STATE OF WISCONSIN

TAX APPEALS COMMISSION

MANPOWER INC., **DOCKET NO. 05-S-046**

Petitioner,

vs. **DECISION AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This matter has come before the Wisconsin Tax Appeals Commission on the parties' cross-motions for summary judgment under Wis. Stat. § 802.08 and Wis. Admin. Code Tax § 1.31. The Petitioner, Manpower Inc. ("Manpower"), has submitted briefs, affidavits, and exhibits in support of its motion for full summary judgment and in opposition to the Respondent's motion for partial summary judgment. The Respondent, the Wisconsin Department of Revenue (hereinafter referred to as the "Department"), has also filed briefs, affidavits, and exhibits in support of its motion for partial summary judgment and in opposition to the Petitioner's motion. Oral arguments were presented to the Commission on February 11, 2009 in Madison.

The Petitioner is represented in this matter by Attorneys Don M. Millis, Kristina E. Somers, and John R. Austin of the law firm of Reinhart, Boerner & Van Deuren, S.C., located in Milwaukee, Wisconsin. The Department is represented by Attorney Robert C. Stellick, Jr., of Madison, Wisconsin.[1]

Having considered the entire record before it, including the motions, the briefs, the affidavits, the exhibits, and the oral arguments, the Tax Appeals Commission hereby finds, rules, and orders as follows:

JURISDICTIONAL FACTS

1. The Department issued a Notice of Field Audit Action to Manpower dated March 30, 2004. The Notice of Field Audit Action asserted that sales and use taxes and interest totaling $1,976,315.90 were due for the period under review, January 1, 1996 through December 31, 1999 ("period under review"). Petition for Review, Ex. A.

2. Manpower timely filed a Petition for Redetermination of the Department's Notice of Field Audit Action via letter dated May 13, 2004. Petition for Review, Ex. B; Answer ¶ 1.

3. The Department denied Manpower's Petition for Redetermination by letter dated March 11, 2005. Petition for Review, Ex. C.

[1] Attorney Stellick retired from the Department after the briefs were filed in this case, but returned for the oral arguments.

4. Manpower filed a timely Petition for Review with the Commission appealing the Department's denial of the Petition for Redetermination. Petition for Review, Ex. B.

MATERIAL FACTS

5. Manpower was founded by two Milwaukee attorneys in 1948. Manpower was initially incorporated as a domestic Delaware corporation and registered to do business in Wisconsin. Affidavit of Terry A. Hueneke ("Hueneke Aff.") ¶ 3, Ex. A at 1, ¶ 4.

6. Manpower provides to its clients in Wisconsin workers with a wide range of skills who work under the direction and control of those clients. Hueneke Aff. ¶ 17.A.

7. In the process of placing a worker, Manpower's client will typically request a worker who possesses certain skills, such as the ability to type at a certain speed, accounting skills or the ability to program computers. Hueneke Aff. ¶ 17.B.

8. Manpower pays the wages of the workers it places and also pays for withholding taxes, other payroll expenses and, in some circumstances, certain fringe benefits. Manpower recoups these costs by the amounts it charges its clients based upon the time its workers are on the job. Hueneke Aff. ¶ 17.C.

9. Manpower does not contract to provide certain outcomes or results. Rather, it is the responsibility of Manpower's clients to ensure that any desired outcome or result is achieved. For example, Manpower often places workers with companies that provide telephone answering services, as well as with call centers which initiate

telephone calls to clients or potential clients. When workers are placed in such settings, Manpower never agrees that the workers placed will answer a certain number of calls, make a certain number of calls or accurately record a minimum number of telephone messages. Hueneke Aff. ¶ 17.D; Affidavit of Nicole Langley ("Langley Aff.") ¶ 5.

10. When Manpower places a worker, Manpower's client defines the scope of the duties to be performed by the worker by deciding the tasks to be assigned to that worker and the manner in which those tasks are to be carried out. Manpower's client also supervises and directs the worker with respect to the worker's activities for the client. Manpower does not supervise or direct the activities that the worker performs for the client. Because Manpower does not define the scope of the work performed by its workers and because Manpower does not direct or supervise its workers, Manpower generally is unaware of the specific tasks performed by its workers. Manpower's management may know that a particular worker is generally performing certain tasks, such as I.T. (information technology) tasks, clerical tasks or general labor, but does not know the specific tasks performed. In many cases, this means that Manpower management does not know if the tasks that are being performed would be considered a taxable service by the Department. Hueneke Aff. ¶ 17.G; Langley Aff. ¶ 8; Affidavit of Robin Pickering ("Pickering Aff.") ¶ 9.

11. Manpower does not supply tools or equipment necessary for its workers to perform tasks that are assigned to them by Manpower's clients. Rather, Manpower's clients provide the necessary tools and equipment. For example, workers placed by Manpower with a client that needs someone to do janitorial and light repair

work may need basic tools such as screwdrivers and wrenches. Manpower does not provide such tools to its workers. Similarly, a worker placed by Manpower in a manufacturing plant may have the need for a wire welder or similar machine. Such pieces of equipment are not supplied by Manpower. Hueneke Aff. ¶ 17.H; Langley Aff. ¶ 11.

12. Manpower does not train its employees to provide a particular outcome. In limited circumstances, Manpower provides generic training – not specific to the needs of any one of Manpower's clients – to the workers it places, such as on the operation of certain machinery or equipment. For example, Manpower may train its workers in the safe operation of a forklift. Similarly, Manpower may provide generic training with respect to the proper installation of certain software packages. However, Manpower would not provide training that is tailored toward the application of such software to meet the needs of a particular client. If one of Manpower's clients wants computers programmed or software installed in a particular manner, the client must train the worker placed by Manpower. Similarly, a Manpower client may want to train workers placed by Manpower in how to take telephone messages in a way that serves the client's customers or a Manpower client may dictate the manner in which Manpower's workers maintain and repair machinery and equipment. Therefore, any job training that is specific to the outcome desired by a Manpower client is provided by that client, not Manpower. Hueneke Aff. ¶ 17.J; Pickering Aff. ¶ 13; Langley Aff. ¶ 14.

13. Manpower's workers do not perform their activities for Manpower's clients at Manpower's offices. Rather, Manpower's workers perform

activities at the location of Manpower's client or at a location specified by Manpower's client. Hueneke Aff. ¶ 17.K; Langley Aff. ¶ 10; Pickering Aff. ¶ 8.

14. While the changing needs of the marketplace have required that Manpower provide workers who have new and different skill sets, in most respects, the tasks performed by workers placed by Manpower have not materially changed over the past 25 years. Hueneke Aff. ¶ 17.L.

15. Manpower is the world's largest employment staffing company with more than 4,400 offices in 73 countries. Manpower is headquartered in Milwaukee, Wisconsin. Hueneke Aff. ¶¶ 15, 18.

16. In 1999, the last year of the period under review, Manpower provided generic training and employment to more than 2 million people. In that year, Manpower had more than 3,300 offices in 52 countries. Hueneke Aff. ¶ 19.

17. In Wisconsin, Manpower employs approximately 4,200 workers who provide staff augmentation services and 1,000 permanent and home office staff. Hueneke Aff. ¶ 21.

18. Manpower is a member of numerous groups and associations in the staff augmentation and personnel industry.

19. Manpower is classified as a "temporary help company" under Section 108.02(24m) of the Wisconsin Statutes. Huenke Aff. ¶ 26.

20. Manpower is not a member of any professional or trade organization that consists primarily of any of the following types of service providers and does not hold itself out as a provider of such services:

(a) Hotels, motels and inns;

(b) Providers of entertainment, athletic, recreational, or amusement events or facilities;

(c) Providers of telecommunication services;

(d) Providers who record and transmit telecommunications messages;

(e) Laundries, dry cleaners, pressing and dyeing service providers;

(f) Photographers and photographic studios;

(g) Providers of parking services;

(h) Providers of information technology services and other computer related services, or any other provider of services relative to tangible personal property;

(i) Firms that produce, print, fabricate, process or imprint upon tangible personal property;

(j) Sellers of cable television services;

(k) Landscapers and lawn maintenance service providers.

Affidavit of Gordon Moehling ("Moehling Aff.") ¶ 2.

21. Prior to the period under review, the Department had audited Manpower for sales/use tax purposes for the following periods:

(i) March 1, 1983 through February 28, 1987 ("1983-1987 Audit");

(ii) March 1, 1987 through December 31, 1990 ("1987-1990 Audit"); and

(iii) January 1, 1991 through December 31, 1994 ("1991-1994 Audit").

Moehling Aff. ¶ 9.

22. The position taken by the Department in this case – that when a worker placed by Manpower performs a task which would be taxable if provided as

part of a taxable service, then Manpower's gross receipts related to that task are subject to the sales tax – has been described by the Department as the "Look Through" position.[2] The term "Look Through" describes the Department's analysis. Affidavit of Kristina E. Somers ("Somers Aff.") Ex. H at Ex. H at 2;[3] Affidavit of Diane L. Hardt ("Hardt Aff.") ¶ 13.

23. In October of 2002, the Department issued a draft tax bulletin that first publicly announced the "Look Through" position. This was the first written notice received by Manpower of the Department's position. Moehling Aff. ¶ 17, Ex. D.

24. In January of 2005, the Department issued a release as part of Tax Bulletin 141, publicly adopting the "Look Through" position. Wisconsin Tax Bulletin 141 at 31-37; Hardt Aff. ¶¶ 4-12.

OPINION

This case concerns the taxation of temporary help services. In brief, Manpower is in the business of placing temporary help workers with companies in need of additional help. The workers are assigned by Manpower based on the skills and interests they possess and are paid by Manpower. The workers may be sent out for a day, or a week, or months. While out on a job site, the temporary help employees are not supervised by Manpower. In this matter, the Department is seeking to impose on Manpower sales tax for the temporary help services performed by its employees that

[2] Interestingly enough, the term "Look Through" appears to have originated with one of the Petitioner's attorneys and was subsequently adopted by the Department. Respondent's Reply Brief, at 4.

[3] i.e., page 2 of Exhibit H to Exhibit H of the Affidavit of Kristina E. Somers.

match any service listed in Wis. Stat. § 77.52 (2). Manpower argues that temporary help services are not specifically enumerated in Wis. Stat. § 77.52(2) and, therefore, are not subject to sales tax. Both sides have moved for summary judgment as to the taxability of temporary help services. Manpower has also asked for summary judgment on the grounds of equitable estoppel. The first part of this opinion will recite the applicable law and standards. The second part of the opinion will summarize the arguments made by the litigants. The final part of the opinion will discuss why Manpower is entitled to summary judgment.

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 party moving for summary judgment has the burden to establish the absence of a genuine issue as to any material fact. *Grams v. Boss,* 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). If a moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle that party to a trial. *Artmar, Inc. v. United Fire & Casualty Co.,* 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967). Once a *prima facie* case is established, "the party

in opposition to the motion may not rest upon the mere allegation or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem,* 94 Wis. 2d 657, 673, 289 N.W.2d 801, 809 (1980), *citing* Wis. Stat. § 802.08(3). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar,* 34 Wis. 2d at 188. The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Kraemer Bros. v. United States Fire Ins. Co.,* 89 Wis. 2d 555, 567, 278 N.W.2d 857, 862 (1979). Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents,* 94 Wis. 2d at 673. The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law are before the court. *Eichenseer v. Madison-Dane County Tavern League, Inc.,* 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

As to the burden of proof, summary judgment is generally inappropriate when matters of complex factual proof need to be resolved before legal issues can be decided. *See, e.g., Peters v. Holiday Inns, Inc.,* 89 Wis. 2d 115, 129, 278 N.W.2d 208 (1979). Summary judgment is not a matter of right, and the trial court may deny summary judgment if it determines that the opposite side is entitled to trial. *Wozniak v. Local No. 1111 of United Elec., Radio, and Mach. Workers of America (UE),* 45 Wis. 2d 588, 173 N.W.2d

596 (1970). A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy. *Kraemer,* 89 Wis. 2d at 566. Summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear. *Lecus v. American Mut. Ins. Co. of Boston,* 81 Wis. 2d 183, 260 N.W.2d 241 (1977). Summary judgment should not be granted if reasonable persons could reach reasonable, but differing inferences and results from the facts that are undisputed. *Maynard v. Port Publ'ns, Inc.,* 98 Wis. 2d 555, 297 N.W.2d 500 (1980). Any reasonable doubt as to existence of a genuine issue of material fact must be resolved against the moving party. *Heck & Paetow Claim Service, Inc. v. Heck,* 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

B. THE ARGUMENTS OF THE PARTIES

The basic facts in this case are undisputed, at least as to the taxability of temporary help services. While there is no stipulation of facts, both sides have submitted proposed findings of fact and have responded to each other's submissions.[4] At oral argument, the attorneys for both sides confirmed for the Commission that the essential facts were not in dispute.[5] In brief, Manpower began providing temporary help services in 1948, placing its workers with customers who performed any of

[4] We have edited the proposed facts for consistency, relevance, and punctuation.

[5] A recorded copy of the oral arguments is in the case file at the Commission and is available for purchase pursuant to Commission rules.

numerous services from accounting to landscaping and this case involves whether providing such services is subject to Wisconsin sales tax.

In Wisconsin, all sales of goods are subject to sales tax unless an exception applies; however, only sales of the specific services listed in Wis. Stat. § 77.52(2) are similarly subject to sales tax. Sales of services not listed in that section are not taxable. From the time of the passage of the sales tax law in 1961, no sales taxes on the services that fit the list in Wis. Stat § 77.52(2) were assessed or collected from the Petitioner. In 2002, the Department circulated a draft tax bulletin which indicated that it was considering collecting sales tax from temporary help companies on the services that fit Wis. Stat. § 77.52(2). In January of 2005, the Department published official guidance in support of taxing temporary services, in effect adopting what the Petitioner terms "Look Through" theory, claiming that an analysis must be done of all the tasks that the placed worker performs, and to the extent the tasks consist of services that are otherwise taxable under Wis. Stat. § 77.52(2)(a), the service would be taxable, unless an exemption applies. On March 30, 2005, the Department notified Manpower that $1,976,315.90 was due for the period 1996 through 1999.[6] Both sides have moved for

[6] The Department estimated the amount due. According to the Petitioner, the reason the Department had to estimate Manpower's alleged liability is that "[The Department] did not have access to Manpower's sales records for this audit because Manpower does not believe that staff augmentation services are taxable." Petitioner's Reply Brief, footnote 4, at 7. The Department states that Manpower refused to allow an audit. Respondent's Brief, at 13. In addition, the Department's position is that if the Petitioner wanted to raise the measure of tax issue, it should have done so in its initial pleadings, or after having been apprised of the lack of that issue, it should have amended its pleadings. Respondent's Reply Brief, at 2.

summary judgment on the taxability of the temporary help services at issue and their arguments are summarized below.

1. THE PETITIONER'S ARGUMENTS

Manpower makes two basic arguments in support of its motion. The first argument is that temporary help services are not taxable under Wis. Stat. § 77.52. Manpower makes a number of claims in support of this argument. First, unlike goods, only services that are specifically listed in Wis. Stat. § 77.52 are subject to the sales and use tax, and "temporary help services" is not generically listed there. Second, under Wisconsin law, tax liability cannot be imposed without clear and express language and ambiguities must be resolved against taxability. Third, Manpower claims that temporary help services are distinguishable in certain respects from the list of taxable services in Wis. Stat. § 77.52, in that (i) Manpower does not supervise or direct the workers, (ii) Manpower does not define the scope of the work, (iii) Manpower does not warrant a specific outcome or result, (iv) Manpower does not provide tools or equipment or training to the workers, and (v) Manpower does not control the location of the work. Fourth, Manpower claims that for purposes of the sales and use tax, workers placed by Manpower are employees of Manpower's clients, not Manpower. Fifth, Manpower claims that the Department has historically accepted Manpower's position. Sixth, Manpower claims that the Department's theory of liability has not been accepted by other states. Seventh, Manpower claims that the Department's construction would lead to inequitable results. Finally, the other basic argument in support of its summary judgment motion is that because the Department audited Manpower three

previous times and did not issue a similar assessment, the Department should be equitably estopped from pursuing this assessment.

2. THE RESPONDENT'S ARGUMENTS

The Department argues that what Manpower is selling is the skill-related services of its employees and that Manpower receives compensation in exchange for the services performed by its employees. The Department points out that the term "services" in the sales and use tax statutes is not limited to those provided by "conventional service providers." The Department argues that "services" must be construed very broadly and that the case law and statutes do not support Manpower.[7] In the Department's view, Manpower's position is a matter of semantics, not substance. Finally, the Department points out that the Wisconsin Legislature has acted to exempt only the sale of services by one identified type of service provider---veterinarians---from the imposition of sales and use tax under Wis. Stat. § 77.52(2)(a)10 and it has not acted to do so in reference to "temporary help companies."

[7] The Department correctly points out that at times this Commission has construed the term "services" rather broadly. *See, e.g., City of Madison v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) ¶400-100 (WTAC 1995). In that case, the Commission found that the required planting of trees by the City in the yards of property owners was a taxable landscaping "service." *City of Madison*, however, concerned an activity that was clearly specified in Wis. Stat. § 77.52(2)(a). At other times, more narrow constructions of "service" have prevailed. *City of Milwaukee v. Dep't. of Revenue,* Wis. Tax Rep. (CCH) ¶400-405 (WTAC 1999), *aff'd,* Wis. Tax Rep. (CCH) ¶400-513 (Wis. Cir. Ct. Dane County 2000). In *City of Milwaukee,* the Commission held that a municipality could not be treated as selling a "service" when it towed cars because the owners received no enjoyment from this "service." In this case, the Petitioner concedes that it is selling a service, just not a taxable one.

C. DECISION

This case requires us to decide if the temporary help services Manpower provides to employers in Wisconsin are taxable under Wisconsin Stat. § 77.52(2). In brief, the Department points to a number of the many services that Manpower provides workers for and attempts to tax Manpower on its receipts that are believed to be linked to those taxable services.[8] On the other hand, Manpower argues that the service it provides is "staff augmentation" and that this service is not specifically listed in Wis. Stat. § 77.52(2).[9] Manpower concedes that what it sells to its customers is a service, but argues that this service is not a taxable one. Petitioner's Reply Brief, at 30. Thus, the Commission must answer the question of whether the temporary help services Manpower provides to employers fit within the taxable services specifically listed in Wis. Stat. § 77.52(2).

Statutory interpretation is a question of law. *Jungbluth v. Hometown, Inc.,* 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996). The goal of statutory interpretation is to discern the intent of the legislature. *Id.* We must first look to the plain language of the statute. *Hemburger v. Bitzer,* 216 Wis. 2d 509, 517, 574 N.W.2d 656 (1998). In seeking a plain meaning, a court seeks a meaning that anyone---a lawyer, a party, an

[8] Manpower places its temporary help workers in numerous general categories such as "waitress," "construction worker," "mechanic," "accountant," "teacher," and "ticket agent." April 23, 2008 Affidavit of Attorney Robert C. Stellick, Jr., Exhibit 16.

[9] Manpower refers generally to the service it provides its customers as "staff augmentation" and the Department refers generally to what Manpower sells as "services." We will refer instead to "temporary help services," because that is the term the Wisconsin Legislature uses in Chapter 108, even though the statute that uses the term was created by the Legislature after the audit period.

administrator, or any reader---could discern simply by examining the text of the statute, perhaps with the aid of a dictionary, a book generally available to all. *County of Dane v. LIRC,* 2009 WI 9, ¶48, 315 Wis. 2d 293, 759 N.W. 2d 571 (Abrahamson, J., concurring opinion). If the language in the statute is ambiguous, we may rely on extrinsic aids such as legislative history, scope, purpose, subject matter and context to determine the legislature's intent. *Id.* A statute is ambiguous only if it is capable of two or more reasonable interpretations. *In re T.P.S.,* 168 Wis. 2d 259, 264, 483 N.W.2d 591 (Ct. App. 1992). A statute, word or phrase is ambiguous, and use of the rules of construction proper, only when it is capable of being interpreted by reasonably well-informed persons in two or more senses. *See, Guertin v. Harbour Assurance Co. of Bermuda, Ltd.,* 135 Wis. 2d 334, 338, 400 N.W.2d 56, 58 (Ct.App.1986), *aff'd,* 141 Wis. 2d 622, 415 N.W.2d 831 (1987). That the parties disagree about its meaning does not necessarily make it ambiguous. *Milwaukee Fire Fighters' Assn, Local 215 v. Milwaukee,* 50 Wis. 2d 9, 14, 183 N.W.2d 18, 20 (1971).

In addition, we note that a statute which is plain on its face may also be rendered ambiguous by the context in which it is sought to be applied. *See, Roehl v. American Family Mut. Ins. Co.*, 222 Wis. 2d 136, 145, 585 N.W.2d 893 (Ct. App.), *review denied,* 222 Wis.2d 676, 589 N.W.2d 630; *See, Brandt v. LIRC,* 160 Wis.2d 353, 368, 466 N.W.2d 673, 679 (Ct. App 1991) ("[D]epending on the facts of a given case, the same statute may be found ambiguous in one setting and unambiguous in another."). Considering these two basic rules of construction, it would appear that a party can

escape the imposition of tax by pointing to any ambiguity and doubt in the statute creating the tax. The ultimate result in this case, therefore, depends upon whether the statute is ambiguous and doubtful. *National Amusement Co. v. Wisconsin Dep't of Taxation,* 41 Wis. 2d 261, 267, 163 N.W.2d 625 (1969).

The Wisconsin Supreme Court has consistently applied two fundamental rules of statutory construction to the imposition language of taxing statutes: (1) when statutory language is clear and unambiguous, no judicial rule of construction is permitted, and the court must arrive at the intention of the Legislature by giving the language its ordinary and accepted meaning; and (2) 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).[10]

Thus, the first question we must answer is if there is ambiguity in whether or not Manpower's temporary help services are included in the taxable services listed in the statute. As mentioned above, a statute is ambiguous only when it is capable of being understood by reasonably well-informed persons in either of two or more

[10] In Wisconsin, the sales tax is imposed on the retailer, and all retailers subject to the tax are required to get a permit, to file returns, and to remit the tax to the Department. The retailer is allowed to pass the tax on to its customers or it may pay the tax itself. Wis. Stat. §§ 77.52(2) and 77.52(7).

senses.[11] The test is whether well-informed persons could have become confused. *Wisconsin Dep't. of Revenue v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 234 N.W.2d 350 (1975). This test has been applied by the courts and the Commission on numerous occasions to find whether or not the sales tax statute is ambiguous in certain contexts:

All City Communication Co., Inc. v. Wisconsin Dep't. of Revenue, 2003 WI App. 77, 263 Wis. 2d 394, 661 N.W.2d 845 [sales tax statute ambiguous because reasonable minds could differ as to whether a communications tower is "personal property"];

National Amusement Co. v. Wisconsin Dept. of Taxation, 41 Wis. 2d 261, 163 N.W.2d 625 (1969) [sales tax statute not ambiguous as to sale of popcorn and soft drinks prepared and sold at motion picture theater refreshment stands];

Luetzow Industries v. Wisconsin Dep't. of Revenue, 197 Wis. 2d 916, 541 N.W.2d 810 (1995) [statutory sales tax exemption concerning packing and shipping materials used in transfer of "merchandise" to customers is ambiguous];

Kastengren v. Wisconsin Dep't. of Revenue, 179 Wis. 2d 587, 594, 508 N.W.2d 431 (1993) [Department concedes that the term "predecessor" under Wis. Stat. § 77.52(18) is ambiguous];

[11] Manpower asserts that the statute here is ambiguous while the Department maintains that as used in the statutes, "services" must be construed very broadly. Respondent's Reply Brief (filed April 23, 2008), at 15.

SSM Health Care v. Wisconsin Dep't. of Revenue, Wis. Tax Rptr. (CCH) ¶400-593 (WTAC 2002) [emergency personal assistance system is not a telephone service subject to sales and use tax; no ambiguous statutory language to interpret];

North-west Services Corporation and North-west Telephone Company v. Wisconsin Department of Revenue, Wis. Tax Rptr. (CCH) ¶*201-688.* (WTAC 1980) [this Commission holds that an ambiguity exists as to whether the lease of equipment by a telephone company is covered by the language of Wis. Stat. § 77.52(2)(a)]; and

Pet Vacations, Ltd. v. Wisconsin Department of Revenue, Wis. Tax Rptr. (CCH) ¶400-002 (WTAC 1993) [the term "maintenance" in Wis. Stat. § 77.52(2)(a) found ambiguous].

After reviewing the nearly 1,700 pages[12] filed by the parties in support of their motions and listening to the oral arguments presented by able counsel, we can only conclude that Wis. Stat. § 77.52 is ambiguous as to whether or not temporary help services are included in the services listed therein. Are temporary help services a subset of services and, hence, potentially taxable, or are temporary help services something fundamentally different and nontaxable? In our view, both constructions are reasonable, which makes the application of the statutory language ambiguous in this particular factual context.

[12] The 1,700 figure is derived from the Petitioner's Motion for Oral Argument.

Having decided that "services" is ambiguous in this factual situation, we turn now to extrinsic aids to determine the Legislature's intent, noting that an ambiguous statute imposing a tax is construed in favor of the taxpayer. *Luetzow Industries*, at 924. When there is no definitive answer to the meaning of a statutory word or phrase, Wis. Stat. § 990.01(1) provides that the word or phrase "shall be construed according to common and approved usage." Relying on this provision, the Commission and the courts often look to dictionary definitions for assistance in ascertaining the meaning of a term in a statute. *See, e.g., Madison Newspapers, Inc., v. Wisconsin Dep't of Revenue,* 228 Wis. 2d 745, 760, 599 N.W.2d 51 (Ct. App. 1999). In that case, the court looked to the dictionary definition from *Webster's Third New Int'l Dictionary* to determine the meaning of the term "customer." In *Pet Vacations,* this Commission used a dictionary definition in determining what activities went into "maintenance" of pets. Both sides refer to dictionary definitions in their respective briefs, although given the relatively narrow difference between "temporary help services" and "services" the likelihood of a dictionary providing assistance seems low. The Department's desk dictionary, *Webster's New World Dictionary (2nd Coll. Ed.)*, defines "service" as the following:

> 6. a) an act giving assistance or advantage to another... c) [*pl*] friendly help; also professional aid or attention [the fee for his services].

The Petitioner would add the phrase "the result of this; benefit, advantage" between a) and c). Petitioner's Reply Brief, at p. 22. Unfortunately, however, we find dictionary

definitions are of little or no assistance in answering the question of whether temporary help services are services which can be taxed under Wis. Stat. § 77.52. [13]

As mentioned above, another aid to courts in statutory construction is legislative history. Neither side has pointed to any here, however. We note parenthetically that Manpower's business predates the sales tax law[14] and the legislature is generally presumed to act with knowledge of existing laws. *See, Peters v. Menard, Inc.,* 224 Wis. 2d 174, 187, 589 N.W.2d 395 (1999). Further, we have been informed that at least two recent attempts to pass legislation dealing with temporary help companies were not passed by the legislature, which, of course, could be read many ways.[15] Respondent's Reply Brief, at 9. By analyzing the changes the legislature might have made over the course of several years, we may be assisted in arriving at the meaning of a statute. *County of Dane,* ¶27. For our purpose here, suffice it to say that we are not aware of any legislative history or materials which give insight into or answer our particular question.

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[13] Analysis by dictionary has its limitations. *Ho-Chunk Nation v. Wisconsin Department of Revenue,* 2009 WI 48, ¶24, ___ Wis. 2nd ___, 766 N.W.2d 738 (discussing why dictionaries provide minimal help in a determination of ambiguity); *See, also, Noffke v. Baake,* 2009 WI 10, ___Wis. 2d ___, 760 N.W.2d 156 (each of the two Wisconsin appellate courts used dictionary definitions, reaching opposite conclusions and Chief Justice Abrahamson's concurrence likened the use of the dictionary to "[t]he equivalent of entering a crowded cocktail party and looking over the heads of guests for one's friends.").

[14] The Wisconsin sales and use tax law was enacted in 1961 and significantly broadened in 1969. The 1969 law has been amended on a number of occasions.

[15] 2003 Senate Bill 424; 2007 Assembly Bill 644 (establishing tax credit for temporary services); 2005 Assembly Bill 336 (establishing exemption with sunset provision).

A third aid to statutory construction is what courts have said on related matters. Although this Commission has interpreted and applied the sales and use tax statutes on numerous previous occasions, it has not previously applied the sales and use tax statutes to substantially similar facts.[16] Both sides have discussed the approaches taken in other states, but such an examination of those approaches typically has limited value in looking at the construction of Wisconsin tax laws. The one case cited by the parties that deals directly with the taxation of temporary help services is *In the Matter of the Petition of Wheatfield Properties,* NY-TAXRPTR (CCH) ¶20010503443, TSB-H-87(157)S (May 29, 1987), a 1987 case where the New York Commission of Taxation and Finance concluded that the sale of certain temporary help services was subject to New York sales and use tax.[17] *Wheatfield Properties* has several limitations here, however. First, the decision is based on New York sales and use tax law as it existed in the late 1970's. As the Department cogently points out, what other states decide, either in statutes or in court decisions, does little to aid in a construction of the Wisconsin statute. Either the Wisconsin statutes are clear and the tax is due, or not. Respondent's Reply Brief, at 6. Second, the decision does not explain the New York Commission's reasoning.[18] Third, for reasons that are unclear in this record, the New York Department of Taxation and Finance decided after the *Wheatfield* decision that the

[16] A Westlaw search on August 7, 2009 of the witx-admin database produced 171 cases dating back to 1978 in which this Commission has construed, cited, or applied Wis. Stat. § 77.52.

[17] The Westlaw citation is 1987 WL 60258.

[18] Manpower's brief states that the only argument considered by that Commission was that the temporary workers were "in an employee-employer relationship" with the client of the temporary service provider. This argument was rejected by the New York Commission because it lacked support in the record.

taxation of temporary help service providers would be prospective only. Respondent's Reply Brief, at p. 5; Petitioner's Brief, at p. 55.

There are a number of other paths suggested here, none of which we will follow. First, there is discussion of a number of employment-related common law doctrines such as *respondeat superior* and the federal common paymaster doctrine, but we see such discussion as having limited value in a tax imposition case. As the Department appropriately points out, these doctrines were developed to resolve disputes, not to create them. Respondent's Reply Brief, at 23. Second, there is discussion of an opinion rendered by a representative of the Department in a different context, which, of course, is not controlling here and is not binding on the Department or this Commission. Petitioner's Reply Brief, at 36.

While we do not find extrinsic aids of assistance here, we note that Wisconsin courts have long looked to substance in taxation matters.[19] *Cliff's Chemical Co. v. Wisconsin Tax Commission,* 193 Wis. 295, 214 N.W. 447 (1927); *Miller v. Tax Commission,* 195 Wis. 219, 221, 217 N.W. 568 (1928). The Wisconsin Supreme Court has stated that it will make determinations of taxability based on the facts viewed as a whole and that it is the substance and realities of a taxpayer's activities that are determinative of the Department's power to tax. *Department of Revenue v. Sterling Custom Homes Corp.,* 91 Wis. 2d 675, 679, 283 N.W.2d 573, 575 (1979). Both sides here provide extensive discussion of the "substance and realities" of this case. As the

[19] The federal courts have long applied a similar principle. *U. S. v. Phellis,* 257 U.S. 156 (1921).

Department notes, Wisconsin courts have previously used this "substance and realities" test. Respondent's Reply Brief, at 21.[20] In *Sterling Custom Homes,* the issue was the taxability of the taxpayer's real construction activities and the court examined the taxpayer's everyday work activities to determine that its actual activities were entitled to the real property exemption to the sales and use tax. In *Madison Newspapers, Inc. v. Wisconsin Dep't of Revenue,* 228 Wis. 2d 745, 599 N.W.2d 51 (Ct. App. 1999), the court looked to the substance of the taxpayer's relationship with its carriers to determine if certain materials were exempt from the sales and use tax. In *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.,* 289 Wis. 2d 628, 712 N.W.2d 351 (Ct. App. 2006),[21] the Wisconsin Court of Appeals noted the Department's reliance on the longstanding principle that the taxability of a given transaction is determined, not by how a taxpayer characterizes it for accounting purposes, but by the substance of the transaction itself. This Commission has previously used this test as well. *Hanz Contractors v. Department of Revenue,* Wis. Tax Rep. (CCH) ¶400-220 (WTAC 1996).

When we look to the substance and realities of the activities in question, certain aspects of these transactions stand out. First, the workers that Manpower sends out are in many ways essentially substitutes or stand-ins for the purchaser's own work force, and the wages of one's own workforce, as the Department agrees, are clearly not

[20] The Department's formulation of the test in its reply brief places emphasis on "activities." ["...the tax is determined by the 'substance and realities of a taxpayer's activities [emphasis in the original] and not the label or form of the transaction."] Respondent's Reply Brief (filed April 23, 2008), at 21.

[21] The *River City* decision cited above was affirmed by the Wisconsin Supreme Court. *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.,* 2007 WI 27, 299 Wis. 2d 561, 729 N.W.2d 396.

subject to sales and use tax.[22] Second, once at a job site, a Manpower employee may wind up doing tasks that are clearly non-taxable based on the purchaser's needs on that particular day, which calls into question the nature of the original transaction itself. Third, the minute-by-minute recordkeeping requirements suggested by the Department are significantly more burdensome than those normally required of a seller subject to sales tax.[23] Fourth, there are at least two major differences between a taxable service and a service provided by a temporary help company: (1) Manpower does not control the employee performing the taxable service; and (2) Manpower does not guarantee a particular result.[24] In sum, we are properly mindful that we are not to search for doubt to defeat an obvious legislative enactment. *Transamerica Financial Corp. v. Wisconsin Dep't.of Revenue,* 56 Wis. 2d 57, 65, 201 N.W.2d 552 (1972). An examination of the substance and realities here as suggested by the litigants leads us to the conclusion that there is a reasonable doubt that temporary help services and the taxable services listed in the statute are the same thing.

As the Wisconsin Supreme Court recently observed, statutory text that is clear in most circumstances may not always provide the answer for unanticipated fact

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[22] At the oral arguments, the Respondent indicated that the reason that ordinary wages are not subject to sales and use tax is that they are not sold at retail. At another point, it was indicated that employees act as a corporation's alter ego.

[23] The Department, based on its January, 2005 Tax Bulletin, suggests a total of three potential allocation methods for a taxpayer to use to determine what percentage of the sales price can be allocated to services that are taxable. Reply Brief of Respondent, at 77. The second method is a "primary purpose" method and the third method is one that uses job descriptions detailing employee tasks.

[24] The Petitioner argues that there are 11 differences between what Manpower provides and what one normally associates with the provision of taxable services at retail to consumers, but we find only control and responsibility for results to be significant here. Petitioner's Reply Brief, at 20.

patterns. *State v. Johnson,* 2009 WI 57, ¶30, --- Wis. 2nd ---, 767 N.W.2d 207. When unanticipated fact patterns occur, one approach is that the statute should be considered in terms of its manifest intent to see, in Professor Hurst's words, whether the "pictures actually drawn by the statutory text … [are] sufficient to cover the new type of situation that the course of events ha[s] produced." James W. Hurst, *Dealing With Statutes,* 35 (1982). According to Professor Hurst, if the legislature has supplied "sufficient specifications to provide a discernible frame of reference within which the situation now presented quite clearly fits, even though it represents in some degree a new condition of affairs unknown to the lawmakers," the statute may be interpreted accordingly.[25] *Id.* Here, the situation does not clearly fit within Wis. Stat. § 77.52's frame of reference and we are not convinced that a taxation statute of imposition can or should be applied in such fashion. Instead, we are reminded of what Judge Learned Hand once wrote about judges:

> When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right.[26]

When we look to the substance and realities of the transactions at issue, we conclude that "temporary help services" are not the same as the services that the legislature has

[25] The example Professor Hurst discusses with approval concerns an 1853 Massachusetts criminal statute making it a felony knowingly to possess burglarious tools that was used to prosecute automobile break-ins circa 1940. *Commonwealth v. Tilley,* 306 Mass. 412 (1940).

[26] Hand, *How Far is a Judge Free in Rendering a Decision?* (1935).

enumerated in Wis. Stat. § 77.52, and we do not find that "temporary help services" fit into the enumerated "services."

In sum, applying the "Look Through" approach to the sales tax with respect to temporary help services has all of the issues described above.[27] For us, the problem with the Department's approach is that it goes against the rule of construction that taxes may only be imposed by clear and express language, with all doubts and ambiguities resolved in favor of the taxpayer. Wis. Stat. § 77.52 does not tax "services," it taxes specific services that the Legislature listed. Simply put, "temporary help services" is not listed in our statutes as a taxable service, and we find that such services are distinguishable from the services enumerated in Wis. Stat. § 77.52(2). In addition, there is the matter that for almost 45 years there was no attempt to tax sales of temporary help services on this basis. While we can accept the Respondent's assertion that the word "services" might be interpreted to encompass certain aspects of temporary help services, we do not see the "clear and express language" required for tax imposition purposes, and under well-settled law, we must therefore resolve the ambiguity in favor of the taxpayer.

[27] The Department's approach has been described as "reasonable" and "having appeal" in the context of resale exemptions. Jon R. Stefanik II, *Crew 4 You, Inc. v. Wilkins: The Ohio Supreme Court Misapplies Statute and Precedent to Eliminate the Resale Exception to Sales of Employment Services,* 22 Akron Tax J. 169 (2007). In footnote 191, the author notes, however, that "[t]his approach is rational, but hotly contested because the Wisconsin Legislature has not expressly made employment services taxable."

CONCLUSION OF LAW

It has been established with the requisite clarity that, as a matter of law, temporary help services are not subject to sales and use tax in Wisconsin and that summary judgment for the Petitioner is appropriate on that basis.[28]

IT IS ORDERED

The Petitioner's motion for summary judgment is granted, the Respondent's motion for partial summary judgment is denied, and the Respondent's action on the Petitioner's Petition for Redetermination is reversed.

Dated at Madison, Wisconsin, this 12th day of August, 2009.

WISCONSIN TAX APPEALS COMMISSION

_____
David C. Swanson, Chairperson

_____
Roger W. Le Grand, Commissioner

_____
Thomas J. McAdams, Commissioner

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

[28] Given our decision on this issue, we do not reach Manpower's Motion for Summary Judgment on the basis of equitable estoppel.