

STATE OF WISCONSIN  
TAX APPEALS COMMISSION

---

**BRENNAN MARINE, INC.,**

**DOCKET NO. 10-S-35**

Petitioner,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE,**

Respondent.

---

**THOMAS J. MCADAMS, COMMISSIONER:**

This matter comes before the Commission on cross-motions for summary judgment. The Petitioner in this matter is represented by Attorneys Joseph A. Pickart, Ross A. Anderson, and Jennifer H. Jin of the law firm of Whyte Hirschboeck Dudek S.C. of Milwaukee, Wisconsin. The Respondent in this matter, the Wisconsin Department of Revenue (“the Department”), is represented by Attorney La Keisha Wright Butler, of Madison, Wisconsin. Both sides have filed briefs with exhibits and affidavits. The issue in this case is whether the Petitioner’s barge fleeting service on the Mississippi River is subject to the Wisconsin sales and use tax under the provision which imposes a sales tax on the “docking or providing storage space for boats.” For the reasons stated below, we find for the Petitioner.

## FACTS<sup>1</sup>

### A. Jurisdictional Facts

1. The Department issued a sales/use tax assessment against Petitioner on February 10, 2009, for the years 2004 through 2007 (“the audit period”), in the total amount of \$115,973.39, including interest calculated to April 11, 2009. (Ex. 1; Mintener Aff. ¶ 2) The additional sales tax assessed is due primarily to Petitioner’s untaxed receipts for providing its customers with “barge fleeting,” also called “fleeting charges,” and/or “fleeting services.” (Exh. 1, Exhibit A-B Comments.)

2. On or about April 6, 2009, the Petitioner filed a Petition for Redetermination, contesting the subject sales/use tax assessment, arguing solely that its “fleeting charges are not taxable under Wis. Stat. § 77.52(2)(a)9 because fleeting services are neither ‘docking’ nor providing ‘storage space’ for boats,” and that “the barges being fleeted do not fall within the definition of ‘boat,’ which is a condition for imposition of tax under Wis. Stat. § 77.52(2)(a)9.” (Exh. 2; Affidavit of Attorney Linda M. Mintener, “Mintener Aff.,” ¶ 3.)

3. With its Petition for Redetermination, Petitioner sent the Department a payment in the amount of \$155,973.39 for deposit in this matter. (Exh. 2 at 2, bottom of page; Mintener Aff. ¶ 4.)

4. On February 23, 2010, the Department, by Notice of Action, granted in part and denied in part the Petition for Redetermination and issued an updated Audit Report showing the granted amounts and the deposited amount, which resulted

---

<sup>1</sup> The facts are taken from the parties’ submissions. We have made edits for form and clarity.

in an overpayment by Petitioner of \$27,941.31 as of the deposit date of April 6, 2009. The Department's grant in part involved removing the fleeting charges that Petitioner showed were non-Wisconsin charges. The Department denied the remainder of the Petition for Redetermination. (Exh. 3; Mintener Aff. ¶ 5.)

5. On March 1, 2010, Petitioner filed a Petition for Review of this matter with the Wisconsin Tax Appeals Commission. (Mintener Aff. ¶ 6.)

6. The Department answered the Petition for Review on March 30, 2010. (Mintener Aff. ¶ 7.)

## **B. Material Facts**

### **Company History and Related Information**

1. Brennan Marine is a Wisconsin corporation with its principal place of business in La Crosse, Wisconsin. Initially founded in 1984 as a marine service company, it has grown to provide a wide variety of marine transportation and management services throughout the Upper Mississippi River region. Brennan Marine's transportation services include fleeting, switching, short haul towing, and barge cleaning, along with topside and dry-dock repairs. Its management services include intermodal transportation, barge shipments, terminal management, marine equipment rental and barge traffic reports. The markets serviced by Brennan Marine include barge lines, barge maintenance, barge owners, brokers, construction companies, local shippers, port engineers, railroads, shippers, terminals and trucking companies. (Affidavit of Kent A. Pehler, "Pehler Aff.," ¶ 3.)

2. Brennan Marine is related to J.F. Brennan Co. (“JF Brennan”), founded in 1919 as a marine operations company. JF Brennan provides an even wider range of marine services including construction, dredging, pile driving, geotechnical repairs, concrete repairs, erosion protection, emergency salvage, permit and regulatory assistance, and spill response. The markets served by JF Brennan generally include agricultural, casinos, government agencies, municipalities, harbors, industrial, lake organizations, mining industry, pulp and paper mills, railroads and utility companies. JF Brennan also has its principal place of business in La Crosse, Wisconsin. (Pehler Aff. ¶ 4.)

3. Brennan Marine is a member of several groups and associations of companies in the barge fleet industry. (Pehler Aff. ¶ 7.)

4. Brennan Marine is not a member of any professional or trade organization of companies primarily engaged in providing docking, slip rentals or the storage of boats. (Pehler Aff. ¶ 8.)

5. The *Inland River Guide* is the principal directory published specifically for the benefit of companies doing business along the inland and intracoastal waterways. Updated annually, the *Guide* contains more than 600 pages of information about companies servicing all industry segments. Brennan Marine is identified in the *Guide* as a provider of “Fleet and Harbor Services,” but is not identified as a provider of docking services, slip rental services or the storage for boats. (Pehler Aff. ¶ 9.)

6. The *Quimby's Cruising Guide* (“*Quimby's*” or “*Guide*”) is the principal directory published for boaters on the Mississippi River and other waterways. *Quimby's* provides information as where to get fuel, overnight dockage, supplies and repairs. It also provides additional information on slip rentals, boat storage facilities, locks, towns, restaurants, bed and breakfasts, landmarks, history and interesting miscellany. Brennan Marine does not advertise in *Quimby's Cruising Guide* and there is no reference to Brennan Marine in the *Guide*. (Pehler Aff. ¶ 10.)

### **Fleeting Industry Terms and Tools of the Trade**

7. A “barge” is a long, large, usually flat-bottomed, unpowered vessel that is towed or pushed by other craft. It is typically used for transporting freight. (Pehler Aff. ¶ 11; Attorney Jennifer H. Jin, “Jin Aff.” ¶ 4.)

8. For over one hundred years, the U.S. Naval Institute has published *The Bluejacket's Manual* (the “*Manual*”), which serves “as an introduction to the Navy for new recruits and as a reference book for Sailors of all ranks.” The *Manual* defines a barge as “[a] blunt-ended craft, usually nonself-propelled, used to haul supplies or garbage.” Thomas J. Cutler 616 (U.S. Naval Institute Press, 23 ed. 2002). (Jin Aff. ¶ 5.)

9. Barges are required to be registered with the U.S. Coast Guard. (Pehler Aff. ¶ 12.)

10. A “tow” is a group of interconnected barges that are transported by a tugboat or towboat. (Pehler Aff. ¶ 13; Jin Aff. ¶ 4.)

11. A “line tow” is made up of a group of barges that are transported by line-haul towboats over long distances and between major ports. Line-haul

towboats are typically larger tugboats equipped with living quarters for the crew designed to operate in line-haul operations. (Pehler Aff. ¶ 14.)

12. “Line-haul operations” are operations involved in the transportation of freight between Ports, usually dedicated to a river section, such as the Lower Mississippi (New Orleans, LA to Cairo, IL) or the Upper Mississippi (Cairo, IL to St. Paul, MN). (Pehler Aff. ¶ 15.)

13. A “dock” is a structure that is connected to the shore and serves as the location where a barge is loaded and unloaded with cargo. (Pehler Aff. ¶ 16; Jin Aff. ¶ 4.)

14. Docking fees are generally charged by dock operators to its customers on a per hour or per ton basis for the use of the dock to load or unload a barge. During the period under review, dock fees in La Crosse averaged roughly \$125 to \$150 per hour, or \$6 to \$7 per ton. (Pehler Aff. ¶ 17.)

15. A “dry dock” is a large dock in the form of a basin from which the water can be emptied. It is used for building or repairing a ship below its water line. (Pehler Aff. ¶ 18; Jin Aff. ¶ 4.)

16. A “fleet,” “fleeting area” or “fleeting site” is an offshore staging area where barges are staged until appropriate transportation can be arranged. There is no access to the fleeting site from the shore other than by boat. Rather than allowing barges to drift in the waterway, the barge is secured in the fleeting area. Typically, the barge is staged at the fleeting area because either (i) the dock where the barge is loaded

or unloaded is being utilized or (2) the tow responsible for transporting the barge is not immediately available. (Pehler Aff. ¶ 19; Jin Aff. ¶ 4.)

17. The “barge fleeting mooring structure” consists of a 20’ diameter head cell and 42” mooring tripod located in the waterway. The barges are either directly secured to the head cell and mooring tripod, or may be tied to other barges that are secured to the barge fleeting mooring structure. (Pehler Aff. ¶ 20.)

18. “Fleeting” or “fleeting services” consists of the temporary staging or marshalling of barges in the fleeting area and the disassembly and assembly of tows. (Pehler Aff. ¶ 21; Jin Aff. ¶ 6.)

19. Providers of fleeting services in Wisconsin are not allowed to operate a fleeting site without first obtaining a permit from the Wisconsin Department of Natural Resources. (Pehler Aff. ¶ 22; Jin Aff. ¶ 6.)

20. Providers of the services in the line-haul industry commonly refer to the charges for fleeting as “fleeting charges.” (Pehler Aff. ¶ 23.)

21. A “fleeting charge” for fleeting services is charged by the owner or operator of a fleeting area on a per day basis. As of April 1, 2008, Brennan Marine charged rates for fleeting within the range of \$40 to \$270 per any part of a 24 hour day depending on the type of barge being fledged. (Pehler Aff. ¶ 24.)

#### **Other Relevant Nautical Terms, Places and Things**

22. The *Bluejacket’s Manual* defines “boat” as “[a] small craft capable of being carried aboard a ship.” *Manual* at 617. (Jin Aff. ¶ 5.)

23. A “boat storage” facility allows for dry storage or dry stacking where boats are stored in rack systems. Boat storage extends the life of the boat by keeping the hull dry, allows for storage of boats during winter in seasonal marinas, and allows for storage of smaller boats in marinas lacking sufficient wet slip capacity. (Pehler Aff. ¶ 30.)

24. Boats stored in a boat storage facility are not available for immediate use by the boat owners and are generally stored for periods of time measured in weeks and months (*e.g.*, during the offseason). (Pehler Aff. ¶ 31.)

25. Boat storage facilities in Wisconsin are generally located on land. (Pehler Aff. ¶ 32.)

26. Providers of services in the recreational boating industry, commonly refer to the charges for boat storage as “boat storage fees.” (Pehler Aff. ¶ 33.)

27. Boat storage fees are typically charged by operators to customers on a per month basis. Boat storage fees are determined by size of the vessel. Depending on the size, the average range for storage fee in La Crosse during the period under review would be between \$100 to \$550 per month. (Pehler Aff. ¶ 34.)

28. A “ship” is a large seagoing vessel, with more than one deck, capable of extended independent operation. (Pehler Aff. ¶ 35; Jin Aff. ¶ 4.)

29. The *Bluejacket’s Manual* defines “ship” as “[a]ny large seagoing vessel capable of extended independent operation.” *Manual* at 626. (Jin Aff. ¶ 5.)



### **The La Crosse Harbor and Brennan Marine's Fleeting Sites**

30. The La Crosse Harbor is part of a commercial structure that annually import/exports almost 1,250,000 tons of cargo. The Harbor has an approximate value of \$150,000,000. The commercial infrastructure at the La Crosse Harbor includes: Brennan Marine, JF Brennan, Fred J. Robers Co., Cargill, Midwest Industrial Fuels, Hydrite Chemical Co., La Crosse Municipal Dock, French Slough NSP Dock, Holcim Cement, Division Street, City of La Crosse Dock, Isle La Plume Fleeting Site and the Harold E. Craig Fleeting Site. The Harbor employs almost 100 employees with a payroll in excess of \$3,500,000, and pays local property taxes of over \$400,000 annually. (Pehler Aff. ¶ 36.)

31. Brennan Marine operates both the Isle La Plume Fleeting Site in Wisconsin and the Harold E. Craig Fleeting Site in Minnesota. (Pehler Aff. ¶ 37.)

32. The Isle La Plume fleeting site was the first fleeting site granted a permit by the Wisconsin Department of Natural Resources ("DNR"). The mooring method employed at this site (specifically, the manner in which Brennan Marine has utilized riprap and placed pile clusters to prevent barges from coming into contact with the shoreline) has been determined to be the most environmentally-advantageous mooring method according to a recent study conducted by Rock Island Fish & Wildlife Services. The DNR has recommended that this design be adopted wherever possible. The site has capacity for 32 barges, 4 barges wide by 8 barges long. (Pehler Aff. ¶ 38.)

33. The Harold E. Craig Fleeting Site is leased by Brennan Marine and has capacity for 15 barges, 3 barges wide by 5 barges long. (Pehler Aff. ¶ 39.)

34. The La Crosse Harbor is located on the Mississippi River, a navigable waterway subject to United States authority. (Pehler Aff. ¶ 40.)

### **Brennan Marine's Fleeting Services**

35. Brennan Marine's role in the barge transportation process begins when a line-haul tow arrives at the La Crosse Harbor. (Pehler Aff. ¶ 41.)

36. Because of the way a tow of up to 15 barges is built and connected, individual barges are not always easily accessible for removal from the tow. Thus, the barges in the tow often need to be rearranged to allow access to the barges designated for the specific port and certain docks in the area. Brennan Marine conducts this rearranging and removal of barges from the tow. (Pehler Aff. ¶ 42.)

37. Brennan Marine then transports all barges removed from the tow to a fleet site (either the Isle La Plume fleeting site or the Harold E. Craig fleeting site) using a harbor tug or switch boat. Because a particular dock may not be immediately available for loading or unloading, (as is often the case because of other barges' placement backlog), the barge or barges will be temporarily fledted or staged by Brennan Marine at the fleeting area until the dock is ready for the particular barge. (Pehler Aff. ¶ 43.)

38. When the dock is available, Brennan Marine tows a selected barge or barges from the fleeting site to docks for loading or unloading. (Pehler Aff. ¶ 44.)

39. Barges that have been unloaded at a dock are then towed by Brennan Marine either to another dock where they are cleaned (if necessary) or back to the fleeting area. (Pehler Aff. ¶ 45.)

40. Brennan Marine's next step for the empty barge is to load it with cargo in the Port, at which time Brennan Marine tows the barge to the dock for loading. Alternatively, the empty barge departs as an empty when Brennan Marine places the barge in a passing line-haul tow to transport the barge to the next fleeting and loading Port. Once the tow arrives, Brennan Marine is responsible for switching the barges from the fleeting area to an outward-bound tow. (Pehler Aff. ¶ 46.)

41. Barges that have been loaded at a dock are subsequently towed by Brennan Marine to the fleeting area to stage for future tow assembly. Once the tow arrives, Brennan Marine is responsible for reassembling the tow. (Pehler Aff. ¶ 47.)

42. In less frequent instances, barges that have been repaired by Brennan Marine in its dry-dock are staged at a fleeting area until a tow arrives to pick up the barge. Brennan Marine tows the barge from the dry-dock area to the fleeting area, and once the tow arrives, Brennan is responsible for towing the barge from the fleeting area to the tow, and reassembling the tow itself. (Pehler Aff. ¶ 48.)

43. The barge fleeting services at issue in this case encompass all of the services provided by Brennan Marine, as described in paragraphs 35 through 42. (Pehler Aff. ¶ 49.)

44. The area of water in which Brennan Marine provides its barge fleeting services is the entire La Crosse Harbor area, and is not limited to a particular pier or piers. (Pehler Aff. ¶ 50.)

45. In all instances, Brennan Marine's fleetling services are provided in connection with barges in excess of a 50-ton burden which are primarily engaged in transporting freight or cargo in interstate or foreign commerce. (Pehler Aff. ¶ 51.)

46. Brennan Marine does not provide fleetling services with regard to watercraft that are designed and constructed for the transportation of persons on water. (Pehler Aff. ¶ 52.)

47. Barges that are staged at a fleetling area are available for immediate use and transportation. (Pehler Aff. ¶ 53.)

48. Barges are typically staged at any one fleet for an average period of twelve (12) days. (Pehler Aff. ¶ 54.)

49. Brennan Marine does not, and has not, used its fleetling areas to store barges that are out of service for extended periods of time. (Pehler Aff. ¶ 55.)

50. Brennan Marine does not own or operate a dock. (Pehler Aff. ¶ 56.)

51. Brennan Marine does not charge its customers a docking fee. (Pehler Aff. ¶ 57.)

52. Brennan Marine does not generate receipts for fleetling its own barges nor does it book an internal charge for the fleetling services of its own barges. (Pehler Aff. ¶ 58.)

## RELEVANT STATUTES

### A. 77.52 Imposition of retail sales tax. (2004-Sept. 30, 2009)

#### (2) (intro.)

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:

\* \* \* \*

9. Parking or providing parking space for motor vehicles and aircraft for a consideration and docking or providing storage space for boats for a consideration.

**B. Wis. Admin. Code NR § 327.03(2)** "Barge fleeting" means the temporary storage of barges and the disassembly and assembly of barge tows. It does not include the temporary mooring of line tows or loading or unloading operations.

## OPINION

Each party in this case has filed a motion for summary judgment. The Petitioner operates a business in the La Crosse area on the Mississippi River that services barges passing through. In brief, the barges are marshaled and then typically tied up to a mooring in the river and then, when the appropriate dock is ready for them, they are taken by tow to a dock, where the barges are unloaded and cleaned and then brought back to the mooring in the river. For this service, the Petitioner charges an hourly fee, which the Department here seeks to tax as "docking" or "providing storage

space for boats.” The first part of this opinion will set forth the applicable law. The second section will summarize the arguments. The third part of this opinion will state the reasons we find for the Petitioner.

## **I. Applicable Law**

### **A. Summary Judgment**

The rules that govern summary judgment motions as to procedure and burdens have been summarized by the parties in their respective briefs. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law remain. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

### **B. Procedure and Burden**

The Wisconsin Supreme Court has consistently applied two fundamental rules of statutory construction to the imposition language of taxing statutes: (1) when statutory language is clear and unambiguous, no judicial rule of construction is permitted, and the court must arrive at the intention of the Legislature by giving the language its ordinary and accepted meaning; and (2) a tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax.

*Wisconsin Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977).<sup>2</sup>

## **II. The Parties' Arguments in Favor of Their Motions**

### **A. The Department**

The Department argues that the Petitioner's fleeting services are subject to sales tax under the plain language of Wis. Stat. § 77.52(2)(a)9. In the Department's view, Brennan Marine's barge fleeting services constitute "docking." Alternatively, the Department argues that Brennan Marine's activity constitutes providing storage space for boats. Finally, the Department asserts that taxation of barge fleeting is not prohibited under the Maritime Transportation Security Act of 2002.

### **B. The Petitioner**

According to the Petitioner, the issue in this case is whether the Department erred in taxing Brennan Marine's barge fleeting services as "docking or providing storage space for boats for a consideration" under Wis. Stat. § 77.52(2)(a)9. The Petitioner argues that fleeting services are not clearly and unambiguously taxed under the plain language of Wis. Stat. § 77.52(2)(a)9 and services are not taxed unless specifically identified in the statute. The Petitioner maintains that given the unique nature of "barge fleeting" as compared to "docking" or "storage of boats," coupled with the rule that tax imposition statutes must clearly and expressly specify that which is to be taxed, the Department's assessment must be reversed. Alternatively, the Petitioner

---

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

argues that the Department's taxation of barge fleeting is prohibited under the Maritime Security Act of 2002.

### III. DECISION

Having reviewed the briefs, we believe there are two questions here for the Commission to answer. First, is a barge a boat? If a barge is not a boat, then the assessment must fall as the statute in question taxes boats. Second, if a barge is a boat, does barge fleeting qualify as a taxable service under Wis. Stat. § 77.52(2)(a)9 either as providing docking or providing storage space?

#### A. Is a barge a boat?

The tax statute in question does not define for tax imposition purposes what is a "boat." However, we can look two places for determining the meaning of "boat" in Wis. Stat § 77.52(2)(a)9. First, we can look to other Wisconsin statutes where the Wisconsin legislature has defined "boat." Alternatively, we can look to dictionary definitions. In this case, both support the Department's argument that a barge is a boat.

Chapter 30 of the Wisconsin Statutes, which is entitled "Navigable Waters, Harbors and Navigation," contains the following definition of "boat":<sup>3</sup>

#### SUBCHAPTER V

#### REGULATION OF BOATING

**30.50 Definitions.** In ss. 30.50 to 30.80:

(2) "Boat" or "vessel" means *every* description of watercraft used or capable of being used as a means of

---

<sup>3</sup> We have not been made aware of any other place in the statutes where 'boat' may be defined.



transportation on water, except a seaplane on the water and a fishing raft.

[emphasis added.]

Clearly, the barges in question fit this definition as it includes “every watercraft.” While Wis. Stat. § 30.50 is not a tax statute, the Commission has often looked to other Wisconsin statutes to help define a term in a tax statute. *See, e.g., Manpower v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶401-223 (WTAC 2009). In that case, the issue before the Commission was the sales tax treatment of “temporary help services” under Wis. Stat. § 77.52 and the Commission looked to statutes regulating and defining temporary help companies in Chapter 108 to help determine if temporary help services were taxable. In this case, when we look to the companion statute, we conclude that a barge is, in fact, a “boat.”

Secondly, when there is no definitive answer to the meaning of a statutory word or phrase in a statute, Wis. Stat. § 990.01(1) provides that the word or phrase “shall be construed according to common and approved usage.” Relying on this provision, the Commission and the courts often look to dictionary definitions for assistance in ascertaining the meaning of a term in a statute. *See, e.g., Madison Newspapers, Inc., v. Wisconsin Dep’t of Revenue*, 228 Wis. 2d 745, 760, 599 N.W.2d 51 (Ct. App. 1999). In that case, the court looked to the dictionary definition from *Webster’s Third New Int’l Dictionary* to determine the meaning of the term “customer.” In *Pet Vacations, Ltd. v. Wisconsin Dep’t of Revenue*, Wis. Tax Rptr. (CCH) § 400-002 (WTAC

1993), this Commission used a dictionary definition in determining what activities went into “maintenance” of pets.

Two dictionary definitions are relevant here. First, as to the meaning of “barge,” *The American Heritage Dictionary*, 3<sup>rd</sup> Edition (1992), in pertinent part, states as follows:

*Nautical.* **1.a.** A long, large, usually flat-bottomed boat for transporting freight that is generally unpowered and towed or pushed by other craft.

Given that the dictionary definition of “barge” describes a barge as a boat, there can be no doubt that a barge—in its common, ordinary, and accepted meaning—is a “boat.”<sup>4</sup>

Additionally, when we look to the definition of “boat,” *The American Heritage Dictionary*, 3<sup>rd</sup> Edition (1992) at 209 defines, in pertinent part, “boat” as follows:

---

<sup>4</sup> *Thesaurus.com* has the following listing for “barge”:

Main Entry: barge  
Part of Speech: *noun*  
Definition: large work boat  
Synonyms: ark, canal boat, dory, flatboat, freight ship, lighter, raft, scow

Further, *Thesaurus.com* has the following for “boat”:

Main Entry: boat  
Part of Speech: *noun*  
Definition: vehicle for water travel  
Synonyms: ark, barge, bark, bateau, bottom, bucket, canoe, catamaran, craft, dinghy, dory, gondola, hulk, ketch, launch, lifeboat, pinnace, raft, sailboat, schooner, scow, ship, skiff, sloop, steamboat, tub, yacht  
Notes: a boat is a vessel that can be hauled aboard a ship, according to the Navy, with a ship being somewhat larger

1. *Nautical.* b. An inland vessel of any size. c. A ship or submarine.

Therefore, in our view, when one examines both of these definitions, it can only be concluded that the subject barges are included in the Wis. Stat. § 77.52(2)(a)9 statutory term “boat.”

The Petitioner’s argument here is that a “barge” is a long, large, usually flat-bottomed and unpowered vessel that is towed or pushed by other craft and typically used for transporting freight across long distances, whereas a “boat” is generally considered to be a small vessel for travel of passengers on water across shorter distances. Petitioner’s Brief at 20. While we can appreciate that in some contexts this distinction is made, we have three responses to this argument. First, while we acknowledge a degree of imprecision and overlap in the respective definitions of “boat” and “ship” and “vessel,” we note first that dictionaries seem universally to define a “barge” as a “boat.”<sup>5</sup> Second, based on well established law, we seek a common usage and clearly the common and approved usage is that a barge is a boat. While the *Bluejacket Manual* the taxpayer submitted suggests that a boat must fit on a ship, we find that distinction of little import in Wisconsin, where ships are relatively less common.<sup>6</sup> The *Bluejacket Manual* definition also states that a barge must be used for hauling supplies or garbage, neither of which is involved here, and leading us to question the applicability of the Naval Institute’s definition to this case. In sum, we cannot say that the common usage is that a “boat” is

---

<sup>5</sup> In addition to the *American Heritage Dictionary*, we note that *Webster’s II New College Dictionary* and *Webster’s Seventh New Collegiate Dictionary* all defined the term in the same fashion.

<sup>6</sup> We also note that Wis. Stat. § 77.52(2)(a)9 never uses the term “ship.” And, further, Chapter 30 of the Wisconsin Statutes neither defines nor undertakes to regulate “ships.”

only something that is a small vessel for passengers going a short distance that might fit on a ship. Finally, even the materials the Petitioner submitted with its motion for summary judgment as Exhibit A define a “barge” as “any of various boats.” *Id.*

In sum, the Department has shown that a “barge” is a “boat” for purposes of Wis. Stat. § 77.52(2)(a)9.

### C. Does Wis. Stat. § 77.52(2)(a)9 cover the taxpayer’s service?

The other question here is whether “barge fleeting” is a taxable service under Wis. Stat. § 77.52(2)(a)9. The Department argues that the taxpayer is providing “docking” or, alternatively, providing “storage space for boats.” The Petitioner argues that barge fleeting is neither docking nor storage. For several reasons, we believe the taxpayer is correct.

First, the definition of “barge fleeting” in NR 327.03(2) does not match what is in the taxation statute, which is Wis. Stat. § 77.52(2)(a)9. In Wisconsin, goods are presumed by statute to be subject to the sales tax, but the same cannot be said of services. Unless a service is specifically listed in the sales tax statute, the service is not subject to the sales tax. What Wis. Stat. § 77.52(2)(a)9, which the Wisconsin Legislature passed in 1979, imposes a sales tax on is the following:

9. Parking or providing parking space for motor vehicles and aircraft for a consideration and **docking** or **providing storage space** for boats for a consideration.

[emphasis added].

On the other hand, the Wisconsin Legislature in 1982 defined “barge fleeting” in Wis. Admin. § Code NR 327.03(2) this way:

"Barge fleeting" means the temporary storage of barges and the disassembly and assembly of barge tows. It does not include the temporary mooring of line tows or loading or unloading operations.

In our view, Wis. Stat. § 77.52(2)(a)9 and NR 327.03(2) do not line up.<sup>7</sup>

While clearly Wis. Stat. § 77.52.52(2)(a)9 and NR 327.03(2) do not line up, are they similar enough such a sales tax may be imposed? We note that Wisconsin courts have long looked to substance in taxation matters.<sup>8</sup> *Cliff's Chemical Co. v. Wisconsin Tax Commission*, 193 Wis. 295, 214 N.W. 447 (1927); *Miller v. Tax Commission*, 195 Wis. 219, 221, 217 N.W. 568 (1928). The Wisconsin Supreme Court has stated that it will make determinations of taxability based on the facts viewed as a whole and that it is the substance and realities of a taxpayer's activities that are determinative of the Department's power to tax. *Department of Revenue v. Sterling Custom Homes Corp.*, 91 Wis. 2d 675, 679, 283 N.W.2d 573, 575 (1979). Wisconsin courts have used this "substance and realities" test on numerous occasions. In *Sterling Custom Homes*, the issue was the taxability of the taxpayer's real construction activities and the court examined the taxpayer's everyday work activities to determine that its actual activities were entitled to the real property exemption to the sales and use tax. In *Madison Newspapers, Inc. v. Wisconsin Dep't of Revenue*, 228 Wis. 2d 745, 599 N.W.2d 51 (Ct. App. 1999), the court looked to the substance of the taxpayer's relationship with its carriers to determine if certain materials were exempt from the sales and use tax. In *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.*, 289 Wis. 2d 628, 712 N.W.2d 351 (Ct.

---

<sup>7</sup> The Department does not argue that the definition of "barge fleeting" is irrelevant or inapplicable.

<sup>8</sup> The federal courts have long applied a similar principle. *U. S. v. Phellis*, 257 U.S. 156 (1921).

App. 2006),<sup>9</sup> the Wisconsin Court of Appeals noted the Department's reliance on the longstanding principle that the taxability of a given transaction is determined, not by how a taxpayer characterizes it for accounting purposes, but by the substance of the transaction itself. This Commission has previously used this test as well. *Hanz Contractors v. Department of Revenue*, Wis. Tax Rptr. (CCH) ¶400-220 (WTAC 1996).

When we look to the substance and realities of the activities in question, certain aspects of the taxpayer's business stand out. What the taxpayer primarily provides to its customers is the activity of "fleeting," and not the things listed in the statute as taxable, which are "docking" or "providing storage space." *Webster's II New College Dictionary* (2001 ed.) defines the term "to fleet" as follows:

2. *Naut.* To alter the position of: shift<sup>10</sup>

In substance and reality, what the taxpayer provides is fundamentally different than what the statute taxes. There are similarities, but it is not the same business as providing "docking" or "storage space." The definition in Wis. Admin. Code § NR 327.03(2) clearly includes the element of the "assembly and disassembly of tows," a feature which the taxing statute does not include. In our view, the record shows that the gravamen of barge fleeting is the construction and movement of line tows. Further, the temporary storage component involving individual barges is an incidental part of the taxpayer's service. In its brief, the Department makes an analogy between the Petitioner's service and the valet parking of cars, which is clearly taxed. In a colorful

---

<sup>9</sup> The *River City* decision cited above was affirmed by the Wisconsin Supreme Court. *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, 299 Wis. 2d 561, 729 N.W.2d 396.

<sup>10</sup> *Websters II New Collegiate Dictionary* (2001 ed.) defines a "fleet" as follows: 2. A group of vehicles, as taxicabs or fishing boats, owned or operated as a unit.

turn of phrase, the Department writes that barge fleeting is “parking for barges.” Respondent’s Brief at 6. The problem with the analogy, however, is that the parking part of the statute does not apply to boats.

Second, each of the taxing alternatives of Wis. Stat. § 77.52(2)(a)<sup>9</sup> in regards to boats can be excluded. In brief, what the legislature taxes in regards to boats is “docking” or “providing storage space.”<sup>11</sup> The Department’s main argument in support of its position that this barge fleeting activity is “docking” is that during discovery in this case an employee of the taxpayer analogized fleeting as a parking area for barges and stated that the barges are tied up at a dock. We regard that evidence as not determinative, however, as the record here clearly shows that the taxpayer, in fact, owns no dock. In our view, this means that the “docking” alternative must be excluded as a basis to impose the tax. As to the other alternative, there is the issue that Wis. Admin. Code § NR 327.03(2) speaks in part of “temporary storage” and Wis. Stat. § 77.52(2)(a)<sup>9</sup> imposes the tax on “storage *space* for boats.” In our view, there is a question as to whether the taxpayer is in fact providing “space” to its customers. Based on the plain language of the statute, we think the legislature clearly meant to tax something different in Wis. Stat. § 77.52(2)(a)<sup>9</sup> than the service of “barge fleeting” that the taxpayer provides.

---

<sup>11</sup> The Petitioner argues that since 1969, the Department has specifically addressed the concept of “storage” under Wis. Stat. § 77.52(2)(a)<sup>9</sup> on more than twenty separate occasions, in forms such as letters to taxpayers, a release, a Department memorandum, or in some similar writing. In each instance, the Department has defined “storage” as long-term storage of property in a manner where such property is not available for immediate use.

Last, but not least, statutes that impose taxes have to be clear and this is not. For us, the problem with the Respondent's arguments is that the arguments go against the rule of construction that taxes may be imposed only by clear and express language, with all doubts and ambiguities resolved in favor of the taxpayer. Wis. Stat. § 77.52(2) as a general matter does not tax services, it taxes specific services. Simply put, "barge fleeting services" is not listed in our statutes as a taxable service, and we find that this service is readily distinguishable from the two services enumerated in Wis. Stat. § 77.52(2)(a)9 that apply here. While we can accept the Respondent's assertion that the words "storage" and "docking" might be interpreted to encompass certain aspects of barge fleeting, we do not see the "clear and express language" required for tax imposition purposes, and under well-settled law, we must therefore resolve the doubt in favor of the taxpayer.

### CONCLUSION

The Petitioner has established with the requisite clarity that, as a matter of law, barge fleeting services are not subject to sales and use tax in Wisconsin under Wis. Stat. § 77.52(2)(a)9 and that summary judgment for the Petitioner is appropriate.<sup>12</sup>

---

<sup>12</sup> Given our decision on this issue, it is unnecessary to consider the Petitioner's motion for summary judgment on the basis of the Maritime Act.



**ORDERS**

1. The Petitioner’s Motion for Summary Judgment is granted.
2. The Respondent’s Motion for Summary Judgment is denied.
3. The Department’s action on the Petition for Redetermination denying the remainder is reversed.

Dated at Madison, Wisconsin, this 7<sup>th</sup> day of September, 2011.

**WISCONSIN TAX APPEALS COMMISSION**

---

Lorna Hemp Boll, Chair

---

Roger W. LeGrand, Commissioner

---

Thomas J. McAdams, Commissioner

ATTACHMENT: **“NOTICE OF APPEAL INFORMATION”**