

STATE OF WISCONSIN
TAX APPEALS COMMISSION

ORBITZ, LLC,

DOCKET NO. 09-S-123

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on Motions by both parties for Summary Judgment. The Petitioner, Orbitz, LLC, ("Orbitz") appears by Attorneys Timothy G. Schally and Robert L. Gordon of Michael Best & Friedrich LLP, Milwaukee, Wisconsin, and by Elizabeth B. Herrington, Jeffrey A. Rossman, and Michael S. Yellin of McDermott Will & Emery LLP, Chicago, Illinois. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer. Both parties have filed briefs and affidavits in support of their respective positions. For the reasons stated below, we find for the Petitioner.

FACTS

A. Jurisdictional Facts

1. On August 6, 2008, the Department issued a Notice of Field Audit Action ("Notice"), assessing Orbitz additional sales/use tax ("tax") for tax periods ending

December 31, 2001, through December 31, 2006 (“audit period”), in a total amount of \$111,253.39, including 18% interest and late filing fees.¹ (Zimmer Aff. ¶ 2, Ex. 1.)

2. Orbitz timely filed a Petition for Redetermination with the Department, which was denied on May 5, 2009. (Zimmer Aff. ¶¶ 3-4, Exs. 2-3.)

3. Orbitz timely appealed the Department’s denial to the Wisconsin Tax Appeals Commission on July 6, 2009. (Zimmer Aff. ¶ 5, Ex. 4.)

4. On October 7, 2013, both parties filed Motions for Summary Judgment, along with affidavits and exhibits in support of their motions.

B. Material Facts

1. Orbitz, Inc. (“Orbitz”), is a limited liability company organized under Delaware law with its principal place of business in Chicago, Illinois. (Zimmer Aff., Ex. 4, Pet. For Review.)

2. During the Audit Period, Orbitz was an online travel company doing business via its website www.orbitz.com. (Zimmer Aff., Ex. 4, Pet. for Review.)

3. In the Notice, the Department asserted that the Assessment was based on the theory that Orbitz is an “internet lodging provider” that “provides lodging throughout Wisconsin.” The Department has asserted that the measure of tax under Wis. Stat. § 77.53(3) was “the full price charged by the internet lodging provider to their customers less the measure of tax previously reported.” The hotels for which Orbitz arranged reservations reported and remitted sales tax on the amounts they received for

¹ The parties have agreed to treat the related rental car issue in accordance with the final decision, whether by the Tax Appeals Commission or an appeals court, regarding the lodging issue.

furnishing rooms and lodging. Thus, the amount at issue in the Assessment is the amount Orbitz received/retained for its services. (Zimmer Aff., Ex. 1.)

Orbitz's Activities

4. Travelers visit Orbitz's website to explore travel destinations and plan trips. Orbitz makes it easy for travelers to plan vacations, locate hotels and attractions, compare the offerings of competing travel suppliers, and make all sorts of reservations. Orbitz's online travel services include the ability to perform electronic searches to compare hotel availability and offerings (and the offerings of many other travel suppliers, such as airlines and cruise ships) at destinations all over the world, explore countless destinations and travel ideas, place reservations, maintain electronic itineraries, and much more. (Affidavit of Peggy Bianco ("Bianco Aff.") ¶¶ 6-8.)

5. Before the advent of online travel companies like Orbitz, a traveler heading to an unfamiliar destination who wanted to reserve a room in advance would have had to gather that information personally or visit an offline travel agent to determine which hotel was most suitable. Orbitz gathers and updates a vast amount of information designed to make trip planning easy and efficient. (Bianco Aff. ¶ 7.)

6. As an essential part of its business, Orbitz collects a wide array of hotel information and publishes it on its website, allowing travelers to plan trips and place reservations with hotels over the Internet through one convenient source at any time of the day or night. The website lists numerous hotels in locations throughout the country, including Wisconsin, describing each one's location, room reservation offerings, amenities, nearby attractions, star ratings, and reviews, including negative

ones. The website allows travelers to search for hotel reservations using any one of a number of parameters such as name, brand, location, price, and quality rating. (Bianco Aff. ¶¶ 7-9.)

The Merchant Model²

7. Although hotels may accept reservations directly through their own fax, phone, e-mail and websites, they also offer reservations through third-party distribution channels, including traditional travel agents, online travel companies like Orbitz, travel wholesalers and consolidators, tour operators, corporate websites, specialty websites, and group booking agencies, many of which use what is known as the “merchant” business model. (Affidavit of Chekitan S. Dev, Ph.D. (“Dev Aff.”), ¶¶ 17, 20.)

8. Under the merchant model, Orbitz contracts with hotels for the right to facilitate reservations for (and in the name of) travelers at “Net Rates” which are often lower than the hotels generally advertise to the public at large (sometimes referred to as “rack rates” or “best available rates”). (Dev. Aff., ¶ 21.)

9. Pursuant to these contracts, hotels do not block off specific rooms for Orbitz, nor are specific rooms held out for Orbitz to be reserved only by Orbitz. Rather, in practice, when rooms are “allocated” or made available to Orbitz for booking or reservation on its website, it simply means that Orbitz may access the hotel’s inventory data, check availability for dates when the traveler desires to stay at the hotel,

² Much of this description of the Merchant Model and related industry information is taken from the Affidavit of Peggy Bianco of Orbitz; however, we note that the information is confirmed by the Affidavit of Chekitan S. Dev, Ph.D., a respected professor at the School of Hotel Administration at Cornell University.

and make a reservation request to the hotel in the traveler's name if a room is available for booking. In the industry, the availability that specific hotels extend to intermediaries is sometimes called an "allotment." "Allotment" sometimes refers to a specific number of rooms that some intermediaries pay for in advance, but not in this case. Orbitz does not pay for rooms in advance and then turn around and "re-sell" or re-offer them to travelers. In regard to Orbitz, "allotment" simply means the number of room reservations the hotels have indicated they will allow Orbitz to facilitate. (Dev. Aff. ¶ 21.)

10. Hotels also do not hold specific rooms for Orbitz. Rather, when a traveler uses Orbitz's website and selects a hotel, Orbitz's system then queries the hotel's reservation system or a database where the room availability is stored such as the extranet, or via a global distribution system (GDS). If the hotel is still accepting reservations from Orbitz, then a reservation request to the hotel is made in the traveler's name. Conversely, if a reservation is not available, the traveler is informed that his request cannot be accommodated. Orbitz cannot require any hotel to make rooms available at particular rates. Nor does the hotel generally set aside specific rooms for travelers who make reservations through the online travel company's website. (Dev. Aff. ¶ 22.)

11. When a traveler chooses accommodations, the Orbitz website displays pricing information or "trip cost." The total cost consists of two components: 1) the "average price per night," which is the sum of the Net Rate the hotel will receive plus a mark-up which will be retained by Orbitz, and 2) "taxes and fees," which

includes a tax recovery charge (the estimate of taxes payable as a function of the hotel's Net Rate) and any additional service fees or other applicable fees. (Bianco Aff. ¶ 16.)

12. The hotel, not Orbitz, determines the Net Rate charged by the hotel for the room. (Bianco Aff. ¶¶ 27, 30.)

13. Prior to completing a booking, the traveler must agree to Orbitz's Terms & Conditions. Additionally, the taxes and fees disclosures provide that Orbitz markets hotel rooms to the traveler using a "prepaid" model, where the traveler pays upfront before arriving at the hotel and Orbitz "handles [the traveler's] payment to the hotel." The disclosures also provide that:

[Orbitz is] not the provider of the hotel rooms under either model, and we do not collect taxes or remit taxes to taxing authorities. Amounts displayed in the "Taxes and Fees" line for prepaid hotel transactions include an estimated amount we expect the hotel to bill for applicable taxes, governmental fees and other charges that the hotels must pay to the government. In addition, the "Taxes and Fees" line includes a fee we charge and retain in exchange for the services we provide in facilitating your transaction with the hotel supplier.

Please note that you may also incur other charges that we do not collect and are not included in the quoted price, such as hotel resort fees, hotel energy surcharges, parking fees, pet fees, and incidental charges (such as room service, mini-bar, gratuities). These amounts will be collected from you directly by the hotel.

(Bianco Aff., ¶¶ 18-19, Exs. B and C.)

14. After reviewing this information and the price for the booking, the traveler is asked to "agree and book." Once the traveler books the reservation, Orbitz requests authorization from the traveler's credit card company for the total amount of

the reservation. If Orbitz receives such authorization, it will send a reservation request to the hotel in the traveler's name. If the reservation is confirmed by the hotel, Orbitz settles with the traveler's credit card company for the previously authorized amount. (Bianco Aff. ¶ 19.)

15. Upon confirmation of the booking, the hotel usually sends a confirmation number to Orbitz confirming the booking in the name of the traveler. Only if the hotel confirms the booking will the booking process continue. Once the booking process is complete, the traveler is presented with a hotel reservation confirmation page. This page provides a summary of the reservation facilitated by Orbitz, including a confirmation number for the hotel as well as a summary of the hotel's policies. (Bianco Aff., ¶ 19).

16. After the reservation is made, Orbitz sends an email confirmation to the traveler. The reservation exists with the hotel in the name of the traveler and stays in the hotel's system until it is cancelled or the customer registers at, and checks into, the hotel. The reservation is not transferred to Orbitz. Prior to check in, the traveler has not yet been registered as a guest nor is the traveler assigned a particular room. (Bianco Aff. ¶ 21.)

17. When a traveler arrives at a hotel after booking through Orbitz, he or she presents identification and any other information required by the hotel and requests to be checked in on the pre-booked reservation. The hotel confirms the existence of the traveler's reservation. If the hotel has no rooms available at the time of check in and cannot accommodate the reservation, the hotel is responsible for finding

alternative accommodations for the traveler. The customer agrees to any mandatory hotel policies, confirms the dates of stay, receives information on check-out time, and often discusses amenities available at the hotel facility and agrees to the type of room and terms of payment. It is only at that point that the hotel—not Orbitz—assigns a particular room to the traveler and grants occupancy. (Bianco Aff., ¶ 24.)

18. After the traveler occupies the room, the hotel collects payment from Orbitz for the hotel's Net Rate, the applicable taxes due on the Net Rate, and any hotel-imposed fees. Orbitz passes the Net Rate and the amount estimated for taxes to the hotel. The hotel remits taxes on the Net Rate to the appropriate taxing authority. Orbitz retains the mark-up amount. (Bianco Aff. ¶¶ 16, 25.)

19. Orbitz secures the right to facilitate reservations at particular hotels by entering into agreements with the hotels that identify the various rights afforded to the hotels and to Orbitz. The contracts typically provide that the hotel is merely granting Orbitz the right to make the hotel's rooms available to travelers for booking via Orbitz's website; that Orbitz has no right or obligation to acquire an inventory of rooms from the hotel (and thus is not buying and reselling rooms); that the hotel can cease making its rooms available to travelers through Orbitz at any time prior to the booking of a room; and that Orbitz has no risk of loss, financial liability or any other obligations with respect to rooms that are not booked. The contracts further provide that the hotel determines the price it will accept for its hotel rooms; that the hotel sets the cancellation policies for its rooms; that reservations are always made in the name of the traveler; and that only the traveler has the right to occupy the hotel room. Orbitz

has neither the right nor the ability to control or take possession of any hotel rooms, and Orbitz never acquires the right to occupy any rooms in a hotel. (Bianco Aff., ¶¶ 26-27.)

20. Orbitz does not own, operate, or manage any hotels in the State of Wisconsin or anywhere else. Orbitz has never owned hotels; does not own or lease any physical structures containing guestrooms that can be rented to travelers; does not check travelers in; does not secure essential utilities like electricity, water, or phone service; does not hire, train, supervise, or terminate hotel employees; does not establish or implement policies and procedures for guests staying at the hotel; does not provide maintenance, security, housekeeping, or garbage removal; does not assign rooms; and does not provide keys to hotel guests. (Bianco Aff., ¶¶ 29, 36, 37, 46.)

21. Orbitz does not manage any of the traditional functions of a hotel: Orbitz does not have employees who run any hotel's front desk or back office operations, nor does it have employees present onsite at any hotel to oversee or participate in day-to-day operations. Orbitz also does not hire or train any hotel staff. Orbitz has no ability to set or adjust room availability or room Net Rates. Orbitz does not create or implement hotel policies and procedures. Orbitz does not make marketing or strategic planning decisions for any hotel. Orbitz is not responsible for resolving any issues that arise at the hotel property. Orbitz cannot redecorate, expand, or in any way legally affect the physical plan of any hotel. (Bianco Aff. ¶ 36-37.)

22. Orbitz does not own or possess any interest in the hotel's rooms, nor does the hotel set aside or designate a block or fixed number of rooms for Orbitz (and Orbitz alone) to make reservations. Rather, the hotels can decrease or increase the

number of reservations available through Orbitz or remove availability altogether. If the hotel does not make a room reservation available to Orbitz, then the traveler will not be able to make a reservation through Orbitz's website. Thus, Orbitz must confirm availability and rates with the hotel each time a traveler requests a reservation. (Bianco Aff. ¶ 41.)

23. Orbitz's financial records demonstrate that Orbitz does not own, take title to, or have possessory interest in any hotels, and Orbitz has never treated any hotel room as "inventory." (Bianco Aff. ¶ 40.)

24. As reflected on Orbitz's financial statements and income tax filings, Orbitz also does not recognize any net revenue for the rental of hotel rooms. The only net revenue that Orbitz recognizes is compensation for its travel services. (Bianco Aff., ¶ 34.)

OPINION

A. APPLICABLE LAW

1. Summary Judgment Standard

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).

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 ¶ 4, 308 Wis. 2d 683, 748 N.W.2d 154.

2. Relevant Statutes³

The specific statutes at issue here involve Wisconsin's imposition of retail sales tax.

Wis. Stat. § 77.52 Imposition of retail sales tax.

(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:

1. The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public, irrespective of whether membership is required for use of the accommodations. In this subdivision, "transient" means any person residing for a continuous period of less than one month in a hotel, motel or other furnished accommodations available to the public. In this subdivision, "hotel" or "motel" means a building or group of buildings in which the public may obtain accommodations for a consideration, including, without limitation, such establishments as inns, motels, tourist homes, tourist houses or courts, lodging houses, rooming houses, summer camps, apartment hotels, resort lodges and cabins and any other building or group of buildings in which accommodations are available to the public, except accommodations, including mobile homes as defined in s. 66.0435(1)(d), rented for a continuous period of more than one month and accommodations furnished by any hospitals, sanatoriums, or nursing homes, or by corporations or associations organized

³ Statutory citations refer to 2003-04 versions of the statutes.

and operated exclusively for religious, charitable or educational purposes provided that no part of the net earnings of such corporations and associations inures to the benefit of any private shareholder or individual. In this subdivision, "one month" means a calendar month or 30 days, whichever is less, counting the first day of the rental and not counting the last day of the rental.

Wis. Stat. § 77.53 Imposition of use tax.

(1) Except as provided in sub. (1m), an excise tax is levied and imposed on the use or consumption in this state of taxable services under s. 77.52 purchased from any retailer, at the rate of 5% of the sales price of those services; on the storage, use or other consumption in this state of tangible personal property purchased from any retailer, at the rate of 5% of the sales price of that property

. . . .

(3) Every retailer engaged in business in this state and making sales of tangible personal property or taxable services for delivery into this state or with knowledge directly or indirectly that the property or service is intended for storage, use or other consumption in this state, shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property or taxable service is not then taxable under this section, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt in the manner and form prescribed by the department.

Wis. Stat. § 77.51 Definitions. Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

(4)(a) "[G]ross receipts" means the total amount of the sale, lease or rental price, as the case may be, from sales at retail of tangible personal property, or taxable services,

3. Presumptions, Burdens, and Statutory Interpretation

As a general matter, assessments made by the Department are presumed to be correct; the burden is upon the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determinations. *Calaway v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984). If the presumption of correctness is successfully rebutted, the Petitioner still carries the burden of persuasion. *Id.*

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 absent clear and express language for that purpose, and any ambiguity and doubt must be resolved in favor of the person upon whom it is sought to impose the tax. *Dep't of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977).

DECISION

The parties have failed to present a Stipulation of Facts. Instead, each side has submitted Proposed Findings of Fact. Both parties have made numerous objections to the other's Proposed Findings of Fact. Nevertheless, each side asserts that this case is ripe for Summary Judgment. In reviewing the submissions from both sides, we find that the

essential underlying facts are not in dispute and therefore we turn to the legal issues at hand.

This case turns on one primary question: Do the activities of Orbitz under the “Merchant Model” constitute a taxable service under Wis. Stat. § 77.52(2)(a)1?⁴ This issue has been the topic of many recent cases in many jurisdictions around the country in recent years. However, each state must analyze the issues in the context of its own specific statutes; thus, the decisions of other jurisdictions, while interesting, do not determine our decision here.

1. Background

We begin by setting forth the method by which Orbitz conducts its business. We next look at precisely what Orbitz does and does not do.

The Merchant Model

Orbitz employs what is known in the online travel industry as the Merchant Model. With respect to the making of room reservations, this model works as follows: Orbitz contracts with hotels for the right to advertise and provide reservation services to the general public for rooms at those hotels through its websites and call centers. Orbitz handles all financial transactions related to the hotel reservations. When an individual makes a reservation through Orbitz, the customer is charged for the room in advance. The amount charged includes a wholesale rate (“Net Rate”) for the room. The amount also includes a “Tax Recovery Charge,” which represents Orbitz’s estimate of

⁴ The parties also strongly disagree on whether the activities of Orbitz establish sufficient nexus with Wisconsin to subject Orbitz to taxation by this state. However, given our findings on the first issue we do not reach the second.

the sales tax the hotel will have to pay for furnishing the accommodations. Finally, the amount also includes a mark-up retained by Orbitz as compensation for its services associated with the transaction.

The customer pays Orbitz, not the hotel, an amount equal to the Net Rate price, plus the estimated taxes due on the Net Rate, plus the mark-up. Once the hotel reservation has been made and paid for, Orbitz can handle any changes or cancellation requests up until the time that the consumer checks into the hotel. Orbitz remits to the hotel the Net Rate for the room and the estimated tax required to be paid by the hotel based on the Net Rate. The hotel, in turn, pays the taxes. Orbitz retains the mark-up.

What Orbitz Also Does

In addition to the facilitation of reservation arrangements through the Merchant Model, there are other aspects to the services provided by Orbitz. As an online travel service company, Orbitz gathers, publishes, and updates comparative information about airlines, hotels, travel tours, car rentals, and the like, on its websites. With the help of Orbitz, travelers can view availability of competing lodging providers, search for various amenities, save potential future itineraries, and email suggested itineraries to others. In addition, Orbitz makes it possible for travelers to compare and make arrangements for complementary services such as car rental, tours, and flights.

Orbitz provides a conduit through which consumers can make a reservation with the hotel, pay for the lodging in advance, and avail themselves of the accommodation services of the hotel at some point in the future. Orbitz sells the service of providing access to travel research and to reservation services; Orbitz serves as an intermediary

which facilitates reservations for the customer with the hotel. Orbitz offers travelers the “ability to book” reservations. (Dept. Exs. 9-13 ¶ 2.)

What Orbitz Does Not Do

Orbitz does not own hotels or other accommodations in Wisconsin. Orbitz does not take title to the rooms in which its customers ultimately stay. Orbitz does not ever possess a present right to occupy the rooms; it does not control which particular rooms its customers ultimately agree to occupy. Orbitz does not determine the Net Rate which the hotel charges for the room. Orbitz does not have customer service people on site at the hotels. Orbitz does not set hotel policies governing the customer’s stay, nor can Orbitz evict guests from any hotel. Orbitz does not oversee or participate in check-in or check-out, assist with maintenance or maid service, or perform any of the activities one would expect from a “hotel keeper” or “motel operator” beyond arranging a reservation and accepting payment in advance so travelers can avail themselves of the accommodations of a hotel at a later date. Orbitz passes the payment on to the hotel. The hotel furnishes the lodging services.

2. Applicability of Wis. Stat. § 77.52(2)(a)1 to Orbitz and its Activities⁵

In the context of these facts, we turn to whether the taxing statute applies to Orbitz. Wis. Stat. § 77.52(2) imposes a sales tax on those who sell, perform, or furnish certain listed services. Services are not taxed unless specifically identified in the statute; subsection (a) lists the services to which the tax applies. The subsection potentially

⁵ The parties have agreed to address the issue in the context of lodging only; the decision will apply similarly to other contexts.

implicated, Wis. Stat. § 77.52(2)(a)1, taxes the “furnishing of rooms or lodging (‘lodging’) to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public.”

The pertinent questions surround (1) whether the activities Orbitz engages in constitute the “furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public” or, (2) alternatively, whether Wis. Stat. § 77.52 applies to a seller of the service of “furnishing” lodging and, if so, whether Orbitz is selling that service.

a. Does Orbitz Furnish Lodging?

First, we will determine whether, pursuant to the plain and ordinary meaning of the statute, Orbitz furnishes lodging so as to fall under the direct imposition of the tax. The Department argues that the provision of online services which allow the traveler to arrange for the lodging actually is “furnishing” lodging. Orbitz is one step removed from physically providing the lodging. However, Orbitz does arguably participate in the first step of the traveler’s experience by facilitating reservations for the lodging. So is this facilitation of reservations a form of “furnishing” accommodations?

Our analysis must begin with a study of the imposition statute. Our focus is on the word “furnishing.” The statute itself provides no guidance in determining whether this indirect participation prior to the customer’s actual stay is encompassed in the term “furnishing.” 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. Dep't of Revenue*, 228 Wis. 2d 745, 760, 599 N.W.2d 51 (Ct. App. 1999); *State v. Steffes*, 2013 WI 53 ¶ 25, 347 Wis. 2d 683, 832 N.W.2d 101. "In seeking a plain meaning, a court seeks a meaning that anyone—a lawyer, a party, an administrator, or any reader—could discern simply by examining the text of the statute, perhaps with the aid of a dictionary, a book generally available to all." *Manpower Inc. v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-223 (WTAC 2009).

"Furnish" is defined to mean: "(1) to provide with what is needed; especially: to equip with furniture; (2) supply, give." Merriam-Webster Online Dictionary 2010. Wisconsin courts have adopted the ordinary usage of the term "furnish" to mean "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); *see also Knapmiller v. Am. Ins. Co.*, 15 Wis. 2d 219, 223-24, 112 N.W.2d 586 (1961) (explaining the words "supply" and "furnish" are synonyms for the word "provide"). While it is abundantly clear that what hotels do is furnish or supply accommodations, the answer is much less clear vis à vis online travel companies, such as Orbitz.

Wisconsin courts have long held that taxability is determined by 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. *Brennan Marine v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-474 (WTAC 2011). Here, it is unclear whether "furnishing" includes establishing, arranging for or, as Petitioner characterizes Orbitz's activities,

“facilitating” the reservation arrangements, or whether it simply means literally providing the physical accommodations, i.e., handing the consumer the key and being responsible for onsite details of those accommodations. The word “furnishing,” in this context, is capable of being understood in more than one sense by reasonably well-informed people. Therefore, we find that the term “furnishing” as used in Wis. Stat. § 77.52(2)(a)1 is ambiguous. See *Wagner Mobil, Inc., v. City of Madison*, 190 Wis. 2d 585, 592, 527 N.W.2d 301 (1995).

When ambiguity exists, imposition statutes are to be construed in favor of the taxpayer. *Dep’t of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977). The essential facts are not in dispute. We look to those facts to determine the substance and realities of what Orbitz actually does that the Department wishes to tax. Orbitz does not furnish lodging to travelers in any traditional sense of the word. Orbitz does not own hotels or motels. Orbitz does not check people in or provide them room keys or other access to the rooms. Orbitz does not provide maid service room service or maintenance services.

While it could be argued that Orbitz furnishes the reservations, we cannot make the leap to say reservations are the same as lodging. Clearly they are not. A reservation may help make it possible to avail oneself of the hotel’s lodging services, but again we are one step removed from the lodging service itself.

In interpreting statutes, we must also look to the full wording of the statute. *Kalal v. Dane County*, 2004 WI 58, 681 N.W. 2d 110 (“statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole”).

Assuming, *arguendo*, that Orbitz's activities qualified as "furnishing" accommodations, in order to uphold the imposition of the tax, Orbitz must be an "other person furnishing accommodations" in keeping with the language of Wis. Stat. § 77.52(2)(a)1: "The furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations"

When a statute contains a list, it can be assumed that a more general term is used as a broad reference to other items very similar to the specific examples listed.⁶ As described above, Orbitz's activities bear little resemblance to those of hotelkeepers or motel operators. Those actors do not host travel websites. They do not provide online search capabilities through which people can compare the offerings of unrelated travel suppliers around the world. They do not assist travelers in comparing other companies' offerings. They do not assist travelers in planning other aspects of trips, such as flights or car rental. They do not generally provide reviews with negative information about their services. The only overlap appears to be the securing of reservations. However, with respect to that facet of Orbitz activities, Orbitz acts as an intermediary. Orbitz accepts payment at the time the reservation is made, but Orbitz does not retain the funds nor does it report them as its own gross receipts. The payment for lodging is passed to the hotel which provides the lodging. Although Orbitz may be listed as the "merchant of record" on the credit card transaction, no

⁶ "Ejusdem generis is a 'canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.'" *Adams Outdoor Advertising, Inc. v. City of Madison*, 2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803 (citations omitted).

reasonable traveler would be led to believe they are going to be a guest of Orbitz. The consumer knows the name of the place of lodging, and its name is not Orbitz.

The statutory section itself contains a related definition and further examples of what it means by “hotel” and “motel.”

In this subdivision, "hotel" or "motel" means a building or group of buildings in which the public may obtain accommodations for a consideration, including, without limitation, such establishments as inns, motels, tourist homes, tourist houses or courts, lodging houses, rooming houses, summer camps, apartment hotels, resort lodges and cabins and any other building or group of buildings in which accommodations are available to the public . . .

Wis. Stat. § 77.52(2)(a)1.

Such are the types of “other persons furnishing accommodations” intended by the statute. We look at what the examples in the list have in common. They are brick and mortar alternatives to hotels and motels which clearly provide the same types of services. Orbitz lacks the essential functions and characteristics of a business which provides lodging accommodations. We cannot say what Orbitz does is similar enough to the activities of “hotel keepers” and “motel operators” to fall under the umbrella of “other persons furnishing accommodations.”

The Department relies heavily on *Hergert d/b/a Aero Expo Corporate Service v. Dep’t of Revenue*, (CCH) ¶400-525 (WTAC 2001). The *Hergert* case involved a petitioner who claimed not to be an “other person furnishing accommodations” under Wis. Stat. § 77.52(2)(a)1. The petitioner was an individual who solicited homeowners near Oshkosh who were interested in renting their homes out during the Oshkosh

Experimental Aircraft Aviation Association Fly In. The petitioner arranged for renters, drafted the contracts to which he was often listed as a party, determined pricing unilaterally, and met with renters to deliver keys and allow physical access to the homes. The petitioner offered numerous complementary and related products and services such as food, cars, rollaway beds, and maid service. If maintenance or repairs were needed during the stay, the renter contacted the petitioner (not the owner). *Id.*

The Commission found that the petitioner's activities were those of a hotel keeper. Unlike the case at hand, the petitioner in *Hergert* physically performed the types of services a traditional hotel keeper performed – he was there to issue keys and access, he fixed things as needed, and he even offered to provide maid and food service. *Id.*

The Commission rejected a narrow definition of hotel or motel but stressed that the definition included “any other buildings or group of buildings in which accommodations are available to the public.” Again, the focus was on the physical similarity. *Id.*

The Department also relies on *Associated Training Services Corp. v. Dep't of Revenue*, (CCH) ¶ 400-854 (WTAC 2005). In that case, the taxpayer, a school, disputed that it was “furnishing accommodations that are available to the public.” The parties stipulated that the petitioner actually bought blocks of rooms and resold them to students for a conference. *Id.*

Orbitz strongly disputes any assertion that its business is the resale of rooms. No “resale” is stipulated in this case, nor do we find a basis to say that such an

arrangement existed. Orbitz cannot be bound by the stipulation of unrelated parties in an unrelated case.⁷ Orbitz does not purchase rooms for resale; Orbitz does not pay the hotel for the rooms then solicit customers to buy from its inventory. Orbitz does not take title to rooms, and it never obtains a right of occupancy or even a reservation at the hotel in its own name. It passes the guest's payment on to the hotel. The hotel owns the rooms and, as the actual seller of the lodging services, properly pays taxes on the proceeds of its sales.

We further note that the focus of the controversy in *Associated Training* was whether the rooms were "available to the public" because the petitioner sold them only to its students. The determinative issue of *Associated Training* was very different from the issue contested in the instant case.

Finally, the Department looks to the State of South Carolina and others⁸ for support, citing *City of Charleston v. Hotels.com, et al.*, 520 F. Supp. 757 (D. S.C. 2007). As noted, these types of cases turn on the language of specific statutes. One of the ordinances referenced in the South Carolina case assessed a tax "on every person engaged or continuing . . . in the business of furnishing accommodations to transients

⁷ Similarly, we reject the Department's reliance on Tax Bulletin No. 146 (2006) which discusses allocation of sales tax in situations where travel agents buy accommodations with resale exemption certificates and then resell them.

⁸ The Department submitted a final out-of-state case, *Travelocity.com v. Wyoming Dep't of Revenue*, ___ P.3d ___, 2014 WL 1326388 (April 3, 2014) shortly before the release of this decision. Although past for a submission, the case affirmed a case previously submitted in a timely manner. We point out, however, that the Wyoming statute in question applies its tax to the "sales price paid," which language is very different from the Wisconsin service tax language. Therefore, we do not find the case relevant to our discussion.

for consideration.” In *City of Charleston*, the court found a question of fact and denied summary judgment as to whether the petitioner was “furnishing accommodations.”

Another South Carolina case pointed to the specific language and clarified that, while online travel companies did not furnish accommodations, they may be “engaged in the business” of doing so (a broader concept). *Travelscape, LLC v. South Carolina Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) (“‘[F]urnish’ does mean to physically provide sleeping accommodations. However, [the online travel company’s] argument ignores the antecedent language in [South Carolina’s statutory language] that it applies to all persons ‘engaged . . . in the business of’ furnishing accommodations. ‘Business’ includes ‘all activities, with the object of gain, profit, benefit, or advantage, either direct or indirect.’) *Id.* The relevant Wisconsin statute does not include the “engaged in the business of” language, and we therefore draw no conclusions interpreting that language in the context of online travel companies in Wisconsin.

Orbitz likewise attempts to bolster its argument with several cases from other jurisdictions, most notably *Louisville/Jefferson County Metro Gov’t v. Hotels.com, L.P.*, 590 F.3d 381, 387 (6th Cir. 2009). In that case, the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of claims against Orbitz and other online travel companies, concluding that online travel companies “do not physically control or furnish the rooms they advertise. The [online travel companies] also do not ‘supply’ or ‘provide’ rooms to visitors . . . because they take no part in making the room physically available.”

Because this issue is so dependent on the interpretation of our own statutes, absent better clarity, we cannot justify the extension of the tax to this Petitioner under the Wisconsin Statutes as currently written. Ambiguities are to be construed in favor of the taxpayer. We find that the services provided by Orbitz do not constitute the “furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations.”

b. Does Orbitz Sell, Perform, or Furnish the Service of Furnishing Lodging?

Having found that Orbitz does not itself furnish lodging, we address the alternate theory⁹ which turns on the fact the statute’s use of the term “furnishing” yet a third time. The statute begins by allowing for a tax on “all persons selling, performing or furnishing the services” specifically listed. Orbitz is a service provider so we begin by determining what service Orbitz sells, performs, or furnishes.

The Department argues that Orbitz sells the service of furnishing of lodging (by hotels or the like who furnish accommodations). That is, even if Orbitz does not itself “furnish” the lodging (which the Department does not concede), it sells and/or furnishes the “furnishing of rooms or lodging.” This interpretation would extend taxation to service providers who are one step removed from the actual provision of the services listed.

Orbitz acts as an intermediary providing access to the providers of lodging by assisting in arranging for reservations for travelers at hotels. The lodging services are actually provided by the hotels themselves. For the reasons explained below, we find

⁹ The Department initially offered an additional argument that Orbitz sold lodging and that the hotels were agents of Orbitz furnishing the lodging on behalf of Orbitz. That agency argument has since been abandoned so it will not be addressed here.

Orbitz's activity is too far removed from the taxable services described in Wis. Stat. § 77.52(2)(a)1.

Whom Does Wis. Stat. § 77.52(2) Tax?

Wisconsin taxes the doer of the service: Wis. Stat. § 77.52(2) imposes a tax on "all persons who sell, perform, or furnish" at retail in Wisconsin any of taxable services listed subsection (a). Orbitz is clearly a service provider. Thus, Wis. Stat. § 77.52(2) could apply to Orbitz if it provides a retail service which is a taxable service under the statute.¹⁰

1. What Do Wis. Stat. § 77.52(2) and its Subsections Tax?

The actions to which the statute applies are set forth with clarity: Wis. Stat. § 77.52(2)(a)1 states, "The tax applies to the following types of services:" followed by a list which includes furnishing lodging. Those who furnish lodging are to be taxed on the gross receipts they receive for those services. As explained above, Orbitz does not itself perform the actions of a hotelkeeper, motel operator, or other person furnishing accommodations to the public. Orbitz cannot reasonably be likened to hotelkeepers or motel operators. Thus, we have concluded that Orbitz does not furnish lodging.

The Department's alternate argument suggests that Wis. Stat. § 77.52(2) should be read so the subsequent subsections are substituted into the first sentence. That is, the tax applies to those "selling, performing, or furnishing" the listed service of furnishing lodging.

¹⁰ For the statute to apply, Orbitz must also be performing its services "at retail in this state." Because we find that the service is not a taxable one, we decline to address these additional aspects.

It is convoluted to read the statute as taxing the providers of the service which is defined as the selling of the service of furnishing lodging. Using the language substitution approach advocated by the Department, we would have to conclude that this statute intends to tax the service of selling “the sale of” various types of services.¹¹ None of these linguistic exercises of substitution strikes us as reasonable or even coherent.

There is no “the sale of” language in the “furnishing accommodations” subsection. If the service of selling the furnishing of lodging were indeed intended for taxation, subsection (a)1 could have been worded as “the sale of the furnishing of rooms or lodging” as was done in other subsections. If that verbiage were unnecessary in the context of lodging, the legislature would not have included in the context of the sales of other services listed in Wis. Stat. § 77.52(2)(a).¹² Because the language taxing “the sale of” various services” does exist in the context of the similar subsections, we conclude that it could have similarly been included in Wis. Stat. § 77.52(2)(a)1 if the legislature had so intended.

The Department’s interpretation is ambiguous at best, as it tries to assess a tax to a second level of service. Such taxation is not clearly intended by the statute, and we reject the Department’s interpretation as overly broad. If we need go down this road of reasoning, we believe Orbitz is selling the service of making arrangements for the furnishing of lodging; again, one step removed from the listed taxable service.

¹¹ Taxable services which involve selling under Wis. Stat. § 77.52(2)(a) are the following: Admissions under (a)2, telecommunication services under (a)5, or services that consist of recording telecommunications messages, or cable television system services under (a)11, or landscaping services under (a)20.

¹² See FN 11.

We read the statute more simply and clearly with Wis. Stat. § 77.52(2) first describing who the actors are who may be liable for the tax and then Wis. Stat. § 77.52(2)(a) listing the services intended for taxation. The services sold by Orbitz -- online research, reservation facilitation services, or the sale of reservation services -- are not on that list.

Wisconsin taxes the privilege of engaging in the taxable services listed in Wis. Stat. § 77.52(2)(a). Specifically, the statute imposes tax on the service of furnishing lodging. Hotels are taxed for the privilege of providing the service of furnishing lodging. The service of facilitating the reservations, which Orbitz provides, is one of several ways in which a customer can make arrangements to enjoy the lodging services of the hotel. Orbitz sells the use of its online research and reservation facilitation services. The service of providing an avenue of access for guests to choose and arrange to take advantage of a hotel's lodging services at some later time is too far removed from the activities contemplated by the statute. Orbitz is not engaged in a listed service and, therefore, its mark-up is not taxable.

2. The Measure of Tax Imposed Under Wis. Stat. § 77.52(2)

Although we have found Orbitz is not liable for sales or use tax on its mark-up compensation under the Merchant Model because Orbitz is not engaged in a listed taxable service, we find further support in a brief discussion of the value intended for taxation. We note that Wisconsin's imposition language is very different from the taxes that have been the subject of similar litigation in other jurisdictions. In many of those

jurisdictions, the focus is the purchaser of the service and, therefore, the measure of tax is the full price paid by that purchaser for the lodging.

In Wisconsin, the service provider is the target of the tax. The service of furnishing lodging is performed by the hotels. The hotels report the proceeds they receive from engaging in that activity and properly pay tax on their receipts for furnishing lodging. The Department has received its tax from the appropriate taxpayer who performs the listed taxable service. The tax paid is based on the appropriate gross receipts – those of the hotel which provided the service. The compensation earned by Orbitz for assisting the traveler in arranging the reservations for the stay is not part of the hotel's gross receipts and is not earned from the taxable service of furnishing lodging.

CONCLUSIONS OF LAW

As required by Wisconsin rules of construction, we must read this imposition statute in favor of the taxpayer and against the taxation. In substance and reality, what Orbitz provides is fundamentally different from what the statute taxes. Thus, we find that the tax applies only to the proceeds Orbitz forwards to the hotels as payment for the reserved rooms and not to the additional compensation retained by Orbitz. It is not the Commission's place to extend the definitions and terms of Wis. Stat. § 77.52(2) to apply the tax to the compensation Orbitz received from customers who utilize their websites or call centers to arrange for hotel reservations. Thus we find summary judgment for the Petitioner is appropriate and conclude as follows:¹³

¹³ In light of this decision granting summary judgment, it is unnecessary to consider the Petitioner's arguments based on nexus or constitutionality.

1. Orbitz serves as an intermediary between travelers seeking hotel reservations and hotels looking to provide lodging services.

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.

ORDER

Based on the foregoing, the Commission orders as follows:

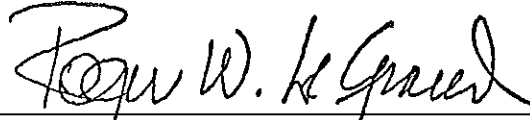
1. The Petitioner's Motion for Summary Judgment is granted.
2. The Department's Motion for Summary Judgment is denied.
3. The Department's assessments are reversed.

Dated at Madison, Wisconsin, this 14th day of May, 2014.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner

(Did Not Participate)

David D. Wilmoth, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS
RESPONDENT**

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.**
2. **If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.**
3. **The 30-day period starts the day after personal service or the day we mail the decision.**
4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.