STATE OF WISCONSIN

TAX APPEALS COMMISSION

CHULA VISTA, INC.,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE

Respondent.

DOCKET NOS. 09-S-247 AND 09-P-248

RULING AND ORDER

THOMAS J. MCADAMS, ACTING CHAIRPERSON:

These cases are before the Commission on cross motions for summary judgment. The Petitioners are represented by Attorney Richard W. Pitzner and Jennifer M. Krueger of the law firm of Murphy Desmond S.C., which is located in Madison, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer, of Madison, Wisconsin. Both parties have submitted briefs with attachments and exhibits. After reviewing the summary judgment submissions of both parties, we grant the Petitioner's motion and deny the Respondent's motion.

FINDINGS OF FACT[1]

A. Jurisdictional Facts

1. After a field audit, the Wisconsin Department of Revenue ("Department") assessed Petitioner Chula Vista, Inc. ("Petitioner") for additional sales/use taxes and additional premier resort area taxes on February 9, 2009 and February 6, 2009, respectively. The assessments were in the respective amounts of $693,899.37 and $38,479.82, including tax, regular interest and penalty for the period ending September 30, 2004 to the period ending September 30, 2007 ("Audit Period"). Affidavit of Jerome J. Gebert ("Gebert Aff."), ¶ 2; Exh. 1.)

2. By letter dated February 19, 2009, the Petitioner timely appealed both assessments to the Department. Petitioner objected to the portions of the assessments that related to: (1) tax assessed on the "water park subsidy," which is not at issue here, and (2) additional use tax and premier resort area tax on the purchase of the steel support structures, engineering design services, and installation services included in the purchase of water slides, which is the subject of these cross motions. A portion of the assessments were agreed to and payments in the amounts of $103,063.47 and $562.86 were remitted to the Department by Petitioner. (Gebert Aff. ¶ 3; Exh. 2.)

3. By Notices dated November 17, 2009, the Department denied the Petitioner's Petitions for Redetermination but adjusted the assessments giving credit for Petitioner's agreed-to payments. (Gebert Aff. ¶ 4; Exh. 3.)

[1] The Findings of Fact are taken from the Department's proposed findings of fact and the affidavits with the taxpayer's briefs. We have made edits for form and clarity.

4. On December 15, 2009, the Wisconsin Tax Appeals Commission received Petitioner's timely filed Petition for Review on both issues. (Gebert Aff. ¶ 5; Exh. 4.)

5. On October 27, 2010, Petitioner filed a Motion for Partial Summary Judgment on the water slide issue only.

B. Material Facts

6. Petitioner Chula Vista, Inc. is a Wisconsin tax option S-corporation, with its principal place of business in Wisconsin Dells, Wisconsin.

7. Petitioner has been operating a hotel resort in Wisconsin Dells for 59 years. Affidavit of Attorney Julie A. Zimmer ("Zimmer Aff."), ¶ 2; Exh. 5, Petitioner's Response to Interrog. No. 1.)

8. Petitioner purchased and installed its first water slide in 1993 as a resort amenity. (Zimmer Aff. ¶ 2; Exh. 5, Petitioner's Response to Interrog. No. 2.)

9. Since 1993, Petitioner and/or its LLC have purchased and installed over 20 additional water slides, some indoor and some outdoor. (Zimmer Aff. ¶ 3; Exh. 6, Kaminski Depo., pg. 5.)

10. The water slides were installed to further Petitioner's business goals and business mission. (Zimmer Aff. ¶ 3; Exh. 6, Kaminski Depo., pg. 12.)

11. Each water slide has included as its components fiberglass flumes[2], the steel support structure that holds up the fiberglass flumes, and a start tower or some type of stairs. (Zimmer Aff. ¶ 3; Exh. 6, Kaminski Depo., pg. 7.)

12. Prior to the water park and water slides at issue in this case, Petitioner had a smaller indoor water park called Coyote Mountain containing three water slides that Petitioner built in the late 1990's. (Zimmer Aff. ¶ 3; Exh. 6, Kaminski Depo., pgs. 13-14 and 21-22.)

13. In 2008, Petitioner demolished Coyote Mountain to make room for additional banquet and meeting space and the three water slides were removed without destroying the building in which they were housed. (Zimmer Aff. ¶ 3; Exh. 6, Kaminski Depo., pgs. 15-17.)

14. In approximately 2002, Petitioner purchased a package of four outdoor water slides, including a large green slide called the Gator Tail, which was bolted to its concrete foundation. After three seasons of use, Petitioner disassembled and removed the Gator Tail water slide and replaced it with a different water slide because it was defective and posed a potential liability risk. (Zimmer Aff. ¶ 3; Exh. 6, Kaminski Depo., pgs. 13, 17-19 and 27-28.)

15. On December 11, 2001, Petitioner established Mike & Tim Properties, LLC ("LLC"), a single-member LLC, to own and operate the water park and water slide amenities at Petitioner's resort. (Zimmer Aff. ¶ 4; Exh. 7; Kaminski Aff. ¶ 4.)

[2] A flume is an inclined channel for conveying water and, in this instance, passengers.

16. During the audit period, the LLC was a disregarded entity for purposes of Wisconsin corporate income/franchise tax only.

17. On January 25, 2002, Petitioner and the LLC entered into a lease agreement ("Lease") whereby Petitioner leased the land upon which the water slides at issue would eventually be built to the LLC in exchange for annual rent of $25,000. (Zimmer Aff. ¶ 5; Exh. 11.)

18. On August 5, 2002, the Bank of Wisconsin Dells filed a copy of the Lease and a UCC Financing Statement with the Wisconsin Department of Financial Institutions. The Financing Statement covered the following collateral: "All furniture, fixtures, inventory, and equipment now owned or hereafter acquired by debtor [Mike & Tim Properties LLC]. Including but not limited to water slides and all accessories and parts pertaining to a water slide project." (Zimmer Aff. ¶ 5; Exh. 11.)

19. Section 1.04 of the Lease states in full: "SURRENDER. On the last day of the term of this Lease, or upon any sooner termination, Tenant shall surrender the Premises to Landlord, subject to Tenant's right to remove improvements, additions, installations and the like from the Property as provided in Section 3.01 hereof." (Exh. 11, pg. 2.)

20. Section 3.01 of the Lease states in full: "ALTERATIONS. Tenant shall be permitted to construct improvements upon the Premises. All improvements, additions, and installations upon ... the Premises and all fixtures thereto shall be deemed to be owned by Tenant during the term of this Lease, and may be removed by

Tenant at any time during the term of this Lease, or within thirty (30) days after the expiration or termination of this Lease." (Exh. 11, pg. 2.)

21. The Lease's term was initially through September 30, 2004. However, there was an Amendment to Land Lease executed on September 29, 2004 that modified the Lease Term through September 30, 2011. (Zimmer Aff. ¶¶ 4-5; Exs. 8 and 11, Sec. 1.02.)

22. On June 15, 2005, the LLC received a commitment from a bank to establish credit in the amount of $18,500,000 for the purpose of "the construction of a new indoor water-park amenity." Chula Vista, Inc. received a commitment for $18,000,000. The commitment letter stated that "each of the Borrowers and each Loan shall in all respects be separate and distinct and shall never be combined or deemed combined for any purpose whatsoever." (Zimmer Aff. ¶ 4; Exh. 9.)

23. In 2005, the LLC paid Whitewater West Industries, Ltd. ("Whitewater") for the engineering design services, installation, and water slide equipment at issue. (Zimmer Aff. ¶ 2; Exh. 5, Petitioner's Response to Interrog. No. 13.)

24. According to the Purchase Agreement with Whitewater, dated April 5, 2005, the equipment purchased included nine fiberglass water slides, steel slide supports for those water slides, and one Aquaplay. Engineering design services and installation services were also included in the sale for a total sales price of $4,000,000. (Zimmer Aff. ¶ 4; Exh. 10, pgs. 6 and 9.)

25. The concrete foundation works, including footings, piers, columns, supply and setting of anchor bolts were specifically excluded from the purchase of the water slides. (Zimmer Aff. ¶ 4; Exh. 10, pgs. 6-7.)

26. The LLC paid Wisconsin sales/use tax on its purchase of the fiberglass water slides and conveyors (flumes) for $1,532,266 and the Aquaplay for $857,734. (Zimmer Aff. ¶ 4; Exh. 10, pg. 9.)

27. The LLC did not pay Wisconsin sales/use tax on its purchase of the engineering design services associated with the water slides for $90,000, the structural steel supports for $620,000, or the installation services for the water slides including the steel supports and towers for $900,000. (Zimmer Aff. ¶ 4; Exh. 10, pg. 9; Gebert Aff. ¶ 2; Exh. 1, Sch. 5.)

28. During the audit period, the LLC owned and operated the indoor water park facility known as Lost Rios, including the water slides at issue. The water slides were installed both inside and outside of Lost Rios. (Zimmer Aff. ¶ 2; Exh. 5, Petitioner's Response to Interrog. Nos. 9 and 11.)

29. During the audit period, the Petitioner owned the land upon which the Lost Rios indoor water park facility was built, including the water slides at issue. (Zimmer Aff. ¶ 2; Exh. 5, Petitioner's Response to Interrog. No. 12; Kaminski Aff. ¶ 3.)

30. Mr. Mark Puccio has a degree in Civil Engineering with emphasis in Structural Engineering. He is a certified Wisconsin Professional Engineer and a registered Structural Engineer in eleven states, including Wisconsin. He has experience in water park building design and water slide support structure design and relocation.

He personally toured Petitioner's water park and viewed the water slides at issue. He also reviewed the architectural blueprints for the indoor water park and the water slide drawings and contracts. (Zimmer Aff. ¶ 12; Exh. 18, Mr. Puccio's Report, pgs. 1-2.)

31. In Mr. Puccio's expert opinion, the water slides at issue, including the steel support columns, support arms, yokes, flumes and foundations do not support any building framing or support the building's structure in any way. (Zimmer Aff. ¶ 12; Exh. 18, Mr. Puccio's Expert Report, pg. 3; Zimmer Aff. ¶ 8; Exh. 14, pg. 40.)

32. In Mr. Puccio's expert opinion, the building that houses the indoor portion of the water slides was designed with the intent to accommodate equipment necessary for removal of the water slides due to the addition of "knock out panels" on the blueprints. (Zimmer Aff. ¶ 12; Exh. 18, Mr. Puccio's Expert Report, pgs. 4-5, Attachment C, Drawings 1-3.)

33. In taxable years ending September 30, 2006 and September 30, 2007, the LLC depreciated the entire purchase from Whitewater, including the water slides' steel structural supports, as personal property with a five-year estimated class life. (Zimmer Aff. ¶¶ 7 and 13; Exh. 13, pg. 4 of Depreciation Expense Report; Exh. 19, Terry Depo., pgs. 10, 13, 19-22, 30.)

34. The LLC also depreciated the sales tax Petitioner paid on the fiberglass flumes and the Aquaplay in the amount of $131,450 over the same five-year estimated class life as the total water slide purchase. (Zimmer Aff. ¶¶ 6-7 and 13; Exh. 12, Exh. 13, pg. 4 of Depreciation Expense Report, and Exh. 19, Terry Depo, pgs. 30-31.)

35. At least three companies exist that are in the business of selling used amusement rides, including water slides: Ital International LLC, Amusement Trader.com, and Rides4U. Ital International LLC has been in business since 1990 and listed a 2004 Whitewater Water Coaster on its website for $140,000. (Zimmer Aff. ¶ 9; Exh. 15.)

C. Mr. Kaminski's Affidavits

36. Mr. Michael Kaminski, the President of Chula Vista, Inc., states that Chula Vista timely paid sales and use tax on certain portions of the indoor water slide (water slide flumes and related pumping equipment) that are removable and replaceable. Chula Vista did not pay sales and use tax on the water slide because the water slide was believed to be part of the realty upon which it is situated. (Mr. Michael Kaminski's ("Kaminski Aff.") October 8, 2010 Affidavit, ¶¶ 5 and 6.)

37. The structural support system for the water slide is attached by huge bolts to a steel plate contained within the concrete platform set in the ground specifically for this purpose. (*Id*. at ¶ 8.)

38. The water slide is surrounded by an outdoor water park just outside the building. The entire water slide, pools, and building project cost approximately $8.7 million in 2006. (*Id*. at ¶¶ 9 and 10.)

39. The water slide is specifically designed for and specifically integrated into a new building that was constructed solely for the purpose of housing the indoor water park. The water slide exits and re-enters the building through large holes constructed in the building for this purpose. (*Id*. at ¶¶ 11 and 12.)

40. The utility of the building that houses the water slide would be seriously diminished if the water slide was removed. The building, complete with approximately 70-foot ceilings, was intended to house the water slide. Given the cost of heating and cooling the building with such high ceilings and concrete floors, the space is uneconomical for any other purpose other than to house an indoor water park. (Mr. Michael Kaminski's January 26, 2011 Affidavit, ¶ 2.)

RELEVANT STATUTES

1. **Wis. Stat. § 77.52(2) Imposition of retail sales tax**

> **(1)(a)** For the privilege of selling, … tangible personal property at retail a tax is imposed upon all retailers at the rate of 5% of the sales price from the sale, … of tangible personal property sold at retail in this state, …
>
> **(2)...**
>
> **10**. … except that the tax imposed by this subsection does not apply to the original installation …of an item listed in par. (ag), if that installation or replacement is a real property construction activity under s. 77.51(2).
>
> **(ag)** For purposes of par. (a) 10., the following items shall be considered to have retained their character as tangible personal property, regardless of the extent to which the item is fastened to, connected with, or built into real property:
>
> **....**
>
> **38.** Recreational, sporting, gymnasium, and athletic goods and equipment including, by way of illustration but not of limitation, all of the following:
>
> a. Bowling alleys.
> b. Golf practice equipment.
> c. Pool tables.
> d. Punching bags.

e. Ski tows.
f. Swimming pools.

2. Wis. Stat. § 77.51 Definitions

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(2) "Contractors" and "subcontractors" are the consumers of tangible personal property used by them in real property construction activities and the sales and use tax applies to the sale of tangible personal property to them. A contractor engaged primarily in real property construction activities may use resale certificates only with respect to purchases of property which the contractor has sound reason to believe the contractor will sell to customers for whom the contractor will not perform real property construction activities involving the use of such property. In this subsection, "real property construction activities" means activities that occur at a site where tangible personal property that is applied or adapted to the use or purpose to which real property is devoted is affixed to that real property, if the intent of the person who affixes that property is to make a permanent accession to the real property. In this subsection, "real property construction activities" do not include affixing to real property tangible personal property that remains tangible personal property after it is affixed.

(emphasis added).

3. Rule Tax 11.68(5)

(a) Contractors shall determine whether a particular contract or transaction results in an improvement to real property or in the sale and installation of personal property. In determining whether personal property becomes a part of real property, the following criteria shall be considered:

1. Actual physical annexation to the real property.

2. Application or adaptation to the use or purpose to which the real property is devoted.

3. An intention on the part of the person making the annexation to make a permanent accession to the real property.

(b) Certain types of property that have a variety of functions may be personal property in some instances and additions to real property in others, including boilers, furnaces, stand-by generators, pumps, substations and transformers. When this property is installed primarily to provide service to a building or structure and is essential to the use of the building or structure, it is a real property improvement. However, when similar property is installed in a manufacturing plant to perform a processing function, it may, as machinery, retain its status as personal property.

OPINION

The dispute in this case arises from an assessment by the Department of Revenue of sales and premier use taxes[3] against Chula Vista Resort for $693,899 and $38,479 in connection with a water slide park Chula Vista built in the Wisconsin Dells around 2005.[4] The Petitioner paid sales tax on the portion of the purchase concerning the water slide flumes and related pumping equipment, but the issue here is the taxability of the steel beams that support the fiberglass flumes and the related engineering services to design and install them.[5] In brief, the issue as posed by the parties is that if the steel beams are considered part of the real estate, they are not

[3] The premier resort area tax is a local retail sales tax which was authorized by the Wisconsin Legislature and is administered by the Wisconsin Department of Revenue. A sponsoring municipality or other political subdivision that has at least 40% of its equalized assessed property values used by tourism-related retailers may enact an ordinance which puts this tax into effect. *See, generally,* http://www.revenue.wi.gov/faqs/pcs/premier.html (last visited on May 29, 2011).

[4] The original assessments contained additional issues that the parties resolved before the filing of these summary judgment motions.

[5] At the time of this case, Wis. Stat. § 77.51(15) (c)2 included in the sales price the amount charged for labor or services rendered in installing tangible personal property.

subject to Wisconsin sales and use taxes. If, on the other hand, the steel support beams are personal property, they are subject to the sales and use taxes.[6] The first part of this opinion will summarize the applicable law. The second part will summarize the arguments the parties make in support of their respective motions for summary judgment. The third part will apply the relevant statutory tests.

I. APPLICABLE LAW

A. Summary Judgment Standards

The rules that govern summary judgment motions as to procedure and burdens have been summarized by the parties in their respective briefs. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The purpose of summary judgment is "to avoid trials where there is nothing to try." *Transportation Ins. Co. v. Hunzinger Construction Co.*, 179 Wis. 2d 281, 507 N.W.2d 136, 139 (Ct. App. 1993) The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law remain. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4, 308 Wis. 2d 684, 748 N.W.2d 154.

[6] Wis. Stat. § 77.52(1) includes accessories, components, attachments, parts, supplies and materials in the tax.

B. Substantive Law

We summarize briefly the procedural and substantive rules that govern our decision here. The Department's assessment is presumed correct and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determination. *Edwin J. Puissant, Jr. v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

In Wisconsin, all retailers must pay sales tax on "the gross receipts from the sale, lease or rental of tangible personal property, including accessories, components, attachments, parts, supplies and materials, sold, leased or rented at retail in this state." Wis. Stat. § 77.52(1) (2005-06). "Tangible personal property" is defined as "all tangible personal property of every kind and description." Wis. Stat. § 77.51(20). Under Wisconsin law, it is presumed that all sales of tangible personal property are subject to sales or use tax until the contrary is established. Wis. Stats. §§ 77.52(1) and (3) and 77.53(1); *H. Samuels Co. v. Dep't of Revenue*, 70 Wis. 2d 1076 at 1077-1078, 236 N.W.2d 250 (1975).

II. THE PARTIES' LEGAL ARGUMENTS

The parties agree that the material facts are not in dispute here. Instead, the summary judgment motions here present the Commission with a legal question. That is, are the steel support beams that hold up the fiberglass water slide flumes subject to Wisconsin sales and use tax?

A. The Petitioner's Arguments

The Petitioner makes several arguments in support of its claim that sales and use taxes on the water slide steel structure, towers and related design and installation services are inappropriate. First, the Petitioner argues that under the three factor *Harvestore* test, the water slide is part of the realty. Second, the Petitioner argues that the existence of a lease between related parties does not defeat the Petitioner's claim.[7] Third, the existence of a market for used water slides does not defeat Chula Vista's position. Finally, the Petitioner argues that Wis. Stat. § 77.52(2)(ag) was in effect when the *Harvestore* decision was made and, therefore, does not control the result here.

B. The Department's Arguments

The Department argues that the issue in the case is whether the contractor in this case conducted "real property construction activities" or whether the contractor installed tangible personal property that was taxable to the purchaser. The Department argues that the water slide remained tangible personal property after installation because it served a "business function" under Rule Tax 11.68(5)(b) and was not essential to the use of the building or the building's structure. Also, the Wisconsin Statutes deem recreational and sporting equipment to be tangible personal property regardless of whether it is affixed to real property. Third, the Petitioner has not met its burden to show that it was the LLC's intention to make the water slide a permanent accession to the real property. For one, it is presumed that the water slide is temporary and

[7] The Petitioner established "Mike & Tim Properties, LLC," a single-member LLC, to own and operate the water park. In our view, the existence of a lease between related parties is not dispositive here.

intended to be removed because the LLC as Petitioner's tenant installed it on leased land. Further, the water slide is removable, and Petitioner has a history of removing water slides for business purposes, and there is a market for used water slides. Also, the Petitioner has taken depreciation on the entire purchase of the water slide (including the steel supports) as tangible personal property with an estimated life of five years. Finally, in any case, the Petitioner owes use tax on the total sales price of the water slides without any deduction for the cost or related engineering design and installation services.

III. DECISION

The issue we must decide is if the steel supports (and related installation services) are deemed taxable personal property or instead are nontaxable "real property construction activities" for the purpose of the sales and use taxes.[8] While the parties agree on the facts for the purpose of the summary judgment motions, they do not agree on what law decides the issue. In brief, the Petitioner argues that the *Harvestore* test incorporated into Rule Tax 11.68(5) and elsewhere controls.[9] On the other hand, the Department argues *inter alia* that Wis. Stat. § 77.52(2)(ag)38 is instructive as to what property remains personal property and that the Petitioner nevertheless loses under both tests. After reviewing the statutes and the briefs, we agree with the taxpayer. The

[8] The Wisconsin courts have described the use tax as a necessary supplement to the sales tax and that the two taxes together provide a symmetrical and complete tax system. *See Wisconsin Dept. of Revenue v. Moebius Printing Co,* 89 Wis. 2d 610, 279 N.W.2d 213 (1979).

[9] Administrative rules enacted pursuant to statutory rule-making authority have the force and effect of law. *DaimlerChrysler Services North America LLC v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-782 (WTAC 2004), *aff'd*, 2006 WI App. 265, 726 N.W.2d 312 (Ct. App. 2006).

first part of this section will summarize the relevant statutes. The second section will set forth the relevant rules of statutory construction. The third part will apply the relevant tests.

A. The Statutory Scheme

The statutory scheme is set forth in Chapter 77 and the administrative rules and the highlights will be summarized here. Wis. Stat. § 77.52(1) imposes a sales tax on personal property. Wis. Stat. § 77.52(2) imposes a sales tax on certain listed services. Wis. Stat. § 77.52(2)10 imposes the sales tax on various listed maintenance and repair type services, and specifically excepts the original installation of an item listed in par. (ag) if that installation is a "real property construction activity" under Wis. Stat. § 77.51(2). Wis. Stat. § 77.51(2) declares that contractors and subcontractors are the consumers of tangible personal property used by them in "real property construction activities" and further defines "real property construction activities" not to include affixing to real property tangible personal property that remains tangible personal property after it is affixed. Wis. Stat. § 77.52(2)(ag) lists more than 39 items considered to have retained their character as tangible personal property for purposes of (a)10 regardless of the extent to which the item is incorporated into real property. One item listed is "recreational equipment."

Rule Tax 11.68(5) requires that contractors determine if a particular contract or transaction results in a real property improvement or the installation of personal property, using the three factor test from the *Harvestore* case. Rule Tax 11.68(5)(b) states that certain property that has a variety of functions may be personal

property in some instances but when it is essential to a building or structure it is a real property improvement. Rule Tax 11.68(7) requires contractors to report for taxation items that retain their character as personal property after installation, including personal property used to carry on a trade or business. An item listed is "fixtures and equipment installed in hotels and motels."

B. Statutory Construction

The primary purpose in reviewing statutes is to achieve a reasonable construction that will effectuate the statutory purpose. *Barnett v. LIRC*, 131 Wis. 2d 416, 420, 388 N.W.2d 652 (Ct.App.1986). In statutory construction, context and structure are important factors, and construction should strive to avoid absurd or unreasonable results. *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004).

Statutes which are contained in the same chapter should be read *in pari materia* if possible. *State v. Clausen,* 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982); *Lake City Corp. v. City of Mequon,* 207 Wis. 2d 155, 165, 558 N.W.2d 100 (1997). *In pari materia* refers to statutes relating to the same subject matter or having the same common purpose. Black's Law Dictionary 791 (6th ed.1990). As a rule of statutory construction, *in pari materia* requires that we read, apply and construe statutes relating to the same subject matter together in a manner that harmonizes all in order to give each full force and effect. *State v. Jeremiah C.,* 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 659 N.W.2d 193. To be *in pari materia,* statutes need not have been enacted simultaneously or refer to one another. In *re estate of Flejter* 2001 WI App 26, 240 Wis. 2d 401, 623 N.W.2d 552.

In *State Farm Mutual Automobile Ins. Co. v. Kelly*, 132 Wis. 2d 187, 389 N.W.2d 838 (Ct.App.1986), quoting Sutherland, the court stated:

> When determining the meaning and effect of statutory sections *in pari materia,* "[i]t is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they all should be construed together."

Id. at 190, 389 N.W.2d 838. Professor Sutherland further instructs that:

> "General and special acts may be *in pari materia*. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail."

State v. Amato, 126 Wis. 2d 212, 217, 376 N.W.2d 75 (Ct.App.1985).

C. Analysis

1. What test controls?

The first issue we must decide is what test controls. The Petitioner argues that we must analyze if the contractor was engaged in "real property construction activities." The Department suggests several approaches specific to this type of property, the first of which would require us to analyze whether the steel support beams are personal property which remains personal property because it is part of a piece of recreational equipment. The Department's second approach would require us to determine whether the steel support beams serve a "building function" or a "process function." The Department's third approach would have us consider if the steel

support beams are personal property used "to carry on a trade or business in a hotel or a motel." For several reasons, however, we believe the Petitioner's approach to this case is correct.

The Department's first argument that the steel beams are taxable concerns Wis. Stat. § 77.52(2)(ag)38, which specifically mentions "recreation equipment" as one of numerous items deemed to remain personal property no matter how affixed to real property. While we agree with the Department that the water slide is recreational equipment, we note that the first clause of Wis. Stat. § 77.52(2)(ag) states that the section applies *"for purposes of par. (a)(10)., ..."* In general, Wis. Stat. § 77.52(2)(a)(10) refers to activities which we would describe here as maintenance and repair type activities. Further, Wis. Stat. § 77.52(2)(a)(10) specifically states that the tax does not apply to the original installation of an item listed in par. (ag) if that installation is a real property construction activity. This reading that the purpose of (a)(10) is the taxation of maintenance and repair activities is confirmed by a Departmental publication entitled *Sales and Use Tax Information for Contractors,* which describes the same distinction:[10]

> **A. Property Deemed Personal Property for Repair and Maintenance Purposes**
>
> A contractor's gross receipts, which includes, both the labor and materials, for repairing, servicing, altering, fitting, cleaning, painting, coating, towing, inspecting, and maintaining the items listed below are taxable, regardless of whether the service may be considered an addition to or a capital improvement of real property and *even though the original installation may have been a real property improvement.*

[10] The publication is available at *http://www.revenue.wi.gov/pubs/pb207.pdf* (last visited July 16, 2011).

Such items are:

....

recreational, sporting,
gymnasium, and athletic
goods and
equipment including
by way of illustration
but not of limitation:
bowling alleys
golf practice
equipment
pool tables
punching bags
ski tows
swimming pools

[emphasis added].

In our view, given the explicit limitation to repair and maintenance type activities, Wis. Stat. § 77.52(2)(ag) cannot be relied on as a basis to tax the steel beams in question. In Wisconsin, a tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax. *Wisconsin Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977).

Second, the Department argues that we should analyze whether the steel beams are personal property under Rule Tax 11.68(5)(b). The Department's argument here is that the water slides remained tangible personal property after installation because they served a "business function" and were not essential to the use of the building or the building's structure. This argument is based on the Department's interpretation of Rule Tax 11.68(5), which the Department has described in published guidance. In particular, the Department has published a chart in Attachment I to

Publication 207, which is entitled "*Chart to Aid in Distinguishing Real v. Personal Property Activities.*" In the chart, recreational and sporting equipment installed in a commercial setting that performs a "process function" are considered personal property, and hence subject to the sales tax. The underlying Rule Tax the Department relies on, however, reads as follows:

> **Rule Tax 11.68(5)** Classification of property after installation (Register July 2003 No. 571)
>
> **(a)** Contractors shall determine whether a particular contract or transaction results in an improvement to real property or in the sale and installation of personal property. In determining whether personal property becomes a part of real property, the following criteria shall be considered:
>
> 1. Actual physical annexation to the real property.
> 2. Application or adaptation to the use or purpose to which the real property is devoted.
> 3. An intention on the part of the person making the annexation to make a permanent accession to the real property.
>
> **(b)** Certain types of property that have a variety of functions may be personal property in some instances and additions to real property in others, **including boilers, furnaces, stand-by generators, pumps, substations and transformers.** When this property is installed primarily to provide service to a building or structure and is essential to the use of the building or structure, it is a real property improvement. However, when similar property is installed in a manufacturing plant to perform a processing function, it may, as machinery, retain its status as personal property.

[emphasis added].

The problem with the Department's argument here is that the section specifically refers to "boilers, furnaces, stand-by generators, pumps, substations and transformers."

When the legislature lists a series of items subject to the provisions of an act, it intends to include items of a like kind. This idea is sometimes stated as *noscitur a sociis,* which means that a word is known by the company it keeps. *See Jones v. Broadway Roller Rink Co.,* 136 Wis. 595, 597, 118 N.W. 170, 171-72 (1908). In our view, the steel support beams at issue here are not a like kind item to the property listed in (b). Therefore, Rule Tax 11.68(5)(b) does not apply here.[11]

Finally, the Department also argues that the steel support beams are personal property under Rule Tax 11.68(7), which reads as follows:

> **Rule Tax 11.68(7)** PROPERTY PROVIDED UNDER A CONSTRUCTION CONTRACT WHICH REMAINS PERSONAL PROPERTY
>
> **(a)** Contractors shall obtain a seller's permit and report for taxation gross receipts from the sale and installation of personal property, furnished under a construction contract, which retains its character as personal property after installation, such as:
>
> > 6. Personal property used to carry on a trade or business, including fixtures and equipment installed in stores, taverns, night clubs, restaurants, ice arenas, bowling centers, hotels and motels, barber and beauty shops, figure salons, theaters and gasoline service stations.

The property in question, however, is not *in* a hotel or a motel. It is located in an attraction near or at a motel. And further, the sec (6) starts with the assumption that the

[11] The annotations in Rule Tax 11.68 state that the definition of real property construction activities was revised effective for sales of property pursuant to contracts entered into on or after December 1, 1997, to:

> (a) Reverse the effect of the Wisconsin Supreme Court decision in the case of *Wisconsin Department of Revenue vs. Sterling Custom Homes* (283 N.W. 2d 573 (1979)) prospectively from the effective date of this revision, and
>
> (b) Provide by statute those criteria that were used by the Supreme Court in the case of *Dept. of Revenue vs. A.O. Smith Harvestore Products, Inc*. (72 Wis. 2d 60, (1976)), for purposes of determining whether tangible personal property becomes real property. The meaning of each of the criteria is explained in the Supreme Court's decision.

property in question is personal property, which leads us to assume that the provision does not apply to steel support beams.

Having rejected each of the statutory approaches discussed above, of course, leaves the question of what statutes do apply here. After reviewing the briefs, we agree with the Petitioner's approach for two reasons. First, from our review of the statutes, we note that Rule Tax 11.68(3)(a) states as follows:

> **(3)** REAL PROPERTY CONSTRUCTION CONTRACTORS.
>
> (a) Generally, real property construction contractors are persons who perform real property construction activities and include persons engaged in activities such as building, electrical work, plumbing, heating, painting, **steel work**, ventilating, paper hanging, sheet metal work, bridge or road construction, well drilling, excavating, wrecking, house moving, landscaping, roofing, carpentry, masonry and cement work, plastering and tile and terrazzo work.

[emphasis added].

The activities the contractor performed in this case installing the steel support beams for Chula Vista appear to fit squarely as "steel work." When read with the other statutes like Wis. Stat. § 77.52(2) *in pari materia*, the use of the term "generally" at the beginning of sec. (3)(a) suggests to us that the *Harvestore* test embodied in Rule Tax 11.68 and Wis. Stat. § 77.51(2) was intended to be the primary method of determining the status of the property, not the statutes the Respondent refers us to for guidance.

Our review of the case law suggests that the Petitioner's approach is correct. For example, in *Advance Pipe & Supply Co., Inc., v. Wisconsin Dep't of Revenue*, 128 Wis. 2d 431, 383 N.W.2d 502 (Ct. App. 1986), the Wisconsin Court of Appeals affirmed a Commission decision upholding an assessment of a sales tax on sales of

manhole components. The court decided the case on the basis that the manufacturer was operating as a retailer who delivered materials and was not engaged in "real property construction activites." In *Precision Metals, Inc., v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-337 (WTAC 1998) this Commission also had to define the scope of "real property construction activities" where the Petitioner's primary business was the custom manufacture of hollow metal frame products. In *Visu-Sewer Clean & Seal, Inc. v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶400-850 (WTAC 2006), the Commission stated that the primary issue was whether or not the Petitioner was a "real property construction contractor" when installing liners and sewer lines.[12] Finally, in *Badger U.S.A,, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-183 (WTAC 1996), the Commission decided *inter alia* that receipts from the installation of new fluorescent tubes, ballasts, and similar items were not derived from "real property construction activities" and, therefore, were subject to the sales tax.

Thus, based on our reading of the statutes *in pari materia* and the case law, we believe that this case must be resolved by application of the three factor *Harvestore* test embodied in Rule Tax 11.68.

2. The *Harvestore* test

Wisconsin has employed a longstanding test to determine whether property was "personal property" or "real estate." *See Taylor v. Collins,* 51 Wis. 123, 127, 8 N.W. 22 (1881). The common law test provides:

[12] The Commission's decision was affirmed in *Visu-Sewer Clean and Seal, Inc. v. Wisconsin Department of Revenue,* 306 Wis. 2d 447, 742 N.W.2d 74 (Ct. App. 2007).

> "[w]hether articles of personal property are fixtures, *i.e.,* real estate, is determined in this state, if not generally, by the following rules or tests:
>
> 1. Actual physical annexation to the real estate;
> 2. Application or adaptation to the use or purpose to which the realty is devoted;
> 3. An intention on the part of the person making the annexation to make a permanent accession to the freehold."

Wisconsin Dep't of Revenue v. A.O. Smith Harvestore Prods., Inc., 72 Wis. 2d 60, 67-68, 240 N.W.2d 357 (1976) (quoting *Premonstratensian Fathers v. Badger Mut. Ins. Co.,* 46 Wis. 2d 362, 367, 175 N.W.2d 237 (1970)).

The parties agree that the first two prongs are met here. Thus, the Commission here must apply what the courts have said has become the most important factor of the test, which is the intent factor. *See Harvestore,* 72 Wis. 2d at 68, 240 N.W.2d 357 (the intent factor "is regarded as the most important of the three factors"). The third factor considers whether there is an intent "to make a permanent accession to the freehold." *Harvestore,* 72 Wis. 2d at 67-68, 240 N.W.2d 357 (citation omitted). Cases distinguishing between personal property and real estate for purposes of taxation have viewed intent as:

> "not the actual subjective intent of the landowner making the annexation, but an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put."

Id. at 69, 240 N.W.2d 357 (quoting Brown, *Personal Property* § 141, at 726 (2d ed.1955)); *see also Pulsfus Poultry Farms,* 149 Wis. 2d at 813, 440 N.W.2d 329 (applying the hypothetical reasonable person standard).

Based on the undisputed facts, the Commission determines that the Petitioner has shown the objective intent to make the water slide a permanent accession to the land. Using the "substance and realities" test described in *Sterling Homes,* we find that on balance, the weight of the factors points to the Petitioner. First, the structure the beams are a part of is substantial, comparing at least in height to the property in *Harvestore.*[13] Second, the construction project the steel beams are a part of represent a substantial investment, costing approximately $8.7 million dollars. Third, the steel supports are fastened to a concrete foundation, which was not taxed. In *Harvestore*, the Supreme Court quoted with approval Brown's treatise on personal property, which states that when property is placed upon a foundation particularly prepared for it, the intent to make a permanent annexation is *almost certain.* Fourth, steel support beams are basic real property construction materials, which is confirmed by their mention in Rule Tax 11.68(3)(a). In our view, the steel support beams are more akin to the concrete foundation than they are to the flumes upon which the Petitioner paid the tax.

On the other hand, there are factors which tend to support the Department's position and we will discuss them briefly. First, the Petitioner has been taking depreciation on the supports as 5 year personal property for income tax

[13] In *Harvestore*, the Wisconsin Supreme Court stated that while not controlling, the factors of size, weight, and cost of moving are certainly relevant to the issue of intention.

purposes. While a taxpayer is entitled to structure its affairs to comply with the tax laws while minimizing tax liability, a taxpayer is generally bound by its choices in doing so, and the taxpayer cannot later recharacterize a transaction to obtain additional tax benefits. *See, generally, Helvering v. Gregory,* 69 F.2d 809, 810 (2d Cir. 1934), *aff'd,* 293 U.S. 465 (1935). At first blush, this treatment certainly seems inconsistent with an objective intent that the property be real property. However, a similar argument failed to prevail for the Department in *Harvestore*, where the Wisconsin Supreme Court discounted the fact that the *Harvestore* had been financed under the Uniform Commercial Code as personal property. In discussing the issue, the Wisconsin Supreme Court stated that the crucial element of intention must be determined from objective circumstances, and not from subjective agreements between the annexor and other parties.

The second factor which the Department argues concerns the fact that there is a market for used water slides and the Petitioner has previously replaced other smaller water slides that had been on the property. The Wisconsin Supreme Court in *Harvestore*, however, had this to say about the relationship between a secondary market and intent:

> That Harvestores are traded in for a larger or different model is of no consequence to the question of intention to make a permanent accession. This is because, as noted in regard to an electric dynamo in Gunderson v. Swarthout, [citation omitted] the fact that one model may be supplanted by another model is perfectly consistent with an intention to have some structure of that type permanently affixed to the realty.

The history of replacement and the existence of a secondary market are thus entitled to little weight here.

Balancing all of the factors above, we find that an objective person would consider the steel supports to be permanent accessions.

CONCLUSION

The Petitioner has met its burden of showing all three prongs of the *Harvestore* test embodied in Rule Tax 11.68(5)(a) and is, therefore, entitled to judgment as a matter of law. Therefore, the Department's assessments must fall.

ORDERS

1. The Petitioner's Motion for Summary Judgment is granted and the Department's action on the Petition for Redetermination is reversed.

2. The Respondent's Motion for Summary Judgment is denied.

Dated at Madison, Wisconsin, this 5th day of August, 2011.

WISCONSIN TAX APPEALS COMMISSION

_____

Thomas J. McAdams, Acting Chairperson

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Roger W. Le Grand, Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**