

STATE OF WISCONSIN
TAX APPEALS COMMISSION

STATE BAR OF WISCONSIN,

DOCKET NO. 16-S-139

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

DAVID L. COON, COMMISSIONER:

This case comes before the Commission for decision on Petitioner's and Respondent's cross-motions for summary judgment. The Petitioner, the State Bar of Wisconsin ("the State Bar"), of Madison, Wisconsin, appears by Attorneys Thomas J. Phillips, Robert B. Teuber, and Courtney A. Hollander, Von Breisen & Roper, SC.¹ Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Kelly Altschul.² The parties filed a Stipulation of Facts. Each party filed a brief and affidavits with exhibits in support of its Motion. Each party filed a response brief. At the request of the Commission, the parties also filed supplemental briefs. For the reasons stated below, we grant Petitioner's motion and deny the Respondent's motion.

¹ Attorneys John T. Barry and Gregory Lohmeyer, Quarles & Brady, LLP, also previously represented Petitioner.

² Attorney Julie A. Zimmer also previously represented Respondent.

FACTS

1. Petitioner is a mandatory professional association, created by the Wisconsin Supreme Court, for all attorneys who hold a Wisconsin law license. Members are required to obtain and report 30 hours of continuing legal education ("CLE") credits every two years (with some exceptions for newly admitted attorneys and emeritus members) in order to maintain their status as active and in good standing, thereby allowing them to practice law in the State of Wisconsin. (Stipulation of Facts ("Stip."), ¶ 1.)

2. Petitioner offers for sale legal seminars and written materials that attorneys can utilize to better their legal knowledge. (Stip., ¶ 1.)

3. During the period January 1, 2010, through December 31, 2013 ("Audit Period"), Petitioner offered CLE seminars led by an instructor or a panel of instructors who were often attorneys themselves and were often experts in their field. Petitioner offered the option to attend or view CLE seminars in the following ways:

a. Seminars offered in "Format 1" were live in-person seminars ("Live Seminars"). These seminars were offered at a specific date, time, and location, and the attendees and instructors) were physically present in the same room. Attendees were able to interact with the instructor(s), ask the instructor(s) questions, hear questions from live webcast viewers (see description of "Format 2," below), and receive answers to those questions in real time.

b. Seminars offered in "Format 2" were live webcast seminars ("Live Webcast Seminars"). These seminars were Format 1 Live Seminars streamed in real time over the internet. Therefore, the Format 2 seminars were offered at the same date and time as the Live Seminars. Attendees were able to view the seminars on their computers but were not

physically present in the same room as the instructors. Attendees were able to ask the instructor(s) questions during and/or immediately after the seminar and receive answers to those questions in real time. Attendees were also able to witness the questions that were asked by the attendees who attended the live seminar and witness the responses provided by the instructor(s) to such questions.

c. Seminars offered in "Format 3" were webcast replays ("Replay Webcast Seminars"). These seminars were broadcast over the internet and were replays of the previously recorded Live Seminars. Format 3 Replay Webcast Seminars were offered at a specific date and time, but the instructor(s) were not required to be available during that time. Attendees viewed the Webcast Replay Seminars on their computers and were not physically present in the same room as the instructor(s). The attendees were able to listen to and view the seminar, witness the questions that were asked by the attendees who attended the Live Seminar and by those who attended the Live Webcast Seminars, if any, and witness the responses provided by the instructor(s) to such questions. Additionally, attendees could submit questions to the instructor(s) via email.

d. Seminars offered in "Format 4" were on-demand replays ("On-Demand Seminars"). These seminars were broadcast over the internet and were replays of the previously recorded Live Seminars. On-Demand Seminars were available to be viewed within a 90-day window from the date of purchase and could be viewed at any time of the day or night during the 90-day period. Attendees could not download or save the On-Demand Seminars onto their own computers, nor could the attendees share or transfer the video to a third party. At the end of the 90-day period, the program was no longer available to be viewed by the attendees, unless he or she purchased it again. The attendees were able to listen to and view the seminar, witness the questions that were asked by the attendees who attended the live seminar and by those who attended the Live Webcast Seminars, if any, and witness the responses provided by the instructor(s) to such questions. Additionally, attendees could submit questions to the instructor(s) via email. (Stip., ¶ 2.)

4. If an attendee submitted a question via email during or immediately following a Format 3 Webcast Replay Seminar or Format 4 On-Demand Seminar, Petitioner requested, but did not require, that the instructors respond within two business days. Instructors generally responded to questions within two business days. The Wisconsin Board of Bar Examiners (“BBE”) Rule CLE 5.01 requires that Format 4 (On-Demand Seminar) questions be responded to within 15 business days. (Stip., ¶ 3.)

5. None of the CLE seminars provided by Petitioner, regardless of Format, required attendees to take a test or submit to evaluation by the instructors of their retention of the information imparted in the seminar. The BBE imposes no such requirement to get CLE credit. (Stip., ¶ 4.)

6. To obtain accreditation by the BBE for CLE credit, Petitioner's seminars had to meet the standards required under Supreme Court Rule 31.07 (June 14, 2013). (Stip., ¶ 5.)

7. Attendees of approved On-Demand Seminars could only receive CLE credits if the conditions under Supreme Court Rule 31.05(5)(a) (June 14, 2013) were met. (Stip., ¶ 6.)

8. Petitioner received a Notice of Field Audit Action (the “Notice”) dated August 10, 2015, assessing additional sales and use taxes for the Audit Period in the amount of \$354,248 in additional tax and \$128,840.67 in interest, as Petitioner did not collect and remit Wisconsin sales tax for Replay Webcast or On-Demand Seminars. Petitioner deposited with Respondent \$478,080.46, the asserted amounts of additional tax and interest, which stopped the running of additional interest. (Stip., ¶ 7.)

9. In the Notice, Respondent conducted a sample of Petitioner's sale of CLE seminars in Replay Webcast and On-Demand Seminars and determined that sales tax was due on such sales.³ Respondent contended these sales were of taxable digital audiovisual works on which tax was not charged and a valid exemption certificate was not maintained. (Stip., ¶ 8.)

10. By letter dated October 5, 2015, Petitioner timely filed with Respondent a Petition for Redetermination objecting to the taxation of Replay Webcast Seminars and On-Demand Seminars and requesting that Respondent redetermine the amount of any additional Wisconsin sales tax and interest due attributable to sales of those formats. (Stip., ¶ 9.)

11. By Notice of Action dated April 1, 2016, Respondent granted in part and denied in part Petitioner's Petition for Redetermination. (Stip., ¶ 10.)

12. The only issue remaining before the Commission for the Audit Period is Petitioner's sales of On-Demand Seminars. Respondent has refunded to Petitioner the portion of its deposit that is not attributable to its sales of On-Demand Seminars and other items Petitioner has since agreed are taxable. (Stip., ¶ 11.)

13. On May 18, 2016, Petitioner filed a timely Petition for Review with the Wisconsin Tax Appeals Commission. (Stip., ¶ 12, Commission File.)

³ Petitioner did pay sales tax on some transactions unrelated to the various CLE formats in this matter. Those payments are not relevant to the issues here.

APPLICABLE LAW

Statutes⁴

Wis. Stat. § 77.51(3p)

"Digital audiovisual works" means a series of related images that, when shown in succession, impart an impression of motion, along with accompanying sounds, if any, and that are transferred electronically. "Digital audiovisual works" includes motion pictures, musical videos, news and entertainment programs, and live events, but does not include video greeting cards or video or electronic games.

Wis. Stat. § 77.51(17x)

"Specified digital goods" means digital audio works, digital audiovisual works, and digital books. For purposes of this subchapter, the sale, license, lease, or rental of or the storage, use, or other consumption of a digital code is treated the same as the sale, license, lease, or rental of or the storage, use, or other consumption of any specified digital goods for which the digital code relates.

Wis. Stat. § 77.52(1)(d)

A tax is imposed on all retailers at the rate of 5 percent of the sales price from the sale, lease, license, or rental of specified digital goods and additional digital goods at retail for the right to use the specified digital goods or additional digital goods on a permanent or less than permanent basis and regardless of whether the purchaser is required to make continued payments for such right.

Wis. Stat. § 77.52(2)

For the privilege of selling, licensing, performing or furnishing the services described under par. (a) at retail in this state, as determined under s. 77.522, to consumers or users, regardless of whether the consumer or user has the right of permanent use or less than the right of permanent use and regardless of whether the service is conditioned on continued payment from the purchaser, a tax is imposed upon all persons selling, licensing, performing or furnishing the services at the rate of 5% of the sales price from the sale, license, performance or furnishing of the services.

⁴ Unless otherwise noted, all statutory citations are to Wisconsin Statutes (2011-2012).

Wis. Stat. § 77.54(50)

The sales price from the sale of and the storage, use, or other consumption of specified digital goods or additional digital goods, if the sale of and the storage, use, or other consumption of such goods sold in a tangible form is exempt from, or not subject to, taxation under this subchapter.

Summary Judgment

Summary judgment is granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show 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). Here, the parties have stipulated to the material facts and have both moved for summary judgment. The effect of simultaneous motions for summary judgment is an assertion that the facts presented are not in dispute and only questions of law remain for determination. *Healthcare Services, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-085 (WTAC 2016).

Burden of Proof

The Department's determinations are presumed to be correct, and it is Petitioner's burden to prove by clear and convincing evidence that the Department erred in its determination. *Puissant v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

ANALYSIS

A service is not subject to sales or use tax unless it is specifically listed in the statutes as a taxable service. "For a service to be taxable in Wisconsin, under Wis. Stat. § 77.52(2), the seller must be 'selling, licensing, performing or furnishing the services

described under par. (a).’ Thus, only services which are listed in the statute are to be taxed.” *Healthcare Services, Inc. v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-085 (WTAC 2016). Educational services are not one of the specifically listed taxable services and are not otherwise defined in the statutes for tax purposes. The Department has agreed that the purchase from Petitioner of a Live Seminar is the purchase of an educational service that is not subject to sales tax. These Live Seminars (Format 1) are not directly at issue before the Commission.

The Department has also determined that purchasers of a Live Webcast Seminar, the right to view a streamed video of a Live Seminar at approximately the same time as the Live Seminar but at a remote location, including the lawyer’s home or office or wherever the lawyer has the proper equipment and internet connection, is also not subject to sales tax. For Live Webcast Seminars, the lawyer does not obtain a copy of the video in any form, such as DVD, USB drive, download to hard drive, or, going back to the technological dark ages, videotape.

The live video stream is a “digital audiovisual work” per Wis. Stat. § 77.51(3p). Audiovisual works are “specified digital goods” under Wis. Stat. § 77.51(17x) and would be a taxable per Wis. Stat. § 77.52(1)(d). However, where a digital good sold in “a tangible form” would be exempt from the sales or use tax, that digital good is also exempt from the tax. Wis. Stat. § 77.54(50).

The Department issued guidance that, while the Live Webcast Seminar data stream to the lawyer’s computer or other device that creates the audiovisual images is a specified digital good, its “tangible form” is the Live Seminar. Following this reasoning,

according to the Department, Live Webcast Seminars would also be exempt from sales tax. Wisconsin Tax Bulletin 170-January 2011 (Tax Releases) pp. 8-9; *Online Seminars*, Wis. Dep't of Revenue, *Tax Treatment of Online Seminars*, Jan. 28, 2011. The Live Webcast Seminars (Format 2) are also not directly before the Commission.

As noted above, for purposes of this action, the parties do not dispute that the Live Seminars and Live Webcast Seminars are non-taxable. It is still necessary to understand the issues involving their non-taxable status in analyzing the taxability of the On-Demand Seminars, which are at issue.

Exempt Tangible Form

For On-Demand Seminars, the lawyer purchases Continuing Legal Education that includes the right to access pre-recorded, saved data of Live Seminars, which are then streamed to the lawyer's computer or other device creating the audiovisual playback of the pre-recorded CLE Live Seminars. Like Live Webcast Seminars, the lawyer can watch the On-Demand Seminars at any location at which he or she has the proper equipment and an internet connection. Again, just as with Live Webcast Seminars, the lawyer does not obtain a copy of the video in any form, DVD, USB drive, download to hard drive, or videotape. The lawyer can view the video stream of the On-Demand Seminar at any time of the lawyer's choosing, not at the approximate time of the Live Seminar, hence the name On-Demand. The lawyer can stop and start the stream at any time and re-watch it multiple times within a contracted period of time, here 90-days.

The Department asserts that the tangible form of an On-Demand Seminar is a data storage medium, for example a DVD. The Department says that the sale of a video on a tangible DVD is not exempt, therefore, the On-Demand Seminars are not exempt from the sales tax under Wis. Stat. § 77.54(50).

Petitioner admits that the On-Demand Seminars are digital audiovisual works and, therefore, are specified digital goods, but Petitioner argues that under the statute, if “a” tangible form is exempt, the specified digital good can fall within the exemption of Wis. Stat. § 77.54(50). Even if a DVD is *one* tangible version of a specified digital good, the statute says “a” rather than “the,” so, Petitioner asserts, if there is another tangible version (i.e. “a” tangible version) that is exempt, the On-Demand Seminars should also be exempt.⁵ According to Petitioner, “a” tangible form of the On-Demand Seminar is the Live Seminar, which is exempt, so it follows that, like the Live Webcast Seminars, the On-Demand Seminar should also be exempt.

Petitioner points to the Department’s guidance which indicates that the Live Seminar is “a tangible” version of the Live Webcast Seminar and asks the Commission to apply the Department’s rationale to On-Demand Seminars, alleging that the Live Seminars are also a tangible form of the On-Demand Seminar. However, the Department’s guidance relative to the exemption for Live Webcast Seminars specifically noted that the same rationale for exemption would not apply to On-Demand type seminars. In the guidance, the Department stated, regarding pre-recorded digital and

⁵ Petitioner also pointed out that, with a possible exception or two, there are no DVD versions of the On-Demand Seminars produced.

DVD versions of seminars, “The exemption under sec. 77.54(50), Wis. Stats., does not apply to the sale of this digital good, since the recorded version of the seminar sold in a tangible form (i.e., on a DVD) is subject to Wisconsin sales and use taxes.” Because of this statement in the guidance, the Petitioner cannot reasonably rely upon the guidance to show that the On-Demand Seminars are exempt. Nevertheless, Petitioner does essentially request the Commission to extend the rationale of the guidance for Live Webcast Seminars to On-Demand Seminars.

From the beginning, the Commission has had concerns with the proposition that a Live Seminar, for the purposes of Wis. Stat. § 77.54(50), could be a “tangible” version of any specified digital good. The Live Seminar appears to be an educational service which one would think is not “tangible.” This, though, depends on how “tangible” is defined for the purposes of Wis. Stat. § 77.54(50).

Petitioner asserts that the Commission should derive a definition of the word “tangible” from Wis. Stat. § 77.51(20), which defines “tangible personal property.” In that statute, the phrase “tangible personal property” is defined to include things that can be touched, but also has a more expansive definition for tangible personal property to include things that can be “seen, weighed, measured, felt, or touched, or *that is in any other manner perceptible to the senses*, and includes electricity, gas, steam, water, and prewritten computer software, regardless of how it is delivered to the purchaser.” (Emphasis added).

Petitioner asks the Commission to parse the word “tangible” from the specific phrase “tangible personal property” then attach the definition “that is in any other manner perceptible to the senses” to the parsed word “tangible” to create a new, expansive definition of the word “tangible” for use throughout the statutes. The Commission declines to engage in definitional gymnastics to create expansive definitions for disparate statutory sections.

Services are actions or activities that create something, make something, or accomplish something. The Petitioner asserts that the service, the activity, that creates or makes a good or product be the “tangible” form of the good the activity creates. We disagree. Services are by their very nature, whether completed in an instant or performed over a period of time, ephemeral and intangible and cannot be the “tangible form” of an item that the activity of the service creates. Therefore, the Live Seminar, an educational service, cannot be a tangible form of a digital good under Wis. Stat. § 77.54(50). The Department has subsequently also agreed that their guidance “regarding the reason live-streamed seminars are not taxable is incorrect and will be revised.”⁶ As we find that the Department’s rationale in its guidance for the exemption of the Live Webcast Seminars is, at best, questionable, we will not extend that rationale to On-Demand Seminars. We therefore find that the Live Seminar is not a tangible form of the On-Demand Seminar and cannot be a basis for the exemption of the On-Demand Seminar under Wis. Stat. § 77.54(50).

⁶ Respondent’s Supplemental Brief, p. 8.

We have answered Petitioner's argument that the Live Seminar is a tangible version of the On-Demand Seminar; it is not. Petitioner has not presented/briefed any other tangible form. Because we find for Petitioner as explained below, we decline to broaden our analysis on this issue.

True Objective Test

The parties agree that Petitioner's On-Demand Seminars are digital audiovisual works and, therefore, are specified digital goods, which are generally taxable. However, the seminars might nevertheless be exempt depending upon the purchasers' true objective for purchasing them. Under the "True Objective Test," sales of On-Demand Seminars would not be taxable, if the "true objective" of the purchasers of the CLE seminars, is to buy an exempt educational service with the specified digital good being incidental to that true objective. To make a determination regarding the true objective, the focus is on the intent of the purchaser.

The True Objective Test states:

When a transaction involves the transfer of tangible personal property or items, property, or goods under s. 77.52(1)(b), (c), or (d), Stats., along with the performance of a service, and the transaction is neither a bundled transaction, as defined in s. Tax 11.985, nor a transaction to which s. 77.52 (2m)(b), Stats., applies,⁷ the true objective of the purchaser shall determine whether the transaction is a sale of tangible personal property or items, property, or goods under s. 77.52 (1)(b), (c), or (d), Stats., or the performance of a service with the transfer of the property, item, or good being incidental to the performance of the service. If the objective of the purchaser is to obtain the personal property, item, or good, a taxable sale of that

⁷ The Department agrees that these transactions were not bundled transactions and were not transactions to which Wis. Stat. § 77.52(2m)(b) applied. (Respondent Brief, p. 6, fn 14).

property, item, or good is involved. However, if the objective of the purchaser is to obtain the service, a sale of a service is involved even though, as an incidence to the service, some tangible personal property or items, property, or goods under s. 77.52(1)(b), (c), or (d), Stats., may be transferred. (emphasis added).

Wis. Admin. Code § Tax 11.67(1).

The True Objective Test requires the Commission to consider what the purchasers are actually attempting to receive via the transaction. We need to “look at the essence of the transaction to determine if it is fundamentally a sale of property or a performance of a service.” *Dep’t of Revenue v. Dow Jones & Co., Inc.*, 148 Wis. 2d 872, 877, 436 N.W.2d 921 (Ct. App. 1989). *See also Janesville Data Center v. Dep’t. of Revenue*, 84 Wis. 2d 341, 346, 267 N.W.2d 656, 658 (1978). The Commission has also determined that it is the “bigger picture” and “the root” of the transaction that should be considered. *See Cannon & Dunphy S.C. v. Dep’t of Revenue*, Wis. Tax Rptr. (CCH) ¶ 401-982 (WTAC 2015) (tangible copies of medical records were incidental to the service of medical care which was the root or essence of the transaction).

The True Objective Test is a doctrine of long standing, created by the courts at least as far back as *Janesville*, decided in 1978. Over a decade later, the True Objective Test was applied in *Dow* where a teleprinting machine was deemed incidental to the true objective of purchasing a news service. More recently, the doctrine has been applied by the Commission in the *Cannon & Dunphy* case.

While *Janesville*⁸ and *Dow*, for example, pre-date the digital goods statute, the True Objective Test is now codified in the Wisconsin Administrative Code. As codified, the True Objective Test is specifically applicable to digital goods as defined in Wis. Stat. § 77.52(1)(d). Wis. Admin. Code § Tax 11.67(1). We find that the True Objective Test does apply to the situation at issue here.

The Supreme Court of Wisconsin has set forth a series of rules regarding continuing legal education for lawyers, who must obtain 30 credits in every two-year reporting period. SCR 31.02(1). The Supreme Court has determined that some of these credits may be earned by “an on-line program delivered over the Internet, repeating a program previously approved by the board, and given at a time of the attendee's choosing within twelve (12) months of the approval of the on-demand on-line program.” SCR 31.01(6m). There are limitations and conditions placed upon this on-demand, on-line programming, including that only 10 credits may be earned in a reporting period by this educational method. Nevertheless, the Supreme Court has determined that such an online, on-demand programming is legal education potentially eligible for credit for the lawyer under the terms and conditions of the Supreme Court Rules. An On-Demand Seminar is, therefore, an educational program per the Supreme Court. An attorney participating in a CLE program over the internet that meets the requirements of the

⁸ In *Janesville*, the issue was the true objective between taxable tangible property represented by computer punch cards, tapes, or printouts versus the intangible, and the, at the time non-taxable, data contained on the punch cards. With the adoption of the digital goods statute, there may well be a different result in *Janesville*. The True Objective Test, though, is, as seen in the Administrative Code above, applicable where a non-taxable service is the true objective and the digital good is incidental to that service.

Supreme Court Rules is obtaining an educational service for which the lawyer earns and is eligible to claim CLE credits.

Under Supreme Court Rules, the lawyer has multiple means by which to receive such a service and accomplish these goals, including Live Seminars, Live Webcast Seminars, Replay Webcast Seminars, or On-Demand Seminars. For convenience, the lawyer may choose to gain some of his or her credits through the On-Demand Seminars. The lawyer does not have the objective of merely obtaining, or even primarily obtaining, a digital good. The lawyer is trying to obtain the educational service that accomplishes his or her goals of legal education, competence, and good standing.

The Petitioner sells four different CLE packages. In three of them, a digital good is included as the transmission vehicle, incidental to the purchased educational service. These delivery methods have been approved by the Supreme Court of Wisconsin. It is clear that lawyers, as the purchasers, are buying the overall CLE, not just a video. When considering the bigger picture of the transaction, the educational service, which is the essence and root of the transaction, is what the purchaser is trying to obtain. Much like the Live Webcast Seminar digital stream (also a digital good), the on-demand digital stream is incidental to the true objective of obtaining that overall educational service. As the lawyer watches the seminar, whether in person, at a remote location by online video feed, or by on-demand streaming, the lawyer actively accrues eligibility for CLE credit. The lawyer is not merely obtaining something which has some educational content, but he or she is receiving the educational service that accomplishes the accrual of credit, legal competence, and the ability to maintain good standing with the Supreme Court and the

Board of Bar Examiners. In addition, as Petitioner points out, as part of the overall educational service provided, the lawyer is guaranteed the right to have contact with, and ask questions of, the CLE seminar presenter via email interaction. Also, other aspects of the CLE seminars, related to Petitioner obtaining and maintaining CLE certification of these seminars, compliance with Supreme Court Rules including any associated record keeping, are part of the overall educational service provided beyond the mere selling of a digital good in the form of a streamed video.

The statistical evidence supports the conclusion that the true objective of lawyers purchasing these CLE seminars is more than just the desire to obtain a digital good, a video. By affidavit, the Department provides the uncontroverted fact that the State Bar offers many On-Demand Seminars for which CLE credit is not available, do not have the right to contact the presenter, and are not accredited or do not comply with the rules set by the Supreme Court. Specifically, by percentage of the whole and by year, those seminars which are not eligible for credit are as follows:

2010: 7 out of 79, or 8.86%

2011: 7 out of 153, or 4.58%

2012: 71 out of 221, or 32.13%

2013: 94 out of 255, or 36.86%⁹

⁹ Affidavit of Julie Zimmer, Attorney for Wisconsin Department of Revenue, ¶ 3, Ex. 2.

While by 2012 and 2013, about one third, or more, of the On-Demand Seminars available online were not eligible (or no longer were eligible) for credit under the Supreme Court Rules, the uncontroverted sales statistics provided by Petitioner show that almost all of the On-Demand Seminars purchased were ones for which the lawyer would earn eligibility for CLE credit as well as all other benefits of such an educational service. By percentage of sales, by year, these were as follows:

2010: 99.17% provided CLE credit

2011: 97.24% provided CLE credit

2012: 97.66% provided CLE credit

2013: 99.44% provided CLE credit¹⁰

In looking at the sales data versus the overall array of On-Demand Seminars available, there is a very clear picture of the true objective of the purchasers of the On-Demand Seminars. While by 2013 more programs were not eligible for CLE credit due to the age of the programs or other circumstances such as Supreme Court rules not allowing ethics credits to be earned by On-Demand Seminars, nearly all, over 99%, of the On-Demand Seminars sold were of the variety for which CLE credit could be earned and which met other Supreme Court rules and record-keeping requirements.

The only reasonable inference is that the purchasers of these On-Demand Seminars are seeking to obtain something more than just a digital good. If the purchasers were merely wanting a digital good, as a reference work for example, it would be

¹⁰ Affidavit of Timothy A. Clark, State Bar of Wisconsin Seminars Division Manager, ¶ 11.

expected that a larger percentage of the non-credit CLE seminars would be purchased, rather than the near unanimous purchase of credit eligible CLE seminars.¹¹ The Department argues that “the purchasers’ true objective was to receive the ‘series of related images that, when shown in succession, impart an impression of motion, along with accompanying sounds, if any, and that are transferred electronically.’” However, based upon the statistical evidence, it is clear that lawyers purchasing the On-Demand Seminars, in an overwhelming majority, are seeking, as their true objective, something more than just a succession of images transferred electronically.

Nevertheless, that “something more,” the true objective, must be an exempt service, with the digital good being incidental to it, for the On-Demand Seminars to be exempt from tax. If the service provided is not an exempt service, even if the service is the true objective, the whole will be subject to the sales tax. If there is no service, then it is just a taxable digital good, unless another exemption applies.

In the context of the True Objective Test, the Department claims that no “service” is purchased. The Department claims that any service was “performed” in the past (at the time of the presentation of the “Live Seminar”) and there is nothing additional that rises to the level of an educational service being purchased “along with” the digital good.

¹¹ Nothing in this decision should be construed to say that merely having some sort of “credit” attached means that there is automatically a service involved. It is possible that the “credit” offered may be a sham, for example. Where there is accreditation and credit or credit eligibility, especially from a organizations such as the Supreme Court of Wisconsin and the Board of Bar Examiners, that should be a good indicator, though, that the essence and root of the transaction may be something more than just the purchase of personal property or digital good, that the transaction is for a service instead.

The Department asserts that the term “along with” in the Administrative Code means that the service and the tangible personal property or digital good must be transferred at the same moment in time. Nothing in the statutes, or the rule, requires this type of time-element reading.

The majority of the activity of the service may have happened in the past, but the service may be ongoing under the particular facts of the matter. In *Cannon & Dunphy, S.C.*, the medical procedure or recording of medical information had already occurred prior to the request for and provision of the paper copies in that case. The information related to a medical care service can only be recorded prior to the copies being made. Copies of that information, especially for use in later litigation, will almost always be sought long after a medical procedure is completed (“performed”), and the medical information recorded. The services of medical care and recording of medical information were not done in a single transaction. The provision of the later paper copies of the recorded information may come long after the medical procedure is completed, and the information recorded. A service may be an ongoing process over time. Therefore, in *Cannon & Dunphy, S.C.*, the exempt service was still provided “along with” the later produced copies as part of a larger, ongoing process of a medical care service. Here, while the actual live lecture was completed at a particular time, the service is an ongoing process and is more than just the recording. The service includes the recordkeeping and compliance with the rules set forth for On-Demand Seminars by the BBE and Supreme Court so that the CLE carries credit eligibility. These CLE seminars are presented in

various formats, at different times and places, but are still all continuing legal education, which is, in this case, an exempt educational service.

In the context of educational services, the CLEs in their various approved formats are educational programs that accomplish the eligibility to receive credit under the Supreme Court Rules and maintain good standing. The Department argues that the format of the program offered does matter by equating the On-Demand Seminars with pre-recorded videos that, for example, teach knitting or the reading of a textbook on advanced biology. In the hypothetical situations posed, the knitting video and the textbook may well be educational in nature, but the Department asserts they are not an educational “service.”

We understand the Department’s concern. For example, even some purely entertainment videos may be educational to some extent. Young teenagers, who find their way to stream an explicit “for mature audiences only” movie on Netflix may receive information and a premature education in anatomy, but they cannot be said to have purchased an educational “service” merely because they learned something. Here, though, there is an actual educational service that, through the overall program, ultimately accomplishes the eligibility for Supreme Court mandated credits and education and competence of the members of the legal bar.

The Department contends that the utilization of the On-Demand Seminar is merely “self-study.” The Department relies on a quote from the BBE Petition before the Supreme Court for approval of On-Demand Seminars for CLE credit, which states, “On-demand programs represent a *close approach to self-study*, which is not permitted in

Wisconsin (nor most states with mandatory CLE).” (Emphasis added) (Resp. Reply Brief, Appendix A.) The Department fixes on the words “self-study” to equate the On-Demand Seminars with a knitting instructional video. While quoting the language of the BBE Petition, the Department ignores the qualifying language “a close approach” in front of “self-study” and the fact that the CLE programs include more than just a video, but also include the overall package that, among other things, includes the compliance with additional SCR rules, documentation, ability to ask questions of the instructor, and other checks and approvals generally not available with a simple self-study video.

Further, the Supreme Court has approved the (vast majority of) On-Demand Seminars as CLE programs beyond being merely self-study. With rules, limits, certifications, and earned credits, these programs are more than “self-study.” Lawyers are not purchasing just a “series of related images that, when shown in succession, impart an impression of motion, along with accompanying sounds, if any, and that are transferred electronically,” as asserted by the Department. These On-Demand Seminars are specifically approved by the Supreme Court as continuing legal education for which credit may be earned, along with accreditation, regulatory compliance, and record keeping, to accomplish the goals of accrual of credit, legal competence, and the ability to maintain good standing with his or her law license.

The Department’s concern is that any book or DVD, or other type of property or good, could be claimed to be an educational service if it provides information that can possibly educate a person on a topic. We agree that merely buying a book or video (in whatever form) would not, alone, be an educational service. The petition to the

Supreme Court for the adoption of credit for On-Demand Seminars made a distinction between “self-study” and the On-Demand Seminars. Self-study is still not eligible for CLE credit in Wisconsin based upon the BBE Petition as approved by the Supreme Court. The On-Demand Seminars, as approved, are not self-study.

After the tax years at issue here, the Department attempted to develop rules or criteria, that must be met to show that a digital good comes along with the performance of a service for On-Demand Seminars.¹² Even if these rules were applicable here, these criteria are very arbitrary and non-inclusive of those things which might be indicia of an educational service.

As we stated in *Canon & Dunphy*, the overall transaction must be considered. The True Objective Test views the transaction from the perspective of the purchaser. The Department’s subsequent, arbitrary litmus tests fail to do either; they focus on a small subset of possible factors and do not consider, from the perspective of the purchaser, what the buyer is trying to obtain.

The Department also cites to Wis. Stat. § 227.10(2m) (2017-2018) for the proposition that the Commission cannot set “standards” or “requirements.”¹³ The Commission, however, has been given a specific grant of authority in Wis. Stat. § 73.01(4)(a) to be “the final authority for the hearing and determination of all questions of

¹² Sales Tax Treatment of Educational Products, Goods, and Services – Updated, <https://www.revenue.wi.gov/Pages/TaxPro/2016/news-2016-160407.aspx>. Last visited September 17, 2019.

¹³ “No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in compliance with this subchapter.” Wis. Stat. § 227.10(2m).

law and fact” under the specified tax statutes. Nevertheless, the Commission is not setting any specific new standard in this matter. The True Objective Test, as written into the Administrative Code, applies here. It is a doctrine of long standing. That test should be applied from the perspective of the purchaser and should consider the overall transaction, essentially the totality of the circumstances. This has been the standard long before this present case. Viewing the stipulated and uncontroverted material facts of this matter in relation to the True Objective Test, we find that the true objective of the purchasers of the On-Demand Seminars was to obtain an educational service, with the digital good being incidental to that service.

We also note that the Department, in a throw-everything-against-the-wall-to-see-what-sticks method of brief writing, alleges that the Commission might commit a constitutional violation if the Commission were to find that some digital goods were exempt, while others were not, based upon content, such as educational content versus entertainment content. For this proposition, the Department cites *Arkansas Writer’s Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), which determined that Arkansas could not tax magazines differently based upon content, such as a sports magazine being taxed but a religious magazine not being taxed, favoring one type of content over another.

In this matter, the Commission does no such thing. We determine that the True Objective of the purchaser is to obtain a tax-exempt educational service with the digital good being incidental to the service. As the educational service is not taxed under the statutes, the On-Demand Seminars are not taxed. We do not make a determination

that the digital good itself is not taxed due to its content; rather we determine that the digital good is incidental to the non-taxed service.

Ultimately, there is no definition in the tax code for “educational service.” We do not create one. These determinations will continue to be fact based. Here, legitimate earned credit as determined by a branch of state government, is a strong indicator that there is an educational service and that obtaining the service is the true objective of the purchaser.

Based upon the facts, we find that the On-Demand Seminars were an educational service, and the true objective of the purchasers of On-Demand Seminars was to obtain an educational service. The digital good was incidental to the purchase of that service. The root and essence of the transaction, considering the big picture from the perspective of the purchaser, is the purchase of an exempt educational service rather than merely the purchase of a digital good. The digital good is incidental to the performance of an exempt service.

CONCLUSIONS OF LAW

1. No issues of material fact exist, so this matter is ripe for summary judgment.
2. The Live Seminars are not tangible forms of the On-Demand Seminars; on that basis, the On-Demand Seminars are not exempt under Wis. Stat. § 77.54(50).
3. The true objective of the purchasers of the On-Demand Seminars is to obtain the educational service provided, not merely to obtain a digital good.

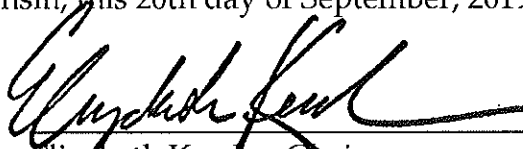
4. The sale of the On-Demand seminars is the sale of a service, with the digital good being incidental to the performed service.

5. The sales of the On-Demand Seminars are exempt under the True Objective Test.

ORDER

The Petitioner's Motion for Summary Judgment is granted, and the Department's Motion for Summary judgment is denied.

Dated at Madison, Wisconsin, this 20th day of September, 2019.


Elizabeth Kessler, Chair


Lorna Hemp Boll, Commissioner


David L. Coon, 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. Alternately, 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 Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, 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 <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.