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Wisconsin Tax Appeals Commission  
Nicole Allee - Legal Assistant

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

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CMFG LIFE INSURANCE COMPANY  
AND CUMIS INSURANCE SOCIETY,

DOCKET NO. 20-S-078

Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

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**RULING AND ORDER**

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This matter comes before the Commission on the parties' Second Cross-Motions for Summary Judgment. The issue for determination is whether Petitioners' Leases are subject to sales tax pursuant to Wis. Stats. § 77.52(1b). The Petitioners are represented by Attorneys Andrew L. Nelson and Roberta F. Howell of Foley & Lardner, LLP, in Madison, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jeffrey A. Evans, of Madison, Wisconsin. For the reasons stated below, we grant Respondent's Motion for Summary Judgment and deny Petitioners' Motion for Summary Judgment.

**FACTS**

1. Petitioner CMFG Life Insurance Company, f/k/a CUNA Mutual Insurance Society ("CMFG"), is an insurance company organized under the laws of Iowa, which provides insurance products and services. Petitioner, CUMIS Insurance Society,

Inc. ("CUMIS"), a subsidiary of CMFG, is an insurance company organized under the laws of Iowa, which provides commercial property and casualty and collateral protection insurance products, and assumes business written by other insurers. (Together, "Petitioners"<sup>1</sup> or CMFG Group.) (Stipulation of Facts ("Stip.") ¶¶ 1-3.)

2. Petitioners are both subject to the regulatory oversight of the Iowa Insurance Division. As regulated insurance companies, Petitioners are required to track and report their respective statutory capital (or surplus amounts) and to maintain certain required statutory capital levels in accordance with Iowa insurance law. (Stip. ¶ 13.)

3. On November 7, 2013, the Department initiated a sales and use tax audit of Petitioners, covering the tax years 2007 through 2013 (the "Audit"). The 2014 tax year was added to the Audit at a later date by agreement of the parties. (Stip. ¶ 3.)

4. On December 27, 2017, Petitioners filed amended returns with the Department and paid a total \$2,350,000.00 to the Department in order to stop interest from accruing on any amounts determined to be owing pursuant to the Audit. In addition, on January 11, 2018, Petitioners paid \$1,803,895.93 in related interest assessed by the Department. (Stip. ¶ 4.)

5. As a result of the audit, on June 14, 2018, the Department issued two Notifications of Field Audit Action to each company, one for the tax period 2007-2010 and one for 2011-2014. Each Notification indicated the Department's conclusion that payments made by Petitioners to PNC Equipment Finance, LLC ("PNC Finance") under

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<sup>1</sup> For simplicity, we will use "Petitioners" to refer to either CMFG or CUMIS or the CMFG Group, as their interests are aligned in this case as a whole.

certain agreements that Petitioners entered into with PNC Finance (the "Aircraft Lease" and "Software Lease," together, the "Leases" or "Contracts") were subject to sales tax under Wisconsin law. (Stip. ¶ 5.)

6. On June 29, 2018, Petitioners timely filed a refund claim requesting the Department refund, among other disputed amounts, sales tax the Department claimed was due on payments Petitioners made to PNC Finance pursuant to the Leases. (Stip. ¶ 6.)

7. On July 30, 2018, the Department denied Petitioners' Refund Claim, rejecting Petitioners' claim that the amounts paid by Petitioners to PNC Finance pursuant to the Aircraft Lease and Software Lease were not subject to Wisconsin sales and use tax. (Stip. ¶ 7; Ex. A.)

8. On August 6, 2018, Petitioners timely filed for redetermination with the Wisconsin Department of Revenue Resolution Unit (the "DOR Appeal"). (Stip. ¶ 8.)

9. On January 29, 2020, Petitioners and the Department reached an agreement on a majority of the contested issues in the DOR Appeal, and entered into a Memorandum of Understanding, which indicated that the sales tax issue was left unresolved. (Stip. ¶ 9; Ex. B.)

10. On March 20, 2020, Petitioners timely filed a Petition for Review with the Wisconsin Tax Appeals Commission, which reiterated Petitioners' objection to the imposition of sales tax relating to the payments to PNC Finance. (Commission file).

## Aircraft Lease

12. On December 19, 2011, Petitioners (specifically, CMFG) entered into what is titled an "Aircraft Lease" with PNC Finance, in which Petitioners agreed to sell an airplane to PNC Finance and then lease the airplane back for a set rent (the "Aircraft Lease"), subject to certain terms, limitations, and conditions. Exhibit C of the stipulation includes the Aircraft Lease as well as several additional documents, exhibits, and addenda which relate to the Aircraft Lease. (Stip. ¶ 14; Ex. C.)

13. Section 1 of the Aircraft Lease states, "Lease of Aircraft. Subject to the terms and conditions provided in this Lease, Lessor [PNC Finance] agrees to lease the Aircraft to Lessee [CMFG], and Lessee agrees to lease the Aircraft from Lessor." (emphasis added) (Stip. ¶ 15; Ex. C, § 1.)

14. The Aircraft Lease further provides that PNC Finance's obligations to purchase the Aircraft from CMFG and to lease the Aircraft to CMFG are conditioned upon satisfaction of certain conditions. (Stip. ¶ 16; Ex. C, § 2.)

15. The Aircraft Lease provides for a payment of rent in "Basic Rent" and "Supplemental Rent." In defining the term "Basic Rent" the Aircraft Lease provides that it will include "(i) on the Acceptance Date, an amount equal to the product of the Daily Rent Percentage times the Lessor's Cost, for each day starting with the Acceptance Date...and (ii) on the First Basic Rent Date and on each Basic Rent Date following that date, an amount equal to the product of the Lessor's Cost multiplied by the applicable Basic Rent Percentage set forth on Schedule No. 2-A." (Stip. ¶ 18; Ex. C, § 3(b).)

16. The Aircraft Lease provides a warranty that CMFG "is the owner of the Aircraft and as of the Acceptance Date, will have good and marketable title to the Aircraft, free and clear of all Liens other than any Liens created in favor of Lessor under this Lease." (Stip. ¶ 20; Ex. C. § 6(e).)

17. The Leases are net leases obligating Petitioners as Lessees to be responsible for taxes, compliance, use, maintenance, and insurance. (Stip. ¶¶ 21-24; Ex. C, §§ 7-10.)

18. In the event of loss, if Lessor/PNC Finance receives payment under an insurance policy, any excess insurance proceeds are to be paid to the Lessee/Petitioners. (Stip. ¶¶ 24 and 26; Ex. C, § 10(d).)

19. Section 16 of the Aircraft Lease states, "Ownership for Tax Purposes; Grant of Security Interest; Usury Savings." Lessee and Lessor agree that "for federal, state, and local sales and income tax purposes, the transaction contemplated hereby will be treated as a financing arrangement consisting of a loan from Lessor [PNC Finance] to Lessee [CMFG] secured by the Aircraft and other Collateral, and Lessee shall be treated, for federal, state and local income tax purposes, as the owner of the Aircraft." (Stip. ¶ 30; Ex. C. § 16(b)(1).)

20. The same section provides that CMFG and PNC Finance would file an Instrument of Conveyance with the Federal Aviation Administration ("FAA") in accordance with FAA regulations to register the Aircraft Lease with the FAA and to grant PNC Finance a security interest in the airplane. (Stip. ¶ 30; Ex. C, § 16(b)(1).)

21. The Aircraft Lease states that “[i]n order to secure the prompt and full payment and performance as and when due of any and all obligations and indebtedness of Lessee to Lessor... Lessee hereby collaterally assigns, grants, pledges and conveys to Lessor, a security interest, and security assignment in and Lien on all of Lessee’s right, title and interest in, to and under all of the following (collectively, the ‘Collateral’): (i) this Lease and the Airframe, each Engine and all of the other property constituting the Aircraft; (ii) any and all present and future subleases, management agreements, interchange agreement, charter agreements...relating to the Aircraft...(iii) the Aircraft...and all present and future parts, accessories...and all present and future replacements, substitutions and exchanges for such goods; and (iv) any and all proceeds of the foregoing...The collateral assignment, security interest and lien granted herein shall survive the termination, cancellation or expiration of the Lease until such time as Lessee’s obligations under this Lease are fully and indefeasibly discharged.” (Stip., ¶ 31; Ex. C. § 16(b)(2).)

22. The Aircraft Lease provides in Section 16(c), “Entire Agreement,” “This Lease, and each of the other Lease Documents, the Conveyance Documents, and the Required Documents, collectively constitute, and are intended to collectively constitute, the complete and exclusive statement of the terms of the agreement between Lessor and Lessee with respect to the purchase and leasing of the Aircraft . . . .” (Stip. ¶ 33; Ex. C, § 16(c).)

23. The Aircraft Lease contains an Exhibit A, "Definitions," which provides that the definition of "Early Purchase Option Amount" shall be "the amount payable by Lessee in the event that it exercises its option to purchase the Aircraft pursuant to paragraph (e) of the Purchase and Renewal Option Addendum to the Lease and shall be determined by multiplying the Lessor's Cost of the Aircraft by the percentage set forth opposite the applicable Early Purchase Date on Schedule No. 2-B." (Stip. ¶ 36; Ex. C, Sub-Ex. A., Definitions.).

24. The Aircraft Lease also contains a PURCHASE AND RENEWAL OPTIONS ADDENDUM that provides, in part: "(c) Purchase. Lessee shall have the option, upon the expiration of the Basic Term or the Renewal Term, to purchase the Aircraft upon the following terms and conditions: If Lessee desires to exercise this option, Lessee shall pay to Lessor on the last day of the Term, in addition to the scheduled Rent then due on such date and all other sums then due hereunder, in cash, the purchase price for the Aircraft, determined as hereinafter provided. The purchase price for the Aircraft shall be an amount equal to thirty (30) percent of the original Lessor's Cost of the Aircraft," plus other identified costs and expenses. In addition, it states that "Lessor will transfer, AS-IS, WHERE-IS, all of Lessor's interest in and to the Aircraft. Lessor shall not be required to make and may specifically disclaim any representation or warranty as to the condition of the Aircraft and other matters (except that Lessor shall warrant that it has conveyed whatever interest it received in the Aircraft free and clear of any Lessor's Lien)." (emphasis added) (Stip. ¶ 39, Ex. C, PURCHASE AND RENEWAL OPTIONS ADDENDUM, p. 6.)

25. On December 19, 2011, CMFG filed a Bill of Sale and Instrument of Conveyance with the FAA which provides that "FOR VALUE RECEIVED, CUNA MUTUAL INSURANCE SOCIETY ("Lessee") hereby conveys, assigns and transfers to PNC EQUIPMENT FINANCE, LLC, its successors and assigns ("Lessor"), all of its right, title and interest in the aircraft described below . . . . The Aircraft shall remain in the possession of Lessee pursuant to that certain Aircraft Lease (S/N 680-0296) dated as of the date hereof (the 'Lease') between Lessor and Lessee which is filed with the Federal Aviation Administration Aircraft Registry ("FAA") simultaneously herewith. The conveyance contemplated hereby is solely for the purpose of recording the Lease with the FAA and on the International Registry, registering the Aircraft with the FAA in the name of Lessee, and for the purpose of granting to Lessor a security interest in the Aircraft." In addition, the Instrument of Conveyance provides that "Lessee represents and warrants to Lessor that (i) Lessee is the lawful owner of the full title to the Aircraft and that Lessor will acquire by the terms of this Instrument of Conveyance an interest in the Aircraft...(iii) Lessee shall warrant and defend title to the Aircraft and indemnify Lessor from and against any and all claims of any person or entity of any kind whatsoever; and (iv) the Aircraft is in Lessee's possession..." (Stip. ¶ 43; Ex. E, Bill of Sale and Instrument of Conveyance.)

#### Software Lease

26. On December 13, 2011, Petitioners entered into what is titled a Master Lease Agreement with PNC Finance, in which Petitioners agreed to sell certain internally developed software to PNC Finance and then lease the software back for a set



rent (the "Software Lease"), subject to certain terms, limitations, and conditions. The stipulated software Master Lease includes several schedules, which convey "an interest in such Software" to PNC Finance "solely for the purpose of granting to Lessor a security interest in the Software. All Software in which an interest is conveyed hereby shall remain in the possession of the Lessee pursuant to the Lease." (emphasis added) (Stip. ¶ 44; Ex. F, Schedules.)

27. The Software Lease states that "Lessee desires to lease from Lessor the software (the 'Software') described in each Schedule executed pursuant to this Lease (each, a 'Schedule') incorporating by reference the terms and conditions of this Lease." (emphasis added) (Stip. ¶ 45; Ex. F, Software Lease, p. 1).

28. The Software Lease states "[t]he Software is proprietary to Lessee and is not subject to a license. With respect to any Collateral, Lessee has good title to, rights in, and/or power to transfer an interest in all of the same." (Stip. ¶ 48; Ex. F; § 3(e).)

29. The Software Lease states that "Lessee irrevocably authorizes Lessor to file UCC financing statements ('UCCs'), and other filings with respect to the Software or any Collateral." (Stip. ¶ 49; Ex. F, § 4(b).)

30. Section 5 of the Software Lease provides, "CONDITIONS PRECEDENT. Lessor's agreement to purchase and lease any Software under a Schedule, is conditioned upon Lessor's determination that all of the following have been satisfied as of the date of such purchase and lease...on the effective date of such Schedule Lessor shall have received a first priority security interest in the software described therein, free and clear of any Liens." (emphasis added) (Stip. ¶ 52; Ex. F, § 5.)

31. Similar to the Aircraft Lease, the Software Lease contains net lease-type provisions obligating Petitioners as Lessees to be responsible for taxes and insurance. (Stip. ¶¶ 55 & 61; Ex. C, §§ 9 & 11.)

32. Similar to the Aircraft Lease, the Software Lease provides in Section 10., "OWNERSHIP FOR TAX PURPOSES; GRANT OF SECURITY INTEREST; USURY SAVINGS. (a) Lessee and Lessor agree that for federal, state, and local sales and income tax purposes, the transaction contemplated hereby will be treated as a financing agreement and consisting of a loan from Lessor to Lessee secured by the Software and other Collateral, and Lessee shall be treated, for federal, state and local income tax purposes, as the owner of the Software, including being entitled to development deductions and cost recovery deductions under the Modified Accelerated Cost Recovery System of the Internal Revenue Code of 1986, as amended." (emphasis added) (Stip. ¶ 56; Ex. F, § 10(a).)

33. Section 10(c) of the Software Lease provides that "Lessee hereby collaterally assigns, grants, and conveys to Lessor, a security interest in and lien on all of Lessee's right, title and interest in and to all of the following (whether now existing or hereafter created, and including any other collateral described on any rider hereto; the 'Collateral'): (1) the Software described in such Schedule...The collateral assignment, security interest and lien granted herein shall survive the termination, cancellation or expiration of each Schedule until such time as Lessee's obligations thereunder and under the other Lease Documents are fully and indefeasibly discharged or until such time as a

particular item of identifiable Collateral is replaced.” (emphasis added) (Stip. ¶ 58; Ex. F, § 10(c).)

34. Section 10(e) of the Software Lease states that “Lessee hereby acknowledges and agrees that, to the extent that Lessor’s participation in any purchase and lease of an item or items of Software pursuant to this Lease constitutes a financing of Lessee’s acquisition of such item or items of Software, Lessee’s repayment of the amounts of such financing shall apply on a ‘first-in/first-out’ basis so that portions of the amounts of such financing used to purchase such item or items of Software shall be deemed repaid in the chronological order of the use of such amounts to purchase the same.” (emphasis added) (Stip. ¶ 60; Ex. F, § 10(e).)

35. Section 18 of the Software Lease provides, “END OF LEASE OPTIONS. . . . (c) Purchase. Lessee shall have the option, upon the expiration of the term of each Schedule, to purchase all (but not less than all) of the Software described on all Schedules executed hereunder upon the following terms and conditions: If Lessee desires to exercise this option, Lessee shall pay to Lessor on the last day of the term with respect to each individual Schedule, in addition to the scheduled Rent then due on such date and all other sums then due hereunder, in cash, the purchase price for the Software so purchased, determined as hereinafter provided. The purchase price for the Software shall be an amount equal to five (5) percent of the original Total Invoice Cost of such Software...Upon satisfaction of the conditions specified in this sub-part, Lessor will transfer, AS IS, WHERE IS, all of Lessor’s interest in and to the Software. Lessor shall not be required to make and may specifically disclaim any representation or warranty as to

the condition of such Software... (d) Notice of Election. ... If Lessee fails timely to provide such notice (of its election), without further action Lessee automatically shall be deemed to have elected to purchase the Software pursuant to sub-part (c) of this Section." (emphasis added) (Stip. ¶ 67; Ex. F, § 18.)

36. In accordance with Section 4(b) of the Software Lease, PNC Finance filed a Uniform Commercial Code (UCC) financing statement in which the software that was the subject of the Software Lease was referred to as "collateral," CMFG and CUMIS were identified as the "debtors," and PNC Finance was referred to as the "secured party." (Stip. ¶ 69; Ex. G, UCC financing statement.)

37. Section 10 of the Schedule Series A No. 1 to the Software Lease states, "The conveyance contemplated hereby is solely for the purpose of granting to Lessor a security interest in the Software. All Software in which an interest is conveyed hereby shall remain in the possession of Lessee pursuant to the Lease." (emphasis added) (Stip. ¶ 70; Ex. F, Schedule Series 1, 2, 3, § 10, p. 3.)

#### APPLICABLE LAW

##### Wis. Stat. § 77.51 Definitions

(7)

(a) "Lease or rental" means any transfer of possession or control of tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) for a fixed or indeterminate term and for consideration and includes:

1. A transfer that includes future options to purchase or extend.
2. Agreements related to the transfer of possession or control of motor vehicles or trailers, if the amount of any consideration may be increased or decreased by reference to the amount realized on the sale or other

disposition of such motor vehicles or trailers, consistent with section 7701 (h) (1) of the Internal Revenue Code.

(b) "Lease or rental" does not include any of the following:

1. A transfer of possession or control of tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) under a security agreement or deferred payment plan, if such agreement or plan requires transferring title to the tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) after making all required payments.
2. A transfer of possession or control of tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) under any agreement that requires transferring title to the tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) after making all required payments and after paying an option price that does not exceed the greater of \$100 or 1 percent of the total amount of the required payments.
3. Providing tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) along with an operator, if the operator is necessary for the tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) to perform in the manner for which it is designed and if the operator does more than maintain, inspect, or set up the tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d).

(c)

1. Transfers described under par. (a) are considered a lease or rental, regardless of whether such transfer is considered a lease or rental under generally accepted accounting principles, or any provision of federal or local law, or any other provision of state law.
2. Transfers described under par. (b) are not considered a lease or rental, regardless of whether such transfer is considered a lease or rental under generally accepted accounting principles, or any provision of federal or local law, or any other provision of state law.

(12) "Purchase" includes:

- (a) Any transfer of title, possession, ownership, enjoyment, or use by: cash or credit transaction, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever of tangible personal property or

items, property, or goods under s. 77.52 (1) (b), (c), or (d) for a consideration, including any 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.

- (b) A transaction whereby the possession of property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d) is transferred but the seller retains the title as security for the payment of the price.
- (14) "Sale" includes any of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property. . . .

**Wis. Stat. § 77.52 Imposition of retail sales tax.**

(1)

- (a) For the privilege of selling, licensing, leasing or renting tangible personal property at retail a tax is imposed upon all retailers at the rate of 5 percent of the sales price from the sale, license, lease or rental of tangible personal property sold, licensed, leased or rented at retail in this state, as determined under s. 77.522.
- (d) A tax is imposed on all retailers at the rate of 5 percent of the sales price from the sale, lease, license, or rental of specified digital goods and additional digital goods at retail for the right to use the specified digital goods or additional digital goods on a permanent or less than permanent basis and regardless of whether the purchaser is required to make continued payments for such right.
- (1b) All sales, licenses, leases, or rentals of tangible personal property or items, property, or goods under sub. (1) (b), (c), or (d) at retail in this state are subject to the tax imposed under sub. (1) unless an exemption in this subchapter applies.

## ANALYSIS

The Department assessed sales tax on the payments Petitioners made to PNC Finance under the terms of the Aircraft Lease and the Software Lease. Each Lease details the sale and lease-back of tangible property. The Department's assessment is grounded in Wis. Stat. § 77.52(1b), which states that lease and rental payments are subject to sales tax.

This Commission is tasked with interpreting Wisconsin tax law. Wis. Stat. § 73.01(4)(a). In this instance, the tax law is clear. There is no dispute that, if Petitioners' payments are made pursuant to a valid lease, a sales tax applies. The question is whether the contracts between Petitioners and PNC Finance create a valid sale-leaseback or whether they do not. The Department argues the form of the Leases is controlling - they do what they say they do, and the transactions are subject to sales tax pursuant to Wis. Stat. § 77.52(1b). Petitioners argue that the form of the Leases should be ignored and part of what the Leases achieve - the substance - should be determinative.

The parties filed previous cross-motions for summary judgment in 2021. On March 2, 2022, the Commission issued a written ruling and order in this matter denying summary judgment to both parties. The parties then conducted additional discovery, and in September of 2023, the parties again requested the opportunity to resolve the matter through summary judgment proceedings. At this stage, after the case had been pending at the Commission for almost four years, and despite the parties' stated interest in resolution through summary judgment, the parties were unable to submit any further stipulated facts. The parties did file Affidavits in Support of their respective Second

Motions for Summary Judgment: Petitioners filed a grand total of five Affidavits (three with their Second Motion for Summary Judgment, one with their Response Brief, and one with their Reply Brief), and the Department filed one Affidavit with its Second Motion for Summary Judgment.

### *Summary Judgment Standard*

The parties have filed simultaneous Motions for Summary Judgment. Summary judgment can only be granted when no material facts are in dispute. Wis. Stat. § 802.08(2). Although both parties have submitted "Proposed Findings of Fact," at this juncture, the Commission is not tasked with finding facts, as it would following a trial, but must apply the law to undisputed facts.

Summary judgment is warranted where "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." Wis. Stats. § 802.08(2). In addition, assessments made by the Department are presumed to be correct, and the burden is upon the Petitioners to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Dep' t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984); Wis. Stat. § 77.59(1).



### *Stipulated Evidence*

The parties have stipulated to the jurisdictional events<sup>2</sup> and the terms of the Leases<sup>3</sup>. However, in their briefs, each side then picks and chooses only the terms of the stipulated Leases which are helpful to their respective causes. The Department points to the form of the Lease which is named "Aircraft Lease," and which includes provisions regarding the sale and leaseback of that aircraft. Petitioners point to some provisions within the Lease which they assert make the Lease a refinancing agreement, and not a lease. Petitioners argue the substance of the Lease is really that of a refinancing agreement.

The Stipulation of Facts includes additional document submissions as attached exhibits. Exhibit D is a legal opinion from the FAA regarding the Lessee's (Petitioners') ability to register the plane. Exhibit E is a collection of documents beginning with an unsigned, undated Bill of Sale purporting to "sell, grant, transfer and deliver all rights, title, and interest in and to such aircraft" from Petitioners to PNC Finance. Exhibit E also includes (in order of submission) an unsigned aircraft registration application with Petitioners listed as the applicant, a printout of a recorded FAA conveyance of the aircraft (listed as collateral) from PNC Finance to Petitioners, and an Instrument of Conveyance of all "right, title, and interest in the aircraft" from Petitioners to PNC Finance. This latter conveyance states, however, that the conveyance is only for the purposes of recording the lease with the FAA and for granting the Lessor (PNC Finance) a security interest in the

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<sup>2</sup> Stip., Exs. A and B.

<sup>3</sup> Stip., Ex. C for the Aircraft Lease and Ex. F for the Software Lease.

aircraft. Finally, Exhibit G consists of a UCC Financing Statement, which indicates that Petitioners are debtors and PNC Finance is a secured party with the software serving as collateral.

The parties did not, however, stipulate as to what actually happened when the Leases were executed and implemented. Understandably, the Department did not do so because it asserts the Leases did what they said – established a sale-leaseback which results in taxable transactions. Therefore, in the Department’s view of this appeal, there was no need to stipulate to additional facts. The decision by Petitioners not to establish what actually happened is less understandable. Petitioners assert the substance of the Leases, and not the form, should govern the analysis of this appeal. Yet, when Petitioners argue the substance, they turn back to the Leases themselves – and not what actually happened after the Leases were executed. Although a prior decision of the Commission gave the parties a second chance to verify what actually happened after the Leases were executed, they failed to do so, deciding to rely on some of the language of the Leases, while simultaneously arguing that the Commission should ignore the language used in other parts of the Leases.

#### *Determinative Issue*

Petitioners object to the imposition of the sales tax based on their assertion that the Leases were, in reality, refinancing agreements and not leases. Petitioners are not permitted, under the precedent set forth in *Ladish Co., Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-326 (WTAC May 1, 1992), to object to taxation on this basis.

*Petitioners Are Bound by the Terms  
They Chose for Their Contracts*

The Department argues that the Leases are leases because the verbiage (Lease, Lessor, Lessee, rent) used throughout the Leases have a generally accepted meaning, and because the verbiage meets the definition contained in Wis. Stat. § 77.51(7)(a). In contrast, Petitioners have highlighted many terms of the Leases and their accompanying documents to show that the Leases should not be considered leases, based on all of the circumstances and provisions set forth in the Leases.

The Leases, by their written terms, purport to create simultaneously both sale-leaseback arrangements and refinancing agreements, each to the exclusion of the other. The Department argues that the inquiry in this appeal should go no further than the form of the leases, pointing to the explicit “Lessor [PNC Finance] agrees to lease the [assets] to Lessee [CMFG], and Lessee agrees to lease the [assets] from Lessor” language, and citing cases, such as *Ladish*, which have held taxpayers to the express terms they have chosen for their Leases. The Commission has previously ruled that “though the state could have rejected taxpayer’s form for the real substance if it had wanted to, it had no legal duty to probe into the shrouded substance and was entitled to accept at face value the form the taxpayer put on the transactions.” *Ladish* at pp 3-4. In other words, while the substance and realities analysis might lead to the conclusion that Petitioners’ leases were actually financing transactions, the Petitioners cannot make that claim. Only the Department can make such a claim, and in this matter, the Department has not chosen to do so.

The Department further argues that the statutory definition of “lease” as “any transfer of possession or control [of enumerated property] for a fixed or indeterminate term and for consideration”<sup>4</sup> demands the ineluctable conclusion that a sale-leaseback occurred, and tax is due from Petitioners. The Commission notes that our Legislature is perfectly capable of carving out exceptions to the statutory definition of “sale” for tax purposes, in that there are fourteen distinct exceptions to “sale” found at Wis. Stat. § 77.51(14g), many of which appear to pertain to transfers of property for business purposes. There is no such carve-out that applies to these sale-leaseback transactions in Wisconsin law.

Finally, the terms of the Leases are less than clear. The Leases do contain terms that conflict with a finding that they create a Lease. This is because the language of the Leases appears to have been designed to create competing inferences as to what the Leases actually achieve.

In their uphill battle against numerous references to the parties as “Lessors” and “Lessees” and to the contract payments as “rent,” Petitioners point to the fact that “rent payment” is a function of the value of the property, as would be the case for a refinance, that there are numerous mentions of PNC receiving only a security interest in the Assets, and that there are many provisions which refer to the Assets as “collateral.” On the other hand, the Leases contain provisions as to the return of the assets to PNC Finance or, in the alternative, allowing Petitioners the option to renew the leases for

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<sup>4</sup> Respondent’s 2023 Brief in Opposition to Petitioners’ 2023 Motion for Summary Judgment, at page 9.

additional years upon expiration of the lease periods. Petitioners could not “return” the assets to PNC Finance had PNC Finance not first owned and then transferred them to Petitioners. Language in the Leases even appears to allow Petitioners to purchase the Assets at the end of the lease term. Petitioners could not purchase the Assets from PNC Finance if Petitioners already own the Assets. There are additional paragraphs in the Stipulation in which Petitioners admit that sales occurred. *See* Stip. ¶¶ 14 and 44. Their agreement to these stipulated facts increases the grade of the hill the Petitioners are climbing to the point that they simply cannot get where they would like to go.

Adding to the analytical disarray are the many contract terms which are modified with variations of “subject to the terms, limitations, conditions and all exhibits and addendum of which are incorporated herein by reference.” This modification leads to disagreement between the parties as to which evidence is to be considered.

Although the Department has argued that the Commission does not need to inquire beyond the four corners of the Leases, the Department does provide additional argument based on Exhibits attached to the Stipulation of Facts outside the Leases. Exhibits C and F include documents in which Petitioners appear to “sell” all “rights, title and interests” to PNC Finance, as Purchaser. However, these same documents also refer to the Assets as “collateral” and contain language describing the transfers as being solely for purposes of creating security interests.

The most glaringly conflicting terms are those entitled “Ownership for Tax Purposes” found in Section 16(b) of the Aircraft Lease and Section 10 of the Software Lease. (Stip. ¶¶ 30 and 56.) The accompanying explanation from Petitioners is that these

Leases were meant to convince other governmental entities that a sale occurred, while the Leases were meant to convince government taxing authorities that no true sale occurred. The Commission would prefer that a transaction be one thing, and that that thing be what the controlling contract calls it on its face, but we have read the Petitioners' submissions on the history of taxation caselaw on this point. In a light most favorable to Petitioners, they argue that, under a tax law analysis applying GAAP,<sup>5</sup> a transaction can properly be considered a refinancing transaction, while the selfsame transaction can simultaneously be considered a sale-leaseback under an SAP<sup>6</sup> analysis. The Commission is persuaded that no outright fraud is intended by the parties to the underlying Leases, but we do not find that this distinction answers the ultimate question in dispute in this appeal. Petitioners ask the Commission to determine whether the Leases actually achieved either a sale-leaseback or a refinancing of the aircraft and software under applicable Wisconsin statutes in order to either uphold or reverse the Department's determination that tax is due from Petitioners. We hold that Petitioners cannot object to taxation imposed on the form of contract they chose. Nonetheless, we address the Petitioners' argument below. To make the determination requested by Petitioners, the statutory definitions of "lease" and "sale" contained in Wisconsin law are controlling.

### *Substance and Realities*

Petitioners argue that the Commission cannot rule on isolated words contained in the Leases alone. Instead, the Commission is urged to determine the nature

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<sup>5</sup> Generally Accepted Accounting Principles

<sup>6</sup> Statutory Accounting Principles

of these financial transactions in order to determine whether the Department properly assessed sales tax on the payments from Petitioners to PNC Finance. This is a through the looking glass moment for the Commission, where the drafters of the contracts urge the Commission to pay no attention to the generally accepted meaning of the words chosen by the drafters, but we will persist.

First, regardless of the labels attached to transactions by parties, Wisconsin courts have long looked to the substance of transactions in taxation matters. *Cliff's Chemical Co. v. Wisconsin Tax Commission*, 193 Wis. 295, 214 N.W. 447 (1927); *Miller v. Wisconsin Tax Commission*, 195 Wis. 219, 221, 217 N.W. 568 (1928). The Wisconsin Supreme Court has stated that it will make determinations of taxability based on the facts of a given case viewed as a whole and that it is the "substance and realities" of a taxpayer's activities that are determinative of the Department's power to tax. *Dep't of Revenue v. Sterling Custom Homes Corp.*, 91 Wis. 2d 675, 679, 283 N.W.2d 573, 575 (1979). In *Sterling Custom Homes*, the issue was the taxability of the taxpayer's real property construction activities; the court examined the taxpayer's everyday work activities to determine that its actual activities were entitled to the real property exemption to the sales and use tax.

This Commission has employed the "substance and realities" test as well. For example, in *Manpower Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-223 (WTAC 2009), the Commission determined that, in substance and reality, temporary services were not the same thing as the services the Wisconsin Statutes specifically tax, and thus were not subject to the sales tax on services.

While the inquiry usually delves into activities (e.g., the construction work performed in *Sterling Custom Homes* and the details of the services provided by the temporary employees in *Manpower*), the Commission has also investigated legal relationships to determine the substance and realities. In *Sullivan Bros. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-600 (WTAC 2012), the Commission used the substance and realities test to determine that a wholly owned corporate subsidiary did not qualify as a customer in the context of a sales tax exemption.

The Stipulation of Facts in this appeal makes it immediately apparent that the terms of the Contracts are self-contradictory. Petitioners' counsel concedes this point ("The parties intentionally included terms or conditions in the agreements that were inconsistent with their classification as refinancing transactions solely to satisfy the statutory accounting requirements for converting the assets that were the subject of the transactions from non-admitted to admitted assets for statutory accounting purposes." Pet. 2021 Brief in Support, p. 38.) The goal of the Leases was simultaneously to convince insurance regulators that Petitioners sold the aircraft and the software and to convince the Department of Revenue that Petitioners refinanced, and did not sell, the same assets.

Petitioners have submitted PNC Finance marketing materials to bolster their position that these Leases served the legitimate business purpose of meeting insurance regulation guidelines, and that the Leases were not part of a tax avoidance scheme. The submitted marketing materials demonstrate Petitioners' reliance on PNC Finance's advertised expertise and flexibility in "structuring deals" to "maximize tax benefits, preserve capital, and improve cash flow." The evidence submitted in favor of



this argument does not lead to an easy answer under a substance and realities analysis. The Commission has long held that taxpayers are ultimately responsible for any strategies employed with regard to taxation, regardless of any demonstration of reliance on professional advice. *Kryshak v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-084 (WTAC 1989).

The Commission in this appeal will follow the precedent set forth in *Ladish*, which precludes the Petitioners from drafting an intentionally muddy contract, and then claiming that the Department must disregard the portions of the contract which meet the statutory definition of "sale" and "lease." To be clear, the Leases each contain a clause in which the parties to the Leases declare that, regardless of whatever the Leases actually accomplished, "for tax purposes" the deal is a refinancing, not a sale-leaseback. A reader can infer that, for tax purposes, if the deal is a refinancing, no sales tax would apply to the "rent" paid under the Leases. However, a clause stating the parties' intent for tax purposes cannot bind the Respondent, since the Respondent was not a party to any of the underlying Leases. Additionally, there is no precedent for two private entities to dictate the Wisconsin tax treatment of a transaction by declaring how their contract for the transaction shall be interpreted for tax purposes.

Petitioners did transfer title to the airplanes to PNC Finance. (Stip. ¶ 43; Ex. E, p. 3) They argue that that single fact does not provide a neat answer to the nature of the transaction, because precedent developed in the Federal tax law arena has specifically held that transfer of legal title alone does not define a transaction as a sale, where all of the benefits and burdens of ownership of the property fall on the taxpayer, and none

accrue to the “buyer.” PLR 9307002 at 6; *Helvering* at 254. Essentially, the argument goes, the terms of the sale were so unfavorable to Petitioners, that the sale cannot be considered a sale in a tax law analysis. We note that decisions regarding Federal tax law can be persuasive to matters before the Commission, but that Federal precedent, interpreting Federal statutes, is not controlling for the Commission, which must make its determination under Wisconsin statutes and precedent.

The terms of the Leases of the aircraft and the software were unfavorable to Petitioners. In fact, the terms of the Leases were so unfavorable to Petitioners, that Petitioners argue the transactions cannot be considered true Leases. Unfortunately for Petitioners, the reasoning of the *Ladish* case does not permit a taxpayer to insist that the Department use a substance and realities analysis to determine the taxability of payments made under a lease, when the taxpayer has drafted a contract which has the form of a sale and subsequent leaseback and also contains provisions which could, under a substances and realities analysis, permit the contract to be treated as a financing transaction. The Commission agrees that the terms of the Leases are not favorable to Petitioners, but perhaps, in light of all that was going on in the insurance industry at the time the Leases were entered into, these Leases were the best Petitioners could bargain for. Ultimately, regardless of why the Leases read as they do, the Commission will make its decision based on the form the Petitioners chose for their Leases. Any other analytical framework would only encourage the drafting of inherently unclear contracts, and would likely lead to an unruly, near to impossible to administer, required analysis for the Department to apply to the returns filed by taxpayers.

## Summary

In Wisconsin, lease and rental payments are subject to sales tax under Wis. Stat. § 77.52(1b) unless an exemption applies. Based on an analysis of the Leases, and in spite of some of the provisions in the Leases drafted by Petitioners, to which they were a party, the Leases were, indeed, Leases. Accordingly, the tax assessed by the Department is due from Petitioners.

We do not stand in the insurance regulators' shoes, so it is not for us to say whether Petitioners' Leases achieved their desired result for insurance regulatory purposes. The Commission acknowledges that significant caselaw has developed over the past eight or nine decades in the federal arena regarding bona fide sale-leasebacks. Ultimately, the Commission here determines issues of state taxation. We find that a valid sale-leaseback did occur.

CONCLUSION OF LAW

1. Petitioner's Leases are subject to Wisconsin sales tax pursuant to Wis. Stat. § 77.52(1b).


ORDER

Based on the foregoing reasoning and caselaw, **IT IS ORDERED** that

1. Summary judgment is granted in favor of Respondent.
2. Summary judgment is denied as to Petitioners.

Dated at Madison, Wisconsin, this 6<sup>th</sup> day of August, 2024.

WISCONSIN TAX APPEALS COMMISSION

  
\_\_\_\_\_  
Elizabeth Kessler, Chair

  
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Jessica Roulette, Commissioner

  
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Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION