BY THE COURT:

DATE SIGNED: February 1, 2024

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

STUBHUB, INC.,

Petitioner,

v. Case No. 23-CV-665

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER

INTRODUCTION

StubHub, Inc. and the Wisconsin Department of Revenue ("DOR") both seek Wis. Stat. ch. 227 review of a decision of the Wisconsin Tax Appeals Commission ("the Commission") which found that between 2008 and 2013, StubHub owed unpaid tax on the sale of $154 million in tickets for admission to Wisconsin events. StubHub contends it should not have to pay sales tax on tickets because, in its view, it made no sales and neither served as the agent nor representative of the ticket sellers who did make sales. In response, DOR argues that StubHub not only owes tax, but that the Commission erred by not imposing a 25% penalty for StubHub's failure to timely pay. Both StubHub and DOR now ask the Court to modify or set aside the Commission's decision.

There is no dispute that StubHub helped others to sell tickets by running an online marketplace. The dispute here is whether helping other people sell tickets means StubHub was selling tickets itself or, if not, whether StubHub was the agent and/or representative of whoever was selling tickets. Under the version of Wisconsin's tax code that existed between 2008 and 2013, the Court concludes that reasonable persons could disagree about how to resolve that dispute. Simply put, reasonable persons could disagree whether terms like "selling" and "representing sellers" apply to "running an online marketplace." The statutes using those terms are, in this context, ambiguous and must be interpreted in StubHub's favor. Furthermore, after the audit period in this case ended, the legislature chose to create new tax rules to cover online "marketplace providers" like StubHub. These amendments suggest StubHub never owed taxes because there would have been little reason for the legislature to amend the law unless the amendment changed Wisconsin's rules for imposing sales tax.

In sum, reasonable persons can disagree about whether StubHub owed sales tax between 2008 and 2013. In tax cases, however, ambiguity must favor the taxpayer, so the Court concludes the Commission erred by imposing sales tax against StubHub. The Court must therefore set aside the Commission's decision.

BACKGROUND

I. StubHub operates an online marketplace

This is a review under Wis. Stat. ch. 227. A court's role under ch. 227 "ordinarily involves only a review of the proceeding before the agency, instead of a trial of fact issues." *Wisconsin's Env't'l Decade, Inc. v. PSC,* 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977); *see* Wis. Stat. § 227.57(1). In their proceeding before the Commission, StubHub and DOR stipulated to a lengthy

series of facts. Stipulation of Facts, dkt. 9:48-69.[1]

From 2008 through 2013, "StubHub operated an online marketplace where tickets to sporting, events, concerts, theater and other live entertainment events were bought and sold." *Id.*, ¶¶1, 7. Over the course of those six years, ticket sellers[2] used StubHub's online marketplace to sell about $153 million in tickets for events that took place in Wisconsin. *Id.*, ¶¶17-18. There is "no evidence in the record that … any of the ticket buyers from the StubHub online marketplace independently paid any sales or use tax on their purchases." *Id.*, ¶19. StubHub paid no taxes on these sales, either. *Id.*, ¶20.

To use StubHub's online marketplace, both sellers and buyers had to register an account with StubHub. *Id.*, ¶49. Registering an account required users to accept StubHub's User Agreement. *Id.* The seller then took three steps to list tickets for sale on the marketplace:

(1) identify the event through StubHub's online event catalog, or if none existed, ask StubHub to add a new event to the catalog,

(2) enter details about the ticket, including venue, date, time, seat location, delivery method, or any other relevant details, and,

(3) set the price.

Id., ¶51. Tickets listed this way would remain available on the marketplace unless withdrawn by the seller or until StubHub received payment from a buyer. *Id.*, ¶53. Before receiving payment, the marketplace did not limit sellers' opportunity to withdraw the listing, change the ticket price, or

[1] The record contains several thousand pages of documents. It is filed as fifteen separate docket entries, plus a certification by the Commission's clerk. Dkt. 7-23. The parties generally cite to the record by docket number, so the Court will too.

[2] The stipulated facts refer to the people listing tickets on StubHub as "ticket holders." The Court refers to these people as "ticket sellers" to prevent confusion and, consistent with the Court's conclusion that StubHub did not sell tickets, to more clearly distinguish StubHub from the people listing tickets on its website. This shorthand should not imply that "ticket sellers" are, in fact, sellers subject to Wisconsin sales tax.

try and sell their ticket elsewhere. *Id*., ¶57. StubHub did not buy or sell anything on this marketplace itself—it never paid for any tickets to sell on its own behalf or to hold for future sales. *Id*., ¶58.

Buyers on the marketplace had to pay the price set by the seller plus StubHub's fees. *Id*., ¶79. These fees included a percentage of the sale plus a "logistics fee that varied …." *Id.*, ¶¶54, 79. After taking its cut, StubHub then returned the remainder of the payment to the seller. *Id.*, ¶52. For hard copies of tickets, StubHub also provided instructions for ticket sellers how to mail or deliver to the buyer. *Id*., ¶66. For electronic tickets, StubHub provided direct access to buyers through its website. *Id*., ¶67. As an added form of protection for buyers, StubHub guaranteed to find "suitable replacement tickets or issue a full refund" if the buyer did not receive tickets in time, if the tickets were not valid, or if the received tickets were not what the buyer ordered. *Id*., ¶61.

StubHub did more than just operate this marketplace. It also owned a subsidiary called Last Minute Transactions ("LMT"). *Id*., ¶23. LMT's purpose was to operate:

> [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 … LMT was obligated to accept and hold tickets for StubHub users and to return unsold tickets as instructed by StubHub.

Id., ¶25. Like StubHub, LMT did not have ownership of any tickets sold via StubHub's online marketplace. *Id*., ¶58.

StubHub also maintained formal relationships with Wisconsin sports teams. It contracted with Learfield Sports, an entity "acting on behalf of the University [of Wisconsin"] to provide advertising. *Id*., ¶36. That agreement "provided StubHub certain promotional and advertising opportunities during … football, men's basketball and men's hockey games." *Id.* The agreement further guaranteed "that StubHub would be the exclusive secondary ticketing provider of the UW

…." *Id.* StubHub maintained similar agreements with the Milwaukee Brewers. *Id.*, ¶¶46-47. StubHub sometimes referred to both the UW sports teams and the Brewers as "integrated partner teams and venues." *Id.*, ¶68. As part of that partnership, StubHub offered "barcode integration," which meant the sports teams could sell tickets on StubHub by providing "only the barcode numbers for their tickets." *Id.*, ¶69.

II. DOR audits StubHub.

On February 10, 2014, DOR told StubHub it would be auditing its sales and use tax payments. *Id.*, ¶87. At the end of the audit, on March 10, 2016, DOR concluded StubHub owed $8,495,937.50 in back taxes, plus another $8,567,136.15 in interest, penalties, and fees. *Id.*, ¶10. DOR further concluded that StubHub negligently ignored guidance published in two tax bulletins "indicating that ticket brokers such as StubHub, Inc. were retailers of admission tickets … and should charge Wisconsin sales or use tax." *Id.*, ¶93. DOR assessed a 25% negligence penalty. *Id.*

StubHub appealed DOR's tax and penalties assessment to the Commission on November 16, 2016. *Id.*, ¶13. On February 28, 2023, the Commission granted summary judgment in favor of DOR. Dkt. 22:146-193. The Commission agreed with DOR that StubHub "was a retailer providing the service of selling taxable admissions at retail in Wisconsin …." *Id.* at 192. The Commission did not agree, however, that penalties were appropriate—it concluded DOR's "imposition of penalties in this appeal is not supported …." *Id.* In total, the Commission made these four conclusions of law:

> "1. …StubHub was a retailer providing the service of selling taxable admissions at retail …."
>
> "2. … StubHub was liable in the alternative with the ticketholders listing tickets on StubHub's online marketplace for the sales tax …."

> "3. … StubHub has not met its burden of proving [DOR's] sales/use tax assessment was incorrect."
>
> "4. [DOR'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."

Commission Final Decision, dkt. 22:192.

On March 15, 2023, StubHub appealed the Commission's decision to this Court. Dkt. 2. The Commission filed its extensive record on March 28, 2023. Dkt. 7-22. Meanwhile, in a different branch of the Dane County Circuit Court, DOR also appealed the Commission's decision. *See* Petition, Case No. 22-CV-784 (Dane Cnty. Cir. Ct., Mar. 30, 2023). The parties stipulated to consolidate the two cases, which the Court has consolidated. Order for Consolidation (Apr. 11, 2023), dkt. 26.[3]

Because both parties appeal the Commission's decision, the Court's briefing order invited additional sur-reply briefing. Briefing Order (May 4, 2023), dkt. 34. The parties have now completed that briefing.

LEGAL STANDARD

This is a review of a decision of the Wisconsin Tax Appeals Commission. Judicial review of an agency decision "shall be confined to the record …." Wis. Stat. § 227.57(1). A court shall affirm an agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). In doing so, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved …." Wis. Stat. § 227.57(10). However, "the court shall accord no deference to the agency's interpretation of law." Wis. Stat. §

[3] Dane County Local Rule 312(2) provides that, "[i]f the consolidation is granted, the cases shall be assigned to the judge with the earliest filed case …." The now-consolidated case remains in this branch because StubHub filed its appeal two weeks before DOR filed its appeal before Judge Mitchell.

227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3 n.3, 382 Wis. 2d 496, 914 N.W.2d 21 ("a majority of the court agrees we should no longer defer to administrative agencies' conclusions of law ….").

"The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). In cases challenging tax determinations, like this one, the tax determination "shall be presumed to be correct." Wis. Stat. § 77.59(2). The challenging party can satisfy its burden, among other ways, by showing that "the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action …." Wis. Stat. § 227.57(5).

DISCUSSION

The Commission's decision interprets several Wisconsin tax statutes. StubHub and DOR both say the Commission erroneously interpreted those statutes. According to StubHub, the Commission erred by making StubHub pay sales taxes on tickets it never sold. According to DOR, the Commission correctly concluded that StubHub owed sales tax for four different reasons.

First, DOR contends the general definition of "sale" in Wis. Stat. § 77.51(14) (2012-13) applies to transactions made on StubHub's website, so for various reasons, StubHub must also have been the seller. Second, DOR points to the specific definition of "sale" in Wis. Stat. § 77.51(14)(m) (2012-13). That statute says that a sale occurs whenever "a person's books and records show the transaction …." StubHub recorded its users' activity, so DOR concludes this statute also requires StubHub pay tax. Third, DOR asserts StubHub acted as the agent of ticket sellers, so even if StubHub did not sell anything, it should share the sellers' tax liability under the agency law doctrine of the undisclosed principal. Fourth, and finally, DOR characterizes StubHub as the "representative" of high-volume ticket sellers. Under Wis. Stat. § 77.51(13)(c) (2012-13), a

representative can assume the tax liability of a represented seller, so DOR concludes StubHub may, at a minimum, owe taxes on sales made by StubHub's high-volume business partners.

Resolving this dispute requires the Court to interpret Wisconsin's sales tax statutes. To do so, the Court first sets forth basic principles applicable to the review of tax statutes, along with the statutory framework DOR relies on for its claim that StubHub owes taxes and penalties. The Court then turns to the specific statutes and the parties' arguments for how those statutes apply to StubHub, either directly or through an agency relationship between StubHub and ticket sellers. After doing so, the Court concludes StubHub did not owe any sales tax and, accordingly, the Court does not proceed to also determine whether StubHub should have paid additional penalties or late fees.

I. Wisconsin may only impose taxes by unambiguous language.

To resolve the parties' dispute requires interpreting the specific statutes under which DOR says StubHub owes taxes. Wisconsin courts have "repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). In addition to the plain meaning of the text, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶46. When the meaning of the statute is plain, "there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.*

Sometimes a statute has no plain meaning. A statute is ambiguous if the statutory language reasonably gives rise to different meanings:

> The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute to determine whether well-informed persons *should have* become confused, that is, whether the statutory language *reasonably* gives rise to different meanings. Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.

Id., ¶47 (emphasis in original, internal citations, quotations marks, and ellipses omitted).

In most cases, the reviewing court proceeds to resolve an ambiguity by examining "the scope, history, context, and purpose of the statute." *Id*., ¶48; *see Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶13, 18, 293 Wis. 2d 123, 717 N.W.2d 258. In tax cases, however, ambiguous statutes require no further interpretation because "where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *DOR v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48-49, 257 N.W.2d 855 (1977); *Kollasch v. Adamany*, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981). This has long been Wisconsin's rule:

> A due regard for individual rights and the plainest principles of justice, requires that [tax statutes] should have only the effect which the legislature clearly intended that they should have; and that, in construing them, all reasonable doubts as to such intent should be resolved in favor of the citizen.

Dean v. Charlton, 27 Wis. 522, 526 (1871).

II. The Commission erroneously interpreted provisions of law.

A. The Commission erred by imposing sales tax under Wis. Stat. § 77.52 because reasonable persons could disagree about whether StubHub "sold" tickets.

1. Wis. Stat. § 77.52 imposes sales tax on sellers.

The Court turns next to the basic framework under which Wisconsin imposes a sales tax. Wisconsin taxes many kinds of sales, including the "sale of admissions to amusement, athletic,

entertainment or recreational events or places ….” Wis. Stat. § 77.52(2)(a)2.a. (2012-13).[4] The person *selling* the admission has to pay this tax: this is true regardless of whether the person is a “person selling” or a “retailer,” a broadly defined term that includes “every seller who makes any sale ….” Wis. Stat. § 77.51(13)(a) (2012-13).[5] “Sales” is also defined broadly by the tax code. A “sale” generally means “the transfer of the ownership of, title to, possession of, or enjoyment of … services ….” Wis. Stat. § 77.51(14) (2012-13).[6] To summarize, these statutes work together to

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[4] DOR audited StubHub for the six-year period ending December 1, 2013. Accordingly, the Court generally cites substantive parts of Wisconsin’s tax code as they existed in 2013.

Wis. Stat §§ 77.52(2)(a) and 77.52(2)(a)2.a. (2012-13) read, in relevant part:

> (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% 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. a. Except as provided in subd. 2. b. and c., the sale of admissions to amusement, athletic, entertainment or recreational events or places except county fairs, the sale, rental or use of regular bingo cards, extra regular cards, special bingo cards and the sale of bingo supplies to players 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.

[5] Retailers are “sellers” by definition, so whether StubHub owed sales tax as a “retailer” under § 77.51(13) or for “selling” under § 77.52(2) does not matter. To avoid unnecessary complexity or jargon, this decision generally frames the discussion as whether StubHub was “seller” rather than a “retailer.”

Wis. Stat. §§ 77.51(13) and 77.51(13)(a) (2012-13) read, in full:

> (13) “Retailer” includes:
>
> (a) Every seller who makes any sale, regardless of whether the sale is mercantile in nature, of tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d), or a service specified under s. 77.52 (2) (a).

[6] Wis. Stat. § 77.51(14) (2012-13) reads, in full:

tax persons selling tickets.

2. Neither the general definition of a "sale" nor comparison to dissimilar taxable businesses show StubHub unambiguously owed tax.

DOR's first argument relies on the broad definition of a "sale" in Wis. Stat. § 77.51(14) (2012-13). According to DOR, the "definition of a sale … renders StubHub a seller." DOR Resp. Br., dkt. 39:14. That definition of "sale" reads, in full:

> "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: …. [subsections (a) through (h) contain specific examples of "sales."]

Wis. Stat. § 77.51(14) (2012-13). From its reading of this statute, DOR concludes "[t]here is no real dispute that qualifying 'transfers' occurred here." DOR further concludes that "StubHub's activity qualified it as a seller under this provision." DOR Resp. Br., dkt. 39:14.

The Court does not understand DOR's reliance on this statute because everybody agrees that ticket transfers took place. StubHub Reply Br., dkt. 44:21 ("there is no dispute that a sale took place."). After all, transferring tickets was the entire point of StubHub's online marketplace. But the undisputed *existence of the sales* does not help determine *who made the sale*. Recall that StubHub can only owe sales tax if it is either a "retailer"—which means a "seller who makes any sale"—or a "person selling" tickets for admission.

To show StubHub sold tickets, DOR does not actually rely on Wis. Stat. § 77.51(14) or any other statute. It instead begins by comparing the actions of StubHub with the ticket sellers

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(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:

using its marketplace. Specifically, DOR highlights the following aspects of StubHub's business model to explain why StubHub, and not the individual ticket sellers, was the one that made the sales:

- StubHub created the marketplace website.
- StubHub displayed the tickets for sale to buyers.
- StubHub marketed its services.
- StubHub charged, then received, buyers' payment for purchased tickets.
- StubHub paid ticket sellers their share.
- StubHub helped deliver tickets by providing shipping labels, by operating the Last Minute Transactions service, by hosting electronic versions of purchased tickets online, and by using barcodes provided by either the University of Wisconsin and the Milwaukee Brewers to generate tickets for select events.
- StubHub guaranteed to look for replacement tickets or to provide refunds.

DOR Resp. Br., dkt. 39:12-13. In contrast, DOR says ticket sellers were "mostly passive ticketholders" who "did nothing to facilitate the sale process" except for the following:

- Ticket sellers selected events on StubHub for which they had tickets.
- Ticket sellers entered details about the tickets.
- Ticket sellers set the price of the tickets.
- Ticket Sellers received their share of the monetary proceeds.
- Ticket sellers delivered hard copy tickets to the buyer.

DOR Resp. Br., dkt. 39:15. Based on this comparison, the Court understands DOR's position to be that StubHub must have made the ticket sales because "StubHub played a greater role." DOR Resp. Br., dkt. 39:15. DOR does not cite authority that might show why this sort of comparative analysis to determine the "greater role" would be necessary or even helpful to its cause. To prevail,

DOR had to show that Wisconsin taxed StubHub "by clear and express language …." *Kollasch*, 104 Wis. 2d at 561. It probably should not be this difficult to decide whether a clear and express tax applies to a particular business. But in any event, DOR further tries to support this comparative analysis by pointing to examples of tax liability in cases involving consignment stores, hotel booking website, auctioneers, and vending machines.

DOR next examines consignment stores.[7] To bolster its conclusion that StubHub sold the tickets listed by others on the StubHub website, DOR cites two past decisions of the Commission imposing tax liability against consignment stores for selling consigned goods. *See* Wis. Stat. § 73.015(3) (generally, "a conclusion of law or other holding in any decision or order of the tax appeals commission may be cited by the commission or the courts as authority.").[8] In *Hargarten v. DOR*, Wis. Tax Rptr. (CCH) ¶ 201-369 (WTAC 1977), *aff'd* Wis. Tax Rprt. (CCH) ¶ 201-430 (Wis. Cir. Ct. Dane Cnty. Oct. 10, 1977), the Commission found a consignment store had made sales based on the fact it had "negotiated or arranged for a sale" and "procured a purchaser" for consigned goods. The Commission reached a similar decision in *YMCA of Beloit, Wis. v. DOR*, Wis. Tax Rptr. (CCH) ¶ 202-698 (WTAC 1986), in which bike equipment sold on consignment constituted taxable sales. As StubHub points out, however, neither case is particularly useful for understanding whether StubHub sold tickets because neither consignment store was remotely similar to StubHub's website. In *Hargarten*, for example, the Commission found that the

[7] Consignment means "goods that are sent somewhere, esp. in a single shipment, usu. to be sold." *Black's Law Dictionary* (11th ed. 2019).

[8] Neither party tries to square the legislature's invitation to consider Commission decisions with our supreme court's holding that "we should no longer defer to administrative agencies' conclusions of law …." *Tetra Tech*, 2018 WI 75, ¶3 n.3. In any event, StubHub does not object to DOR's citation, so the Court assumes it may consider past Commission decisions as persuasive authority. Considering these decisions will not materially alter the Court's conclusions in this particular case.

consignment store appraised and set the price for its goods while the "owner of the goods to be sold does not participate in any way …." In contrast, StubHub neither appraised nor priced its tickets, the owners of which had to directly participate in the sale by listing, detailing, and pricing their ticket.

DOR next turns to the court of appeals' examination of tax liability for an online hotel booking service in *DOR v. Orbitz, LLC,* 2016 WI App 22, ¶22, 367 Wis. 2d 593, 877 N.W.2d 372, *abrogated by Tetra Tech,* 2018 WI 75, ¶3 n.3. That case involved a different tax statute—Wis. Stat. § 77.52(2)(a)1., which imposes sales tax on the "furnishing of rooms"—and an entirely different set of facts. Suffice it to say there are differences between furnishing hotel rooms and selling tickets. The *Orbitz* court deferred to the Commission's conclusion under the standard of review applicable prior to *Tetra Tech,* then consistent with the Commission, concluded that Orbitz did not owe sales tax. The court of appeals reasoned that whatever role it had in providing a marketplace for hotel reservations, Orbitz did not unambiguously participate in the "furnishing" of any room:

> We agree with the Commission that it is not clear … whether "furnishing," as the term is used in that subdivision, encompasses those, who like Orbitz, facilitate reservation arrangements with hotelkeepers and motel operators. …

Orbitz, 2016 WI App 22, ¶24. The court explained that:

> [T]he omission of the words "[t]he sale of" in subdivision 1, indicates that the legislature did not intend to impose a tax on those selling the services of making hotel reservations but not actually furnishing the accommodations.

Id.

According to DOR, this reference to an omitted phrase means that "the court strongly implied," absent that omission, Orbitz would have been subject to sales tax. DOR Resp. Br., dkt. 39:24. In other words, DOR thinks a statute taxing "*the sale of* furnishings" would have

encompassed Orbitz' hotel booking marketplace, so a statute taxing "the sale of admissions"—which is exactly what Wis. Stat. § 77.52(2)(a)2.a. (2012-13) taxes—must apply to StubHub's ticket marketplace.[9] This comparison is not persuasive for two reasons. First, the court of appeals in *Orbitz* relied, at least in part, on deference to an administrative agency. The Court cannot tell from the text of that opinion how much that deference—which *Tetra Tech* now forbids—influenced the court of appeals' conclusion. Second, the comparison is not persuasive because there are marked differences between the two online marketplace providers: Orbitz could access the inventory of hotels' rooms and could also determine prices while StubHub could do neither. Orbitz' hypothetical tax responsibilities under a modified version of § 77.52(2)(a)1. therefore shed little light on StubHub's tax responsibilities under § 77.52(2)(a)2.a. (2012-13).

The third source which DOR relies on for characterizing StubHub as a ticket seller is Wis. Stat. § 77.51(13)(b), which defines auctions as one type of a taxable sale. To repeat, this argument is not persuasive because StubHub does not dispute that sales took place and, even if StubHub did, an alternative rationale for the *existence of a sale* does not help the Court to understand whether Wis. Stat. § 77.52(2)(a)2.a. (2012-13) unambiguously defines StubHub as a ticket *seller*. In any event, DOR's point here appears to be that a business need not own the property it sells, but nobody disputes that proposition, either. In StubHub's words, "the fact that StubHub did not own the tickets is just one of many material facts …." StubHub Reply Br., dkt. 44:15.

Fourth, DOR analogizes StubHub to a vending machine, arguing as follows:

[9] StubHub criticizes DOR's citation to the court of appeals' commentary as dicta. StubHub Reply Br., dkt. 44:16. StubHub's criticism is misplaced. Wisconsin's lower courts cannot disregard a statement from a higher court as dictum. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 ("to uphold the principles of predictability, certainty, and finality, the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum."); *see also Wis. Justice Initiative v. WEC*, 2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring and A.W. Bradley, J., dissenting) (discussing the role of dicta in Wisconsin case law).

> [Vending machines] are alike in enough key respects that shed light on the taxability question here. Much like StubHub, vending machine operators receive product from third parties, make it available for sale through their platform, and collect sales proceeds from buyers. That arrangement has traditionally subjected vending machine operators to sales taxes, as the supreme court held in *Servomation Corp. v. Department of Revenue*, 106 Wis. 2d 616, 317 N.W.2d 464 (1982), which indicates StubHub similarly can be held liable.

DOR Resp. Br., dkt. 39:26-27. Assuming vending machine owners have traditionally paid sales taxes, and further assuming the Court shared DOR's assessment that vending machines in 1974 are like online ticket marketplaces in 2013, the Court does not agree the reasoning of *Servomation Corp.* applies to this case. There, the supreme court explained, the vending machine owner was a retailer subject to Wisconsin sales tax because "[i]t retained ownership and control of the machines and possessed the only keys to them." 106 Wis. 2d at 620. Similar reasoning does not apply here because StubHub neither owned nor controlled the tickets listed on its website by ticket sellers.

In sum, DOR believes StubHub must have sold tickets based on comparisons between StubHub and individual ticket sellers, or between StubHub and various businesses like auctioneers and vending machine operators. These comparisons do not convince the Court that Wis. Stat. § 77.52(2)(a) (2012-13) unambiguously imposed a sales tax on StubHub according to the stipulated facts of record.

Having carefully examined the facts of record and the statutory text, the Court disagrees with DOR's interpretation. Wis. Stat. § 77.52 (2012-13), which imposes sales tax only on the person selling, is ambiguous in this context because reasonable persons could disagree about whether StubHub was "selling" anything by running an online marketplace for other ticket sellers. The Court expresses no opinion about whether that statute might be ambiguous in any other context. *Teschendorf,* 2006 WI 89, ¶20 ("A statute that is unambiguous in one context may be

ambiguous in another because words cannot anticipate every possible fact situation."). Reasonable persons understand that "[t]he Internet's prevalence and power have changed the dynamics of the national economy." *S. Dakota v. Wayfair, Inc.*, 585 U.S. __, 138 S. Ct. 2080, 2097 (2018). With that in mind, reasonable persons could disagree about whether StubHub "sold" tickets by operating an online marketplace and they could do so based on the fact that StubHub had essentially no choice in deciding when to sell tickets, which tickets to sell, and for what price.

In most other cases, a court would proceed to interpret the ambiguous statute and then render judgment accordingly. But this is a tax case. There is no need to go further because "where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *Milwaukee Refining Corp.*, 80 Wis. 2d at 48-49. Accordingly, the Court concludes Wis. Stat. § 77.52(2) (2012-13) does not unambiguously impose sales tax against StubHub. The Commission erred in concluding otherwise.

2. Alternative definitions of "sale" do not help answer who did the selling.

Moving on from the definition of "sale" as a "transfer," DOR next points to the specific definition of "sale" in Wis. Stat. § 77.51(14)(m) (2012-13). As before, DOR appears to believe that the definition of a particular kind of sale somehow "renders StubHub a seller." DOR Resp. Br., dkt. 39:28. And, as before, DOR does not explain why the existence of a sale helps determines who made the sale. In any event, here is the alternative statutory definition of sale on which DOR next relies:

> ["Sale" includes:] 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.

Wis. Stat. § 77.51(14)(m) (2012-13). DOR reads this statute to do more than define when a "sale"

occurs. In its words, "if a transaction appears in a person's books and records … that person has engaged in a taxable sale …." DOR Resp. Br., dkt. 39:28.

The Court does not share DOR's reading of Wis. Stat. § 77.51(14)(m) (2012-13). When interpreting a statute, "the court is not at liberty to disregard the plain, clear words of the statute." *Banuelos v. Univ. of Wisconsin Hosp. & Clinics Auth.*, 2023 WI 25, ¶16, 406 Wis. 2d 439, 988 N.W.2d 627 (quoting *Kalal*, 2004 WI 58, ¶46). This statute has a plain meaning. The first two words of the statute define a sale as "a transaction." The statute continues by narrowing that definition to only certain kinds of transactions, but plainly says nothing from which to conclude the existence of a transaction means any identifiable person "engaged" in that transaction, or why "engaging" in a transaction matters.[10] Accordingly, nothing in this section demonstrates that StubHub unambiguously made sales by operating its online marketplace.

C. The Commission erred by interpreting the doctrine of the undisclosed principal to create sales tax liability for StubHub.

DOR's third argument for why StubHub unambiguously owed sales taxes relies on agency law principles. It asserts StubHub acted as the agent of ticket sellers, so even if StubHub did not sell anything, it should share the sellers' tax liability under the agency law doctrine of the undisclosed principal. The Commission appears to have agreed with DOR, although it did not explain why except to say "StubHub does not persuade the Commission on this point." Commission Final Decision, dkt. 22:176.

Understanding DOR's argument first requires summarizing basic agency principles. "An

[10] As a threshold matter, DOR develops no argument to explain why it matters whether a "person has engaged in a taxable sale." To repeat, sales tax liability under § 77.52(2) applies to "selling, licensing, performing or furnishing …." The verb "engage" appears many times in Wisconsin's tax code, but the Court declines to abandon its "neutral role to develop or construct arguments for parties; it is up to them to make their case." *SEIU v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

agency relationship 'results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *Lang v. Lions Club of Cudahy Wisconsin Inc.*, 2020 WI 25, ¶29, 390 Wis. 2d 627, 939 N.W.2d 582 (quoting *Hoeft v. Friedel*, 70 Wis. 2d 1022, 1034, 235 N.W.2d 918 (1975)). More succinctly stated, "[w]hat matters in forming an agency relationship is that the principal has the right to control that conduct." *Id.*, ¶30.

An agent is ordinarily not liable for its principal's contractual duties. *Benjamin Plumbing, Inc. v. Barnes*, 162 Wis. 2d 837, 848, 470 N.W.2d 888 (1991). The doctrine of the undisclosed principal is an exception to that rule of contract liability. The doctrine holds that:

> [W]here an agent merely contracts on behalf of a disclosed principal, the agent does not become personally liable to the other contracting party. Under common law agency principles, however, 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 organization identity.

Id. at 848-49.

DOR uses these concepts to draw a four-step path to StubHub's tax liability: first, DOR asserts StubHub must be the agent of individual ticket sellers because ticket sellers consent to use StubHub as an agent by listing tickets on the StubHub website, StubHub agrees to this arrangement, and "the ticketholder controls the undertaking." DOR Resp. Br., dkt. 39:33. DOR does not explain exactly how the ticketholder "controls" StubHub, but second, under this purported agency relationship, DOR points to the fact that StubHub does not disclose the identity of ticket sellers to the ticket buyers. So, as a result of the ticket seller's (the principal) undisclosed identity, the doctrine of the undisclosed principal requires that StubHub (the agent) must be considered a

party to the sales contracts with the ticket buyers (the third party). Finally, DOR thinks that if StubHub is a party to the sales contract, it "is therefore a seller liable for the corresponding taxes on those sales." DOR Resp. Br., dkt. 39:36.[11]

StubHub denies serving as any ticket sellers' agent. Among other reasons, StubHub says it cannot have been an agent of ticket sellers because the user agreement between StubHub and every ticket seller expressly disavows any kind of agency. StubHub Br., dkt. 35:41. However, the label StubHub applies to its relationship with ticket sellers does not, by itself, determine whether StubHub was an agent. Instead, "the test is not solely dependent on what [it] is called in any particular instrument but rather upon the acts of the principal and the agent …." *Harris v. Knutson,* 35 Wis. 2d 567, 576, 151 N.W.22d 654 (1967). StubHub further cites cases from other jurisdictions that appear to have rejected similar arguments for any agency relationship. *Hill v. StubHub, Inc.,* 727 S.E.2d 550, 563 (Ct. App. N.C. 2012) (StubHub "simply functioned as a broker, effectively putting a buyer and seller into contact with each other in order to facilitate a sale at a price established by the seller.").

Alternatively, even assuming the doctrine of the undisclosed principal could apply to StubHub's liability in contract, StubHub claims the doctrine should not matter for purposes of sales tax. StubHub Br., dkt. 35:43. In other words, StubHub asks why its potential liability in a contract dispute between ticket sellers and buyers should matter to a question of its liability for sales tax? Neither party cites any Wisconsin cases, and the Court's own research finds none, in which the doctrine of the undisclosed principal has ever worked to impose tax liability. The only authority DOR cites to show the doctrine might apply is *Bank of Am. Nat. Tr. & Savings Ass'n v.*

[11] StubHub does not dispute that "a party" to a sale must be a "seller." *See* StubHub Reply Br., dkt. 44. In a ch. 227 review, StubHub has the burden to show the Commission erred, so the Court assumes some provision of Wis. Stat. ch. 77 creates tax liability for "a party" to a ticket sale.

State Bd. of Equalization, 26 Cal. Rptr. 348 (Cal. Ct. App. 1962). There, a bank allowed customers to order checks from a third party, using the bank as an intermediary. *Id.* at 357. As the intermediary, the bank charged customers for the cost of the checks and imposed its own fee. The California court determined the intermediary bank acted as the check seller's agent, so it concluded the bank "must also bear the obligations of the contract of sale including the statutory duties inherent therein." *Id.* at 358.

As a threshold matter, the Court does not understand what appears to be a basic logical inconsistency in DOR's argument. DOR takes the position that "ticketholders"—the group of persons using StubHub's website, a group this decision refers to as ticket sellers—had a relatively minor role in the process of transferring ticket ownership on StubHub's website. In fact, DOR goes to great lengths to make this point. *See* DOR Resp. Br., dkt. 39:15 (according to DOR, "StubHub played a greater role—by far—than ticketholders."); *ibid.* (ticketholders took "few steps" and were "mostly passive."); *ibid.* (ticketholders "relied on StubHub to accomplish everything else needed to find buyers and transfer tickets to them."). But if it is true that ticketholders played a small role in StubHub's sale of tickets, then how could the ticketholders unambiguously owe sales tax as "sellers?" And if the ticketholders would not owe sales tax, why would their agent owe that tax under the doctrine of the undisclosed principal? Alternatively, as StubHub points out, how can all of the ticketholders owe tax given the wide variety of exclusions for "[i]solated and sporadic sales …." Wis. Stat. § 77.54(7)(a) (2012-13); *see also* Wis. tax Bulletin 199 (Oct. 2017) (DOR presumed sales of less than $1,000 per year were isolated and sporadic). So, even assuming the doctrine of the undisclosed principal could apply here, the ticket sellers' underlying tax liability is a problem for DOR. Ultimately, it would make no difference whether StubHub acted as an agent for principals that owed no tax.

But assuming ticket sellers owed sales tax, and further assuming StubHub acted as the ticket sellers' agent, the Court does not agree the doctrine of the undisclosed principal can create any sales tax liability. To begin, the lone California case cited by DOR does not provide sufficient reasoning for the Court to understand whether it even applied the doctrine of the undisclosed principal, let alone persuasive reasons why this Court should do the same. A better authority on the application of agency law is the Restatement, on which Wisconsin courts commonly rely. *E.g., Lang v. Lion's Club,* 2020 WI 25, ¶¶39-40; *Townsend v. ChartSwap, LLC,* 2021 WI 86, ¶21, 399 Wis. 2d 599, 967 N.W.2d 21. The Restatement explains that the purpose of the doctrine of the undisclosed principal is to preserve the third party's expectation in the contract formed with an agent:

> *b. Rationales for contractual liability.*
>
> …
>
> An agent who makes a contract on behalf of an undisclosed principal also becomes a party to the contract. The basis for treating the agent as a party to the contract is the expectation of the third party. The agent has dealt with the third party as if the agent were the sole party whose legal relations would be affected as a consequence of making the contract.

Restatement (Third) of Agency § 6.03 cmt. b (2006) (emphasis added).

Applying the Restatement's rationale here, ticket buyers (the third party) expected to get the tickets they purchased, so the doctrine of the undisclosed principal might let them sue StubHub (the agent) under any sales contracts with ticket sellers (the principal). But third parties would have no interest in whether the agent and/or principal would pay sales tax. It makes little sense, therefore, for the doctrine of the undisclosed principal to make StubHub liable for that tax.

D. The Commission erred by imposing sales tax under Wis. Stat. § 77.51(13)(c) because reasonable persons could disagree about whether StubHub was a "representative" of ticket sellers.

DOR's final argument for StubHub's sales tax liability characterizes StubHub as the "representative" of high-volume ticket sellers. Under Wis. Stat. § 77.51(13)(c) (2012-13), a representative can assume the tax liability of the seller, so DOR concludes StubHub may, at a minimum, owe taxes on sales made by StubHub's high-volume business partners.[12]

To determine if Wis. Stat. § 77.51(13)(c) (2012-13) unambiguously required StubHub pay sales tax, "as always, we begin with the text of the statute." *Fleming v. AAU,* 2023 WI 40, ¶21, 407 Wis. 2d 273, 990 N.W.2d 244. Here, in full, is the text of § 77.51(13)(c) (2012-13):

> When the department determines that it is necessary for the efficient administration of this subchapter to regard any salespersons, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) sold by them, irrespective of whether they are making the sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the department may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this subchapter.

Neither party explains how the Court should evaluate DOR's determination of necessity "for the efficient administration of the tax code." But both parties agree this statute applies only to salespersons, representatives, peddlers, or canvassers. DOR Resp. Br., dkt. 39:37; StubHub Reply Br., dkt. 44:28. Although DOR appears to contend StubHub was also a salesperson, peddler, and canvasser, any of which could subject StubHub to tax liability, both parties focus their attention on whether StubHub was a "representative."

According to DOR, StubHub was unambiguously a representative of the high-volume

[12] The Commission did not separate out what sales, exactly, StubHub made as a representative. DOR suggests, assuming the Court agrees that StubHub was a representative of ticket dealers, remanding the matter to the Commission "to establish this breakdown." DOR Resp. Br., dkt. 39:39 fn.21. However, the Court concludes StubHub was not unambiguously a representative, so there is no reason to remand for this purpose.

business partners because it "received listings from larger-volume ticketholders and facilitated sales transactions on their behalf." DOR Resp. Br., dkt. 39:38. StubHub responds, to summarize, that it cannot be liable under this section because it was not unambiguously a salesperson, representative, peddler, or canvasser. StubHub Reply Br., dkt. 44:28.

Both parties find support for their position in the Commission's decision in *NEJA Grp. v. DOR,* Wis. Tax Rep. (CCH) ¶ 401-815 (Wis. Tax Appeals Com'n Jan. 13, 2014) *aff'd* Wis. tax Rep. (CCH) ¶ 401-874 (Walworth Cnty. Cir. Ct. Aug. 22, 2014). There, NEJA set ticket prices for admission to its own venue. Ticketmaster then sold tickets for NEJA, charging its own fees on top of NEJA's set prices. The Commission concluded Ticketmaster owed sales tax under Wis. Stat. § 77.51(13)(c) because "Ticketmaster acted as Petitioner's ticketing agent; Petitioner granted Ticketmaster the exclusive right to sell tickets to its events." StubHub App'x, dkt. 36:99. DOR thinks *NEJA* helps its cause because StubHub "is analogous to Ticketmaster, which sold tickets on NEJA's behalf." DOR Resp. Br., dkt. 39:39. In response, StubHub says *NEJA* demonstrates how unlike StubHub is from Ticketmaster, which had both the exclusive rights to sell tickets for NEJA as well as a revenue sharing agreement for ticket sales. StubHub Reply Br., dkt. 44:29.

The Court must construe statutory terms according to their common and accepted meaning. *Kalal,* 2004 WI 58, ¶46. Courts can determine that meaning by consulting a dictionary. *Id.,* ¶¶53-54. The dictionary defines a "representative" as: "One that serves as an example or type for others of the same classification" or a "delegate or agent for another" *The American Heritage College Dictionary,* 1180 (4th ed. 2002). Reasonable persons could disagree about whether StubHub was a "delegate" or "agent" for the same reasons they could also disagree about whether StubHub sold anything. Namely, reasonable persons understand that "[t]he Internet's prevalence and power have changed the dynamics of the national economy." *Wayfair, Inc.,* 138 S. Ct. at 2097. With that

understanding in mind, reasonable persons could question whether, having chosen to list a ticket for sale by online marketplace, they have made the marketplace their "delegate."

Accordingly, the Court must conclude that in this context, Wis. Stat. § 77.51(13)(c) (2012-13) is ambiguous. And, to repeat, "where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax." *Milwaukee Refining Corp.*, 80 Wis. 2d at 48-49. Accordingly, the Court concludes Wis. Stat. § 77.51(13)(c) (2012-13) does not unambiguously impose sales tax against StubHub by acting as "representative" of ticket sellers. The Commission erred in concluding otherwise.

E. Extrinsic sources confirm StubHub did not unambiguously owe sales tax.

The Court could not have imposed taxes on StubHub either under Wis. Stat. §§ 77.51(13)(c) or 77.52(2) (2012-13) without first concluding StubHub unambiguously sold tickets or acted as ticket sellers' representatives. In Parts II.A and II.D of this decision, the Court explained why both statutes were, at best, ambiguous because reasonable persons could disagree about whether StubHub "represented" sellers or "made sales" by operating an online ticket marketplace.

In concluding these statutes were ambiguous, the Court looked only at the facts of record and the statutory text. The Court looked no further because "Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous." *Kalal,* 2004 WI 58, ¶50. Now, although it is not strictly necessary to do so, the Court looks beyond the statutory text "to confirm or verify a plain-meaning interpretation." *Kalal,* 2004 WI 58, ¶51. In this case, further analysis will readily confirm the Court's conclusion that Wis. Stat. § 77.52(2)(a) (2012-13), at best, ambiguously applied to StubHub.

1. Legislative amendments presumptively change the law.

One extrinsic source particularly encapsulates why Wisconsin sales tax statutes could not

have unambiguously applied to StubHub. In 2019, the legislature overhauled how Wisconsin taxes online marketplaces like StubHub by passing 2019 Wisconsin Act 10 ("the Act"). In doing so, the legislature expressly tells us that its purpose was "requiring marketplace providers to collect and remit sales tax from third parties …." Preamble, 2019 Wisconsin Act 10. The legislature's explanation of purpose helps discern its intent. *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶26, 385 Wis. 2d 748, 924 N.W.2d 153 (collecting cases on the persuasive value of a preamble).

The intent of the legislature is more readily apparent, however, from the text of the substantive tax liability created by § 11 of the Act. That section created Wis. Stat. § 77.51(7i), which first defines a "marketplace provider" as "any person who facilitates a retail sale," and then requires the marketplace provider pay sales tax for the "services specified under s. 77.52(2)(a)." *Id.* In this way, the legislature amended Wisconsin's tax code to unambiguously impose sales tax on StubHub for facilitating other ticket sellers' sales.

To be clear, the 2019 amendment does not apply retroactively to impose taxes against StubHub. The amendment is nevertheless crucial for understanding StubHub's tax liability because of two principles of statutory interpretation that explain the legislature's intent. "First, there is a presumption that the legislature intends to change the law by creating a new right or withdrawing an existing right when it amends a statute." *Lang v. Lang*, 161 Wis. 2d 210, 220, 467 N.W.2d 772 (1991) (citing *Estate of Nottingham*, 46 Wis. 2d 580, 590, 175 N.W.2d 640 (1970)). "Second, a statute should not be construed so as to render any portion or word surplusage." *Id.* (quoted source omitted).

Estate of Nottingham is a useful example of how these two principles work. That case dealt with a 1963 statute that defined "income," for purposes of a specific kind of inheritance, to include

"recurring and periodic payments only …." 46 Wis. 2d at 589. The legislature amended that statute in 1965 to clarify that "devises, bequests and hereditaments were to be encompassed within the definition of income." *Id.* at 590. The newly-defined 1965 version of "income" helped our supreme court to understand the previous definition because:

> The revised statute, 1965, shows that it was the intent of the legislature that all assets should be included as income. Perhaps it was the purpose of the previous legislature to set forth the same intent; however, in the 1963 statute it simply did not do so.

Estate of Nottingham, 46 Wis. 2d at 590-91. Other examples of the application of this presumption abound. *E.g., Banuelos v. UWHCA,* 2021 WI App 70, ¶24 399 Wis. 2d 568, 966 N.W.2d 78 (legislature presumptively intended to limit costs of healthcare records that previously were allowed); *Knoke v. City of Monroe,* 2021 WI App 6, 395 Wis. 2d 551, 953 N.W.2d (legislature presumptively intended to limit claims against municipalities that previously were allowed); *City of Stoughton v. Olson,* 2020 WI App 69, 394 Wis. 2d 325, 950 N.W.2d 852 (legislature presumptively intended to expand rights given to "bowling centers" that previously applied more narrowly to "bowling alleys"); *Lang,* 161 Wis. 2d at 220 (legislature presumptively intended to expand "property inherited" to include gifts, bequests, and devises); *Green Bay Drop Forge Co. v. Indus. Com'n,* 265 Wis. 38, 60 N.W. 409 (1953) (legislature presumptively intended to add hearing loss to a category of injuries previously defined more narrowly).

Recht-Goldin-Siegal Const., Inc. v. DOR, 64 Wis. 2d 303, 219 N.W.2d 379 (1974), serves as a useful counterexample. Similar to the tax statutes discussed in this decision, *Recht-Goldin-Seigal* dealt with a 1967 statute that broadly defined a "retailer" to include "every seller who makes any sale …." *Id.* at 310. Two years later, a 1969 amendment specified that "retailer" included "persons selling household hold [sic] furnishings to landlords for use by tenants …." *Id.* at 309.

DOR rebutted the presumptive change in the law because, given the enormous breadth of the original definition ("every seller"), the supreme court explained that "any further enumeration of specific persons who are included within the definition of 'retailer' must serve the purpose of making the statute more detailed and specific and removing all doubt as to its coverage." *Id.* at 310. *Recht-Gold-Siegal* thus demonstrates that presumptive intent to change the law is rebutted where the legislature intended only to clarify. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 147, 1452 (7th Cir. 1992) ("New words may be designed to fortify the current rule with a more precise text that curtails uncertainty."); *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628, 638 (7th Cir. 1992) ("amendments to a statute, the meaning of which has been a subject of recent controversy, are more likely intended as clarifications ….").

Another counterexample of the rebutted presumption of change is *Buettner v. DHFS,* 2003 WI App 90, ¶16, 264 Wis. 2d 700, 663 N.W.2d 282. *Buettner* examined a statute that disqualified patients from a medical assistance program if they unfairly transferred assets. *Id*., ¶10. The purpose of disqualifying patients, the court of appeals explained, was "to prevent those who could afford to pay for their own medical needs from receiving medical assistance." *Id.* A change to that disqualifying provision would have meant that, prior to the change, "transfers with no legitimate underlying economic substance were permitted by the statute." *Id*., ¶16. The legislature could not have intended to allow this kind of unfair transfer, so the presumption of change was easily rebutted.

2. 2019 Wisconsin Act 10 presumptively created new tax liability for marketplace providers like StubHub.

After StubHub's tax audit period ended, the legislature enacted a new tax statute imposing sales tax on "marketplace providers." StubHub argues the new statute must mean, at least

presumptively, that the legislature had not previously intended to tax businesses for providing online marketplaces. In other words, if it was indeed the legislature's intent to create new tax liability for marketplace providers in 2019, then StubHub cannot have owed that tax in 2013, when DOR's audit period ended. Simply put, StubHub's position is that the Act must have changed the tax liability of marketplace providers or else "there would have been no occasion for enacting the same." *Green Bay Drop Forge Co.*, 265 Wis. at 50.

DOR views the Act not as a substantive enactment but rather "a belt-and-suspenders" way to clarify that marketplace providers owed sales tax under the pre-existing regime. DOR Resp. Br., dkt. 39:45.[13] It asks the Court to interpret the Act as having clarified Wisconsin's tax scheme for marketplace providers in the same way the amendment examined by *Recht-Goldin-Siegal* clarified Wisconsin's tax scheme for "household furnishings" or how the amendment examined by *Buettner* clarified what kinds of transactions disqualified patients from the medical assistance program.

DOR does not rebut the presumption that the Act intended a change. Unlike the statutory provisions in *Recht-Goldin-Siegal* and *Buettner,* the newly-created § 77.51(7i) plainly creates a distinct form of tax liability for any person who "facilitates a retail sale" and "processes the payment from the purchaser for the retail sale …." That the legislature intended new forms of liability rather than mere clarification should be apparent both from the fact that "facilitating a sale" plainly means something different than "selling," *The American Heritage College*

[13] Both parties also cite a memorandum authored by DOR's Secretary. DOR Resp. Br., dkt. 39:46 (citing Letter from DOR Secretary Chandler to Michael Heifetz, Sep. 7, 2016 dkt. 9:353). It is true that the reasons for the legislature's amendment can help determine whether it intended to change or merely clarify the law. *Hardin, Rodriguez & Boivin,* 962 F.2d at 638. But the parties do not cite this memo to show 2019 Wisconsin Act 19 was the product of DOR's request for a non-substantive clarification. Instead, they appear to cite the memo for the persuasive authority, or lack thereof, of DOR's past legal conclusions. The Court does not understand why DOR's past conclusions, as set forth in the cited memo, carry any more weight than DOR's current legal conclusions, as set forth in its briefing, so the Court addresses this memo no further.

Dictionary, 498 (4th ed. 2002) (facilitate means "to make easy or easier"), and because, if the legislature actually thought concepts like "sale" or "selling" were sufficiently confusing to warrant a clarifying amendment, it would have only compounded that confusion by introducing the even more confusing concepts of "facilitating" or "processing payment" for that "sale."

Given the many changes wrought by the digital revolution, it should not come as a surprise that the legislature intended the Act as a substantive update. As the United States Supreme Court recently explained—in a decision overruling its own pre-internet tax precedent—stubbornly taxing new kinds of online businesses under mid-twentieth-century rules is "likely to embroil courts in technical and arbitrary disputes about what counts …." *Wayfair,* 138 S. Ct. at 2098. This case may be one of those technical and arbitrary disputes. Simply put, "[t]he Internet's prevalence and power have changed the dynamics of the national economy." *Id.* at 2097. To keep pace with those changing dynamics, the Court presumes the Act created new tax liability for online marketplace providers where none previously existed rather than, as in *Recht-Goldin-Siegal* or *Buettner,* an opportunity to clarify an unchanging and unambiguously applicable standard.

III. DOR fails to show the Commission erred by not imposing a negligence penalty.

Finally, DOR seeks review of the Commission's decision to not impose negligence penalties against StubHub. These penalties are applicable only "[i]n case of failure to file any return required …" Wis. Stat. § 77.60(4), and only if DOR "shows that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause." Wis. Stat. § 73.16(4). These sections have no application here because the Court has already determined that StubHub satisfies its burden to show it owed no sales tax for providing an online marketplace. Accordingly, no negligence penalties may be awarded.

In conclusion, the Court "shall set aside or modify the agency action if it finds that the

agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action ….” Wis. Stat. § 227.57(5). Here, the Commission concluded that StubHub owed Wisconsin sales taxes for 2008-2013. The Commission did so based on the erroneous conclusions that StubHub unambiguously sold tickets, that StubHub was the agent of an undisclosed principal ticket seller, and/or that StubHub unambiguously represented ticket sellers. A correct interpretation of law requires setting aside the Commission’s decision.

ORDER

For these reasons, the Court sets aside the decision of the Wisconsin Tax Appeals Commission.

This is a final order for purpose of appeal.