STATE OF WISCONSIN

TAX APPEALS COMMISSION

BUCYRUS INTERNATIONAL, INC., **DOCKET NO. 08-M-187 (P-I)**

Petitioner,

vs. **RULING AND ORDER**

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

THOMAS J. MCADAMS, COMMISSIONER:

This case comes before the Commission on the parties' cross-motions for summary judgment. The Petitioner, Bucyrus International, Inc., (generally referred to as "Bucyrus" herein), is represented by Attorney Joseph A. Pickart, Attorney Ross A. Anderson, and Attorney Jennifer H. Jin of the law firm of Whyte Hirschboeck Dudek of Milwaukee, Wisconsin, and has moved for complete summary judgment. The Respondent, the Wisconsin Department of Revenue (also referred to in this opinion as "the Department"), is represented by Attorney John R. Evans of Madison, Wisconsin, and has moved for partial summary judgment. Both parties have filed briefs, affidavits, and exhibits. The issue in the case is the application of a settlement agreement the parties reached in 2006 to an assessment the Department issued to the Petitioner in 2008.

Having considered the record before it in its entirety, the Commission finds, concludes, rules, and orders as follows:

FINDINGS OF FACT[1]

A. Jurisdictional Facts

1. On June 30, 2008, the Department issued a Notice of Personal Property Assessment to Bucyrus for DOR Account 000017280 for the buildings on the property at issue defined by the parties as "South of Rawson" (or "The Facility"). The assessment listed the following information:

Machinery & Equipment	$3,245,400
Furniture & Fixtures	$4,421,700
All Other	$12,155,700
Buildings on Leased Land	$5,100,500
Total	$24,923,300

Second Affidavit of Adam Tooke, Exhibit 1, p. A-1.

2. On August 28, 2008 Bucyrus filed a PA-131 Form of Objection to Personal Property Assessment with the State Board of Assessors ("the Board"). Bucyrus's required estimates of what full value should be included the following:

Machinery & Equipment	$3,245,400
Furniture & Fixtures	$4,159,488
All Other	$536,205
Buildings on Leased Land	$0.00
Total	$7,941,100

Second Affidavit of Adam Tooke, Exhibit 1, p. A-2.

[1] The findings of fact are taken from the affidavits, exhibits, and depositions with edits for clarity and punctuation. We also incorporate by reference into this section the portions of the affidavits quoted in the body of the Discussion section below relating to the square footage clause.

3. Along with the August 28 filing, Attorney Pickart sent a letter to the Department indicating that he was authorized to act as an agent on behalf of Bucyrus and the property owner for the assessments identified as 77-40-282-R-002400, 77-40-282-R-002700, and 77-40-282-P-000460. The Agent Authorization Form was signed by Mr. John F. Bosbous as the Treasurer for Bucyrus. Affidavit of Adam Tooke, Exhibit 1, attachment to Mr. Tooke's Report to the Board.

4. The Board issued a Notice of Determination to Bucyrus on November 18, 2008 denying the objection Bucyrus filed with the Board on August 28, 2008. The Board's report stated that the 2006 stipulation between the parties is not controlling or binding with respect to the personal property assessment for Bucyrus. Second Affidavit of Adam Tooke, Exhibit 1.

5. The Petitioner filed a timely Petition for review at the Commission on November 24, 2008.

B. Material Facts

1. Bucyrus filed an appeal of its 2005 manufacturing property assessment for the two parcels at South of Rawson with the Board[2] that was resolved in March, 2006 by way of a written agreement that provided in relevant part as follows:

> Upon execution of this agreement by both Bucyrus International, Inc. ("Bucyrus") and the Department of Revenue ("DOR"), Bucyrus hereby consents to the immediate withdrawal of the above-referenced appeals. By

[2] The Board is an investigatory arm of the Department and its members are appointed by the Secretary of Revenue. In order to take an appeal to this Commission in a manufacturing property assessment case, the taxpayer must be "aggrieved by the Board's determination." *See*, Wis. Stat. §§ 70.995(8) and 73.01(5)(a).

> signing this letter, the DOR agrees that in the absence of any sale of the subject properties or increases in the subject properties' overall square footage or finished area, resulting from new construction or remodeling, the total full market value assessments of the subject properties will be as set below until the next field audit in 2009.

The agreement was written on Bucyrus' letterhead and signed by its Manager of Taxes as well as by its Chief Financial Officer. The Section Chief of the Manufacturing and Utilities Section signed for the Department. Affidavit of John F. Bosbous (Bucyrus' Treasurer), Exhibit B, attached to Petitioner's August 28, 2009 Brief.

2. In 2006, Bucyrus razed a portion of the Assembly Building/Weld Shop. There was no new construction during 2006. In 2007, Bucyrus razed square footage in the Machine Shop Complex, the OEM[3] Warehouse, and the Scale House. Also, during 2007, a new OEM Warehouse addition and a new Assembly Building/Weld Shop addition were constructed. Affidavit of Phillip R. Cook, ¶13.

3. On a 2008 Manufacturing Personal Property Return, Schedule Y-P, Bucyrus reported to the Department expenditures of $33,452,119 for leasehold improvements, and $11,617,559 for buildings on leased land. Second Affidavit of Adam Tooke, Exhibit 1, Mr. Tooke's November 11, 2008 Report to the Board, p. 2.

4. In addition to the personal property assessment at issue in this appeal, the Department also issued a manufacturing property assessment of $6,685,000 consistent with the agreement described in Material Fact #1 to One Liberty Properties,

[3] Bucyrus's 2004 Annual Report states that "OEM" refers to "original equipment products." Affidavit of John R. Evans, Exhibit BB, p. 55.

Inc., ("OLP") for DOR parcel 000005518 and $115,000 for DOR parcel 000005519 on June 30, 2008. Second Affidavit of Adam Tooke, Exhibit 1, pp. A-10 and A-11.

5. Bucyrus is a world leader in the manufacturing of mining equipment and has been located at the site in the City of South Milwaukee since 1893. In 2002, Bucyrus sold the site to Insite South Milwaukee, LLC, ("Insite") and immediately leased the facility back from Insite. In 2004, Insite sold the facility to OLP, assigning its rights as the landlord under an industrial lease agreement to OLP. OLP is a managed real estate investment trust which owns and manages a portfolio of properties under long-term leases. Bosbous Affidavit, ¶¶3, 4, and 5.

6. Under the terms of the industrial lease agreement, Bucyrus is the sole tenant and is responsible for paying all of the taxes. Bucyrus is also responsible for maintaining the facility and for constructing, renovating or demolishing any buildings located on the facility. Bucyrus must obtain consent from OLP for any alterations, additions, or improvements to the facility that cost more than $250,000. The initial lease term is 20 years, and Bucyrus thereafter has the right under Section 2.06(a) of the lease to extend the lease for up to five periods of five years each. At the end of the lease term, Bucyrus must surrender the facility in a "broom clean" condition to OLP. Any improvements made by Bucyrus to the facility then become the property of OLP, which, under the lease, has the option of requesting that any improvements made by Bucyrus be removed by Bucyrus. The total annual rent is $1,125,000 for the first 15 years of the lease. Bosbous Affidavit, ¶7 and Exhibit A.

7. A newspaper article about the building and renovation project appeared in the Business Section of the *Milwaukee Journal Sentinel* on January 11, 2005. The first four paragraphs appearing under the bold headline "Bucyrus to beef up local plant" stated as follows:

> Bucyrus International, Inc. has decided to expand its South Milwaukee operations, rather than opening a plant in another city, the company said Monday.
>
> The expansion will create about 100 jobs this year, the mining-equipment maker said. Some of the plant positions, such as welding and machinist work, pay more than $55,000 a year.
>
> The expansion will begin soon and probably continue into 2006, said Kent Henschen, company marketing director.
>
> "It's actually going to start very quickly, but it's going to be a ramp-up," he said. Some of the timing will depend on how quickly the company can add machinery, employees and make changes to its century-old plant on Milwaukee Ave.

A copy of the article was found in the Department's file. [Petitioner's August 28, 2009 Brief, Affidavit of Attorney Joseph A. Pickart, Exhibit A, photocopy of newspaper article written by Reporter Rick Barrett.]

8. Mr. Phillip R. Cook, a Manager at American Appraisal Associates, Inc., performed a square footage analysis for the Petitioners of the demolition and the construction at the South of Rawson Facility to determine the net increase or decrease in the square footage of the facility between 2006 and 2009, including an analysis of the square footage finished for each year, i.e., January 1 of 2007, 2008, and 2009. According

to Mr. Cook, a certified appraiser in Wisconsin and an Associate Member of the Appraisal Institute, Bucyrus razed a total of 185,824 square feet and completed new construction totaling 79,439 square feet in accordance with the construction plans. The completion of the construction plan resulted in a decrease in overall square footage from 947,428 square feet to 841,043 square feet. Affidavit of Mr. Phillip R. Cook (the "Cook Affidavit"), ¶¶7, 9, and 11.

9. Mr. Cook also analyzed the change in finished area based on the Department's anticipated definition of the term. Of the 185,824 square feet demolished over the course of the construction, 25,203 square feet would qualify as finished area. As of January, 2008, 23,095 square feet of finished property had been constructed. Cook Affidavit, ¶15.

10. Mr. Adam Tooke, an Advanced Property Assessment specialist with the Department and a certified appraiser, did a "brief observation" of the properties in May, 2007 and tours of the properties in April, 2008 and August, 2009. In addition, Mr. Tooke has reviewed the records of the Department and made estimates based upon scaled drawings and concluded that a total of 23,000 square feet of finished area was constructed as of January 1, 2008 and that a total of 15,800 square feet was demolished as of January 1, 2008. Third Affidavit of Mr. Adam Tooke, ¶6.

11. In February 2009, OLP offered to sell the South of Rawson Facility to Bucyrus for $14,060,000. Bucyrus rejected OLP's offer and made a counter-offer to

purchase the facility for $12,500,000, which OLP rejected in March, 2009. Bosbous Affidavit, ¶10.

RELEVANT STATUTES

> **70.03 Definition of real property.**
>
> "Real property", "real estate" and "land", when used in chs. 70 to 76, 78 and 79, include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto, except that for the purpose of time-share property, as defined in s. 707.02 (32), real property does not include recurrent exclusive use and occupancy on a periodic basis or other rights, including, but not limited to, membership rights, vacation services and club memberships.
>
> **70.04 Definition of personal property.**
>
> The term "personal property", as used in chs. 70 to 79, shall include all goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term "real property", as defined in s. 70.03.

Wis. Stat. §§ 70.03 and 70.04 (2005-06).

STANDARDS OF REVIEW

A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). A material fact is one that would influence the outcome of the controversy. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶21, 291 Wis. 2d 393, 717 N.W.2d 58. The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;

the requirement is that there be no *genuine* issue of *material* fact." *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). An issue of fact is genuine if a reasonable jury could find for the nonmoving party. *Id.* In our review of a summary judgment motion, we are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. *Id.* Any reasonable doubts as to the existence of a factual issue must be resolved against the moving party. *Maynard v. Port Publ'ns., Inc.*, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

DISCUSSION

The issue in this case is the application of the settlement agreement the parties reached in 2006 concerning the Petitioner's manufacturing property tax appeal from 2005. The settlement was intended to cover the manufacturing property assessment for the parcels of land at issue in South Milwaukee, Wisconsin from 2006 through 2009, subject to certain enumerated exceptions.[4] Four months after the agreement was signed, however, the Petitioner began demolition, eventually constructing several new buildings on the site costing tens of millions of dollars on the portion of the facility that is south of Rawson Avenue.[5] In 2008, the Petitioner reported the new buildings on the personal property tax return that manufacturers are required to file with the State of Wisconsin. In response to this reporting, the Department issued

[4] Wis. Stat. § 70.995(7) (b) requires the Department to complete a field investigation or on-site appraisal of all manufacturing property in the state every 5 years.

[5] Rawson Avenue is an arterial street which runs east and west across Milwaukee County. The address of the properties at issue in this case, though, is on Milwaukee Avenue in South Milwaukee. Industrial Lease Agreement § 1.03. The manufacturing property facility consists of two tax parcels identified by computer numbers 77-40-282-R-002400 and 77-40-282-R-002700.

a *personal property* assessment for the buildings the Petitioner listed on the form.[6] The Petitioner argues that the 2006 agreement bars the assessment and the Department argues that it does not. After reviewing the "four corners" of the written agreement, we agree with the Petitioner that the 2006 written agreement bars the separate personal property assessment. After examining the materials submitted on the summary judgment motion, however, we also agree with the Department that the facts concerning whether the new construction increased the finished area are in dispute. We therefore deny the Petitioner's motion for full summary judgment and the Department's motion for partial summary judgment. However, we agree with the Petitioner that the Department may not assess the property at issue as personal property, and therefore grant partial summary judgment to the Petitioner as to that issue.

A. RELEVANT FACTS

This case has its origins in the dispute over the Petitioner's 2005 manufacturing property assessment. The Petitioner disputed that assessment to the Board, and, in March of 2006, the Petitioner came to an agreement with the Board which set the assessment for the property until the January 1, 2010 assessment.[7] The second paragraph of the parties' 2006 written agreement reads as follows:

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[6] The mill rate in this case for a personal property assessment and a manufacturing property assessment is the same. Petitioner's Brief Opposing Department's Motion for Summary Judgment, Exhibit 2 (December 18, 2008 Deposition of Mr. William Wardwell, p.26).

[7] The entire agreement consists of a single page of text and provides no definitions or cross-references to assist in defining or interpreting its terms.

> Upon execution of this agreement by both Bucyrus International, Inc. ("Bucyrus") and the Department of Revenue ("DOR"), Bucyrus hereby consents to the immediate withdrawal of the above-referenced appeals. By signing this letter, the DOR agrees that **in the absence of any sale of the subject properties or increases in the subject properties' overall square footage or finished area, resulting from new construction or remodeling,** the total full market value assessments of the subject properties will be as set below until the next field audit in 2009.

[emphasis added].

The negotiated assessed value for each year was $6,800,000, consisting of $1,361,000 in land and $5,439,000 in improvements. The agreement was signed by Bucyrus' Chief Financial Officer on February 3, 2006 and by the Department's Manufacturing & Utilities Section Chief on March 20, 2006.[8] The Department applied these assessment values in both 2006 and 2007 and those years are not at issue in this appeal.

Beginning in 2006, however, Bucyrus embarked on an ambitious construction project to renovate and replace many of the buildings located at its South of Rawson Facility. On January 1, 2006, the South of Rawson Facility had 947,428 square feet and was comprised of multiple buildings. In accordance with their building plans, Bucyrus razed a total of 185,824 square feet and completed new construction with a total of 79,439 square feet. Thus, as Bucyrus argues, the construction plan resulted in a decrease in square footage from 947,428 square feet to 841,043 square feet. It is not clear from this record if anyone from the Department was aware of these plans when it signed the agreement in March, 2006. It is not clear if there was any discussion

[8] The agreement is printed on Bucyrus' letterhead.

between the parties about the plans. A January 11, 2005 newspaper article in the *Milwaukee Journal Sentinel* about the project was later found in the Department's file.[9]

In 2008, the Petitioner reported the new buildings on a self-assessment form pursuant to Wis. Stat. § 70.995(12). The Petitioner listed $33,452,119 for leasehold improvements and $11,617,559 for buildings on leased land. On June 30, 2008 the Department issued a *personal property* assessment to Bucyrus based on a valuation totaling $24,923,300. The combination of Bucyrus' real property and personal property assessment of the buildings added by Bucyrus in 2007 resulted in an overall assessment of the land and buildings at the South of Rawson Facility of $23,856,202, consisting of $1,361,000 in land and $22,495,202 in improvements.[10] The question we now have before us is if the 2006 written agreement concerning the manufacturing property assessment bars the 2008 personal property tax assessment for the buildings.

B. THE PETITIONER'S ARGUMENTS

The Petitioner states that its appeal has two prongs. First, Bucyrus argues that the Department is bound by the negotiated assessed values for 2006 through 2009 reached in its agreement settling Bucyrus' appeal of the 2005 assessment. The second prong is that if the 2006 agreement does not control, the 2008 assessment is excessive.[11]

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[9] The record does not reveal who read the article or when the article may have been read.

[10] This figure excludes the remainder of the personal property assessment that is not in issue with either Motion for Summary Judgment.

[11] The Petitioner's brief states that Bucyrus rejected an offer by OLP to sell the property to Bucyrus for $14,060,000 in 2009. Given our decision on the motions, we do not reach the second prong of the argument.

As to the first prong, the Petitioner argues that the 2006 agreement remained in effect because no "triggering event" occurred. Further, the Petitioner argues that assessing buildings affixed to the land as personal property is contrary to the Department's own *Property Assessment Manual*.[12] Bucyrus seeks a reduction of the 2008 personal property assessment of $17,056,202 and a refund of the excess tax it paid as a result of the 2008 assessment.[13] Petitioner's Motion for Summary Judgment at 1.

C. THE DEPARTMENT'S ARGUMENTS

The Department's first response is that the Petitioner is not entitled to summary judgment because the Petitioner is addressing property not part of the settlement. The Department contends that the land is owned by OLP and the personal property at issue here is owned by Bucyrus. The Department's second point is that the Petitioner increased its finished area in contradiction to the terms of the settlement and, therefore, the agreement is void.

D. ENTITLEMENT TO JUDGMENT

The first part of the summary judgment equation is whether or not one of the parties is entitled to judgment as a matter of law. The requisite standard from the

[12] The importance of the *Property Assessment Manual* can be explained briefly. The assessor's valuation is presumed to be correct. *State ex. rel. Brighton Square Co. v. City of Madison,* 178 Wis. 2d 577, 504 N.W.2d 436 (Ct. App. 1993). The method of valuation, however, must be in accord with the statutes**.** *Id.* The presumption of correctness does not apply to an assessment that did not apply the principles of the *Property Assessment Manual*. *Adams Outdoor Adver., Ltd. v. City of Madison*, 2006 WI 104, ¶56, 294 Wis. 2d 441, 717 N.W.2d 803. While the *Property Assessment Manual* is authoritative under Wis. Stat. § 70.32(1), there are limits to its authority. The *Property Assessment Manual* must conform to, rather than establish, Wisconsin law. *Doneff v. Review Board of Two Rivers*, 184 Wis. 2d 203, 217, 516 N.W.2d 383 (1994). In this case, both parties refer to the *Property Assessment Manual* in their briefs, but we view this case primarily as a matter of construing the written agreement.

[13] The record at this point in the case does not establish what the amount of the tax is.

case law is that a moving party must prove its right to judgment so clearly as to leave no room for controversy. *Kraemer Bros. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 278 N.W.2d 857 (1979). The first part of this section will examine what our role is in the context of settlement agreements. The second part of this section will summarize the cases where we have construed settlement agreements. Finally, we will show why the Petitioner is correct that the settlement agreement is binding.

The Tax Appeals Commission is a body created by statute. In Wisconsin, administrative boards and commissions have no inherent common law authority and their powers are limited to the statute conferring such powers expressly and to those powers that are "fairly implied." *Nekoosa-Edwards Paper Co. v. Public Service Comm'n.*, 8 Wis. 2d 582, 593, 99 N.W.2d 821, 827 (1959); *Village of Silver Lake v. Dep't of Revenue*, 87 Wis. 2d 463, 275 N.W.2d 119 (1978). It is the general rule that an agency or board created by the legislature only has the powers which are either expressly conferred therein or those powers that are necessarily implied from the four corners of the statute under which the agency or board operates. *Racine Fire and Police Comm'n. v. Stanfield*, 70 Wis.2d 395, 399, 234 N.W.2d 307, 309 (1975). The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. *Id.*

The Commission's responsibilities are set forth in chapter 73 of the Wisconsin statutes. The Commission's main responsibility is to decide questions of law and fact concerning statutory assessments. Both Wis. Stat. § 73.01(4) and the case law

plainly establish that the Commission is the final authority on all the facts and questions of law regarding the tax code. *Dep't of Revenue v. Menasha Corporation*, 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 275 (2008).[14] According to the Wisconsin Supreme Court, in addition to being designated the final authority on all questions of law involving taxes, the Commission has generated and employed its substantial experience discharging its duty in construing the rules governing the taxability of tangible property. *Id.*

On numerous occasions, the Commission has been called upon to construe and apply statutes and regulations. *See, generally*, *Manpower v. Dep't of Revenue*, Wis. Tax Rptr. (CCH), ¶401-223 (WTAC 2009); *Milwaukee Symphony Orchestra v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶400-959 (WTAC 2006); *Xerox v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-999 (WTAC 2007); *Menasha Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-719 (WTAC 2003).[15] In addition to our role in interpreting statutes and regulations, the Commission is frequently called upon to construe wills, trusts and settlement agreements to determine the tax implications of private transactions. *Gilson v. Dep't. of Revenue*, 246 Wis. 2d 669, 630 N.W.2d 275 (Ct. App. 2001). This case requires us to construe a written agreement between a taxpayer and the Department.

[14] Commission decisions are, of course, subject to judicial review.

[15] The Commission's decision was ultimately upheld by the Wisconsin Supreme Court. *Menasha Corp. v. Dep't. of Revenue,* 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95. The Wisconsin Court of Appeals also affirmed the Commission in *Milwaukee Symphony v. Dep't. of Revenue*, 2009 WI App 69, 318 Wis. 2d 261, 767 N.W.2d 360 and *Xerox Corp. v. Dep't. of Revenue*, 2009 WI App 113, 321 Wis. 2d 181, 772 N.W.2d 677.

Both the Wisconsin courts and the Commission have stated that a settlement agreement is treated like a contract. More than 100 years ago, the Wisconsin Supreme Court stated in *Illinois Steel Co. v. Warras,* 141 Wis. 119, 123 N.W. 656 (1909)[16] the rule that where a settlement stipulation is in all essential characteristics a mutual contract by which each party grants to the other a concession of some rights as a consideration for those secured, the settlement stipulation is entitled to all of the sanctity of any other contract and the courts will follow general contract law principles in interpreting the agreement. The same rule has been applied in the taxation context. In *Dep't. of Revenue v. U.S. Shoe Corp.,* 158 Wis. 2d 123, 462 N.W.2d 233 (Ct. App. 1990), the issue before the Wisconsin Court of Appeals was whether or not a 1984 closing agreement between a taxpayer and the Department to compromise the taxpayer's franchise tax liability for 1978 through 1983 also settled the taxpayer's liability for an assessment issued in 1980 for 1976 and 1977. The Department argued before the Court of Appeals that the closing agreement was ambiguous and offered evidence that the signers were unaware of the existence of the 1980 assessment. The circuit court had affirmed the Commission's disposition of the summary judgment motions but reversed the Commission's decision and order as to U.S. Shoe's franchise tax liability for fiscal years 1976 and 1977 and reinstated the Department's 1980 additional assessment. The specific language in the agreement was as follows:

[16] *Illinois Steel Co.* was an ejectment action to recover certain property on Jones Island. The attorneys for the parties had entered into a stipulation related to procedural matters.

> It is further stipulated that this agreement and the payment of the above additional taxes shall serve as a final disposition of the taxpayer's franchise tax liability up through and including the year ended January 31, 1983.

After reviewing the writing, the Court of Appeals agreed with the taxpayer that the language quoted above unambiguously supported the taxpayer's position. However, the Court went on to state that using contract law principles, the meaning of a particular provision in a contract is to be determined by looking at the whole contract, citing *Crown Life Ins. Co. v. LaBonte*, 111 Wis.2d 26, 36, 330 N.W.2d 201, 206 (1983). Using contract law principles, the Court of Appeals held that the agreement when construed as a whole was intended to apply only to the 1984 assessment for 1978-83. Thus, the Department prevailed.

The federal courts have applied similar rules to agreements between taxpayers and the IRS.[17] The Fifth Circuit has stated that an agreement compromising unpaid taxes is a contract and, consequently, that it is governed by the rules applicable to contracts generally. *Walker v. Alamo Foods Co.*, 16 F.2d 694 (5th Cir. 1962). Just as in Wisconsin, the cardinal rule of contract construction in the federal courts is to ascertain the intention of the contracting parties and to give effect to that intent if it can be done consistently with legal principles. *Jacksonville Terminal Co. v. Railway Express Agency*, 296 F.2d 256, 259 (5th Cir. 1962). Offers in compromise are governed by "general principles

[17] As early as 1831, the Treasury Department was authorized to compromise tax liabilities. Robert E. Meldman and Richard J. Sideman, Federal Taxation---Practice and Procedure ¶1331 (5th ed. 1998). According to another commentator, there are two devices used in the federal system as a means of resolving issues of tax liability: one is the closing agreement and the other is the offer in compromise. Michael I. Saltzman, IRS Practice and Procedure § 9.09 (2d ed. 1991).

of contract law." *Id.* An interpretation that gives a reasonable meaning to all parts of a contract will be preferred to one that leaves portions of the contract meaningless. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983).

Our review of federal cases indicates a substantial body of case law where a breach is alleged in a tax agreement. Cases in which courts have found offers in compromise materially breached generally involve taxpayers who either fail to make payments agreed to in the offer in compromise, or taxpayers who fail to pay taxes owed during the 5-year period after the offer has been accepted. *See, United States v. Feinberg,* 372 F.2d 352, 356 (3rd Cir. 1965) (decedent's installment payments of less than the amount due and the estate's complete failure to make payments on the offer constituted a material breach of the offer in compromise); *United States v. Lane,* 303 F.2d 1, 3-4 (5th Cir. 1962) (taxpayer's failure to comply with terms of collateral agreement by refusing to file annual statements and pay additional money constituted a breach of the offer in compromise); *Roberts v. United States,* 225 F.Supp.2d 1138, 1148 (E. D. Mo. 2001) (taxpayer's delay in paying his 1995 tax liability of $246,354 was a material breach of the offer in compromise).

A review of these cases shows that there are several principles followed in construing settlement agreements. First, like statutes, agreements can be ambiguous or unambiguous. A contract is ambiguous if it reasonably can be read more than one

way.[18] *Hull v. State Farm Mut. Auto Ins. Co.*, 222 Wis. 2d 627, 586 N.W.2d 863 (1998). Second, the purpose of contract construction is to ascertain the intent of the parties and the primary source of information in doing so is the language of the agreement itself. *In Matter of Estate of Alexander*, 75 Wis. 2d 168, 248 N.W.2d 475 (1977). Third, it is a cardinal rule of contract construction that the meaning of a particular provision in a contract is to be ascertained with reference to the contract as a whole, and the court should avoid a construction that would render any portion meaningless. *Crown Life Ins. Co.*, 111 Wis. 2d at 36.

The Commission has also used these principles. First, in *W.R. Grace Co v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-037 (WTAC 1989), the Commission construed a closing agreement similar to the closing agreement at issue in *U.S. Shoe.* In *W.R. Grace*, a manufacturer challenged before the Commission a closing agreement prepared by the Department. The second paragraph of the closing agreement stated that "this agreement... shall serve as a final disposition of the taxpayer's franchise tax liability up through and including the year 1980." Relying on general contract law principles, the Commission noted that the primary purpose of contract construction is to ascertain the intent of the parties and the primary source of information in doing so is

[18] The Department posits that this agreement is not ambiguous and that the contract is clear on its face as only addressing the two real estate parcels, so no construction is necessary. The Department however, precedes that statement by noting that construction must favor the government when entered on behalf of the public, as this settlement was as part of the governmental mandate of fair taxation for all citizens. Respondent's Brief at 3. The Department cites 17A Am. Jur.2d, Contracts ¶406 for that proposition, but our review of the cases cited in the annotation showed that none of the cases involves taxation. It appears from our research that no court or commission in Wisconsin has used this as a rule of construction in a tax case.

the language of the agreement itself. The Commission quoted from the circuit court opinion[19] in *U.S. Shoe* at length and, in particular, one section where the circuit court pointed out the taxpayer's interest in "finality that could be relied upon."[20] The Commission went on to write that parol evidence, while not admissible to vary the terms of an unambiguous contract, is admissible to show the context of the agreement, citing *In re Spring Valley Meats, Inc.*, 94 Wis. 2d 600, 607, 288 N.W.2d 852 (1980). The Commission wrote that the evidence of the context of the agreement did not support the Petitioner's claim of intent to settle the assessment in the closing agreement. Thus, the Commission determined that the agreement disposed only of the second tax period, from 1976 through 1980, and that tax year 1975 was still open.

In *Lyndon Ins. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-127 (WTAC 1995), the Commission also examined a settlement agreement. In that case, the issue was if a settlement agreement that was used to determine refund claims for 1981—1983 constituted an agreement that the taxpayer could use "weighted average"

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[19] *U.S. Shoe v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶203-039, Case Nos. 88CV0414 and 88CV0491 (Dane Co. Cir. Ct., February 28, 1989).

[20] Finality has been an important concern with closing agreements in the federal system. According to one observer, the closing agreement procedure has been included in the internal revenue laws since 1921. Prior to that time, it was common practice to reopen returns examined by field agents whenever an error was suspected or a new administrative position was taken. Harold Dubroff, *The United States Tax Court: An Historical Analysis,* 40 Alb. L. Rev. 253 (1975). A closing agreement was a means of ensuring finality. With respect to the 1921 law change, the Senate Finance Committee report said:

> Under the present method of procedure, a taxpayer never knows when he is through as a tax case may be opened at any time because of a change in ruling by the Treasury Department. It is believed that this provision will tend to promote expedition in the handling of tax cases and certainty in tax adjustments.

S. Rep. No. 275, 67th Cong., 1st Sess. (1921), reprinted in 1939-1 (Part 2) CB 204. Finality works both ways. Even if the United States Supreme Court declares a provision unconstitutional after an agreement has been entered, the agreement stands. *Wolverine Petroleum Corp. v. Comm'r*, 75 F.2d 593 (8th Cir.), *cert. denied,* 282 U.S. 887 (1930).

apportionment percentages when determining revised refund claims. After reviewing the "four corners," the Commission said there was no basis for concluding that an agreement of the parties to a weighted average apportionment could be found from the settlement stipulation entered into in the first appeal, because this alleged agreement was not set forth in the written terms of the settlement agreement. In explaining its reasoning, the Commission quoted with approval a passage written in an unrelated case by the United States Tax Court:

> We emphasize that it is each party's responsibility to negotiate a written settlement that accurately reflects each aspect of each adjustment in dispute. To the extent the written settlement does not clearly address certain aspects of the adjustments in question, the Court will not be inclined to insert such terms into the written settlement or to otherwise speculate as to the agreement of the parties.

Alan H. Applestein v. Commissioner, 56 T.C.M. (CCH) 1169, 1170-71 (1989).

The Commission stated in *Lyndon Ins.* that the "four corners" of the settlement and companion schedules simply did not reflect any agreement on apportionment weighting indicating a meeting of the minds. Thus, the Commission declined to reform or recast the agreement.

We note several facts here that lead us to the conclusion that the Petitioner is correct and entitled to judgment as to the applicability of the agreement.[21] First,

[21] We do not hold that buildings may never be assessed as personal property. *See, e.g., Dallas Central Appraisal District v. Mission Aire IV, L.P.*, 279 S.W.3d 471 (2009) (tenants properly assessed under Texas law for buildings they built on leased governmental property). Wis. Stat. § 70.17(1) provides that improvements on leased lands may be assessed either as real property or as personal property. In this case, however, we hold that the language of the written agreement, particularly the square footage clause, controls.

while not perhaps a model of clarity in terms of its ability to forecast what took place here, neither party argues that the agreement is ambiguous as to whether the buildings are included in its terms. When the terms of a contract are unambiguous, the contract or agreement is construed as it stands without examining extrinsic evidence to determine the intent of the parties. *Rosplock v. Rosplock*, 217 Wis. 2d 22, 31, 577 N.W.2d 32 (Ct. App. 1998). The written agreement was intended to cover the manufacturing property at South of Rawson, including land and buildings. Looking to the agreement as a whole to ascertain the intent of the parties, the clear goal was to resolve the original dispute as to the manufacturing property at South of Rawson, including land and buildings. Second, the written agreement in its "four corners" has a formula for voiding or adjusting the assessment, indicating to us the parties' intent that change was contemplated, or at least allowed for. That the scope and breadth of the new construction exceeded the Department's target expectations does not by itself void or vitiate the underlying agreement.[22] Third, under the Department's interpretation, the possibility of overlap and double assessment exists. According to the map of the property, some of the newly constructed square footage appears physically to have replaced old square footage. The Department has not explained to our satisfaction how both of these assessments can stand simultaneously. In hindsight, this agreement may not have worked out well for the Respondent, but it is binding for the year at issue. The

[22] A mistake of fact or law, whether unilateral or mutual, no matter how material, is not a misrepresentation. *Cramp Shipbuilding Co.*, 14 TC 33 (1950).

Department has not urged upon the Commission that there was fraud or misrepresentation.[23]

The Department offers two main arguments in support of its position and we will discuss each in turn.[24] First, the Department argues that the Petitioner is not entitled to summary judgment because the Petitioner is addressing property not part of the settlement. The Department points out that the settlement addresses property identified by particular computer parcel numbers. Those parcels contain both raw land and land improvements. The property covered in the agreement is owned not by Bucyrus, but by OLP. The Department notes that the Petitioner reported the buildings as personal property on a 2008 Form M-P that was filed with the Department. The Department argues that the property at issue here is "legally foreign" to the parcels settled for 2005. In brief, the argument is that this new property falls outside the agreement.

The first problem with the Department's position, however, is the presence of the agreement's "triggering events" clause which specifically refers to "the subject properties' overall square footage or finished area, resulting from new

[23] The deposition of the board member who signed the March 20, 2006 agreement is part of the record for this motion. However, that board member testified at his deposition that he did not participate directly in the negotiations. (Deposition of Mr. William Wardwell, p.18, lines 22-25). No affidavit was submitted from the representative of Bucyrus who negotiated the settlement. Thus, even if we were inclined or requested to look outside the four corners of the agreement, there is no relevant additional evidence for us to consider regarding the parties' intent.

[24] The Department also argues in one section of its brief that the Petitioner appears to be depreciating the buildings and this provides indicia of Bucyrus' ownership. Nothing in the settlement agreement, however, prohibits this.

construction or remodeling . . . ." The second problem is that these new buildings are located in essentially the same spots as the old buildings. Also, we give little weight to the fact that the Petitioner reported the buildings on a Form M-P. As the Board member who signed the agreement acknowledged in his deposition, the Form M-P was the only place the Petitioner could report the buildings to the Department, as required.[25]

The Department's other major argument concerns whether the new buildings belong to Bucyrus or to OLP. In its brief, the Department cites a Wisconsin Supreme Court case for the proposition that improvements are the lessee's property. In the Department's view, this indicates that the new buildings Bucyrus constructed are personal property and appropriately assessed here by the Department as such. We will discuss this case below.

The Wisconsin Supreme Court has stated that a tenant's tangible personal property affixed to rented land "for a temporary purpose" generally retains its character as tangible personal property. *State ex rel. Hanson Storage Co. v. Bodden*, *Tax Com'r.*, 166 Wis. 219, 164 N.W.2d 1009, 1011 (1917). As discussed by the Department, *Hanson Storage* involved a real property assessment issued against a tenant that held a 5-year lease on certain real estate and built a warehouse on the leased property. After construing the lease, the Supreme Court said that the general rule was that a tenant could remove improvements provided the tenant left the premises in as good of a

[25] A taxpayer's failure to submit to the Department the standard manufacturing report form makes the assessment of which the taxpayer complains final and conclusive; therefore, this Commission lacks jurisdiction as well to hear the merits of the taxpayer's Form of Objection. *Du-Well Mfg. Co. v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶202-021 (WTAC 1982).

condition as when the tenant received the premises. Given that, a building affixed to rented real property for "a temporary purpose" retained its character as personal property. *Id.* Thus, the Supreme Court affirmed the circuit court's decision that the building should have been assessed as the tenant's personal property.

The Commission considered a similar issue in *All City Communication Co., Inc., and Waukesha Tower Assoc. v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶400-561 (WTAC 2001). In that case, we held that a real property tenant's lease of a position on its commercial communications tower, along with space in a related equipment building, to a paging company that used the tower and building to install, operate, and maintain equipment for its paging business was subject to Wisconsin sales tax. The Commission's reasoning was that the tower and building were temporary tenant improvements that were leased out as tangible personal property rather than as a real property improvement.[26] Therefore, the payments received by the tenant from the paging company for the use of the building and tower were taxable as payments for the lease of tangible personal property.[27]

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[26] In *All City*, the Commission stated that Wisconsin has employed a longstanding test to determine whether property was "personal property" or "real estate." *See Taylor v. Collins,* 51 Wis. 123, 127, 8 N.W. 22 (1881). The common law test provides:

"[w]hether articles of personal property are fixtures, *i.e.,* real estate, is determined in this state by the following rules or tests: (1) Actual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold."

The test is mentioned in the briefs here, but not fully developed.

[27] The Commission's decision in *All City* was upheld by the Wisconsin Court of Appeals. *All City Communication Co., Inc. v. Dep't. of Revenue,* 263 Wis. 2d 394, 661 N.W.2d 845 (Ct. App. 2003).

We are not convinced, however, that the results in *Hanson Storage* and *All City* should control here, especially not on summary judgment. For several reasons, those cases are distinguishable from this case. First, *Hanson Storage* and *All City* involved property that was "temporary" or could be moved and that clearly was a factor in the respective rulings. The facts here indicate that the same could not be said of the more than $120 million dollars worth of manufacturing buildings involved in this project, which appear to be physically annexed to the real estate. Second, in contrast to *Hanson Storage* and *All City*, which involved relatively short term leases, the lease term here is not fixed and could run as long as 45 years. Third, unlike *Hanson Storage* and *All City*, it appears that under the lease with OLP, the Petitioner would need OLP's approval to remove the buildings at the end of the lease term. For summary judgment purposes, neither side has shown an entitlement to judgment as to this point.

In sum, the Department's interpretation of the agreement as allowing it to assess the buildings as personal property is unreasonable because it would render the agreement valueless or illusory. It would make no sense for the parties to have tied two of the three triggering events in the agreement to a potential expansion of the property if the new buildings would be assessed as personal property anyway. Under recognized rules of interpretation of contracts, where one construction would make a contract unusual and extraordinary while another equally consistent with the language used would make it reasonable, just, and fair, the latter must prevail. *Bank of Cashton v. La Crosse County Scandinavian Town Mutual Ins. Co.*, 216 Wis. 513, 518, 257 N.W. 451, 452

(1934). Simply put, on balance, the Petitioner's construction of the agreement is the more reasonable one.

E. FACTUAL DISPUTE

The second part of the summary judgment equation concerns whether or not there is a factual dispute. In order to demonstrate that the facts are in dispute as to the square footage of the finished area, we quote from the submissions at length. The affidavits of Mr. Phillip Cook submitted by the Petitioner state as follows:

> 9. In 2009, I was asked by Bucyrus to perform a square footage analysis of the demolition and the construction at the South of Rawson Facility to determine the net increase or decrease in the square footage of the facility between 2006 and 2009, including an analysis of the square footage finished for each year, i.e., January 1 of 2007, 2008 and 2009.
>
> 10. In connection with the current appraisal work, I reviewed data from American Appraisal's past appraisal as of January 1, 2005, and analyzed plats, plans, and internal documents at Bucyrus. I also reviewed computer assisted design ("CAD") drawings generated in connection with building additions. Finally, I also physically inspected the South of Rawson Facility on several occasions and, in some instances, performed actual measurements to verify the accuracy of drawings which I had been provided showing the dimensions of the buildings located at the South of Rawson Facility.
>
> 11. Beginning in 2006, Bucyrus embarked on an ambitious construction project to renovate and replace many of the buildings located as its South of Rawson Facility. On January 1, 2006, the South of Rawson Facility totaled 947,428 square feet and was comprised of multiple buildings. In accordance with the construction plans, Bucyrus razed or demolished a total of 185,824 square feet at the South of Rawson Facility and completed new construction totaling 79,349 square feet. The completion of the construction plan

> resulted in a decrease in overall square footage at the South of Rawson from 947,428 square feet to 841,043 square feet.
>
> 14. Based on my analysis, project there was no increase in square footage at the South of Rawson Facility for the entire three year construction, nor was there any increase in square footage for the construction work finished during 2006 and 2007.
>
> 15. Finally, I analyzed the change in finished area based on the Department's anticipated definition of the term. **Of the 185,824 square feet demolished over the course of the construction, 25,203 square feet would qualify as finished area. As of January 1, 2008, 23,095 square feet of finished property had been constructed.**

[emphasis added in bold].

On the other hand, the affidavits of Mr. Adam Tooke submitted by the Department state as follows:

> 2. That your affiant has personal knowledge of the above-captioned matter, properties involved in the above–captioned matter relating to the 2008 assessment ("personal properties") pursuant to the Form of Objection to Personal Property Assessment filed by Bucyrus International, Inc. ("Bucyrus"), said Report to the State Board of Assessors being attached to the Notice of Determination ("Determination"), all attached as Exhibit 1 to Affidavit of Adam Tooke.
>
> 3. That your affiant was assigned the assessment of the personal properties involved in the above captioned matter relating to the 2006 assessment and relating to the 2007 assessment, and has personal knowledge therefore; that your affiant assessed amounts of the personal properties in the 2006 assessment and the 2007 assessment, respectively, as such personal properties were reported on the 2006 Form M-P Manufacturing Property Report Form and the 2007 Form M-P, Manufacturing Property Report Form (Affidavit of...
>
> * * *

> 4. That your affiant did a brief observation of the personal properties May 14, 2007, at the time your affiant inspected other property of the petitioner; that your affiant toured the personal properties on April 28, 2008; that your affiant toured the subject properties and personal properties on August 7, 2009.
>
> 5. That your affiant reviewed the 2008 Form M-P Manufacturing Property Report Form....
>
> 6. That your affiant has reviewed the records of the Department of the "finished areas" as those records existed as of the time the 2005 settlement as that terms is used in the 2005 settlement (Affidavit Adam Tooke, Ex. 2), that the Phillip Cook Affidavit states that 25,303 square feet of finished area has been demolished as of January 1, 2008, and 23,095 square feet of finished area was constructed as of January 1, 2008; that your affiant's conclusion based upon the Department's records of the finished area and your affiant's estimates bases upon scaled drawings, is that 23,000 square feet of finished area was constructed as of January 1, 2008; and that 15,800 square feet of finished area was demolished as of January 1, 2008.
>
> 7. **That your affiant concludes that the finished area has increased** and that the 2005 settlement is not operative as of January 1, 2008, due to that increase in finished area.

[emphasis added in bold].

In this case, both parties recognize that they have different positions as to the square footage of finished area. The Petitioner, however, sets forth several legal arguments as to why we should still grant the Petitioner summary judgment. The first part of this section will set forth the applicable law to this request and then we will explain why the Department is correct that the dispute over the finished areas precludes summary judgment.

As the Petitioner points out, a party seeking summary judgment must establish a record sufficient to demonstrate that there are no issues of material fact. *Transportation Ins. Co. v. Hunzinger Const. Co.*, 170 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). According to the Petitioner, a mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. Instead, affidavits must be evidentiary in nature and must be admissible in form. *Helland v. Kurtis A. Froedert Mem'l. Lutheran Hospital*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). In particular, the Petitioner argues that Mr. Tooke's affidavit is inadmissible. The Petitioner cites *Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977), for the proposition that portions of affidavits made by persons who do not have personal knowledge or which contain allegations of ultimate facts do not meet statutory requirements and will be disregarded. Further, the Petitioner complains that while Mr. Tooke visited the property, none of his visits was for the purpose of measuring the finished area and that there is no certification that the records Mr. Tooke relied upon are accurate.

For several reasons, we reject these contentions and agree with the Department. First, what the Department has tendered in opposition is substantial. The Department's witness is a certified appraiser, as is the Petitioner's affiant. While one affiant's analysis may be more thorough than another affiant's analysis, what the Department has proffered is substantial enough to place the facts in issue and to get to a hearing. The combination of three personal visits to the facility during the relevant time

period in conjunction with the calculations the Department's appraiser made from business records of the Department is much more than conclusory remarks or speculation. Second, the Petitioner has not identified a proper basis for the affidavits from the Department's appraiser to be inadmissible. In fact, the rule that governs the admissibility of evidence before the Commission, TA 1.53, states that the Commission is not bound by the common law or the statutory rules of evidence. Only evidence that is irrelevant, immaterial or unduly repetitious is excluded by TA 1.53. The points made by the Petitioner are well taken, but they appear to go to the weight of the evidence, not its admissibility. Third, the Petitioner invites us to compare the work of the two appraisers. The Petitioner argues that we can still grant it summary judgment because its appraiser performed actual measurements. On the other hand, the Department's appraiser relied on Department documents that may or may not have been certified and submitted. On summary judgment, however, a trial court may not consider the credibility of the witnesses or the weight of the evidence. *White v. Pence,* 961 F.2d 776, 779 (8th Cir.1992). Thus, for all of these reasons, we agree with the Department that genuine issues of material fact are in dispute and that summary judgment is therefore inappropriate.

CONCLUSION

The Petitioner has demonstrated that the 2006 written agreement that is the subject of this appeal is controlling. On the other hand, the Department has shown conclusively that facts are in dispute as to whether or not the construction at the South

of Rawson facility increased the square footage of the finished area of the property. Thus, the parties' respective motions for summary judgment are denied.

ORDER

1. The Department's motion for partial summary judgment is denied.

2. The Petitioner's motion for full summary judgment is denied in part and granted in part consistent with our finding that the parties' written agreement controls this dispute.

3. The Commission will contact the parties to schedule further proceedings in this matter.

Dated at Madison, Wisconsin, this 18th day of March, 2010.

WISCONSIN TAX APPEALS COMMISSION

_____

David C. Swanson, Chairperson

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Roger W. Le Grand, Commissioner

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Thomas J. McAdams, Commissioner