STATE OF WISCONSIN **CIRCUIT COURT BRANCH 3** **DANE COUNTY**

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

ORBITZ, LLC,

Respondent.

Case No. 14-CV-1708

Administrative Agency Review: 30607

DECISION AND ORDER

The Wisconsin Department of Revenue (the "Department") requests judicial review of a Ruling and Order issued by the Tax Appeals Commission (the "Commission") granting Summary Judgment to Petitioner Orbitz, LLC ("Orbitz"), denying the Department's cross motion, and reversing the tax assessments imposed against Orbitz by the Department. At issue is the Commission's interpretation of Wis. Stat. § 77.52(2)(a)1. and subsequent conclusion that Orbitz's activities are not among the taxable services enumerated under this statute.

FACTS

In 2008, the Department notified Orbitz that additional sales/use tax in the amount of $111,253.29 was owed for the tax periods ending December 31, 2001 through December 31, 2006. (Comm. Ruling 1-2.) This assessment was based on the Department's determination that Orbitz is an "internet lodging provider" who provides lodging throughout Wisconsin. (Comm. Ruling 2.) The Department asserted that the correct measure of tax owed by Orbitz is the "full price charged by the internet lodging provider to their customers less the measure of tax previously reported." (Id.) There is no dispute that the hotels for which Orbitz facilitated

reservations remitted sales tax on the amounts they received for furnishing lodging to Orbitz users. (Id.) The assessed amount reflects only on the additional amounts Orbitz received and retained as payment for its services during the audit period. (Id.)

Orbitz filed for a redetermination of this assessment, which was denied. (Comm. Ruling 2.) Orbitz then appealed the Department's denial to the Commission. (Id.) The Commission was tasked with determining whether, under the "Merchant Model," Orbitz's activities constitute a taxable service under Wis. Stat. § 77.52(2)(a)1. (Id. at 14.) Both parties filed for summary judgment on this issue. (Id. at 2.) While the parties failed to present a joint Stipulation of Facts to the Commission, the parties' simultaneous summary judgment motions in effect stipulated that only questions of law were before the Commission. (Id. at 10-11); see *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4. The Commission independently agreed that the relevant facts underlying the legal issues were not in dispute. (Id. at 13-14, 18.) The Commission granted Orbitz's motion for summary judgment and denied the Department's cross motion on the grounds that Orbitz does not provide a service that is taxable under Wis. Stat. § 77.52(2)(a)1. (Id. at 30.) The Commission specifically concluded that:

> (1) Orbitz serves as an intermediary between travelers seeking hotel reservations and hotels looking to provide lodging services.
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> (2) The provision of online reservation facilitation services as provided by Orbitz under the "Merchant Model" is not "the furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public" under Wis. Stat. § 77.52(2)(a) 1.
>
> (3) The imposition statute at issue taxes those who sell, perform, or furnish the services listed in the subsection. The activities of Orbitz are not a listed service under Wis. Stat. § 77.52(2)(a). The argument for taxing one who sells lodging services sold, performed or furnished by another creates a second layer of tax liability not specified in Wis. Stat. § 77.52(2)(a)1. We reject that approach because the statute does not clearly intend that result.

(4) Wis. Stat. § 77.52(2)(a) does not clearly impose a tax on the mark-up compensation Orbitz receives from its customers for its reservation facilitation services; such ambiguity must be resolved in the Petitioner's favor and against extending the reach of the taxing authority.

(Comm. Ruling 30.)

The Department filed a petition for judicial review of the Commission's decision, asserting that the Commission erroneously interpreted Wis. Stat. § 77.52(2)(a)1. as imposing tax only on those who furnish lodging, rather than imposing tax on all those who sell, perform or furnish the service of furnishing lodging. (Pet. Br. 1.) The Department further asserts that the Commission erred when it failed to recognize that Wis. Stat. § 77.51(13)(c) enables the Department to impose tax on the agents of those who furnish lodging. (Id. at 2.) Additionally, the Department asserts that the Commission relied on factual findings that were unsupported by substantial evidence in light of the entire record, and erroneously dismissed the reasoning and conclusions in similar cases from other jurisdictions. (Id.)

On review, this court must first determine the proper level of deference to be given to the Commission's statutory interpretation. Next, this court must determine whether the Commission reasonably concluded that Orbitz provided a service that was not taxable under Wis. Stat. § 77.52(2)(a)1.

STANDARD OF REVIEW

While an agency's interpretation and application of a statute is a question of law to be determined by a court, a reviewing court may nonetheless give deference to the agency's interpretation. *Milwaukee Symphony Orchestra, Inc., v. Wis. Dep't of Revenue*, 2010 WI 33, ¶ 32. The level of deference granted by a reviewing court to an agency's interpretation – great weight, due weight, or no deference – is dependent on the comparative qualifications and

capabilities of the courts and the agency. *Milwaukee*, 2010 WI at ¶ 34. Furthermore, it is the petitioner's burden to show that the agency's interpretation should be overturned. See *Telemark Dev., Inc. v. Dep't of Revenue*, 218 Wis. 2d 809, 821, 581 N.W.2d 585 (1998).

"Great weight deference is warranted when (1) the agency is charged by the legislature with administering the statute in question; (2) the agency interpretation is of long standing; (3) the agency employed its specialized knowledge or expertise in interpreting the statute; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute." *Milwaukee*, 2010 WI at ¶ 35. When great weight deference is applied by a reviewing court, an agency's reasonable statutory interpretation will be sustained even if the court determines that an equal or more reasonable interpretation exists. *Id.*

Due weight is a lesser degree of deference that is appropriate when not all of the requirements for great weight deference have been met, yet an agency has been charged by the legislature with enforcement of the statute, and the agency has experience in the area but not necessarily the developed expertise that would place it in a superior position to the court to interpret the statute. *Id.*, at ¶ 36. When due weight deference is applied, a reviewing court will only disturb the agency's interpretation if the interpretation is not contrary to the clear meaning of the statute and a more reasonable interpretation does not exist. *Id.*

A reviewing court will give no deference to an agency's statutory interpretation when the issue is one of first impression, the agency has no experience or expertise with the issue, or the agency's position on the issue has been so inconsistent as to provide no real guidance. *Id.*, at ¶ 37. In this case, a court will adopt the interpretation that it independently determines to be the most reasonable. *Id.*

Orbitz contends that great weight deference should be given to the Commission's interpretation, since the Commission has extensive experience in the administration of the sales tax statutes. (Orbitz Br. 13-15.) Conversely, while acknowledging that two of the four necessary prongs for great weight deference are satisfied in this case, the Department nonetheless argues that no deference should be given to the Commission's interpretation of Wis. Stat. § 77.52(2)(a)1., since the issue of whether sales tax should be imposed on an online travel company such as Orbitz is one of first impression for the Commission. (Pet. Br. 10.) Furthermore, citing *Hergert dba Aero Expo Corporate Service v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ ¶ 400-525 (WTAC 2001), the Department contends that the Commission's interpretation of Wis. Stat. § 77.52(2)(a)1. has thus far been inconsistent and therefore no deference should be given to the Commission's interpretation in this case. (Pet. Br. 11.)

In this case, due weight deference to the Commission's interpretation is appropriate. It is clear that the Commission has been charged by the Legislature with interpreting the sales tax statutes, and the Commission has extensive experience in doing so. See *Telemark*, 218 Wis. 2d at 820. Furthermore, the Commission's interpretation provides uniformity and consistency in the application of the statute by clarifying on whom and under what circumstances the statute seeks to impose tax. See *Hergert*; *NEJA Group LLC v. Wis. Dep't. of Revenue,* Docket No. 2014-CV-0131 (Aug. 22, 2014); *Associated Training Services Corp., v. Dep't. of Revenue*, (CCH) ¶ 400-854 (WTAC 2005). However, the Commission's interpretation of Wis. Stat. § 77.52(2)(a)1. is not one of long standing as it relates to the imposition of tax on third-party service providers such as Orbitz or other online travel companies (OTCs). Under due weight deference, this court will not set aside the Commission's reasonable interpretation of Wis. Stat. § 77.52(2)(a)1. unless a more reasonable interpretation is found to exist.

DISCUSSION

In order to determine whether the Department properly assessed sales taxes against Orbitz, the Commission had to first ascertain what services Orbitz provided, based on the substance and realities of Orbitz's activities. This determination then served as the factual basis for the Commission's application of Wis. Stat. § 77.52(2)(a).

Services Provided by Orbitz

Based on the parties' submissions, the Commission found that Orbitz is an online travel company which conducts business via its website, www.orbitz.com. (Id. at 2.) Orbitz collects and publishes information about numerous hotels throughout the country, such as location, price, amenities, star ratings, reviews, and nearby attractions. (Id. at 3.) Customers can then search for hotel accommodations based on the above information. (Id.)

Operating under the "Merchant Model," Orbitz contracts with hotels for the right to facilitate a predetermined number of reservations. (Id. at 8, 13.) However, while rooms are "allocated" for Orbitz's use, specific rooms are not blocked off by the hotel for Orbitz and Orbitz is not penalized for failing to utilize its entire room allotment. (Id. at 4, 8.) Orbitz does not own, operate or manage any hotel rooms, nor does it purchase hotel rooms that are then resold to by Orbitz to its users. (Id. at 4, 9.)

After locating a desired hotel through Orbitz search functions, Orbitz users have the option to then reserve accommodations at a desired hotel directly from the Orbitz website. (Id. at 4.) However, Orbitz users must pre-pay for any lodging reserved through Orbitz. (Id. at 6.) The pre-payment amount charged to the customer is comprised of several parts: a Net Rate determined by the hotel, which represents the cost of the lodging; a mark-up on the hotel's Net Rate, assessed and retained by Orbitz as compensation for its services; the estimated taxes that

will be assessed by the appropriate taxing authorities, based on the hotel's Net Rate; and any additional service charges or applicable fees, including a fee that Orbitz retains as additional compensation for the services provided. (Id. at 5-6, 10.)

When a customer reserves a room through the Orbitz website, Orbitz determines whether the requested hotel is still accepting reservations from Orbitz and, if so, Orbitz makes a reservation directly with the hotel in the name of the Orbitz user. (Id. at 5.) After the reservation is made, the customer then deals directly with the hotel to register and receive a room assignment. (Id. at 7-8.) Orbitz does not assign nor grant occupancy to any of a hotel's rooms. (Id.) Furthermore, if at the time of check-in a hotel is unable to honor a reservation made through the Orbitz website, it is the hotel's responsibility – and not the responsibility of Orbitz – to find alternative accommodations for the traveler. (Id.) Orbitz has neither the right nor the ability to control, take possession or occupy these hotel rooms. (Id. at 8.) Instead, Orbitz acts as an intermediary between the customer and the hotel. (Id. at 15-16.)

Based on the substance and realities of Orbitz's activities and the undisputed facts on the record as a whole, the Commission reasonably determined that Orbitz "participate[ed] in the traveler's experience by facilitating reservations for the lodging," but was still "one step removed" from actually providing that lodging to the traveler. (Id. at 17.) Ultimately, only the hotels furnished the actual lodging. (Id. at 16.)

Taxable Services Under Wis. Stat. § 77.52(2)(a)1.

The Commission next turned to the statute to determine whether the online reservation facilitation services provided by Orbitz were specifically identified as subject to the imposed tax. (Id. at 16.) A reviewing court must read the imposition language of taxing statutes according to its "ordinary and accepted meaning." *Dep't. of Revenue v. Milwaukee Refining Corp.*, 80 Wis.

2d 144, 48, 257 N.W.2d 855, 858 (1977). However, if the language of a taxing statute is capable of more than one reasonable meaning, any ambiguity within the statute must be resolved in favor of the taxpayer. *Milwaukee Refining Corp.*, 80 Wis. 2d at 48. Wis. Stat. § 77.52(2)(a)1. (2003-2004) states in relevant part:

> (2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.
>
> (a) The tax imposed herein applies to the following types of services:
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> 1. The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public [...].

The Commission determined that it was unclear whether Orbitz's "indirect participation" in the customer's hotel stay by facilitating the reservation was encompassed by the term "furnishing," based on the plain language of the statute. (Comm. Ruling 17.) The Commission next looked to the term's ordinary usage, meaning to "provide or supply with what is needed, useful, or desirable." *Katzman v. State*, 228 Wis. 2d 282, 292, 596 N.W.2d 861, 865 (Ct. App. 1999); (Comm. Ruling 18.). But even applying the common meaning of the term "furnish," the Commission determined it was still unclear whether online reservation services were included in the statute. (Comm. Ruling 19.)

To try to resolve this ambiguity, the Commission then analyzed whether the services provided by Orbitz were similar to those provided by "hotelkeepers, motel operators, or other persons furnishing accommodations," as identified by the statute. (Id. at 21.) Relying on its prior decision in *Hergert*, the Commission reasoned that the nature and extent of the services a taxpayer provided to his customers and the degree of control the taxpayer exercised over the accommodations that were ultimately furnished were determinative as to whether a taxpayer

qualified as an "other person[ ] furnishing accommodations" under the statute. (Id.) In *Hergert*, not only did the taxpayer facilitate reservations, he unilaterally determined the pricing of the accommodations, was the sole point of contact for the renters (who never met the homeowners face-to-face), provided renters with physical access to the homes, and addressed the renters' needs during their stay. *Id.*; (Comm. Ruling 22.).

In contrast, Orbitz did not physically provide the lodging to its users and did not perform any of the duties typically performed by hotelkeepers or motel operators apart from the limited service of facilitating reservations and pre-payment for the accommodations. (Comm. Ruling 22.) And, unlike the taxpayer in *Hergert*, Orbitz did not maintain any control over the accommodations once the reservations were made and pre-payment was accepted, nor did Orbitz exercise unilateral control over the pricing or access to the accommodations that were ultimately furnished. (Id.) Based on this, the Commission found that Orbitz did not qualify as an "other person furnishing lodging" under the statute. (Id.)

The Commission reasonably concluded that Wis. Stat. § 77.52(2)(a)1. was unclear as to whether "furnishing rooms and lodging" encompassed indirect activities such as facilitating reservations, or whether it was limited to literally providing the physical accommodations. Furthermore, the Commission found that Orbitz did not provide the same services that a hotelkeeper or motel operator provides sufficient to qualify Orbitz as an "other person[ ] furnishing lodging" under the statute, based on the Commission's prior decision in *Hergert.* Since any ambiguity within the statute must be resolved in favor of the taxpayer, the Commission's determination that Orbitz is not subject to tax imposed under Wis. Stat. § 77.52(2)(a)1. is reasonable, based on its interpretation of the statute and prior decisions.

Affording due weight deference to this conclusion, the Commission's interpretation will not be disturbed unless a more reasonable interpretation is found to exist.

Actors Taxed By Wis. Stat. § 77.52(2)(a)1.

The Department argues that the Commission's interpretation and application of the statute is erroneous, since it fails to take into account the introductory language of Wis. Stat. § 77.52(2) stating that "a tax is imposed on *all persons selling, performing or furnishing* the services," which are subsequently enumerated in the statute. (Pet. Br. 14-16.) Statutory language must be interpreted in context of the entire statute in which it's used. *Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶ 46. Furthermore, a statute's interpretation must be reasonable and not lead to absurd results or meaningless surplusage. *Kalal*, 2004 WI at ¶ 46. Importantly, "when there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision." *Frank Lloyd Wright Found. v. Town of Wyo.*, 267 Wis. 599, 608, 66 N.W.2d 642, 647 (1954).

In its Order, the Commission analyzed the Department's proposed interpretation of Wis. Stat. § 77.52(2) as imposing tax on all persons "selling, performing or furnishing" the enumerated taxable services. (Comm. Ruling 27.) The Commission determined that the Department's interpretation was inconsistent with the plain language of the statute as a whole, and would impose a second layer of taxation that was not clearly intended by the statute. (Id.) Instead, the Commission interpreted the introductory language at issue as simply "describing who the actors are who may be liable for the tax," which was then followed by a specific list of taxable services. (Id. at 28.)

The Commission's interpretation of the introductory language contained in Wis. Stat. § 77.52(2) is reasonable and will only be overturned if the Department's interpretation is *more* reasonable. However, as both the Commission and Orbitz point out, and consistent with the rules of statutory construction, this introductory language is most clearly and simply read as a general provision referring to the operative terms found in the enumerated list of specific services, and not as additional services that are to be grafted on to that list. See *Frank Lloyd Wright*, 267 Wis. at 608; (Orbitz Br. 20; Comm. Ruling 28.). Furthermore, using the Department's suggested interpretation yields unreasonable results and surplusages when applied to other provisions within the statute. For example, the statute would read as imposing tax on "all persons *selling the sale* of telecommunications services." See Wis. Stat. § 77.52(2)(a)5.a. This redundancy does not exist under the Commission's interpretation. Even if the Department's interpretation could be viewed as reasonable, it is certainly not *more* reasonable than the one supplied by the Commission.

Substantial Evidence

Next, the Department contends that Orbitz is a seller of lodging based on Orbitz's own representations made through its SEC filings, webpage, and promotional program. (Pet. Br. 15.) Specifically, the Department points to the Commission's reliance on the affidavit testimony of both an Orbitz employee, Peggy Bianco, and of Orbitz's expert witness, Professor Chekitan S. Dev, Ph.D., from the School of Hotel Administration at Cornell University. (Pet. R. Br. 11.) The Department asserts that the Commission's legal conclusions based on this testimony aren't supported by substantial evidence and therefore must be set aside. (Id.)

"When simultaneous Motions for Summary Judgment are pending, the parties in effect stipulate to the underlying material facts because they are both claiming that only issues of law

are before the Commission." See *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 4; (Comm. Ruling 11.). In this case, the Commission specifically noted that the underlying facts essential to determine the legal issues were not in dispute, based on the substance and reality of Orbitz's activities as demonstrated by both parties' submissions. (Comm. Ruling 13-14, 18.)

Additionally, while uncorroborated hearsay testimony alone does not constitute substantial evidence, the affidavit testimony of Ms. Bianco was corroborated with the SEC filings, webpages, and hotel contracts that demonstrated the full context of the language relied on by the Department. See *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16, ¶ 4; (Orbitz Br. 34.). Relying on the facts contained within the record, the Commission noted that there was no factual basis to find that Orbitz was in the business of "reselling" rooms, based on Orbitz's activities: Orbitz did not purchase rooms for resale; Orbitz did not pay for rooms, then solicit customers to buy from its inventory; Orbitz did not take title to the rooms; Orbitz did not obtain from the hotel a right of occupancy to the rooms in question. (Comm. Ruling 22-23.) As such, the Commission reasonably concluded that while Orbitz provided online reservation facilitation services, the hotel was the "actual seller of the lodging services." (Id. at 23, 30.)

Prior Decisions of the Commission

The Department also contends that the Commission's interpretation of Wis. Stat. § 77.52(2) is inconsistent with its previous decision in *Hergert*. (Pet. Br. 12.) There, the Commission noted that "assuming for the sake of argument that the petitioner did not furnish the accommodations, there is no doubt that *he sold services* described in section 77.52(2)(a)1." *Hergert*, at 3; (Pet. Br. 12.). However, as previously noted, the Commission's decision in *Hergert* was based on the degree of control the taxpayer exercised over the accommodations and

the nature and extent of the services the taxpayer actually provided to his customers, which far exceeded merely facilitating the reservations. (Comm. Ruling 22.). The Commission found that, unlike Orbitz, the services provided in *Hergert* were physically similar to those provided by hotelkeepers and motel operators. (Id.) Orbitz, on the other hand, was found to be "selling the service of making arrangements for the furnishing of lodging," and not the actual furnishing of lodging itself. (Id. at 27.) Ultimately, the Commission's interpretation in the case at hand is consistent with its prior decision in *Hergert*, and comments made *in arguendo* by the Commission do not form a sufficient basis to show otherwise. Importantly, the Commission's Ruling and Order helps to clarify these past decisions by further defining the services that fall under the ambit of Wis. Stat. § 77.52(2)(a)1.

Relying on Tax Bulletin No. 146 (2006), the Department also notes that travel agent receipts are taxable under Wis. Stat. § 77.52(2)(a)1., and Orbitz should be treated no differently. (Pet. Br. 16.) However, the circumstances addressed by the Tax Bulletin are dissimilar to those in this case, and pertain only to situations where travel agents buy accommodations that are then resold to their customers. (Comm. Ruling 23 nt. 7.) As such, the Commission rejected the Department's comparison since Orbitz did not purchase rooms from hotels for resale to its customers. (Id.) While the Department raises this challenge again in its Brief, it cites no authority to demonstrate that travel agents' commissions are subject to taxation in circumstances beyond those originally cited in the Bulletin. (Pet. Br. 16; Orbitz Br. 21 nt. 10.)

The Department's Discretionary Authority Under Wis. Stat. § 77.51(13)(a) and (c)

The Department contends that the Commission failed to read Wis. Stat. ch. 77 as a whole, and failed to consider the Department's discretionary ability to impose tax on Orbitz granted by Wis. Stat. § 77.51(13)(a) and (c) (2003-2004). Wis. Stat. § 77.51(13) states in part:

(13) "Retailer" includes:

(a) Every seller who makes any sale of tangible personal property or taxable service.

...

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

The Department asserts that under these statutes, it can "deem" Orbitz to be "an agent of the dealer (and therefore a retailer) for efficient administration, irrespective of whether the salesperson is making sales on its own behalf or on the behalf of such dealers," which then allows the Department to tax Orbitz for the sale of the lodging furnished by the hotels. (Pet. Br. 18.) The Department argues that the Commission's conclusion taxing only the "doers" of a service (the hotels themselves) is clearly erroneous in light of this discretionary ability granted to the Department by this statute. (Id.)

In support of its argument, the Department relies on *NEJA Group LLC v. Wis. Dep't. of Revenue*, Docket No. 2014-CV-0131 at 9 (Aug. 22, 2014). There, Petitioner NEJA Group, the owner/operator of Alpine Valley Music Theater, entered into an agreement giving Ticketmaster "the ***exclusive right...to sell, as [Petitioner's] agent, all Tickets*** made available generally to the public through any and all means." *Id.* at 1 (emphasis added). As part of this agreement, Petitioner and Ticketmaster shared equally the revenue received from the per-ticket Customer Convenience Charges and per-order handling fees assessed by Ticketmaster. *Id.* at 2. The Commission held that the convenience charges and handling fees charged by Ticketmaster under this arrangement were part of Petitioner-NEJA's gross receipts from the sale of admissions, and

therefore subject to the tax imposed under Wis. Stat. § 77.52 (2)(a)2. *Id.* at 7. Additionally, the Commission found that Ticketmaster did not actually provide additional "convenience services" to the customer separate from the sale of admissions. *Id.* at 7. Instead, the service charges and fees were an attempt by the Petitioner to avoid paying taxes on a portion of the revenue obtained from the sale of the tickets. *Id.* at 8.

NEJA differs from the case at hand in in two critical ways: first, in the subject whom the Department is seeking to tax; and second, in the nature of the services provided by Ticketmaster and by Orbitz. In *NEJA*, the Department sought to tax NEJA for revenue it received from its acknowledged 3rd party agent, Ticketmaster. However here, the Department seeks to first unilaterally deem Orbitz to be an agent for the hotels, and then impose tax on Orbitz for fees it independently collected and retained for its services. While Ticketmaster expressly entered into an agency relationship with the Petitioner, there is no evidence that Orbitz entered into a similar agency relationship with the hotels with which it contracted. Further, there is no evidence to suggest that the fees imposed by Orbitz were ever shared with the hotels, nor evidence to suggest that Orbitz's fees were somehow created by the hotels in an attempt to avoid paying tax on the total amount of the hotels' lodging sales, as the court found occurred in *NEJA*. See *Id.* at 8.

Second, contrary to the finding in *NEJA*, the Commission expressly found that Orbitz provided travel services to the customer that were unlike the services a customer could receive directly from the hotels themselves, such as Orbitz's comprehensive search and comparison functions and unbiased hotel reviews. (Comm. Ruling 3-4, 15.) And while Ticketmaster and the Petitioner in *NEJA* were both selling event tickets, a taxable service under the statute, the Commission determined that Orbitz was selling a service distinct from that provided by the hotels, and which was not included as a taxable services listed under Wis. Stat. § 77.52(2)(a).

Based on the plain language of Wis. Stat. § 77.51(13)(a), Orbitz must be selling a taxable service, either on its own behalf or on behalf of the hotels with which it contracts, before Orbitz is eligible to be "deemed" a retailer by the Department for purposes of taxation. In its Ruling and Order, the Commission concluded that Orbitz sold the service of online reservation facilitation, which is not a taxable services listed under Wis. Stat. § 77.52(2)(a). (Comm. Ruling 30.) Regardless of whether Orbitz facilitated reservations on its own behalf or on that of the hotels with which it contracted, the service that was sold – online reservation facilitation – is not a taxable service. Therefore, the provisions set forth in § 77.51(13)(c) do not apply.

Persuasive Authority from Other Jurisdictions

The Department argues that the Commission's statutory interpretation of Wis. Stat. § 77.52(2)(a)1. failed to take into consideration cases from other jurisdictions which were cited by the Department. (Pet. Br. 13.) While the Department correctly concedes that these outside cases are not binding authority in the instant case, the Department nonetheless argues that the Commission erroneously dismissed the reasoning and holdings in these cases, which were "almost directly on point." (Id. at 13, 19.)

The Department relies on both *Travelscape LLC v. South Carolina Dept. of Revenue*, 391 S.C. 89 (2011), and *Travelocity.com LP v. Wyoming Dept. of Revenue*, 2014 WY 43, which held that an OTC's service fees were subject to sales tax. Similar to Wisconsin, South Carolina's sale tax statute imposed tax the "gross proceeds" derived from the "furnishing" of accommodations. *Travelscape*, 391 S.C. at 97. And similar to Orbitz, the OTC Appellant, Travelscape, maintained that they were not subject to the tax since they did not "furnish" hotel rooms. *Id.* at 99. However, critically different from the Wisconsin statute, the subjects of South Carolina's sales tax were "every person engaged ...*in the business* of furnishing accommodations." *Id.* at 97.

The Court then further defined the scope of "business" to include "all activities, with the object of gain, profit, benefit or advantage, ***either direct or indirect***." *Id.* at 101 (emphasis added). Based on this expansive language, the South Carolina Court found that even though Travelscape did not itself furnish accommodations, it was nonetheless *in the business* of doing so. *Id.* at 102.

While the *Travelocity* Court in Wyoming reached a similar conclusion to that in *Travelscape*, its reasons for doing so were slightly different. Unlike both South Carolina and Wisconsin, the amount of tax imposed under the Wyoming sales tax statute was based on the sales price paid by the purchaser to obtain the lodging. *Travelocity*, 2014 WY at ¶ 22. Furthermore, the subject of the sales tax was the purchaser of the lodging, not the provider. *Id.* But while sales tax was not imposed on the lodging vendors, the vendor was the one who was required to collect and remit the appropriate sales tax. *Id.* at ¶ 23. Wyoming defined a vendor as "*any person engaged in the business* of selling at retail...services which are subject to taxation." *Id.* at ¶ 25. Like South Carolina in *Travelocity*, the Wyoming Court relied on this expansive language to find that Travelocity qualified as a vendor "in the business" of selling lodging, and who was subsequently required to collect and remit the appropriate sales tax to the Department of Revenue, based on the price paid by the purchaser. *Id.* at ¶ 41. Since Travelocity's fees and mark-ups were part of the sales price paid by the purchaser, the Wyoming court found that these fees were to be included in the sales tax calculation. *Id.* at ¶ 104.

Here, the Commission specifically noted that while the issues at hand have been the topic of recent cases in other jurisdictions, "each state must analyze the issue in context of its own specific statutes." (Comm. Ruling 14.) The Commission reviewed the decisions from outside our jurisdiction cited by both the Department and by Orbitz, but declined to draw comparisons to

the case at hand due to the specific statutory language governing those decisions that differed slightly (but significantly) from the language contained in the Wisconsin statute. (Id. at 24.)

The Commission's use and consideration of the decisions in both Wyoming and South Carolina was reasonable. While these cases are informative, they ultimately do not influence the interpretation of Wisconsin's own statute since both States' decisions hinge on the use of similarly expansive phrases not found in Wisconsin's statute. This expansive phrasing unambiguously brings the activities of OTCs within the scope of these States' respective sales tax statutes. However, Wisconsin's specific statutory language does not clearly permit the same result.

Public Policy

Amicus curiae City of Madison argues that the Commission's determination excluding Orbitz from the sales tax imposed by Wis. Stat. § 77.52(2)(a) runs contrary to public policy, which "should encourage these sources of revenue." (A.C. Br. 5-6.) The City further argues that the Commission's decision creates a loophole for OTCs to avoid state and local taxation on their service fees and mark-ups. (A.C. Br. 6.) But while the increased sales tax collected from OTCs on the basis of their retained fees and mark-ups would undoubtedly benefit both State and local municipalities, this benefit cannot be obtained by ignoring the requirement that a tax may only be imposed by clear and express language for that purpose. Wisconsin's sales tax statute does not clearly and unambiguously impose tax on OTCs such as Orbitz. And while the services provided by OTCs were certainly inconceivable at the time the sales tax statute was imposed in 1961, it is the job of the Legislature to now determine whether to bring the activities of these service providers within the scope of the statute.

CONCLUSION

At first blush, the Department's contention that Orbitz's services are subject to the tax imposed under Wis. Stat. § 77.52(2)(a) seems reasonable. However, in light of the actual services provided by Orbitz, the statute's language does not unambiguously allow this imposition. As the Commission noted, facilitating a reservation may help make it possible to avail oneself of the hotel's lodging services, but it is still one step removed from the actual furnishing of the lodging itself. Yet the statute does not clearly extend the Department's reach to such services one step removed from those enumerated in the statute. While the Department, as well as *amicus curiae* City of Madison, urge a more expansive interpretation of the statute to include the activities of Orbitz and other OTCs in those taxable services under Wis. Stat. § 77.52(2)(a)1., this interpretation is not clearly intended by the plain meaning of the statute. Resolving this ambiguity in order to reach a different conclusion is a task which necessarily rests in the hands of the Legislature.

A tax may only be imposed by clear and express language for the purpose, and ambiguity as to this purpose must be resolved in favor of the taxpayer. Here, the Commission was required to resolve this existing ambiguity in favor of the taxpayer, Orbitz. Since the Commission's interpretation and application are reasonable and a more reasonable interpretation has not been demonstrated, the Commission's conclusions will not be disturbed.

SO ORDERED.

This is a final order.

By the Court,

Hon. John C. Albert

Circuit Court Branch 3

Dated this 11th day of December, 2014.

cc: Asst. Atty. Gen. Maria Lazar
Atty. Timothy G. Schally
Asst. City Atty. Jaime L. Staffaroni