub was selling at retail under Wisconsin law. Wis. Stat. § 77.51(13rm) defines “sale at retail” as “any sale, lease, or rental for any purpose other than resale, sublease, or subrent.” The parties stipulated that tickets for admission to sporting events, concerts, theater and other live entertainment services were bought and sold on StubHub’s online marketplace.<sup>15</sup> StubHub argues that the dispositive question is whether StubHub can be considered a “retailer” under Wis. Stat. § 77.51(13)(a) or could be deemed a retailer under Wis. Stat. § 77.51(13)(c). Both parties make arguments regarding this question. However, the statute does not require that a person making a sale at retail be or be deemed to be a retailer in order for its sales to be subject to tax. The Commission appreciates the frustration expressed by StubHub regarding the apparent shift in the basis of the imposition of tax to the transactions which are the subject of this appeal. However, the Department has provided a rational basis for the imposition of tax under the statutory framework, and the Commission is following the analysis to its logical conclusion in this decision. Based on the parties’ factual stipulation, the sale of tickets for admission on the StubHub online marketplace was a sale at retail under Wisconsin law.

The admissions for which the tickets at issue in this appeal were sold were admissions for events which took place at venues located in Wisconsin. The online marketplace is located on the internet, which is not particularly located in a specific state. However, the venues hosting the events were all located in Wisconsin. The sale at retail of admissions to venues located in Wisconsin constitutes a sale at retail in Wisconsin.

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<sup>15</sup> SOF ¶ 7

StubHub was selling at retail in Wisconsin admissions to amusement, athletic, entertainment or recreational events. The parties have stipulated that the events to which admissions were being sold were amusement, athletic, entertainment or recreational events.<sup>16</sup> StubHub argues that the Department's sourcing of transactions is evidence that StubHub cannot be liable for collection of sales tax on the transactions at issue. StubHub argues that, because the tickets were merely representations of the admissions being sold, and StubHub was only involved in selling the tickets for admissions, StubHub cannot be held liable for tax on those sales. This argument blends two separate concepts and leads to a faulty conclusion. As explained above, the ticket price paid by the consumer was for the admission to the event, which was subject to tax under Wis. Stat. § 77.52. (*Supra* pp. 31-32.) The parties agree that the admissions being sold were for events occurring in Wisconsin. Accordingly, StubHub was selling at retail in Wisconsin admissions to amusement, athletic, entertainment or recreational events.

The Department addresses nexus at length in its initial brief. Petitioner does not claim a lack of nexus with the State of Wisconsin in its briefs. Petitioner only argues that nexus does not matter, because what StubHub did was not taxable. The Department cites the following as a basis for nexus in this case: StubHub sent employees to Madison, Wisconsin in 2008, 2009, 2010, and 2011 to negotiate advertising contracts with the University of Wisconsin, and also sent employees to Milwaukee, Wisconsin in 2008, 2009, and 2010 to generate publicity, meet with the Milwaukee Brewers, and discuss improved

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<sup>16</sup> SOF ¶ 7

ticket integration regarding its advertising contract with the Brewers. Last Minute Transaction (“LMT”), a wholly-owned subsidiary of StubHub, carried on substantial business in Wisconsin, including distributing tickets, assisting customers in purchasing tickets, providing customer service, brand presence, and the promotion and consummation of ticket sales for StubHub. Between 2008 and 2011, LMT rented rooms in Green Bay, Wisconsin thirty-eight times and rented rooms in Milwaukee, Wisconsin twenty-four times. The Petitioner does not dispute any of these activities occurred. The Commission finds that StubHub had the necessary nexus with Wisconsin for the statutes of Wisconsin to apply to the transactions at issue in this appeal.

Petitioner argues that no penalties should be imposed in this appeal, because the guidance provided in Tax Bulletins 114 and 172 applies to “ticket brokers,” and StubHub is not a ticket broker. Further, StubHub argues, since the Department concedes that the question of whether StubHub is a retailer is not relevant to the taxability of the transactions at issue, it is, at best, disingenuous for the Department to rely on guidance which describes who is considered a retailer at length. The Commission agrees that StubHub is not a “ticket broker,” as that phrase is commonly understood. StubHub did not buy tickets, hold an inventory of tickets, and then sell those same tickets to buyers. The imposition of penalties in this appeal is not appropriate.

Both parties address the passage of new statutory authority which more closely tracks the evolving models of internet sales transactions. Wis. Stat. § 77.51(14)(n)7. The law, passed in 2019, was not in existence during the audit period at issue in this

appeal. That law has no bearing on whether the transactions at issue in this appeal were taxable under the statutory scheme in existence at the time the transactions took place.

### CONCLUSIONS OF LAW

1. Petitioner StubHub was a retailer providing the service of selling taxable admissions at retail in Wisconsin to the amusement, athletic, entertainment and/or recreational events at issue, pursuant to Wis. Stat. § 77.51 (13g), Wis. Stat. § 77.51(14)(m) and Wis. Stat. § 77.52(2)(a)2.

2. Petitioner StubHub was liable in the alternative with the ticketholders listing tickets on StubHub's online marketplace for the sales tax due on the sale of admissions to the events at issue, pursuant to Wis. Stat. § 77.51(14)(m) and Wis. Stat. § 77.52(2)(a)2.

3. Petitioner StubHub has not met its burden of proving the Department's sales/use tax assessment was incorrect.

4. The Department's imposition of penalties in this appeal is not supported by the facts, law, and department publications in place at the time of the transactions at issue.

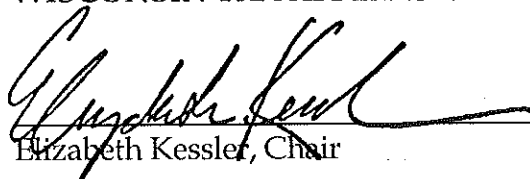
**ORDER**

Based upon the foregoing,

**IT IS HEREBY ORDERED** that the Department's Motion for Summary Judgment is granted in part and denied in part, and the Petitioner's Motion for Summary Judgment is granted in part and denied in part.

Dated at Madison, Wisconsin, this 28<sup>th</sup> day of February, 2023.

**WISCONSIN TAX APPEALS COMMISSION**

  
Elizabeth Kessler, Chair

  
Jessica Roulette, Commissioner

  
Kenneth P. Adler, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**



WISCONSIN TAX APPEALS COMMISSION  
101 E Wilson St, 5<sup>th</sup> Floor  
Madison, Wisconsin 53703

**NOTICE OF APPEAL INFORMATION**

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.
2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.
3. The 30-day period starts the day after personal service, or the day we mail the decision.
4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.