

STATE OF WISCONSIN
TAX APPEALS COMMISSION

MILWAUKEE SYMPHONY ORCHESTRA,

DOCKET NO. 98-S-130

Petitioner,

vs.

DECISION AND ORDER

WISCONSIN DEPARTMENT OF REVENUE,

Respondent,

JENNIFER E. NASHOLD, CHAIRPERSON:¹

The above-entitled matters came before the Commission for a hearing on May 4-7, 2004, at which over 400 exhibits were introduced.² Petitioner, Milwaukee Symphony Orchestra ("MSO"), appeared at the hearing by Attorneys Joseph A. Pickart and Timothy G. Schally, of Michael Best & Friedrich, LLP, and appears on briefs by Attorney Schally and Robert A. Schnur, of Michael Best & Friedrich, LLP. Respondent, Wisconsin Department of Revenue ("Department"), appears by Attorney Linda M. Mintener.

Two primary issues are before the Commission in this case. The first is whether revenues received by MSO from admissions to its concerts were subject to

¹The Commissioner who presided over the hearing is no longer on the Commission and did not participate in authoring this decision. However, pursuant to *Wrigley v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) §202-905 (Dane Co. Cir. Ct. 1987), he submitted a May 10, 2004 Memorandum regarding his "Impressions of Witnesses," attached to this decision, which the full Commission has reviewed and taken into account in rendering its opinion in this case.

² The Commission notes that briefing in this case was delayed by significant problems with the transcription as well as by briefing extension requests due to the lengthy trial, many exhibits, and complex arguments presented. The briefs that were ultimately submitted, which were superb, totaled 317 pages in length, not including attachments.

Wisconsin sales taxes under Wis. Stat. § 77.52(2)(a)2, which imposes sales tax on "[t]he sale of admissions to amusement, athletic, entertainment or recreational events or places." The second is whether the admission receipts are non-taxable under appellate precedent creating an exception from sales tax for sales that are not made by retailers engaged in mercantile transactions. *See Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981).

Having considered the entire record before it, the Commission finds, concludes, and orders as follows:

FINDINGS OF FACT

Jurisdictional Facts and Facts Regarding Tax Audit and Refund Claim.

1. The Department conducted a field audit of MSO for September 1, 1992 through August 31, 1996 ("The audit period").³ During the audit, MSO, on or about July 14, 1997, filed amended sales tax returns for the audit period, claiming a refund of \$719,456.69 in sales tax that it had previously paid on its sales, including all of its ticket sales.

2. On October 3, 1997, the Department issued a sales/use tax assessment against MSO, in the amount of \$30,640.83, plus interest of \$8,757.04, for a total of \$39,397.87 in tax and interest as of December 2, 1997. This assessed amount is not at issue in this appeal.⁴ The Department incorporated its action on MSO's claim for

³ All facts relate to the audit period, unless otherwise specified.

⁴ In its Statement of Facts, MSO states that it "agrees that if all of its ticket sales are taxable, the Department's assessment . . . , plus applicable interest, is correct." (Pet. Br., p. 3). However, MSO makes no separate legal argument regarding the assessed amount and the Commission therefore does not address or include facts related to the assessment. Rather, the facts and legal analysis relate only to MSO's refund claim. Moreover, because we conclude the ticket sales are taxable, MSO's concession regarding the assessment is in effect.

refund into the field audit assessment, granting a portion of the refund claim in the amount of \$10,642.93 in sales and \$585.36 in sales tax. The Department denied the remainder of MSO's refund claim, which denial MSO now contests.

3. On or about December 3, 1997, MSO filed a petition for redetermination dated December 1, 1997, for the subject sales/use tax assessment and the denial of the majority of its claim for refund. On April 30, 1998, the Department denied the petition for redetermination and issued a Notice of Action and Notice of Amount Due in the total amount of \$41,503.28, with updated interest to June 29, 1998, which MSO received on May 1, 1998.

4. On June 1, 1998, MSO filed a petition for review.

General Facts Regarding MSO.

5. MSO was incorporated as a not-for-profit corporation under Chapter 181 of the Wisconsin Statutes on September 24, 1953. It has no members, shareholders or stock and it is prohibited from paying dividends or profits to any of its directors or any other person. Upon its dissolution, its remaining assets are to be distributed to such charitable, eleemosynary, benevolent, educational or similar organizations as are described in § 501(c)(3) of the Internal Revenue Code (IRC) and comparable provisions, as directed by the Board of Directors.

6. In response to the Department's First Interrogatories, MSO stated that its "primary purpose[s]" during the audit period were those stated in its 1976 Restated Articles of Incorporation as follows:

[T]o “organize and maintain and conduct a symphony orchestra and to present performances by the said orchestra in the city of Milwaukee and County of Milwaukee and to the extent possible in the state of Wisconsin and elsewhere; to further the cultivation and appreciation of the art of Music; to do all things necessary or incidental to the carrying out of such purposes; and to exercise the general powers of such corporation in accordance with Section 181.04 of the Wisconsin Statutes.”

(Exh. 11, Interrog. 4; *see also* Exh. 6, p. 2)

7. In 1988, MSO again restated its Articles of Incorporation, stating its purposes as follows:

The purposes for which the Corporation is organized are educational, to present classical and other orchestral music, performed with the highest degree of artistic excellence, to promote and develop public appreciation of and to educate the public in such music, and to engage in any other lawful activity within the purposes for which corporations may be organized under Chapter 181 of the Wisconsin Statutes.

(Exh. 6, 9th printed page)

8. Other MSO documents are similar, stating MSO's purpose or mission as cultivating an appreciation for the art of music, presenting concerts, and/or raising funds to fulfill its purpose. Only a few of the many documents expressing MSO's purpose or mission use any form of the word educate or similar words, and, except for the quote directly above, the term was always used in the context of educating people in the art of music or similar words to that effect. (Exhs. GG; DDD, pp. 4, 7; FFF, pp. 2, 6; GGG, pp. 2, 6, 17; Z, p.1; CC, p. 1; 68, Bates 1717; 79, Bates 2098; 129, last page; 130, p. 1.; 131, Bates

1665; 5-U⁵, p. 1; NNN-PPP, p.3; QQQ, p. 5.; Vol. I, p. 71)⁶

9. At trial, MSO's expert witness was Dr. Robert Greenberg, a noted composer, performer and music educator. Dr Greenberg stated his opinion that the subject concerts were educational rather than entertainment events.

10. MSO's principal violist, Robert Levine, testified that MSO's concerts are "not instructional." (Vol. III, pp. 113, 142). According to Audrey Baird, MSO's Director of Audience Relations and Group Sales, the concerts taught "discipline" and "organization." (Vol. III, p. 197).

11. MSO's income came from ticket sales; sales of miscellaneous tangible personal property; concert revenues paid by other organizations (when on tour or playing for ballets and operas; revenues from media activities such as playing for TV and radio); earnings on its investments; grants from national, state, and county government and from private foundations; and donations from individuals, businesses, and foundations.

12. Ninety percent of MSO's earned income came from concert admissions receipts, which amounted to \$3,574,636 in the year 1992-1993; \$3,327,498 in 1993-94; \$3,559,778 in 1994-1995; and \$3,413,742 in 1995-1996. MSO's total income in the audit years was in excess of \$10.9 million annually.

13. MSO had an annual budget of about \$11 million in 1994. It is the

⁵ MSO's exhibits in this matter are marked with letters A through ZZZZZZZ. For ease of reading the multi-lettered exhibit references, the Commission refers to MSO's exhibits with more than three letters with the letter followed by a number representing the number of letters.

⁶ MSO claims that its "only purpose" in presenting its classical concerts was to further its mission of educating the public in the art of classical music. (Pet. Br., p. 13) The cite from the trial transcript that MSO gives in support of this statement states only that MSO's "intent is to enrich the community by possibly exposing the community to classical music, to have people's lives enhanced by what happens when they're able to hear and become part of symphonic music." (Vol. I, p. 71)

largest performing arts budget in the state. MSO intended to operate with a balanced budget each year, and did so in most years, and for year 1994/95 even had a "small surplus." (Vol. III, pp. 224-225; Exh. 56, Bates 1052, 1137; Exh. 98, Bates 2010)

14. MSO was managed by a Board of Directors of from 40 to 60 members. The members of the MSO's Board were volunteers, and receive no compensation from MSO for their services.

15. MSO's Board members were chosen for their ability to make large financial contributions to MSO, for their skill in raising money, for their personal contacts with other persons or businesses that could donate large amounts of money, and for their talents, professional abilities, and political influence that they used to assist MSO. The Board members assisted in fundraising and made substantial donations from their own personal funds. The MSO Board was the most generous of any arts organization in the state.

16. The MSO Board was responsible for seeing that MSO operated on a "business model," and had a good business plan in place "to assist in the raising of funds." (Vol. II, p. 159). The Board operated in a business-like manner, having at least five meetings per year that lasted from two hours to several days. The minutes of the Board and its Executive Committee reveal constant discussion of and reports on the budget, fiscal condition, and fiscal problems and about fundraising and improving ticket sales, and very little, if any, talk or planning about educational issues. (Exhs. 78, 81, 96-98).

17. The Board had several committees and subcommittees. It had an Executive Committee, a Development Committee, an Endowment Committee, a Long

Range Planning Committee, a Marketing/Public Relations Committee, and a committee to explore performance opportunities. MSO also formed committees for special activities such as for its Capital/Endowment Campaign and for its Telemarketing Campaign 1995.

18. The Milwaukee Symphony Orchestra League (MSOL), the volunteer arm of MSO, is a separate organization that incorporated in 1993 as a spin-off of MSO. It is dedicated to raising money for MSO. MSOL worked with MSO's Marketing Department on fundraising activities. MSOL conducted special events to raise funds for MSO.

19. MSO has held a Wisconsin Seller's Permit since 1967 and filed monthly sales/use tax returns with the Department.

20. MSO employed approximately 90 highly qualified musicians. Most have had rigorous training on their instruments since a very young age and have advanced college or conservatory degrees in music. Their instruments were worth thousands or even hundreds of thousands of dollars. MSO advertised its openings for orchestral positions nationally and internationally. MSO formed a committee of Orchestra members, Board members, and high-level staff to select a new music director (conductor). That committee did extensive research to determine what they were looking for in a music director; went out to hear other orchestras with potential conductor candidates; and invited those conductors to perform with MSO to see if they would be a good fit. MSO hired Music Directors who had been directors of other symphony orchestras or had had prior experience as assistant or associate directors at much larger orchestras before coming to MSO.

21. MSO was a professional full-time orchestra. MSO musicians had written contracts and were paid at the union wage for all rehearsals and performances, and generally rehearsed or performed every day, except for one (and sometimes two) days off per week. All performances were professionally done and involved the use of MSO's stage manager, stagehands, and lighting crew. For most of the musicians, their income from MSO was the principal source of income for their family. MSO paid between \$5.6 and \$6.8 million each year in salaries and benefits for its musicians. The musicians were unionized (as were the stagehands), and all musicians belonged to the Milwaukee Musicians Association, Local 8, of the American Federation of Musicians. The beginning salary for musicians was about \$50,000 per year.

22. MSO had the reputation of being "[a]rtistically very, very fine, very high level." (Vol. I, p. 143). In addition to the professional musicians, MSO also had 40 or more non-musicians who were full-time, well paid, and highly-qualified professionals who administered and managed the logistics and finances of the Orchestra. MSO used sophisticated hiring practices and conducted national searches to recruit and find its musicians and non-musician staff.

23. Each MSO employee had a detailed position description. The staff members were generally given raises every year. MSO offered benefits to its employees such as insurance for health, dental, and long-term disability; musical instrument insurance; a pension plan; an employee assistance program; and paid vacation and sick leave. MSO gave regular raises and paid the entire premium for its employees' health insurance. MSO withheld taxes from the checks paid to its employees, and issued W-2s to them.

24. MSO brought in and contracted with as many as 95 guest artists per year. MSO paid its guest artists as much as a total per year of \$566,823, plus expenses of as much as \$62,002. MSO also brought in and contracted with guest conductors, whom MSO paid up to \$15,000 or more per concert. (Vol. I, pp. 155-156).

25. MSO is a “major league asset” to the Milwaukee community. (Vol. I, pp. 208, 215) One MSO Board member stated that MSO is “a business” and “in the business of entertainment.” (Exh. 97, Bates 1965; TR 1, Vol. I, pp. 110-111).

26. A symphony orchestra “operate[s] like a business all the time.” (Vol. II, p. 157) MSO operated in a businesslike manner with a form and structure comparable to for-profit businesses, *i.e.*, a Board of Directors; officers (Executive Director, President, various Vice Presidents of different operations, etc.) with a large professional staff under them; an Executive Committee that met regularly; a Marketing Department that prepared advertisements and publicity (brochures, flyers, newspaper articles, radio announcements, and TV blurbs); a Human Relations Department with staff to assist in hiring; and a sales staff that made promotional phone calls. MSO had its own in-house Marketing Department, including a Director of Public Relations and Media Relations, an Associate Director of Marketing, a Public Relations Coordinator, a Public Relations Associate, a Creative Manager, a Sales Dept. Manager, a Production/Advertising Coordinator, and many others.

27. MSO maintained detailed financial records that an outside accounting firm audited annually. MSO also launched a website during the audit period.

28. Symphony orchestras are “wildly interested in selling tickets”

because that is their principal way of staying in business. There is enormous pressure on symphony orchestras to sell tickets. MSO realized that its ticket sales receipts were important to its financial health.

29. MSO sold subscription tickets for its Pops and Classical series at a reduced per-concert price. Patrons generally purchased single concert tickets through Ticketmaster, which also sold tickets for sporting events, commercial music, and other forms of amusement, entertainment and recreation.

30. MSO developed ambitious ticket revenue goals, both for each week of its season and for the entire season. MSO also had goals for the percentage of subscription renewals for its various series and had an amount budgeted for ticket revenue.

31. During each year of the audit period, MSO's overall operating revenues, consisting almost entirely of revenues from the sale of tickets to its concerts, were always much less than overall expenses for those concerts. In addition, the concert revenues from each type of the three major concert categories (Classical, Pops and Youth concerts) were substantially less than the direct and allocated indirect expenses of that type of concert.

32. These annual operating deficits were anticipated and expected by MSO's Board of Directors, which recognized that income from MSO's performances could never reasonably be expected to exceed 50% of MSO's expenses. It was also recognized that, even if MSO were able to sell every ticket to every concert, MSO's overall operating revenues from its concerts would still be substantially less than its overall expenses, and that its revenues from each such concert would still be

substantially less than the expenses directly or indirectly attributable to that concert.

33. These annual operating deficits were mostly offset by charitable contributions made to MSO. In some years, however, MSO still had a deficit after taking these contributions into account.

34. MSO's charitable contributions came from various sources, including individuals, private corporations, and private foundations, including the Milwaukee United Performing Arts Fund. During the audit period, major contributions were also received from several government agencies, including the National Endowment for the Arts, the Wisconsin Arts Board, and the County and City of Milwaukee.

35. During each year of the audit period, MSO had a substantial "fund deficit" (that is, its liabilities substantially exceeded its own corporate assets). In its fiscal year ended August 31, 1996, however, MSO's accounting firm determined that, under applicable accounting rules, MSO's balance sheet should also include the amounts held in two trusts, the Milwaukee Symphony Orchestra Endowment Trust and the Milwaukee Symphony Orchestra Foundation Trust, each of which was established for the sole purpose of providing support to MSO. These Trusts were separate legal entities and were managed by their own Boards of Trustees, independent and separate from MSO's Board of Directors. Their function was to receive gifts on behalf of MSO, to manage and invest those funds, and to make annual contributions to MSO when and to the extent that their own Boards decided to make such contributions. When the assets held in these Trusts are added to MSO's own assets solely for accounting purposes, MSO's balance sheet showed a positive fund balance, although MSO's own corporate

assets remained at a level that was considerably less than its liabilities.

36. MSO owns no real estate. It owns personal property consisting of office furniture, office equipment, computer equipment, musical instruments, an automobile, and a music library.

37. MSO engaged in lobbying and spent thousands of dollars on lobbying in the years 1990-1992.

38. MSO had at least seven persons on its administrative staff who dealt with its finances and at least thirteen additional staff members in its marketing and public relations departments. The salaries for its administrative staff totaled almost \$2 million per year.

39. An analysis of the information on MSO's financial statements for fiscal years 1991-92 through 1995-96 prepared by the Department's Audit Technical Services staff member, Kevin Steffens, shows the relationship of annualized education and outreach expenses to total revenue claimed on MSO's financial statements. The Department's analysis shows that MSO spent the following percent of its total revenue for education and outreach purposes:

1991-1992: 1.24%

1992-1993: 1.6%

1993-1994: 1.99%

1994-1995: 2.4%

1995-1996: 2.5%

(Exh. 76; Vol. IV, pp. 179-181)

40. MSO had a line of credit with as much as \$2.7 million available. The Endowment Trustees guaranteed the borrowed amount, up to \$2.6 million. MSO routinely drew from said line of credit.

41. In 1993, MSO's Long Range Planning Committee canceled its six-week Summer Nights Festival as part of a plan to maintain financial stability and save approximately \$125,000 in the 1992-1993 season. (Ex. 56, Bates 1050). MSO chose to cancel the Summer Nights Festival because "expenses exceeded revenue." (Exh. 40, Bates 0549)

42. MSO, in its 1994-1997 Long Range Plan, identified its eight most "critical issues," none of which included the educational value of its concerts or educating its patrons.

Facts Regarding MSO's Status Under Federal Laws.

43. On May 10, 1956, MSO (under its then corporate name, "Milwaukee Pops Orchestra, Inc.") filed a Form 1023 Exemption Application with the Internal Revenue Service ("IRS") seeking a determination that MSO was exempt from federal income tax under I.R.C. § 501(c)(3). This application stated that its purpose was "[t]o enhance the appreciation of music and to educate the general public in the Art of Music" and that its activities were "[r]aising money and organizing concerts." (Exh. Z)

44. On May 15, 1956, the IRS approved MSO's application, stating that "it is shown that you are organized and operated exclusively for educational purposes." (Exh. AA)

45. In each year thereafter, the MSO filed a Form 990 "Return of Organization Exempt from Federal Income Tax" with the IRS. (Exhs. DDD, EEE, FFF and GGG)

46. On the Forms 990, MSO regularly described its concerts as a service that MSO provided "in carrying out the organization's exempt purposes" and the Forms further stated that MSO "engaged in these activities to present performances that would further cultivate an appreciation for the art of music." Based on its conclusion that its concerts were "substantially related" to its educational purpose, MSO has never reported the revenues derived from the sale of concert tickets as "unrelated business taxable income" ("UBTI") within the meaning of I.R.C. §§ 511-513.

47. In 1993, the IRS audited MSO for its taxable year ending August 31, 1991. In this audit the IRS generally accepted without change MSO's annual Form 990 as it had been filed with the IRS, with the exception of a few minor adjustments, one of which was the UBTI issue described in the next paragraph. The IRS did not (in this audit or at any other time) challenge the continuing qualification of MSO as a tax-exempt entity that was organized and operated exclusively for purposes permitted under I.R.C. § 501(c)(3).

48. In the 1993 audit, the IRS took the position that certain small amounts received by MSO from some non-concert activities constituted UBTI. The IRS, however, accepted MSO's treatment of its sales of concert tickets as "substantially related" to MSO's exempt purpose, so that the IRS did not require (in the 1993 audit or at any other time) MSO to treat the revenues from such sales as UBTI.

49. In each year of the audit period, MSO filed information returns with the federal government on Form 990.

50. MSO applied for and qualified for the special mailing rates provided by the United States Postal Service for organizations that are organized and

operated exclusively for educational and charitable purposes, and has always used those lower rates in its bulk mailings.

Facts regarding MSO's status under other Wisconsin tax laws.

51. On January 7, 1962, MSO applied to the Department for a Certificate of Exempt Status ("CES") which the Department issues to certain nonprofit organizations that are "organized and operated exclusively for religious, charitable, scientific or educational purposes" under Wis. Stat. §77.54(9a)(f) and are therefore exempt from paying Wisconsin sales or use tax on purchases of tangible personal property.

52. On March 9, 1962, the Department issued a CES to MSO and, relying on this CES, MSO has never paid any Wisconsin sales or use taxes on its purchases of otherwise taxable goods or services.

53. MSO has also never filed any Wisconsin income or franchise tax returns as a taxable corporation, and it is the current understanding of the Department that MSO does in fact qualify for the Wisconsin income and franchise tax exemption provided by Wis. Stat. § 71.26(1)(a). MSO is not organized or conducted as a corporation for pecuniary profit, and thus, except on its unrelated business income, is not subject to Wisconsin income/franchise tax, pursuant to Wis. Stat. § 71.26(1)(a).

54. Based on its position that its concerts are substantially related to its educational purposes, MSO has never reported the revenues it derives from the sale of tickets of its concerts as Wisconsin UBTI for Wisconsin income or franchise tax purposes under Wis. Stat. § 71.26(1)(a).

MSO's Concerts, Generally.

55. MSO presented 100-150 concerts per year, which consisted primarily of the following three categories: Classical concerts, which were sometimes referred to as "Classics" or "Subscription" concerts; Pops concerts; and Youth concerts. (MSO also performed special concerts, such as Christmas concerts, Fourth of July concerts and a gala New Year's program. However, a determination regarding the three primary categories will resolve the issue with respect to the relatively minor admission receipts pertaining to the special concerts.)

56. Some of the tickets to both MSO's Classical and Pops concerts were sold as part of a subscription series, allowing admission to a number of such concerts, and some tickets were sold for individual concerts. A subscription series included only concerts of one type, so that, for example, a single subscription would include either Classical concerts or Pops concerts, but not both. The approximate percentages of MSO's ticket sale revenues at issue in this case that were attributable to its principal types of concerts were as follows:

<u>Type of Concert</u>	<u>92-93</u>	<u>93-94</u>	<u>94-95</u>	<u>95-96</u>
Youth*	9.00%	2.43%	6.09%	6.07%
Pops (subscription)	30.36%	37.40%	32.50%	35.48%
Pops (single)	7.08%	5.08%	7.11%	6.08%
Classics (subscription)	41.49%	40.43%	37.58%	36.50%
Classics (single)	7.08%	7.10%	8.12%	9.12%

* Including High School, Youth, and Kinderkonzerts

(Exh. 11, p. 13)

57. From 60 to 80 percent of the subscription tickets sold in each year to MSO's Classical and Pops concerts were to repeat subscribers, that is, persons who had purchased such tickets in one or more prior years.

58. Most of MSO's concerts were in Milwaukee but some were presented elsewhere in Wisconsin or out of state. This case involves only concerts in Wisconsin for which MSO sold tickets to the public. None of these concerts were held in schools and all were held in concert halls. The works performed at MSO's concerts were generally performed by MSO's full orchestra.

59. Some classical concerts included a guest artist or artists, hired by MSO for the occasion. All such guest artists were chosen for their artistic excellence and so that MSO could play the broadest range of classical music possible. Some were also chosen because of their reputation, name recognition and ability to provide more ticket sales for MSO, with additional consideration of the guest artist's fee.

60. The price for MSO's concert tickets was different for each concert and changed each year. MSO set its ticket prices according to its various expenses, inflation, and what the market could bear. MSO kept its ticket prices as inexpensive as possible so as to broaden its audience, and such prices were generally lower than commercial music concerts. (Vol. I, pp. 72-73). Subscription tickets for the Classical concerts were as high as \$760.00 per series. The Milwaukee market was "very price sensitive" and raising prices resulted in a decrease in subscribers.

61. MSO offered 10% discounts on ticket prices to full-time students and educators, 50% discounts to children ages 6 through 17 and free tickets (when available) to senior citizens and others.

Facts Relating to Classical Concerts

62. MSO's Classical concerts consisted primarily of classical symphony music written over the past three or four centuries. In addition, MSO, on a regular basis, would commission an original work to be performed at one or more of its Classical concerts. This was done in order to broaden and expand the audience's knowledge and appreciation of symphonic music and add to the body of classical music.

63. According to MSO, the process for selecting works for its Classical concerts involved "balancing MSO's educational mission and primary purpose; the likely interest of its patrons to the music of this particular genre or compositional style; and budget considerations." (Exh. 11, p. 47). If the direct costs associated with a particular intended performance exceeded projected ticket sales, the intended performance was undertaken if the Music Director and President & Executive Director determined that the intended performance was important to the fulfillment of MSO's mission and primary purpose. However, in making this determination, one of the considerations was whether MSO's total direct costs for all performances during a season would exceed projected ticket sales for all MSO performances during a season. "In some cases," even if the overall projected direct costs exceeded the projected ticket sales for an MSO season due to choosing the intended performance, the president and Music Director "might" still have decided to undertake presentation of the intended performance if they determined that such performance would be critical to fulfilling MSO's mission and primary purpose. (Exh. 11, p. 48)

64. Steven Ovitsky, Executive Director of MSO, testified that MSO did not choose its pieces because they were "entertaining." (Vol. I, p. 70)

65. MSO picked at least some of the music for its Classical concert series because they were "audience pleasers" and likely to attract patrons. (Vol. I, p. 172-173; Exh. 56, Bates 1107; Exh. 59, p. 1). MSO chose pieces based partly on the cost of performing it. MSO rejected some pieces because the cost of performing them was too great, for example, pieces that called for a large orchestra or chorus, several soloists, or a larger hall.

66. MSO offered pre-concert and post-concert sessions for its Classical concerts and Classical Conversations concerts (but not for Pops concerts or Youth concerts). MSO offered its post-concert sessions in only approximately one-fourth of the Classical concerts, only at the Friday night concerts, and never for those concerts presented in churches. Most⁷ of the Classical concerts were immediately preceded by free previews or talks, in which an MSO conductor, musician or other expert discussed the music to be presented at the concert.

67. In advance of the season, all subscribers to a Classical Concert Series received a publication entitled, "Classical Concerts Program Notes," containing program notes for all the Classical concerts for the forthcoming season. (Vol. I, p. 186-87; Exhs. U-4, V-4)

⁷ MSO states that "every one" of the classical Concerts was preceded by such a talk (Pet. Brief, p. 15). However, the portions of the record MSO cites do not support that claim.

68. Persons attending the Classical and Pops concerts were given a copy of MSO's program book, *Encore*. *Encore* contained extensive advertising and those copies distributed at the Classical concerts also contained: (a) items of administrative interest; (b) feature stories about the MSO, its personnel and information about contributors to MSO; (c) glossaries of music terms and discussions of particular types of music and instruments; (d) profiles of guest artists; and (e) program notes about the music to be performed at the concerts, sometimes including explanations from the composer as to the content of the music and what the music was intended to convey.

Facts Relating to Pops Concerts.

69. Pops concerts are programs of "lighter music, mixing orchestral pieces with lighter[,] usually American[,] music." (Vol. I, p. 89). Some of MSO's Pops concerts consisted entirely of works from the traditional classical repertoire, although these were generally of a more accessible nature to the audiences than the works performed at the Classical concerts. Other Pops concerts contained no works from the traditional classical repertoire. Often, the concerts consisted of several such works, plus works of a lighter character, all of which were generally performed by the MSO's full orchestra in a full symphony orchestra format.

70. MSO admitted that some of its Pops concerts did not represent its primary mission.

71. MSO's Pops concerts did not have either pre-session or post-session discussions associated with them.

72. The *Encore* publication for MSO's Pops concerts generally contained no information on the music performed.

73. The Chair of MSO's Artist Liaison Committee, Russell Dagon, recognized, in his letter of February 6, 1994, that the audience attending the Pops concerts came "for an evening of entertainment," and that the music performed should not "turn off" that audience. (Exh. 131, Bates 1668-1669, ¶ 3)

74. MSO used its Pops concerts as outreach to encourage new ticket purchasers. Audrey Baird called the Pops concerts "popular concerts" and the "popular series." (Vol. III, pp. 172, 179)

Facts Related to Youth Concerts.

75. MSO presented the subject Youth concerts at the Marcus Center or the Elmbrook Auditorium, and never in schools. MSO carefully calculated its Youth concert programs to appeal to the specific age group that would attend. Since MSO thought that children must be exposed to classical music before the age of 14 years to establish an interest in purchasing classical concert tickets as adults, part of MSO's purpose in putting on concerts for youth was to develop potential future MSO ticket purchasers.

76. MSO's Youth concerts actually consisted of three different series of concerts directed at children of different grade levels, namely, (a) High School concerts, (b) Youth ("Middle School") concerts, and (c) Kinderkonzerts.

High School Concerts

77. The High School concerts were presented in the same Milwaukee concert halls used by MSO for its Classical concerts namely, Uihlein Hall of the Performing Arts Center (now the Marcus Center) or the Pabst Theater. These concerts generally featured MSO's full symphony orchestra.

78. MSO's High School concerts were designed "1) to present live concerts which will excite young people and open them up to a world of symphonic music which they will understand and love and 2) to provide educators with program themes, relevant curriculum, and effective resources which can be integrated into the total learning environment." (Exh. R-5, p. 3).

79. MSO's High School concerts consisted of many works from the traditional classical repertoire, supplemented by other works of serious music, all of which were connected to an overall educational theme appropriate for high school students. An example is the series of such concerts for 1994-1996, which constituted a project entitled, "American History Through Music." (Exh. Q-5) This series looked at the United States through music and the humanities from its revolutionary beginnings through 20th Century urbanization.

80. Students who attended MSO's High School concerts received concert program guides, some of which contained some explanations about the orchestra, background materials about the composers, glossaries, explanatory materials about the music, suggestions as to what to listen for, questions for thought and discussion, and other informational materials.

81. MSO prepared teaching materials and program guides for high school teachers whose classes would be attending the High School concerts, including deeper discussions about the themes of the concerts, the music and the composers, and suggestions for class discussion, as well as inter-disciplinary publications relating to the music.

82. Material for the High School and Middle School concerts was sent to the teaching staff at the schools to use in the classroom if they so chose. The teaching materials and docent program had to be specifically requested (and tapes paid for) and were not a prerequisite for attending the Middle School concerts. Any pre-concert teaching activities or instruction using the materials was done by the school classroom teachers or the MSOL docents, not by MSO staff.

83. MSO collected sales tax on its sales to students of tickets to its High School concerts and Middle School concerts. MSO did not take any resale exemption certificates from the schools or have any purchase orders from the schools that the children attended, since it was the individual students (as opposed to the schools) that paid for the tickets.

84. School teachers and students who attended MSO concerts with their classes responded to MSO's questionnaires with comments such as: "fantastic," "I enjoyed it very much," "[m]y students LOVED the program," "fun," "very fun," and "wonderful for 4th graders." (Exh. 39, Bates 1604, 1607-1609, 1612, 1615, 1617). In its compilation of quotes from letters received from students who attended MSO concerts, MSO included quotes that talked about how "enjoy[able]," "fun," and "relaxing" the concerts were; how "pretty" the music was; and how much the students "like[d]" the music. MSO asked no questions about the concerts' educational value. (Exh. 39, Bates 1615.)

Middle School Concerts

85. MSO's Middle School concerts were directed at students in Grades 3 through 8. Each such concert was directed at a different pair of such grades.

86. Except as just stated, MSO's Middle School concerts were similar to the High School concerts, in that (a) they were generally performed in MSO's regular concert halls at the Milwaukee Performing Arts Center and Pabst Theater, (b) they generally featured MSO's full symphony orchestra, (c) the students in participating classes received instructional materials prepared so as to enhance their educational experience, and (d) in advance of the concerts, the teachers in participating classes received Teacher's Guides consisting of such features as program notes and a list of proposed discussion topics related to the music, as well as a chaperone's guide and an etiquette book for their students. (Exh. C-6 through G-6, I-6, J-6, M-6 through P-6, and T-6 through Y-6).

Kinderkonzerts

87. MSO's "Kinderkonzerts" were presented by MSO in cooperation with MSOL.

88. MSO's Kinderkonzerts were directed at very young children (ages 3-8). As with the High School and Middle School concerts, the Kinderkonzerts consisted mostly of traditional music from the classic repertoire that would be appropriate for young children, including works by such composers as Rimsky-Korsakov, Tchaikovsky, Strauss, Grieg, Mozart, Vivaldi, and Saint-Saëns. However, many popular songs were played as well, including pieces like a "Frosty Medley," Disney's "Aladdin" Orchestral Suite, and sing-a-longs like "Jingle Bells" and "Old McDonald."

89. Families that subscribed to the Kinderkonzerts received advanced "Kinderkits," consisting of written materials containing brief descriptions of the music

and the composers, lists of suggested activities, materials for parents to read to their children regarding the music, pictures and descriptions of orchestra instruments, and lists of suggested readings. They also received "Kinder Cards," which are cards containing pictures of musical instruments and information relating thereto. Parents carried out any teaching activities or other pre-concert preparation for the Kinderkonzerts at home.

90. The Kinderkonzerts also included some other activities, such as a "Petting Zoo," in which the children were permitted on stage to view and touch the orchestra instruments, and persons dressed up as Ms. Barbara Romper Room, Brian the Lion, and Kinder Kitty to greet the children and make them comfortable.

91. Each Kinderkonzert was organized around a specific theme, and consisted of an interactive talk and play format (that was always referred to in the musical performance) in order to facilitate the children's learning about the music.

92. MSO, with the assistance of MSOL, generally held the Kinderkonzerts at the Marcus Center. MSO's goal for the Kinderkonzerts was "to excite the imagination of young children." (Exh. 128, p. 1). The music, lighting effects, characters on stage, and other production elements were designed to "create a sense of fantasy or magic for the children." (*Id.*)

93. There were often pre-concert events for the Kinderkonzerts, such as stilt walkers, clowns, a stuffed animal parade, storytelling, dancers, coloring contests, sing-alongs, balloons, prizes, a children's fashion show, look-alike contests, a fashion show, and face painting.

94. Audrey Baird, referring to the first Kinderkonzert, testified, "It was wonderful" and, "It was a scream." (Vol. III, p. 157).

MSO's Marketing Activities.

95. MSO advertised in the newspaper; in press releases; in brochures and flyers; on the radio and TV; in magazines; in direct mailings to targeted areas or elements of the population in various areas; on signs in buses; with displays, sandwich boards, and banners outside the Marcus Center; on posters; and in handouts at concerts. An outside advertising agency produced TV spots for MSO as a donation. MSO's total "sales and promotion expenses" plus its "media activities" expenses or "marketing" expense totaled between \$1.2 and \$1.6 million per year.

96. Mr. Ovitsky testified that this advertising was not directed at the general public but, rather, at "music lovers, symphony goers, people who are generally interested in fine and performing arts." (Vol. I, p. 107) He further testified that in any urban area, approximately 2 to 3 percent of the population is interested in attending "classical" music events. (Vol. I, p. 108).

97. MSO's marketing staff had advanced degrees in marketing and other fields such as art and journalism and years of experience in their field. The Marketing Department put out polished multi-color brochures and flyers, which it mailed and handed out to thousands. MSO advertised on the radio, on TV, and with printed materials. MSO's newspaper advertisements appeared in the entertainment section of the newspaper.

98. MSO had a Sales Department that had a manager, who trained persons to staff a booth at concerts to sell tickets for future events; to make telephone

sales calls; and to use other methods to sell concert tickets.

99. There was continually more and more competition for the public's entertainment time and discretionary "entertainment dollar." (Vol. IV, p. 224-225; Exh. 56, Bates 1051) MSO compared itself to "major league sporting teams" in its news release of March 12, 1993, and pointed out that it competed for the public's "entertainment dollar" with "outdoor festivals, fireworks, ballgames, and the like." (Exh. 56, Bates 1051)

100. MSO hired independent contractors, professional fundraising firms, and other outside consultants to give fundraising advice and to assist with fundraising campaigns and other activities. Those activities handled by outside consultants included face-to-face solicitations for larger donations, telefundraising or telemarketing (phoning of a list of persons to solicit donors and donations), special promotional concerts, Maestro's Brunch, receptions for donors; to attract ticket purchasers, benefactors, and donors.

101. Audrey Baird, who worked under the Vice President of Marketing, along with an assistant who worked under her, marketed MSO's concerts by contacting groups and organizations at places like retirement centers, banks, churches, colleges, businesses, in order to hand out MSO brochures, to sell tickets, and to encourage attendance at the concerts, as well as to raise money. Ms. Baird gave away tickets to some concerts and gave discounts of 25%-50% on other concert tickets, and offered incentives for purchasing tickets, such as promotional prizes of cruises, and airplane flights. Ms. Baird was an expert at selling tickets and raising money for MSO. She has given talks on the subject of ticket sales and fundraising in every state in the country,

including Hawaii, Alaska, Puerto Rico, and Guam, and has had a national award named after her.

102. MSO approached various businesses and corporations both to raise money and to sell tickets. The concerts were “pitch[ed]” to those businesses and corporations “as a nice night out for your employees” and “an attractive entertainment option for employee recruitment, incentive and client appreciation.” (Vol. IV, pp. 108-109)

103. MSO began an "Ambassador of Note" program which, according to an MSO press release, was launched as a "powerful new business tool . . . provid[ing] companies the opportunity to purchase groups of tickets and receive extensive on-site recognition at the concert hall." (Exh. 56, Bates 1088) Further, the program was "created by the MSO to enable area companies to offer world-class musical entertainment to clients and employees." (Exh. 56, Bates 1126) MSO advertised its concerts as an "alternative to entertainment options" that businesses could use for employee incentive, client appreciation, or business promotion, and as "a cost-effective program that is customized for your entertainment needs." (Exh. 56, Bates 1127, 1159) The program promoted a partnership program that "pairs great musical entertainment with business development and promotion." (Exh. 56, Bates 1126) At presentations for the program, MSO presented "entertaining highlights" of the Classics and Pops seasons. (Exh. 56, Bates 1089)

104. In MSO's advertising for its group sales, MSO proclaimed, “[W]e’ve got your entertainment – from thrilling Classics to fun and entertaining Pops and more!” and stated: "Whether you like Mozart favorites, Rachmaninoff's romantic

power, a pops extravaganza. . . a group outing to [MSO] is a unique way to entertain employees, business associates, clients, church groups and service organizations." (Exh. 59, p. 23)

105. MSO also sought and arranged for sponsorship of concerts from corporations such as Midwest Express Airlines (which also provided MSO with free plane tickets for MSO staff travel), Delta Dental, Bank One, Kikkoman Foods, and Marquette Electronics Foundation in exchange for complimentary concert tickets and publicity.

106. For fiscal years 1994/95 through 1996/97, MSO had a Capital Campaign to increase ticket sales with a goal of \$35 million for its endowment funds. That campaign included offering 50% off for children of subscribers; bonus gifts; making remarks prior to concerts and at post-concert gatherings to encourage sales; placing inserts in concert programs; encouraging and setting up social contact between patrons and musicians; special pricing for certain groups; changes in concert times and duration to accommodate more attendees; initiating an automatic ticket subscription renewal process; seeking sponsorship for free community concerts; and establishing a speakers bureau. (Exh. 57, Bates 1256)

107. MSO gave incentives to those who bought series tickets. For example, the benefits MSO offered for subscribing (*i.e.*, purchasing tickets for a series of concerts, as opposed to tickets for individual concerts), included discounted ticket prices; installment payment options; flexible ticket exchange; priority in renewing or upgrading seats; \$2 off on purchases of other Classics concert tickets; a VIP Coupon Book worth an estimated \$90 for discounts at restaurants, music shops and bookstores;

tickets mailed to patrons; the right to buy the Guide to the Season for a small charge; a free bibliography and discography relating to the concerts; invitations to open rehearsals; a free subscription to *Applause* newsletter; a free CD; and 2-for-1 coupons; as well as other discounts.

Examples of Advertisements Relating to Classical Concerts.

108. The theme for the 1995-96 Classics season was: "Just when you thought you'd heard it all . . . we'll surprise you." (Ex. 98, Bates 1722) MSO promised a "sparkling season-opening Gala and a splendid Festival finale." (*Id.*)

109. MSO's Classical Series' brochure promised that "you will be moved by an experience beyond words," and boasted of the music offered as "[e]xhilarating music, soothing sounds, thrilling energy." (Exh. 52, 1994-95 Classics Brochure at C2)

110. On its tickets and its ads for *Carmina Burana*, MSO described the music as "LUSTY!;" "fiery, sublime, funny, and sensuous;" "rousing;" and "show stopping" and urged attendees to "[c]elebrate the pleasures of wine, women and song in Orff's earthy, rhythmic audience pleaser," (Ex. 59, p. 1; Exh. 53, Bates 1185, 1189-1190). In the program notes for *Carmina Burana*, MSO printed the words of the various songs that included lyrics about drinking, gambling, physical love and lust, chastity, and submission. (Ex. 40, Bates 0607-612).

111. A brochure for MSO's 1996-97 Classical and Pops concerts read:

Classics

"Hot" is the only way to describe powerhouse violinist Nadja Salerno-Sonnenberg. . . . Legendary performers . . . will entertain and astonish you with their bravura. Looking for thrills, exhilaration, and unsurpassed beauty? You'll find them all in great classical masterpieces of the repertoire . . . grand symphonies by Beethoven, Bruckner, & Shostakovich and beloved piano concertos by

Tchaikovsky, Mozart & Rachmaninoff. . .

(Exh. 59, p. 19)

112. An advertisement for another Classical concert stated: "When you're in Milwaukee, hear a romantic all-Tchaikovsky program performed by the world-renowned MSO. Maestro Zdenek Macal conducts the dazzling Violin concerto, with guest soloist Chantal Juillet, the lyrical Symphony No. 2, 'Little Russian,' and the 'Hamlet Overture.'" (Exh. 60, p. 27; Exh. WWW) The advertisement includes a picture of Tchaikovsky with a thought bubble containing hearts above his head.

113. For one of its concerts featuring works by Beethoven, Mozart, Rachmaninoff, Tchaikovsky, among others, MSO promised "an evening of delightful entertainment" and guaranteed a "wonderful time!" (Exh. 59, p. 4)

114. A concert featuring Mozart and Schubert pieces was described as "dazzling music that's guaranteed to delight." (Exh. 5, p. 6; Exh. WWW, p.2) Another advertisement for MSO's Classics and Pops concerts described the concerts as a "wonderful time at the symphony." (Exh. 59, p. 9)

Examples of Advertisements Specifically Related to Pops Concerts.

115. The brochure for MSO's 1996-97 Classical and Pops season read:

You'll have a fabulous time with the Milwaukee Symphony Pops, too. The star-studded line-up includes the innovative Bobby McFerrin, jazz legend Mel Torme, the nostalgic sound of a band you can dance to -- Guy Lombardo's Royal Canadians -- the silky vocals of Maureen McGovern, mellow pop tunes by Lou Rawls, and Gershwin's musical Of Thee I sing. . . .

(Exh. 59, pp. 19-20).

116. A special fundraising event for the 1995-96 season, featuring music by Rossini, Mozart and Gershwin, stated: "Stage actor, movie star, composer, classical

and jazz pianist Dudley Moore will engage and entertain with mirth and music . . . with a fabulous concert" (Exh. 59, p. 21) One of the Pops concerts, "A Viennese New Year's Celebration," was advertised as "a sparkling . . . concert," featuring "Romantic waltzes, racy polkas, and bubbly hits from favorite operettas!" (Exh. 60, p. 22)

117. MSO publicized its Romantic Conversations as "Fun, food and great music . . . a refreshingly casual atmosphere;" "delightfully accessible;" "a real cool way to enjoy the classics;" and "a most entertaining way to enjoy" the MSO (Exh. 51: 1228, 1234, 1237-39) Before the Romantic Conversation concerts, MSO offered pre-concert get-acquainted parties with hors d'oeuvres and drinks and other pre-concert parties. (Exh. 51, p. 1232)

118. In addition to "light classical favorites" by Mozart, Wagner, Brahms, Weber, Beethoven and Strauss, MSO's German Fest concert included a "fun-filled sing-along of popular songs . . . led by the world's foremost yodeler." (Exh. 59, pp. 21-22)

119. MSO advertised a promotion for Marcus Corporation Employees featuring Doc Severance with "The Doctor is In, " stating that he was "ready to treat you with his unique brand of 'medicine;' virtuoso trumpet playing, terrific music by the Milwaukee Symphony Pops, plus laughter and fun that add up to topnotch entertainment." (Exh. 60, p. 2)

120. MSO's 1992/93 Pops brochure promoted its Pops concerts as "great musical entertainment" and "fun," "light, upbeat classics, hit songs from the stage and screen," providing the opportunity to hear "the top names from the entertainment world live." (Exh. 54, Bates 1170) The brochure further stated, "On the way home you

talk about your favorite melody, the funny line that made you laugh out loud" (*Id.*)

In its 94/95 brochure, MSO called its concert with Doc Severinsen "Entertainment with a capital E!," "a night of stellar entertainment," and "unparalleled pops entertainment!" (Exh. 54, Bates 1293, 1295)

121. The theme of the Pops Series for 1995/96 was: "When you want to see stars . . . we'll shine for you." (Exh. 98, Bates 1722) MSO's Pop Concert Series included performances by popular artists. Examples are: the "superstar," Maureen McGovern, singing songs of Gershwin (Exh. 54, Bates 1178); "the flamboyant musical director of the Tonight Show," Doc Severinsen, "an entertainer" with his "virtuoso playing, wise-cracking showmanship, and knock-out wardrobe" (Exh. 54, Bates 1179); the Kingston Trio that played "folk-music" and "took the country by storm and changed popular music forever"⁸ (performing such memorable favorites as *Tom Dooley*, *Scotch and Soda*, and *M.T.A.*) (Exh. 54, Bates 1179; Exh. 56, Bates 1029); the Manhattan Rhythm Kings, a "dynamic trio;" the Preservation Hall Jazz Band featuring "music born from turn-of-the-century street parades and saloons, from riverboats and from the heart of Dixie that will have you rocking, swaying, tapping and clapping" (Exh. 54, p. 1296); Bernstein and Brass, "with witty banter and dashing showmanship" (Exh. 54, Bates 1180); a "dynamic group called the 5th Dimension;" Banu Gibson, "one of the hottest jazz and blues singers in America," who is a "natural entertainer," a "powerful force," and a "frisky, super-charged Jazz lady" (Exh. 54: pp. 1296, 1298); Marvin Hamlisch, the "consummate entertainer;" (Exh. 54, Bates 1298); Andrea Marcovicci, "[c]hanteuse, torch singer, café singer, saloon singer" (*id.*); and Mel Torme; as well as others.

⁸ The Kingston Trio concert was a solo concert where the MSO did not perform, (Ex. 56, Bates 1029).

122. The music performed at Pops concerts included “show-stoppers from favorite Broadway musicals” featuring “wonderful stories, hummable tunes and witty lyrics” (Exh. 54, Bates 1180); “a dazzling array of vocal styles” (Exh. 54:1178); “America’s most popular, most enduring hit tunes” (Exh. 54, Bates 1295); a “playful romp of music about and from Gay Paree [sic]” (Exh. 54, Bates 180); “themes from your favorite movies and TV programs,” including “Star Trek V, Rambo, Alien and a medley of TV themes, including ‘the Walton’s.’” (Exh. 54, Bates 1170); Beatles’ songs; a “feast for the eyes and ears” combining “the music of Goodman, Dorsey and Miller” with “segments from old-time serials, quiz shows, and commercials. . .” (Exh. 54, p. 1296); African American spirituals; traditional holiday favorites (including *Rudolf the Rednose Reindeer*) (Exh. 56, Bates 1042); and a “South of the Border” show with “lively Latin rhythms” that “will have you dancing in the aisles and shouting Ole.” (Exh. 54, p. 1299).

123. MSO referred to its guest artists as “stars,” and advertised them in terms such as, a “consummate entertainer,” a “superstar,” and a “knock out entertainer!” (Exh. 60, pp. 6, 31; Exh. 61, pp. 6-7; Exh. 62, p. 6) According to MSO’s marketing information, guest Pops Series artist, the “flamboyant” Doc Severinsen, “blow[s] ‘em away” and “blow[s] the roof off the PAC,” and has “TV’s hottest set of lips!” (Exh. 52, 1993-94 Season Brochure at 14; Ex. 56, Bates 1085).

Marketing Specific to Youth Concerts.

124. MSO increased its sales to Kinderkonzerts by “effective marketing.” (Ex. 128, Bates 0039, 0042) Marketing for the Kinderkonzerts publicized the concerts as the “wondrous world of music” and “Musical Fun for Your Whole Family!”

MSO encouraged attendance so as to “[e]njoy enchanting pre-concert activities,” and pledged that, “WOW!, Your kids will love these concerts!” (Exh. 58, Bates 1271, 1274, 2199, 2200) MSO gave its Kinderkonzerts titles such as: “Zippidee-Zoo-Daa;” “Happy Birthday, Mr. Nutcracker;” “Circus on Parade;” and “The Snowman, The Snow Maiden.” (Exh. 58, Bates 1271, 1167, 1272, 2200). MSO’s materials promised that the kids “will enjoy the holiday extravaganza” and that the “spectacle of the circus will delight your little ones.” MSO advertised its Kinderkonzerts as being “even more fun when you bring a group,” such as for children’s birthday parties and family reunions. (Exh. 58, Bates 0130, 2192)

125. MSO promoted its Kinderkonzerts as “entertaining your family,” and “Musical Fun for your whole family” (Exh. 58, p. 1274)

American Symphony Orchestra League (ASOL) survey and other surveys.

126. In 2000-2001 (four years after the end of the audit period), the American Symphony Orchestra League (ASOL) conducted a study called the *Audience Motivation Research Project* or *Audience Motivation Study*. (Exh. 7-Z) The primary purpose of the research was “to discover and understand the values, beliefs, and attitudes which motivate individuals to listen to classical orchestral music and attend live performances.” (7-Z Report, Prescott & Associates “Classical Orchestra Concert Experiences,” p. i). The project also stated its objectives as follows:

1. Better understand consumers' tacit and emotional beliefs about entertainment and leisure activities in general, and the Orchestra specifically, including the key factors that influenced their attitudes and behaviors.
2. Uncover opportunities and barriers to generate increased Orchestra attendance and involvement/loyalty.
3. Understand advantages and disadvantages for Orchestras versus other entertainment/leisure activities.

(*Id.*, SpencerHall Report, Audience Motivation Study Executive Summary at 1, Research Overview at 1.)

127. ASOL conducted its research during August through October 2000, in Chicago, Illinois and Raleigh-Durham, North Carolina, and not in Milwaukee or Wisconsin. MSO did not provide any of the samples for the study, as many other orchestras did. However, Vice-President and Chief Operating Officer of ASOL, Jack McAuliffe, testified that MSO was similar to other orchestras in the League and that he believed the conclusions reached in the Study Project were equally applicable to earlier periods, such as the years in the audit period.

128. One survey contained in the Study was conducted principally by the Gallup Organization and asked attendees to listen to 13 different statements and state to what degree (on a 5-point scale, with 5 being the highest), the statements described their "usual experience regarding classical orchestra concerts." (Exh. Z-7, Report, Prescott & Associates, p. 16) Seventy-eight percent of the persons identified as current attendees of such concerts responded by giving a "5" or a "4" ranking to the following statement: "The classical orchestra experience is an educational and continual learning experience." (*Id.*)

129. None of the 13 statements read to participants included any form of

the word "entertainment" or any similar word. (*Id.*)

130. Moreover, 76% gave a 5 or 4 ranking to the statement, "You become completely absorbed in the music;" 74% gave such a ranking to the statement, "attending takes you to a special state of mind;" 59% to "attending sets a good example for children;" 52% to "profound transformational feeling" and "the experience is a powerful feeling," respectively; 31% to "attending is a romantic time with spouse/partner;" 26% to "attending conjures up fond memories;" and 14% to "social factors are the most exciting part." (*Id.*)⁹

131. MSO did not survey or test to see if it was accomplishing any educational goals, but did surveys for other purposes. MSO surveyed to see if its concert-goers appreciated and enjoyed its concerts, to obtain other types of information from its concert-goers, and to encourage patrons to contact others in the Milwaukee area who "enjoy this kind of entertainment." (Exh. 29, Bates 1020) In its Season-End Review of its 1995 Concerts in the Parks, MSO had a category for "Entertainment Evaluation," but no category related to the educational evaluation of its concerts, (Exh. 31)

132. MSO conducted informal types of surveys where staff members, professional telemarketers, musicians, and other volunteers telephoned new subscribers to say, "I hope you enjoyed [the concert]" and to ask questions such as "[H]ow did they enjoy [the concert]?;" "Wasn't it great?;" and "Didn't you love it?" (Exh. 29; Vol. III, pp. 190-192)

133. In November 1994, MSO did a survey of its Classics and Pops

⁹ The study is discussed in more detail in the opinion section of this decision.

concert attendees. In that survey, MSO asked “your overall opinion of . . . your Milwaukee Symphony Orchestra experience,” giving choices of “Pleasurable,” “Somewhat Pleasurable,” “Somewhat Unpleasant,” and “Unpleasant.” Nowhere, did MSO ask how educational the concerts had been or how much the attendees had learned by attending the concerts. (Ex. 34, Bates 1523, Question # 12) MSO did other surveys to determine what was the best time and day for its Pops attendees to go to concerts and to attend pre-concert sessions and fashion shows, as well as to determine the family incomes of concert attendees.

134. In another “Two Minute Survey,” MSO asked about what newspapers its concert-goers read and radio stations they listened to, as well as their age, household income, and model of car, but asked nothing about the educational value of its concerts.

135. In its surveys, MSO referred to its concerts as “entertainment” and compared itself to other entertaining types of events, such as sporting events and YMCA/YWCA. For example, in its September 1996 Elmbrook Series Survey, MSO listed itself as one of the “forms of entertainment” along with “sporting events at the Bradley Center” and operas, and asked other questions about “entertainment” that are obviously meant to include MSO’s concerts. (Exh. 38, pp. 1-2) In the Elmbrook Series and other surveys, MSO demonstrated that it realized that it competed for the public’s entertainment dollars and entertainment time with the YMCA/YWCA and sporting events such as the Bucks’, the Brewers’, and the Packers’ games by asking which of those types of events its patrons had attended in the past two years.

136. Comments of MSO’s concert-goers after attending MSO concerts

included language like “enjoy,” “enjoyed tremendously,” “a real pleasure,” “wonderful,” “great,” “heart warming,” “warm glow still remains,” and “loveliest.” (Exh. 132)

137. In response to the Department's Request for Admissions asking MSO to admit that some audience members attended MSO's concerts to be entertained, MSO stated that it does not know whether its attendees came to its concerts to be entertained or not. (Exh. 12, Admiss. 1)

CONCLUSIONS OF LAW

(1) MSO's performances were properly characterized as entertainment events for purposes of imposing sales tax under Wis. Stat. § 77.52(2)(a)2.

(2) Sales of admissions to MSO's performances are not immune from sales tax under *Kollasch* and its progeny.

OPINION

MSO raises two issues before the Commission. The first is whether revenues received by MSO from admissions to its concerts were subject to Wisconsin sales taxes under Wis. Stat. § 77.52(2)(a)2, which imposes sales tax on “[t]he sale of admissions to amusement, athletic, entertainment or recreational events or places.”¹⁰ If the Commission answers the first question affirmatively, MSO asks the Commission to hold that its sales receipts are immune from taxation under the *Kollasch* line of cases,

¹⁰ All statutory references are to the Wisconsin Statutes as in effect during the entire audit period. Wis. Stat. § 77.52(2)(a)2 has not changed since the audit period.

which have created an exception from sales tax for sales that are not made by retailers and do not involve mercantile transactions.

I. RECEIPTS FROM MSO'S CONCERTS WERE PROPERLY TAXED BECAUSE THE CONCERTS WERE "ENTERTAINMENT" EVENTS UNDER WIS. STAT. § 77.52(2)(A)2.¹¹

The sales at issue involve ticket sales MSO made directly to its patrons and sales made indirectly to its patrons through Ticketmaster. The Department's position is that MSO's concerts were amusement, entertainment and/or recreational events under Wis. Stat. § 77.52(2)(a)2. MSO disputes this characterization and argues instead that the concerts were primarily educational or charitable. While those terms are not used in § 77.52(2)(a)2, MSO asserts that its concerts are classified as primarily educational or charitable in various other legal contexts, such as under the federal Internal Revenue Code, federal postal law, local property tax law, and even several other Wisconsin tax laws.

A. Sales receipts for MSO's performances were properly taxed under Wis. Admin. Code § Tax (Rule) 11.65.

Rule 11.65, which has been in effect since 1978, states:

Section Tax 11.65 Admissions.

(1) TAXABLE SALES

(a) The sale of admissions to amusement, athletic, entertainment or recreational events or places This includes admissions to movies, ballets, musical and dance performances, ball games, campgrounds, circuses, carnivals, plays, hockey games, ice shows, fairs, snowmobile and automobile races, and pleasure tours or cruises.

¹¹ In light of the Commission's conclusion that the concerts constituted entertainment, the Commission need not specifically discuss whether they are also events of amusement or recreation, as the statute only requires that events fall under one of those descriptions. Moreover, any justification for characterizing the concerts as amusement or recreation would also make them entertainment.

(2) NONTAXABLE SALES. The following are nontaxable admissions:

(b) Admissions to museums of history, art or science, and to auto or trade shows, if professional entertainment is not provided at the show. Also, all admission fees to any museum operated by a nonprofit under a lease agreement with the state historical society, such as the circus world museum.

In Wisconsin, administrative rules enacted pursuant to an agency's statutory powers have the force and effect of law. *Kranzush v. Badger State Mut. Casualty. Co.*, 103 Wis. 2d 56, 77-78, 307 N.W.2d 256 (1981); *Burrus v. Goodrich*, 194 Wis. 2d 654, 662, 535 N.W. 85 (Ct. App. 1995) An agency's interpretation and application of its own administrative rule is entitled to deference unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous. *Aslakson v. Gallagher Bassett Services, Inc.*, 2006 WI App. 35, 289 Wis.2d 664, 711 N.W.2d 667; *Pfeiffer v. Board of Regents*, 110 Wis. 2d 146, 155, 328 N.W.2d 279 (1983).

MSO asserts that no deference should be accorded Rule 11.65 because the Department has applied it in "an inconsistent and arbitrary manner" and because the rule "establishes arbitrary and indefensible distinctions that cannot have been intended by the Legislature." (Pet. Br., pp. 30, 50-51) In support of its assertion that the Department's application of Rule 11.65 is arbitrary and inconsistent, MSO refers to three prior determinations made by the Department which it argues are inconsistent with Rule 11.65. The first involved performances by Ko-Thi, a group whose stated mission was to "perform, document, preserve and promulgate the African, African-American, and Caribbean traditional arts of dance and music." (Exh. N, p. 1) The Department also deemed nontaxable admissions to stage performances by a children's theater group and admissions to an event involving an I-Max theater.

The Department's conclusions in these other cases do not form a basis for disregarding Rule 11.65. We observe that these determinations are not currently and have not been before the Commission, the propriety of the Department's actions in those matters has not been adjudicated, and the Commission cannot make a complete and fair comparison between those events based on the record before it in this case.¹²

Moreover, to the extent the record contains information regarding these other events, they appear to be distinguishable from the concerts at issue here. Ko-Thi, as stated in its By-Laws, was established as an "organization for the study, research, preservation, and teaching of the dance, music, and cultural histories of the African world." (*Id.*) The Department determined in an Informal Ruling that admissions to Ko-Thi's performances, which involved dance and music, were nontaxable. According to the Department's July 3, 1997 Informal Ruling, the Ko-Thi performances primarily involved two annual African and Caribbean dance and music productions, for which admissions were charged but no profit was made.¹³ Each of the productions was "narrated by a storyteller" in order "[t]o assist in conveying the historical and cultural significance of the productions to the audience." (Exh. N, at 2; *see also* Vol. IV, 24-25). At each of the two annual events, written programs were distributed to the audience and a question and answer session was held to "further explain the educational and cultural aspect of each production." (Exh. N, p. 2). One of the two annual performances

¹² Indeed, potentially significant information has been redacted from the exhibits pertaining to these events. In addition, with regard to the children's performances, the Department's memorandum, upon which MSO relies, states that the Articles of Incorporation, Bylaws, Application for Exempt Status and promotional materials were attached, indicating that they formed part of the basis for the Department's determination; however, the materials are not included in the record.

¹³ Before it had all of the relevant information, the Department believed that Ko-Thi's admissions were taxable. However, after receiving and reviewing additional information, the Department determined that Ko-Thi's performances were primarily educational.

included an African street bazaar. There was no indication that Ko-Thi advertised or promoted any of its events as entertainment or amusement or that it used any language connoting such a characterization of its performances.

With regard to the children's theater performances, the Department stated in a 1994 memorandum that the theater company was "in the business of performing stage plays of highly acclaimed children's novels." (Exh. V, p. 1). In addition,

The majority of the audiences were public grade school, elementary school, secondary schools, or nonprofit private school[] students and teachers. Most of the performances were held on school days and were classroom field trips. The only weekend performances were held at the [deleted]. Those performances would attract individuals with children and groups other than school classes, such as scout troops.

(*Id.*). Further, "the promotional literature which is sent by the taxpayer to target audiences (public and private schools) recommends that students perform certain activities in preparation of seeing the play. The promotional literature also indicates the age group for which the play is adapted. " (*Id.* at 1-2)

The particular I-Max theater was not taxed on its admissions because the productions were primarily educational, and the admission fee was part of a zoo/museum's entrance price. (Vol. IV, pp. 38, 85-86)

Based on the foregoing, the Commission is not convinced that the Department inconsistently applies Rule 11.65.¹⁴ Furthermore, even if MSO is correct that it has uncovered a few instances since 1978 (when Rule 11.65 was promulgated) in

¹⁴ In contrasting these events with MSO's concerts, the Commission does not suggest that it would also hold that admissions to these other events were non-taxable; rather, the Commission merely recites these differences as grounds for rejecting MSO's assertion that Rule 11.65 may be ignored because the Department inconsistently applies it.

which the Department has departed from the unqualified statement in Rule 11.65 that admissions from "musical and dance performances," "plays," and "movies" are taxable, such a discovery does not establish that the Department's application of Rule 11.65 is inconsistent or arbitrary, nor does it constitute a sufficient basis to invalidate Rule 11.65 or disregard its clear and express language.

We also reject MSO's assertion that the Rule establishes arbitrary and indefensible distinctions that cannot have been intended by the legislature. In taxing admissions to "amusement, . . . entertainment or recreational events" without specifically defining these terms or enumerating specific taxable activities, the legislature certainly contemplated that the agency charged with enforcing § 77.52(2)(a)2 would be required to engage in interpretation of those statutory terms and would have to make distinctions between one type of event and another. The Department engaged in this interpretation by promulgating Rule 11.65. "An agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute," provided that the rule does not exceed the bounds of correct interpretation. Wis. Stat. § 227.11(2)(a).

A fundamental problem with MSO's position is that it would almost certainly lead to a situation in which the Department would be placed in the position of having to review and analyze every questionable musical, theatrical, dance and film event in order to weigh whether its entertainment features outweigh its educational components. The Commission and courts would be required to undertake similar efforts. Such an undertaking would require a tremendous devotion of resources and would subject the process to a much higher degree of subjectivity than that which

currently exists.

We conclude that the Department's interpretation of Wis. Stat. § 77.52(2)(a)2., as reflected in Rule 11.65, is not unreasonable and should be followed. Accordingly, admission receipts for all of the concerts at issue here were taxable "musical performances" under Rule 11.65.¹⁵

B. Even without Rule 11.65, under commonly understood definitions of the word "entertainment" as used in §77.52(2)(a)2, the Department's classification of MSO's concerts was proper.

Although Rule 11.65 requires a decision in the Department's favor, our conclusion would be the same even if Rule 11.65 did not exist and the Commission simply relied upon the language of Wis. Stat. § 77.52(2)(a)2, which imposes sales tax on the sale of "admissions to amusement, athletic, entertainment or recreational events or places." Application of this statute requires the Commission to interpret the term "entertainment" contained in § 77.52(2)(a)2.

The purpose of a statutory interpretation is to determine what a statute means so that it may be given its full, proper, and intended effect. *Mared Industries, Inc. v. Mansfield*, 2005 WI 5, ¶ 10, 277 Wis. 2d 350, 690 N.W. 2d 835. When a statute does not define a term, we examine the ordinary meaning of that term, and rely on dictionary definitions for undefined, non-technical terms. *Id.* at ¶ 32.

Both MSO and the Department agree that, pursuant to §77.52(2)(a)2, the event must be *primarily* amusement, entertainment, and/or recreation and that "primarily" means anything more than 50%. They also agree that reliance on dictionary

¹⁵ In light of our conclusion regarding the applicability of Rule 11.65, we need not address the Department's additional contention that the legislature tacitly approved Rule 11.65 because § 77.52(2)(a)2

definitions is appropriate here.

In *Milwaukee Repertory Theater, v. Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶ 400-151 (WTAC 2000) ("*Milwaukee Rep*"), the Commission relied on the following definition from Webster's Ninth New Collegiate Dictionary (1991): "'Entertainment' is 'something diverting or engaging: as a public performance.'" In *Historic Sites Foundation, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-662 (WTAC 1986) the Commission, referring to Webster's dictionary, stated that the term "entertainment" "relate[s] to the passing of time in a pleasant or agreeable manner." The parties rely on the definition of entertainment set forth in *Milwaukee Rep*, as well as additional dictionary definitions, all of which are in a similar vein.

Even without analyzing the details of the specific performances here, it is reasonable to conclude that any type of symphony concert would constitute entertainment under these definitions -- *i.e.*, "something diverting or engaging" and "relat[ing] to the passing of time in an agreeable manner." The Commission nonetheless addresses MSO's other challenges to the Department's determination in this case, and the Department's additional grounds for upholding it.

C. **The Commission's decision in *Milwaukee Rep* controls this case and the Commission declines MSO's invitation to overturn it.**

In *Milwaukee Rep*, the Commission held that sales of tickets to theater performances were subject to tax as admissions to entertainment, amusement, and recreational events under § 77.52(2)(a)2. The facts of *Milwaukee Rep* are strikingly similar to those here, and the arguments made by the Milwaukee Repertory Theater

has been amended five times since the Rule's promulgation and the legislature never changed the Rule during that time.

(MRT) and rejected by the Commission are nearly identical to those MSO advances here.

MSO's approach to *Milwaukee Rep* is two-fold: it attempts to distinguish *Milwaukee Rep* and also urges the Commission to overrule its decision issued six years ago. Neither approach is convincing.

1. *Milwaukee Rep* is substantively indistinguishable from the instant case.

The facts related to MRT and its performances are similar to those related to MSO and its performances. Like MSO, MRT was organized and operated exclusively for non-profit, tax-exempt purposes under I.R.C. § 501(c)(3). MRT's primary sources of income, like MSO's, came from ticket sales, contributions, and grants and totaled in the millions of dollars each of the audit years. MRT's ticket sales, like MSO's, never exceeded the related performance expenses, and neither MRT nor MSO expected that their performances would be profitable. Both attempted to operate with a balanced budget.

MRT had professional performers whom it employed full-time, and used professional crews as stagehands and for lighting effects, as did MSO. MRT used guest actors, similar to MSO's guest artists and conductors. MRT and MSO both set the prices of their tickets at a level that the market could bear in order to maximize attendance.

In addition to its performances, MRT, like petitioner, offered materials to educate and familiarize its audiences with its productions, such as programs, guides and a newsletter and held pre-production discussions and "Talkback" sessions. MRT also produced instructional-type materials and programs to assist members of the community in having greater access to its activities and productions, similar to MSO's

related ACE program and materials and the pre-concert materials for its youth and children's concerts.

Both had their own staff that created their graphics for their ads and other materials. In its advertisements, MSO, like MRT, touted its performances as "entertaining" and "entertainment," (and never as education) by using additional identical terms in its advertisements to those used by MRT such as: "magic," "magical" "fun," "enjoy," "exciting," "wonderful," "fascinating," "flamboyant," "thrill," "beautiful," and "hilarious comedy." The Commission found that those terms "describe amusement, entertainment and recreation, not education."

MRT made two arguments in support of its contention that its admission receipts were not taxable, the same as those MSO advances here -- that its performances were educational in nature and not events of entertainment, amusement or recreation under § 77.52(2)(a)2, and that it was not a "retailer" engaged in "mercantile" transactions with respect to its ticket sales under *Kollasch*. The Commission rejected both of those arguments.¹⁶ Using a dictionary definition of the term entertainment as "something diverting or engaging; as a public performance," the Commission determined that MRT's performances constituted entertainment events under § 77.52(2)(a)2. The Commission stated that MRT performances were "public" ones which it promoted and advertised as shows that "would 'divert' and 'engage' the ticket-buying public." The Commission concluded that even if education were MRT's primary objective, its educational mission and stated objectives were irrelevant since "the overriding thrust of

¹⁶ The *Kollasch* argument will be addressed in Section II, below.

its advertising and promotion, as well as the obvious objective of the public who responded by buying tickets, was 'entertainment,' 'amusement,' and or 'recreation' as those terms are commonly understood and defined," and further, because its marketing practices "acknowledge[d] the entertaining nature of the performances."

MSO seeks to distinguish *Milwaukee Rep* on the following grounds: (1) unlike in *Milwaukee Rep*, here MSO introduced the ASOL survey which reflects the audience's motivation in attending classical symphony concerts; (2) in *Milwaukee Rep*, the Commission stated that MRT was in competition for the "discretionary entertainment dollar," whereas here, the ASOL Report concluded that "we [symphony orchestras] cannot compete as diversionary entertainment" but must instead "play to our strengths as a powerful enrichment" (Exh. Z-7, Task Force Executive Summary, p. 4); (3) in *Milwaukee Rep*, the Commission "may have" been influenced by the fact that there are commercial theaters directly competing with MRT, whereas there are no "commercial" symphony orchestras; and (4) MSO's marketing was more "restrained" than MRT's. (Pet's Brief at 125) None of these factors serves to distinguish *Milwaukee Rep* from the case at bar.

MSO relies on the ASOL survey which showed that 78% of persons identified as current attendees of classical symphony concerts responded by giving the top two highest rankings (a 5 or 4) to the statement that "their usual experience regarding classical concerts" was that "[t]he classical orchestra experience is an educational and continual learning experience." (Exh. Z-7, Report, Prescott & Associates, p. 16)

However, none of the 13 statements read to participants included any

form of the word "entertainment" or any similar word. (*Id.*). Thus, we can only speculate as to what percentage would have given high scores to "the concert was entertaining" as usually reflecting their classical concert experience. Further, the question only involved the "classical" orchestra experience (*id.*), not concerts such as MSO's Pops concerts, which constituted 37-42% of MSO's performances for each of the years at issue, or MSO's other concerts which were not part of its Classical concerts. Further, that survey does not indicate that the concerts were *primarily* educational as required by §77.52(2)(a)2; rather, it only shows that of those surveyed, 78% gave the highest two scores to the statement that their usual experience at classical concerts was that the concerts were educational and continual learning experiences.

Moreover, 76% gave a 5 or 4 ranking to the statement, "You become completely absorbed in the music;" 74% gave such a ranking to the statement, "attending takes you to a special state of mind;" 59% to "attending sets a good example for children;" 52% to "profound transformational feeling and "the experience is a powerful feeling," respectively; 31% to "attending is a romantic time with spouse/partner;" 26% to "attending conjures up fond memories;" and 14% to "social factors are the most exciting part." (*Id.*). None of these statements connote an educational experience.

In addition, as noted by the Department, many statements made in the report equating classical concerts with entertainment and leisure actually cut against MSO's assertion that its concerts are not primarily entertainment. For example, the Task Force *Executive Summary* discusses "The Entertainment Continuum," first stating, "Classical orchestra concerts are often categorized as entertainment." Their research

indicated that there is an entertainment continuum that stretches from pure entertainment (such as spectator sports, rock concerts, and movies) to enrichment (classical orchestra concerts and chamber music) on the other end. (Exh. 7-Z, Task Force *Exec. Summary* at 4, § D). The ASOL Survey classifies orchestra concerts as entertainment by stating the Survey's objectives as to "[b]etter understand consumers' tacit and emotional beliefs about *entertainment and leisure activities* in general, and the Orchestra specifically," and to "[u]nderstand the advantages and disadvantages for Orchestras versus *other entertainment/leisure activities*." (Exh. 7-Z, SpencerHall, Audience Motivation Study, *Exec. Summary* at 1; emphasis added).

The study found that one of the motivational needs of its audience was "[t]he need to feel accepted and comfortable in the entertainment setting," and emphasized orchestras' needs to focus on "the relaxing, enjoyable aspect it provides." (Exh. 7-Z, *Research Overview* at 5). The study refers to the concerts as "likened to a sacred experience" and "a festive event" and the concerts as "conveying images of serenity, contemplation, coziness, peacefulness and warmth." The Survey also recognizes the social aspect of classical music concerts by admitting that they are events that concert-goers prefer to attend with friends; that 60% or more attend to spend a romantic time with a spouse or partner; and that the younger adult audience was motivated by social factors such as "getting dressed up, having a special evening out, and socializing with friends." (Ex. 7-Z, Task Force *Executive Summary* at 6, § H, 10).

MSO's second basis for seeking to distinguish *Milwaukee Rep* is its assertion that there are no commercial symphony orchestras, but that there are commercial theater companies, and that that factor "may well have influenced" the

Commission's *Milwaukee Rep* decision. (Pet. Br. at 125). However, there is no finding of fact or other indication in the *Milwaukee Rep* decision supporting that contention, nor is there any suggestion that the Commission thought it was of any import. A decision in this case cannot be based on some unstated fact that *might have* influenced the Commission. Moreover, the Department states "there are multiple commercial classical chamber music ensembles (whose concerts the ASOL Survey classified with classical orchestra concerts as the highest end entertainment) that are in competition with MSO." (Dept. Br., p. 61, citing Exh. 7-Z, Task Force *Exec. Summary* at 4, § D)

MSO also contends that there is no evidence in this case showing that that MSO was in competition with other events for the discretionary dollar, as there was in *Milwaukee Rep*. However, MSO's advertisements reveal that it competed to sell tickets with other events that were considered to be entertainment. MSO compared itself to "major league sporting teams" in its news release of March 12, 1993, and pointed out that it competed for the public's "entertainment dollar" with "outdoor festivals, fireworks, ballgames, and the like." (Ex. 56, Bates 1051). Also, MSO has taken the quote it cites from the ASOL Report about not being able to compete as "diversionary entertainment" out of context. A reading of the entire paragraph shows that, after classifying classical orchestra concerts as high-end entertainment, the point was made that orchestras must distinguish themselves from *other* forms of entertainment to be competitive.

Finally, we are unpersuaded that the advertisements used in *Milwaukee Rep* were "more exuberant" (pet's brief, p. 125) than those used for MSO's concerts, including its Classical concerts. As shown in the Statement of Facts, which the

Commission will not repeat here, MSO's advertisements reveal that MSO used not only language identical to that used by *Milwaukee Rep*, but other equally "exuberant" advertisements connoting entertainment. This was true for all three categories of MSO's concerts.

Accordingly, MSO cannot distinguish *Milwaukee Rep* on those grounds either and *Milwaukee Rep* therefore governs this case.

2. *The Commission will not overrule its decision in Milwaukee Rep, but modifies it to the extent it suggests that the sponsor's motivation is irrelevant.*

MSO states that *Milwaukee Rep* was wrongly decided for the following reasons: (1) it "may have" utilized a test that finds an event to be taxable if it has *any* aspect of amusement or entertainment, rather than determining whether they were primarily so; (2) the *Milwaukee Rep* case departed from earlier Commission cases which MSO claims used a "sponsor motivation" approach, which MSO argues should govern analysis of § 77.25(2)(a); (3) even if the Commission adopts an approach based on the audience's motivation in attending the event, the Commission in *Milwaukee Rep* erred in relying solely on advertising to determine the audience's motivation; and (4) *Milwaukee Rep* was decided after the audit period in this case and its application here would constitute an impermissible "retroactive" application of the law. We address these in turn.

First, we do not discern any suggestion in *Milwaukee Rep* that an event is taxable under § 77.52(2)(a)2 whenever it has *any* entertaining, amusing or recreational elements. However, if such a conclusion can somehow be teased out of *Milwaukee Rep*, it is hereby replaced by the Commission's interpretation (agreed to by the parties here)

that an event must be *primarily* entertaining, amusing or recreational to be taxable under § 77.52(2)(a)2.

MSO next argues that *Milwaukee Rep* contradicts two prior Commission cases, *Historic Sites* and *Experimental Aircraft Association, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-672 (WTAC 1986), because *Milwaukee Rep* exclusively relied on the audience's motivation in attending the event whereas the prior two cases relied on the sponsor's motivation in presenting the event. The Commission rejects MSO's premises. In determining that the events at issue were non-taxable in *Historic Sites* and *Experimental Aircraft*, the Commission did not only rely on the sponsor's motivation.

In concluding that admission fees to the public area of the Oshkosh "fly-in" were non-taxable, the Commission, in *Experimental Aircraft*, noted not only the sponsor's stated educational purpose but many other factors as well, including: the presence of thousands of volunteers who volunteered some 60,000 hours to help accomplish the fly-ins (*id.*, Finding of Fact ("FOF") 19); that there were no paid advertisements in newspapers, or on radio or television regarding the fly-ins (FOF 20); the many historic, and home-built aircraft displayed (FOF 28); the daily air shows which feature a wide range of historic, home-built, and classic aircraft, demonstrating precision flying and various aerial maneuvers (FOF 30); the numerous forums, films and other presentations in various large tents in the public area which were scheduled throughout every day of the fly-ins, including the evenings, with a total of 20-30 forms per day, all of which were educational (FOF 35); the workshops on aircraft construction techniques (FOF 38); and the mini-museum in the public area which featured a sampling of experimental, historic and sport aircraft and aviation artifacts (FOF 39).

In holding that admission fees to the Circus World Museum were non-taxable in *Historic Sites*, the Commission also detailed the nature of the events at issue, including the numerous reenactments and demonstrations of historically correct circus activities which were "historical in nature;" the many static displays of circus history including posters, lithographs, photographs, original circus wagons, band wagons and circus floats; and the Circus World Museum library located at the site and open to the public, which has an extensive collection of circus objects, records, history, nostalgia and artifacts of all circuses. Thus, *Historic Sites* did not just look at the sponsor's motivation, but also at the educational nature of the event, in determining that admission fees were non-taxable.¹⁷

Moreover, a reading of *Milwaukee Rep* shows that the Commission did not reject any portions of those two cases. Rather, the Commission distinguished the cases in the section of its decision entitled "Other Cases Distinguished." Thus, *Milwaukee Rep* did not materially depart from prior Commission decisions.

We also decline to adopt MSO's suggestion that we look only at the sponsor's motivation in determining whether an event is taxable under § 77.52(2)(a)2. There are inherent problems with such an approach, including that it would allow the party seeking to avoid taxation under § 77.52(2)(a)2 to determine whether its events are entertainment, recreation or amusement, primarily by asserting its subjective beliefs about those events.

Moreover, there is simply no good reason for limiting the analysis in the way MSO suggests, thus disregarding the nature of the performances themselves and

¹⁷ We reject any language in *Milwaukee Rep* suggesting that the decision in *Historic Sites* was based solely

the audience's motivation for attending, or its reaction to, those events. The better

on the sponsor's motivation.

approach is to look not only at the motivation or purpose of the sponsor in presenting the event, but also at the nature of the event itself and the audience's motivation in attending, and its reaction to, the event. Of course, these three considerations will invariably overlap, and one piece of evidence, such as advertising, may provide insight into all three considerations. Thus, to the extent *Milwaukee Rep* may be read to suggest that the sponsor's motivation in presenting the event is completely irrelevant, we hereby clarify that language. We emphasize, however, that the sponsor's motivation is only one factor in the analysis and that a sponsor's statements that its events have an educational purpose, as in *Milwaukee Rep*, might be undermined by other evidence showing that its purpose was otherwise.

We also reject MSO's premise that *Milwaukee Rep* only utilized the audience motivation approach to the exclusion of other considerations. The Commission clearly also took into account the nature of the events themselves, stating, "MRT's marketing practices thereby acknowledge the entertaining nature of performances in the Powerhouse and Stiemke theaters." The Commission further stated, "Therefore, given the commonly accepted meaning of "entertainment, amusement and recreation, *and the nature of the disputed performances* as confirmed by MRT's own promotion and advertising, we conclude that the receipts at issue are taxable." (emphasis added).

Finally, MSO argues that it is unfair to look at the attendees' purpose in attending concerts because *Milwaukee Rep* was decided after the audit period in this case, and that thus applying the *Milwaukee Rep* decision would be changing the rules retroactively. (Pet. Br., p. 43) As stated, *Milwaukee Rep* is fundamentally consistent with

precedent; thus, there was no retroactive change of the rules. Moreover, the Department's action here is no more retroactive than it was in *Milwaukee Rep* where the audit period began in 1991 (a year before the beginning of the audit period here), and the decision was obviously made after the end of MRT's audit period, as is true in all assessments and refund denials. In fact, this matter was held in abeyance for many months awaiting the decision in *Milwaukee Rep*. It would be unfair to treat MSO more favorably than MRT, which had a similar audit period and almost identical facts to those here.

With the minor modification set forth above, the Commission reaffirms its decision in *Milwaukee Rep*. Under that case, MSO's admission receipts are taxable.

D. None of MSO's performances are primarily educational.

MSO asserts that its concerts are primarily educational, and not primarily entertainment, events. While the statute at issue, § 77.52(2)(a)2, does not create an exception for events that are primarily "educational," MSO's assumption is that if the event is primarily educational, it cannot be primarily entertainment under the statute. We conclude that the concerts at issue are not primarily educational events.

First, MSO's concerts do not fit standard dictionary definitions of "education." The American Heritage Dictionary, Second College Edition (1991) at 439, defines "education" as follows:

1. The act or process of educating or being educated.
2. The knowledge or skill obtained or developed by a learning process.

Webster's Third New International Dictionary, unabridged, (1981) at 723 provides the definition of "education" as:

- A. The act or process of educating or being educated.
- B. The act or process of providing with knowledge, skill, competence Desirable qualities of behavior or character or of being so provided esp. by a formal course of study, instruction or training.
 - 2a. A process or course of learning, instruction, or training that educates or is intended to educate . . . esp. a formal course of instruction or training offered by an institution.

MSO's concerts are not a "formal course of study, instruction or training," nor "offered by an institution," and attending them is not "the act or a process or course of learning, instruction or training." MSO had no structured instructional curriculum or specific instructional course and did not give its concerts in a classroom or learning center setting, and no skill or knowledge was obtained or developed by attending concerts such as there would be by taking music lessons or attending a college music history or theory course. There is no direct or concrete correlation between attending a concert and learning. Even if some educational values flowed from MSO's concerts, that would be insufficient to classify the concerts as primarily educational.

It is not clear what MSO claims was taught at its concerts or learned by attending its concerts. To the extent MSO is arguing that by attending one of its concerts, one becomes more educated in the sense of becoming more familiar with the music itself, that must be rejected because that same statement could be made about any event -- i.e., that one becomes more familiar with it by exposing oneself to it.

In the words of MSO's principal violist, MSO's concerts are "not instructional." (Vol. III, pp. 113, 142) That would indicate that the concerts were not educational at all. However, according to Audrey Baird, the concerts taught "discipline" and "organization," but exactly how attending a musical concert can teach

anyone discipline or organization is unexplained. (Vol. III, p. 197)

MSO relies primarily on the testimony of its expert witness, Dr. Greenberg.¹⁸ We first note that in his Memorandum, the presiding Commissioner stated that Dr. Greenberg's testimony was "genuinely credible and authoritative," he "had an impressive command of the subject matter" and that his "opinions were based on sincere convictions." While Dr. Greenberg is undoubtedly an accomplished musician and an expert in music history, we are not bound to accept his opinion on the ultimate legal issue here -- *i.e.*, whether the concerts performed were primarily entertainment under § 77.52(2)(a)2 -- as that issue is outside the scope of his expertise and within the province of the Commission and courts.

MSO notes that Dr. Greenberg reviewed the repertoire performed by MSO during the audit period. He was then asked, whether in his opinion, MSO's classical concerts were primarily events of amusement or entertainment. His answer was "no," which he explained as follows: "Because they're not, because there's much more involvement than that. Perhaps indeed there is a level of entertainment going on, amusement, but by far the primary impulse, the primary event that's going on in these concerts is an educational and informative impulse." (Vol. II, p. 42.) He further explained that classical music is a medium "ripe with meaning, with metaphor, with expressive content that is meant by the composer who is writing an orchestral piece to tell something of himself or herself, of his or time and place, to the audience lucky

¹⁸ MSO asserts that the "only" evidence presented at trial as to the educational versus the entertaining characteristics of the MSO's classical and youth concerts was introduced by MSO. (Pet's Br. at 52). This is false and completely ignores the Department's exhibits that were accepted into evidence and much of the testimony in this matter.

enough to hear that music." (Vol. II, p. 46.)

These descriptions, however, might just as well apply to many other types of music -- opera, jazz, blues, or even some of the more sophisticated folk or contemporary music. Such a standard also does not adequately distinguish a documentary movie or other historical or dramatic film from MSO's concerts. Dr. Greenberg's testimony serves to illustrate how elusive the standards would be if MSO's position were adopted, and how difficult to apply.

MSO also points to Dr. Greenberg's analysis of three works presented for MSO's Classical concerts on September 23 through 25, 1994. Dr. Greenberg stated that their meaning, the context, the metaphors and messages in these three works have been the subject of PhD. dissertations and an entire lecture series and courses. He then proceeded to discuss some of the historical, artistic and psychological content and messages of the three pieces.

Regarding Smetana's "Overture to a Bartered Bride," Dr. Greenberg explained that the piece contained nationalistic Czech influences that would have been considered subversive to the Austrian rulers of Czechoslovakia at the time, who had only recently allowed the composer to return from exile. (Vol. II, p. 48-49) Dr. Greenberg testified that although the piece is "very enjoyable" it was, in Smetana's day, also "politically subversive, ripe with political meaning." (Vol. II, p. 49). As stated by the Department, such a standard for education would pull in the performances of the Capitol Steps and the Vietnam War era songs of Joan Baez and others that were also "politically subversive, ripe with political meaning."

With respect to Mendelssohn's Concerto in E Minor for Violin and

Orchestra, Opus 64, which he described as a "gorgeous piece," Dr. Greenberg described how this work "represented an outstanding middle ground solution to a crucial artistic problem of the time, which was whether to adopt the newer self-expressive volcanic model of Beethoven, or to continue the classical earlier style, represented by Mozart and Haydn, with its refined nature and less overt emotionalism." (Vol. II. p. 50).

Finally, as to Beethoven's Third Symphony No. 3 in E-flat major, Opus 55 ("the Eroica"), which Dr. Greenberg described as the "watershed work of the 19th century" and a piece that changed the language of Western music, he explained that this work resulted from Beethoven's well-recorded attempt in 1802 to "reinvent himself as a hero" after learning of his impending deafness, considering thoughts of suicide, and viewing the political convulsions in Europe following the French Revolution and the rise of Napoleon Bonaparte. The Third Symphony is for these reasons heroic in nature, filled with tragedy and a descent into the "abyss of dissidence," but ending with victory and a celebratory conclusion. (Vol. II, pp. 51-53). He continued:

We listen to this music. We hear the aspirations for greatness at the beginning. We hear these amazing passages of darkness and dissidence when themes fall apart where we don't know what key we're in anymore and we feel the abyss, we feel the despair with Beethoven and, as he digs himself out, as the music slowly reaccumulates, we go along with it.

...
His [Beethoven's] life becomes our life. He informs and edifies our own experience and gives meaning to feelings that might have been only nonverbal until that moment, until he helped us work through our own emotions or even our own state of being, our own lives. It's incredibly moving and self-educational, even transformational.

(Vol. II, p. 55). When asked how we can know what messages the composers intended to convey in their works, Dr. Greenberg answered that these intentions were usually

well communicated through the composers' letters, through the recorded remembrances of their friends, and even (in later times) by programs they prepared for distribution at their own concerts.

As shown above, although Dr. Greenberg's testimony on the music was indeed primarily educational (as would be reading a dissertation or participating in a lecture series or courses on the three pieces), there is no indication that audience members would, by attending the concerts, become privy to any of the information he discussed. Moreover, with regard to his assessment of the psychological component of the particular pieces, such as the Third Symphony, the same could be said of many theater performances, other types of musical¹⁹ or dance performances, or weighty films.

In addition to the music repertoire itself, Dr. Greenberg also based his opinion as to the primarily educational character of MSO's concerts on other factors: (1) the orchestra, which he described as "an evolving musical organism," a "synergistic entity," and an "ensemble from which composers can draw an infinite number of different musical colors and combinations" (Vol. II, pp. 38, 39, 43); (2) the performance hall, which he stated was an "environment very much like a museum" that allowed members of the audience to "see more clearly," "think more deeply" and "hear more sharply" (Vol. II, p. 43); (3) the instruments, some of which are very old, very valuable

¹⁹ When asked to compare symphony concerts to rock concerts and similar popular events, Dr. Greenberg stated that those types of music lack the significant internal complexity and messages of classical music; as a result, although they might provide an experiential event in which a person is enjoyably immersed in the immediate environment during the period in which he or she is at the concert, he or she leaves without any "larger perspective" that lasts beyond the immediate experience itself. (Vol. II, p. 71) Dr. Greenberg showed no basis for this assertion and had no scientific data showing that those who go to symphonic concerts leave with a larger perspective or that they retain the experience. Moreover, while one would likely be on fairly safe grounds stating that many musical performances leave nothing in an audience member beyond the immediate experience, there exists a wide range of music, some of which might be more aptly compared in terms of weight or significance to classical symphony concerts.

and were "a perfect marriage of form and function, a great interface of technology and art" (Vol. II, pp. 43-44); and (4) the musicians, each of whom is an "artist" and very accomplished. These facts and adjectives simply do not establish that the events were "primarily educational."

Nor do the pre-concert or post-concert lectures or the *Encore* publication establish that the concerts were primarily educational. The lectures, which primarily occurred only at the Classical concerts, were not part of the concerts themselves. Rather, they were an optional event that a portion of the audience members attended. Regarding the *Encore* publications, they generally contained a small amount of information about the pieces themselves and the audience members may or may not have read that information. Moreover, the Pops concerts programs contained *no* information on the music performed, and thus provided no educational value to the listener.

With regard to the educational material for the High School and Middle School concerts, and the "kinderkits" provided to Kinderkonzert subscribers, the record does not indicate what percentage of schools, parents or audience members used the optional materials. Even if all of them did, MSO's issuance of these materials did not transform the concerts themselves into primarily educational events. The teaching and instruction associated with the concerts, if any, was conducted by teachers, parents, or MSOL docents, not MSO. Finally, to some degree, the children's concerts were a marketing technique to develop future audiences since MSO thought that children must be exposed to classical music before age 14 to establish an interest in attending classical concerts as an adult.

That the concerts were not primarily educational is also demonstrated by other facts in the record. In promoting its performances, MSO frequently used the term "entertainment" (or its derivatives) and terms connoting entertainment, while never once using any derivations of terms such as "educational," "learn," "teach," "instruct" or "charitable." This illustrates that MSO itself considered the performances primarily entertainment rather than educational or charitable.

In its various mission statements and the like, MSO generally did not mention education, and when it did, "education" was generally listed *after* "enjoyment," and then usually in the context of educating the audience in the art of music or classical music. The purpose that MSO has stated is applicable for purposes of this action was set forth in its 1976 Restated Articles of Incorporation as "[t]o organize and maintain and conduct a symphony orchestra and to present performances by said orchestra . . . to further the cultivation and appreciation of the art of Music" That purpose says nothing specifically about education, and cannot be interpreted as being an educational purpose.

In its Statement of Accomplishments on its Form 990 return for the period ending August 31, 1996, MSO stated its accomplishments as "concert productions," mentioning nothing about education, teaching, or learning. (Exh. GGG, p. 3)

Moreover, MSO did conduct surveys, but never asked for any education related information, further suggesting that education cannot have been an important issue for it. The fact that MSO never surveyed or tested to see if it was accomplishing any educational goals, and never asked any questions in its surveys related to whether it was fulfilling its claimed educational purposes, negates MSO's claim that it was

interested in the educational value of its concerts. Never were its concert audiences asked if they had learned anything from the MSO concerts, or how MSO could improve the educational value of its concerts. Rather, MSO surveyed to determine if its audiences appreciated and enjoyed the concerts by asking questions to determine how “pleasurable,” “appealing,” and enjoyable the concerts were, and what those who attended liked the most and the least about its concerts. In general, responders never mentioned anything about the educational or learning value of the concerts.

In several of its surveys, MSO referred to its concerts as “entertainment,” but never referred to them as “educational” or learning experiences, and compared the concerts to other entertaining types of events such as Bucks’, Brewers’, or Packers’ games. Moreover, MSO has admitted that it does not know if its attendees came to its concerts to be entertained or not. Therefore, it has not shown that the motivation of its audience was primarily educational.

MSO stresses that the majority of the audience members for the Classical concerts and the Pop concerts were repeat subscription purchasers and were more familiar with classical music. MSO asserts that this demonstrates that they would be more educated by attending the concerts than an average citizen or a one-time concert goer. While that might be true, it is certainly equally true that, as with many other activities, the more familiar one is with the activity or medium -- here, classical music -- the more entertaining it is as well. Thus, the fact that the majority of audience members were subscription purchasers does not assist MSO as MSO believes.

While only a small portion of the general population attends classical symphony orchestra concerts, for those who do, it is not unreasonable to assume that

the concert is an enjoyable, pleasant and relaxing night of entertainment, often combined with other social activities with friends, such as dinners, social gatherings and drinks. If the concerts were not entertaining, it seems unlikely that so many people would be willing to spend a weekend night or Sunday afternoon to attend.

E. **MSO's concerts are also not primarily charitable activities and even if they were, that would not preclude them from being primarily entertaining under §77.52(2)(a)2.**

MSO claims that its concerts were primarily charitable events in that they promoted "social welfare" and "lessen[ed] the burdens of government." (Pet. Br. at 39-40). The Court of Appeals has found that a soccer program, which taught children how to play soccer and trained soccer coaches and referees, did not provide "what ordinarily would be provided by government such that the burdens on government are lessened." *Kickers of Wisconsin, Inc. v. City of Milwaukee*, 197 Wis. 2d 675, 684 n.4, 541 N.W.2d 193 (Ct. App. 1995). The same is true of MSO and its concerts.

Even if MSO's concerts were "charitable," that would not exclude them from the imposition of tax under § 77.52(2)(a)2. A concert can have a charitable purpose (such as to raise funds for a good cause), yet be intended to entertain (so people will attend) and be entertaining to those who do attend, and thus be taxable.

MSO relies on a Texas Court of Appeals case, in which the court concluded that the orchestra was a "charitable" organization for property tax purposes. That decision is inapplicable as it did not involve a sales tax statute imposing tax on "entertainment" events and addressed the purpose of the organization for property tax purposes, not the purpose of the symphony's concerts.

F. **The Department's determination that MSO's concerts were primarily "entertainment" events under Wisconsin's sales tax statute does not conflict with other federal, state or local laws or determinations.**

Likewise misplaced is MSO's reliance on federal, state, and local provisions and determinations that MSO is a charitable or educational organization. For example, MSO first notes that since 1956 it has been is exempt from federal income taxes under I.R.C. § 501(c)(3), which applies only to non-profit organizations that are "organized and operated exclusively²⁰ for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . or for the prevention of cruelty to children or animals." While MSO acknowledges that the educational or charitable classification of an organization under § 501(c)(3) does not mean that every activity carried on by the organization is primarily for educational or charitable purposes, MSO asserts that the classification of the organization must apply to its principal activity, which in MSO's case is presenting concerts.

However, even if MSO, as an entity, is organized for educational purposes and therefore exempt from federal income tax, this does not mean that its primary activity cannot be taxed under a state sales tax provision which specifically taxes transactions and not entities. MSO concedes that an activity could be considered primarily educational and charitable for federal income tax purposes under § 501(c)(3) even though the same activity is considered primarily entertaining for sales tax purposes. However, it relies on the rule of statutory construction that state and federal statutes may be *in pari materia*. That is only true, however, where the statutes relate to

²⁰ The requirement has been relaxed in the federal tax regulations, which require only that the organization be organized and operated "primarily" for one or more of the purposes listed in the statute. Treas Regs. § 1.501(c)(3)-1(c)(1).

the same subject matter. A federal statute exempting from income tax those entities organized for educational or charitable purposes does not relate to the same subject matter as a state statute imposing sales tax for "entertainment" events. For similar reasons, the U.S. Postal Service's treatment of MSO as an organization operated for "educational purposes" for purposes of reduced bulk mailing is of little relevance here.

MSO also relies on Wis. Stat. § 77.54(9a)(f), which provides that an otherwise taxable sale will be exempt from tax if the buyer is a "corporation . . . organized and operated exclusively for religious, charitable, scientific or educational purposes" To facilitate the administration of this exemption, the Department issues a Certificate of Exempt Status (CES) to qualifying organizations. MSO applied for and received a CES in 1980 and has since had all of its *purchases* free of sales and use taxes under § 77.54(9a)(f). MSO suggests that it could not be primarily educational or charitable organization if its main activity were not primarily so. Again, the two statutes have very different purposes, as § 77.54(9a)(f) addresses exemptions for purchases by certain charitable entities, and § 77.52(2)(a)2 addresses taxation of an entity's sales to other (non-exempt) entities such as MSO's customers. For these same reasons, the Commission is not influenced by MSO's reliance on its exemption from Milwaukee personal property taxes under Wis. Stat. § 70.11(4), which exempts from tax property owned by certain non-profit organizations, including educational ones. The fact that an organization has educational purposes does not mean all of its activities, or even any of its activities, are educational.

II. MSO'S SALES OF CONCERT TICKETS WERE MERCANTILE TRANSACTIONS AND TAXABLE UNDER *KOLLASCH* AND ITS PROGENY.

Relying primarily on the Wisconsin Supreme Court's holding in *Kollasch*, MSO asserts that its sales of tickets is a nonmercantile activity and therefore not subject to sales tax. In *Kollasch*, the Wisconsin Supreme Court held that the Sisters of St. Benedict were not "retailers" within the meaning of the sales tax statute for that portion of charges made to guests for lodging, food and use of facilities which was allocable to meals. In so holding, the Court determined that the type of transactions which make one a retailer for purposes of the sales tax statute are "mercantile ones," *id.* at 568, and that "the concept of 'retailer' embodied in the sales tax statute does not encompass such fundamentally nonmercantile transactions as were engaged in by the Sisters" *Id.* at 567-68.²¹ The Court noted that the sole motive of the Sisters was to advance their religious and ecumenical ideals, *id.* at 569, and that the preparing, serving and sharing of meals was "as much a religious act as praying" and was "not a means of supporting their ministry" but was an "integral part of their ministry." *Id.* at 572.

A. Under the Commission's decision in *Milwaukee Rep*, MSO's concerts are mercantile in nature and therefore subject to tax.

The Commission has interpreted *Kollasch* on several occasions. Most

²¹ The legislature has amended Wis. Stat. § 77.51(13)(a), effective January 1, 2006, to provide that a "retailer" includes "[e]very seller who makes any sale, regardless of whether the sale is mercantile in nature, of tangible personal property." The amended language appears to be in response to *Kollasch* and *Frisch*. See *Wisconsin Dept. of Revenue v. River City Refuse Removal, Inc.*, 2006 WI App 34 ¶k 27, n.14, 289 Wis.2d 628, 712 N.W.2d 351, review granted, 2006 WI 108, 718 N.W.2d 723 (No. 2004AP2468).

The Department makes the point that under *Kollasch* and its progeny, mercantilism is relevant only to define the term "retailer" as that term is used in § 77.51(13)(a) and that because the imposition statute at issue here, § 77.52(2)(a)2, does not require the sales to be made by a retailer, it is immaterial whether MSO's sales of tickets were mercantile sales or not. Although the Department's argument is worthy of consideration and is also supported to some extent by the legislature's amendment of § 77.51(3)(c) while keeping § 77.52(2)(a)2 intact, the Commission need not address the Department's argument in light of its conclusion that *Kollasch* and related cases are distinguishable.

applicable to the instant case is the Commission's holding in *Milwaukee Rep*²² that MRT was a retailer engaged in a mercantile enterprise with respect to its admission tickets for its plays, which, as noted in the decision's fact section, "illuminated the human condition." The Commission's decision in *Milwaukee Rep* was based on the following factors: (1) unlike the religious activity of the Sisters in *Kollasch*, "MRT is a sophisticated, non-profit mercantile enterprise, required to hold a retailer seller's permit;" (2) "MRT engaged in extensive commercial advertising and promotion of its performances and employed professional actors, designers, and other employees;" (3) "[f]or FY 1995 MRT's promotion and selling expenses alone were \$407,818;" (4) "the Sisters in *Kollasch* charged just \$82,808 for meals over a five-year period and promoted their retreat center through non-commercial means while MRT's gross receipts from admission to just two theaters alone for the four-year audience period were in excess of \$5 million and promotional expenses for one theater alone for three years totaled \$53,057."

Not only did the Commission distinguish *Kollasch* but it also distinguished the Commission's decision in *American Heart Association v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-379 (WTAC 1998), describing as "incidental" the literature sales found not subject to sales tax in that case. The Commission further stated, "Like the Sisters' meal receipts, and unlike MRT's theater admission receipts, the Heart Association's literature sales receipts were relatively small and were promoted through non-commercial means."

²²The Commission notes that MSO, along with four other performing arts groups, submitted a Brief of Amici Curiae in the *Milwaukee Rep* case regarding the *Kollasch* issue. In *Milwaukee Rep*, the Commission reviewed those arguments and decided against MRT, affirming the tax on MRT's admission receipts.

MSO's attempts to distinguish *Milwaukee Rep* are unconvincing. Indeed, all of the factors relied upon by the Commission in *Milwaukee Rep* are either the same or more pronounced here. MRT, like MSO, was a nonprofit arts organization that was exempt from federal income tax under I.R.C. § 501(c)(3) and performed for members of the public. MRT, like MSO, held a Wisconsin seller's permit. As MSO does here, MRT claimed its mission and "primary objective" were educational. MRT advertised as does MSO, *i.e.*, in newspapers, magazines, and on the radio. MSO's advertising and promotional expenses were extensive -- \$1.2-\$1.6 million in each of the audit years -- which was much higher than MRT's promotional expenses. MSO is even larger than MRT since it is by far the largest arts organization in the state, with an annual budget of over \$11 million.

Pursuant to *Milwaukee Rep*, *Kollasch* does not exclude MSO's concert receipts from taxation.

B. *Milwaukee Rep* is consistent with appellate precedent and Commission cases.

MSO also urges the Commission to disavow its holding in *Milwaukee Rep* on grounds that it is inconsistent with *Kollasch* and two decisions from the Court of Appeals, *Frisch, Dudek and Slattery, Ltd. v. Wisconsin Department of Revenue*, 133 Wis. 2d 444, 396 N.W.2d 355 (Ct. App. 1986), decided prior to *Milwaukee Rep*, and *River City Refuse, supra.*, decided after *Milwaukee Rep* and currently pending before the Wisconsin Supreme Court (oral arguments were held October 13, 2006). MSO asserts that under this appellate precedent, it is irrelevant whether the subject organization is a large and sophisticated organization and/or has a seller's permit because the taxability of a transaction depends on the specific circumstances of the transaction at issue.

We see no conflict between *Milwaukee Rep* and appellate precedent. In analyzing whether a given entity is a "retailer" with "mercantile intent" with respect to any given transaction, the courts have consistently looked at the subject activity in relation to the organization as a whole, the amount of income generated by the activity, and the degree to which the organization's resources are devoted to that activity. This is made abundantly clear by any reasonable reading of *Kollasch*. Moreover, where the courts have stressed the transaction at issue, such emphasis was in direct response to the Department's assertion that because the entity's overall purpose was profit-seeking, mercantile intent can be attributed to any of its activities, even where the latter activities involved transactions which were incidental to the organization's overall mercantile purpose.

For example, the issue in *Frisch* was whether the law firm was required to pay sales tax on photocopy charges it billed to clients. 133 Wis. 2d at 445. The Court of Appeals held that the law firm was "not a 'retailer' of photocopies" within the meaning of the sales tax statute and that therefore no sales tax could be imposed under that statute. *Id.* at 449. The Department argued that photocopying should not be isolated from the firm's law practice, which undoubtedly was expected by its members to reap a profit. The court rejected this argument, relying on Wis. Admin. Code § Tax (Rule) 11.67.

Under Rule 11.67, "If the objective of the purchases is to obtain the personal property, a taxable sale of that property is involved. However, if the objective of the purchase is to obtain the service, a sale of a service is involved even though, as an incidence to the service, some tangible personal property may be transferred." *Id.* at

448-49. The court noted that the law firm's clients did "not patronize the firm to purchase photocopies" and that "[t]he need to make copies is wholly dependent upon the provision of legal services." *Id.* at 449. The court further stated that the purpose of separate itemization was not to make a profit but only to fairly distribute the photocopying costs among clients in fair proportion. *Id.* at 449. Moreover, the charges to clients for photocopying "always approximated actual costs of production" and "[t]he firm did not make photocopies for the general public but only for its clients." *Id.*

The court also noted the *Kollasch* court's observation that the commonly understood conception of a retailer is one who transacts business with a consumer in the hopes of making a profit on the transaction. *Id.* at 448. The *Frisch* court then held that even though the law firm "may charge a client a penny or two per page more than its estimated average cost of making the copies," it could not be established that the firm hoped to make a profit on the transaction. *Id.* at 448.

River City Refuse involved the transfer of fixed assets between corporate subsidiaries whereby the parent corporation periodically assessed the equipment needs of each of its subsidiaries and, based on the current business volumes and trends, directed that various assets be transferred among its subsidiaries according to their respective needs. 2006 WI App 34 at ¶4. The transferee corporations made no payment of cash or other considerations for the transfers nor was there an expectation or requirement that such would be paid. *Id.* When accounted for correctly by the subsidiaries, the transactions netted to zero on the parent company's consolidated financial statements. *Id.* at ¶5.

The court concluded that the transfers were not subject to the use tax

because the transferring subsidiaries lacked mercantile intent and therefore were not retailers with respect to the transactions. The court reasoned, "The . . . subsidiaries shifted fixed assets among themselves in order to more efficiently carry out the overall corporate enterprise, not to make a profit on the transactions in and of themselves." *Id.* at ¶26.

Because we do not discern anything in *Milwaukee Rep* which conflicts with *Kollasch, Frisch* or *River City Refuse*, we decline MSO's invitation to ignore or overrule it. Moreover, as shown below, the approach taken in *Milwaukee Rep* and the instant case are consistent with other Commission cases.

C. Our holding that MSO's sales of concert tickets were mercantile transactions is consistent with other Commission cases.

A comparison to other Commission cases further demonstrates that MSO's sales of concert tickets are mercantile transactions. For example, in concluding in *American Heart, supra.*, that the Heart Association's sales of informational literature were not taxable, the Commission noted that the charges made for the literature, just as in *Kollasch*, were "clearly incidental" and that "the receipts from the sales activity were relatively small." The Commission specifically noted that the Sisters in *Kollasch* charged \$82,808.53 for meals over a 5-year period and that the Heart Association charged \$223,820 for the literature sales at issue during the 5-year audit period and that the sales of literature constituted only 3.8% of gross revenue during the audit period. *Id.* at n. 4

In *American Baptist Assembly, Inc. v. Dept. of Revenue*, Wis. Tax Rptr. (CCH) 400-380 (WTAC 1998), the Commission rejected the assertion that meals sold by the American Baptist Assembly to conference participants were nonmercantile transactions undertaken as an integral part of its charitable purpose. Instead, the Commission

concluded that such meals were "a means of supporting it, unlike the meals served by the Sisters in *Kollasch* and the literature sold in *American Heart Association*." The Commission noted that American Baptist Assembly's sales of meals "were a significant part of a mercantile undertaking which grossed \$4.8 million in 1989, including \$537,163 from the disputed meals alone." The Commission also stressed the "commercial promotion" engaged in by the American Baptist Assembly.

In *YMCA of Beloit, et. al v. Wis. Dept. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-698 (WTAC 1986), the Commission held that twelve YMCAs and three YWCAs were "retailers" for purposes of the sales and use tax with regard to various items they sold. The Commission distinguished *Kollasch* on grounds that the meals served by the Sisters were part of a religious endeavor at a "monastery" which was not open to the public, the Sisters lost money every year and had no seller's permit, and the meals had overtones more of a meal with guests than a restaurant or cafeteria transaction. The Commission saw little resemblance between the transactions in *Kollasch* and the "voluminous and various transactions on a daily basis with members and 'the public' alike" in *YMCA of Beloit*.

In another example, this Commission affirmed the Department when it found an "obvious difference" between the meals served by the nuns in *Kollasch* and the City of Madison's planting of trees for the benefit of its residents' property. *City of Madison v. Wisconsin Department of Revenue*, Wis. Tax Rep. (CCH) ¶400-100 (WTAC 1995). In so holding, the Commission stated that the *Kollasch* court's holding was based "largely" on the fact that the activities at issue were "'in furtherance of [the Sister's] religious beliefs'" (citation omitted). In *YMCA of Beloit*, the Commission again

expressed its reluctance to continually expand *Kollasch*: "This Commission in two previous cases under circumstances similar to those here has read the *Kollasch* holding narrowly in effect as limited to its specific facts. See *YWCA of Madison; Adult Christian Education Foundation*."

Neither MSO's concerts nor the revenues they generated were "incidental" as in *Kollasch*, *Frisch* and *American Heart*, nor did they involve a shifting of assets between subsidiaries at no cost, as in *River City Refuse*. MSO's annual receipts from its concerts were in the millions of dollars in each of the audit years and constituted at least 90 percent of its revenues, its ticket sales were "voluminous," as in *YMCA of Beloit*, and were a "means of supporting" MSO, as in *American Baptist*.

Furthermore, MSO made enormous efforts to sell tickets and, unlike the Sisters in *Kollasch* or the Heart Association, spent considerable funds on its marketing activities. In contrast to the non-commercial means of promotion used by the Sisters in *Kollasch* and the Heart Association, MSO used many different forms of commercial advertising, which included printed materials prepared by its own Marketing Department; advertisements in newspapers, on TV, and over the radio; flyers, brochures, and multiple different types of mailings; as well as telephone calls directly to its patrons. Additionally, MSO sold its tickets to the general public and performed in public halls, while the Sisters served their meals only to "selected and invited guests," in its own retreat center, *Kollasch*, 104 Wis. 2d at 575, the law firm sold copies only to its clients, and River City Refuse conveyed equipment only to its subsidiaries.

To hold that the transactions involved in this case were nonmercantile would be to stretch *Kollasch* beyond recognition. We decline to expand *Kollasch* that far.

In conclusion, the Commission holds that MSO's concerts were entertainment events under § 77.52(2)(a)2 and that MSO's sales of its concert tickets were mercantile activities subject to taxation under *Kollasch*.

Accordingly,

IT IS ORDERED

The Department's denial of the remainder of MSO's claim for refund is affirmed.

Dated at Madison, Wisconsin, this 15th day of December, 2006.

WISCONSIN TAX APPEALS COMMISSION

Jennifer E. Nashold, Chairperson

Diane E. Norman, Commissioner

David C. Swanson, Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

DAVID C. SWANSON, COMMISSIONER, CONCURRING:

I join and concur with the lead opinion of the Commission. I write separately only to address the impact of *Milwaukee Repertory Theater, Inc. v. Dep't of Revenue*, Wis. Tax Rep. (CCH) ¶400-151 (WTAC 2000) ("*Milwaukee Rep*"), on this case. As discussed in the lead opinion, the facts at issue in this case are so similar to the facts at issue in *Milwaukee Rep* that no significant distinctions can be drawn between them.

Thus, to decide this case in favor of MSO, the Commission would have to hold that *Milwaukee Rep* was wrongly decided.

Although consistency in administrative proceedings “is a virtue,” the doctrine of *stare decisis* is not binding on an administrative agency. *Nelson Bros. Furniture Corp. v. Dep’t of Revenue*, 152 Wis.2d 746, 756, 449 N.W.2d 328 (Ct. App. 1989) (citations omitted). However, the policy considerations that form the basis of *stare decisis* remain. As the Wisconsin Supreme Court recently stated, “respect for prior decisions is fundamental to the rule of law.” *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 264 Wis.2d 60, 115, 665 N.W.2d 257 (2003). As summarized by the Court:

Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law “is open to revision in every case, ‘deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.’” ... “A court’s decision to depart from precedent is not to be made casually. It must be explained carefully and fully to insure that the court is not acting in an arbitrary or capricious manner. A court should not depart from precedent without sufficient justification.” *State v. Stevens*, 181 Wis.2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring).

Johnson Controls, 264 Wis. 2d at 115-116. Additional rationales for following precedent include: “(1) the desirability that the law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; (2) the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and (3) the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.” *Id.* at 116. Arguments for rejecting precedent must be weighed against these factors.

Departing from precedent is justified in a number of circumstances, including where the following situations are present: (1) changes or developments in the law have undermined the rationale behind a decision; (2) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (3) the prior decision is unsound in principle or unworkable in practice; or (4) reliance interests are implicated. *Id.* at 118-119 (citations omitted). None of those circumstances are present here.

The applicable statute has not been amended, and no court has criticized *Milwaukee Rep.* As discussed in the lead opinion, MSO has not shown that *Milwaukee Rep* has become detrimental to coherence and consistency in the law, or that it is unsound in principle or unworkable in practice. Finally, there are no reliance interests at stake. MSO has operated under the assumption that its sales of admissions were taxable and has paid most of the taxes at issue. It is fair to assume that other nonprofit organizations in Wisconsin also have been complying with *Milwaukee Rep* since it was decided.

Absent a compelling justification for departing from precedent, the Commission should follow *Milwaukee Rep.* Therefore, I respectfully join the lead opinion and concur in its result.

David C. Swanson, Commissioner