STATE OF MINNESOTA

TAX COURT

COUNTY OF RAMSEY

REGULAR DIVISION

Walgreens Specialty Pharmacy, LLC,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

File No. 8902-R

Filed: October 16, 2017

This matter came before The Honorable Bradford S. Delapena, Chief Judge of the Minnesota Tax Court, on the parties' cross-motions for summary judgment.

Walter A. Pickhardt and Martin S. Chester, Faegre Baker Daniels LLP, represent appellant Walgreens Specialty Pharmacy, LLC.

Michael Goodwin and Kyle W. Wislocky, Assistant Minnesota Attorneys General, represent appellee Commissioner of Revenue.

Walgreens Specialty Pharmacy received prescription drugs from wholesalers and drug manufacturers at several pharmacies located outside of Minnesota and, after receiving doctors' prescriptions, sold and shipped the drugs from those locations to Minnesota customers. The parties dispute whether those transactions are subject to the Minnesota Legend Drug Tax, Minn. Stat. § 295.52, subd. 4(a) (2016). We grant Walgreens Specialty Pharmacy's motion for summary judgment and deny the Commissioner's motion.

The court, upon all the files, records, and proceedings herein, now makes the following:

ORDER

1. Walgreens Specialty Pharmacy's motion for summary judgment is granted.

2. The Commissioner's motion for summary judgment is denied.

IT IS SO ORDERED. THIS IS A FINAL ORDER. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT,

Bradford S. Delapena, Chief Judge
MINNESOTA TAX COURT

DATED: October 16, 2017

MEMORANDUM

I. FACTUAL BACKGROUND

This matter is here on a partial stipulation of facts. Although each party has submitted some additional matter by way of affidavit, there are no material facts in dispute.

A. The Taxpayer

Walgreens Specialty Pharmacy, LLC ("WSP"), is a single-member limited liability company organized under the laws of Delaware and headquartered in Florida.[1] During the Years at Issue (2008 through 2013),[2] WSP was a subsidiary wholly owned either directly or indirectly by Walgreen Co., a corporation organized under the laws of Illinois ("Walgreens").[3]

[1] Partial Stipulation of Facts (Stip.) ¶¶ 1-2.

[2] Unless otherwise indicated, factual statements pertain to the Years at Issue.

[3] Stip. ¶ 3; *see also id.*, ¶¶ 5-13 (explaining Walgreens' direct and indirect ownership of WSP and its predecessors, all of whom paid tax that WSP now seeks to recover).

WSP engaged in the retail specialty pharmacy business.[4] Specialty drugs are used to treat chronic, rare and/or complex medical conditions.[5] They often have special storage and handling requirements; may need to be taken on a strict schedule; and are often more expensive than other medications.[6] WSP owned and operated retail specialty pharmacies located in Carnegie, Pennsylvania; Ann Arbor, Michigan; Frisco, Texas; Beaverton, Oregon; Wilmington, Massachusetts; and Morristown, New Jersey.[7] Although none of these specialty pharmacies were located in Minnesota,[8] all were licensed by the Minnesota Board of Pharmacy to dispense drugs to Minnesota residents.[9]

B. WSP's Minnesota Contacts

During the Years at Issue, Walgreens operated between 122 and 164 retail drug stores in Minnesota,[10] and employed a Minnesota-based representative to act on behalf of WSP.[11] This representative regularly called on doctors,[12] medical practice managers, hospitals, and other referral sources to promote WSP as a source of specialty drugs, to verify delivery locations, and

---

[4] Stip. ¶ 15.

[5] Stip. ¶ 16.

[6] Stip. ¶ 17.

[7] Stip. ¶ 18. The New Jersey location closed in January 2011; the Massachusetts location in February 2012. *Id.* The Michigan location moved from Ann Arbor to Canton in November 2013. *Id.*

[8] Affidavit of Kathleen Kokoski (June 15, 2017) ¶ 3.

[9] Stip. ¶ 20. Pharmacies that dispense drugs to Minnesota residents must be licensed by the Minnesota Board of Pharmacy. Minn. Stat. § 151.19 (2016). Each of WSP's specialty pharmacies annually applied for and received a Minnesota license. Stip. ¶ 20.

[10] Stip. ¶ 4.

[11] Stip. ¶ 21.

[12] When doctors write prescriptions for patients, they are free to suggest that those prescriptions can be filled at WSP. Stip. ¶ 22.

to relay information to WSP.[13] WSP also had contracts with insurers, HMOs, and health plans in Minnesota.[14] Walgreens and WSP shared a common website.[15] WSP did not own or rent any property in Minnesota, and did not have any employees in Minnesota.[16] WSP acknowledges that it, "as an entity[,] had nexus with Minnesota" during the Years at Issue.[17]

C. WSP's Specialty Drug Purchases and Sales Generally

WSP purchased specialty drugs from wholesalers and drug manufacturers, placing orders from its locations outside of Minnesota.[18] Wholesalers and manufacturers delivered specialty drugs to WSP locations outside of Minnesota for storage in inventory.[19]

WSP sold specialty drugs only after receiving doctors' prescriptions for individual patients at one of WSP's locations outside of Minnesota.[20] WSP employees, all of whom were located outside of Minnesota, were responsible for keeping patient records including prescription histories, doctors' notes, insurance information, and HIPAA privacy releases.[21] WSP staff contacted patients and/or physicians; confirmed delivery addresses and dates; obtained and updated patient medical profiles and allergy information; explained the contents of orders; confirmed financial responsibility; collected payments (if applicable); and performed any required clinical assessments

---

[13] Stip. ¶ 21.

[14] Stip. ¶ 23.

[15] Stip. ¶ 24. The website offered customers of Walgreens and WSP, respectively, the ability to refill prescriptions. *Id.* ¶ 25.

[16] Stip. ¶¶ 39-40.

[17] Appellant's Mem. Supp. Summ. J. 3 (filed June 16, 2017).

[18] Stip. ¶ 29.

[19] Stip. ¶ 41.

[20] Stip. ¶ 42.

[21] Kokoski Aff. ¶ 8.

and data collection.[22] They also handled insurance claims and collected payments (including copayments) from patients.[23] In some cases, WSP pharmacists located outside of Minnesota provided counseling.[24]

WSP filled all prescriptions at its pharmacies outside of Minnesota.[25] WSP employees picked the specialty drugs from inventory and printed labels.[26] Its pharmacists confirmed that the correct drug was being sold in the proper quantity.[27] In all cases, WSP delivered specialty drugs to common carriers (primarily UPS and FedEx) outside of Minnesota for shipment to customers.[28] WSP did not itself make deliveries of specialty drugs to Minnesota customers.[29] Most deliveries were to the customer's home address.[30] In some cases, however, delivery was made to the office or treatment center of the treating physician, so that the physician or healthcare administrator could administer the drug.[31] Even in these situations, the sale of the specialty drug was to the customer (via a patient-specific prescription), not to the physician.[32] Any charges for the administration of the drug belonged to the physician, not WSP.[33]

---

[22] Kokoski Aff. ¶ 9.

[23] Kokoski Aff. ¶ 10.

[24] Kokoski Aff. ¶ 9.

[25] Kokoski Aff. ¶ 11.

[26] Kokoski Aff. ¶ 11.

[27] Kokoski Aff. ¶ 11.

[28] Kokoski Aff. ¶ 12.

[29] Kokoski Aff. ¶ 12.

[30] Kokoski Aff. ¶ 13.

[31] Kokoski Aff. ¶ 13.

[32] Kokoski Aff. ¶ 13.

[33] Kokoski Aff. ¶ 13.

E. WSP's Minnesota Specialty Drug Sales

In accordance with the foregoing, all specialty drugs WSP sold to Minnesota customers were filled from WSP's inventory maintained outside of Minnesota.[34] WSP filled the following number of prescriptions for Minnesota customers: 133,125 in 2011; 128,609 in 2012; and 54,968 in 2013.[35] Figures for 2008, 2009, and 2010 are not known.[36] Collectively, these Minnesota specialty drug sales are the "Transactions in Issue."

The specialty drugs WSP sold were "legend drugs" for purposes of Minnesota's Legend Drug Tax.[37] The following table shows, for the Years at Issue, the wholesale cost of legend drugs WSP sold in Minnesota (the tax base) as reported on its Minnesota Legend Drug Tax returns:[38]

Period	Amount
2008	$21,643,678
2009	$76,077,272
2010	$146,499,404
2011	$185,102,759
2012	$201,649,191
2013	$90,735,741
Total:	**$721,708,045**

In isolated instances, WSP made *wholesale* sales of specialty drugs to physicians located in Minnesota.[39] WSP had receipts (recognized on the date of delivery) from wholesale sales in the following amounts: $2,661.55 in 2008; $5,429.60 in 2009; none in 2010; $3,717.58 in 2011;

---

[34] Stip. ¶ 41.

[35] Stip. ¶ 28.

[36] Stip. ¶ 28.

[37] Stip. ¶ 47.

[38] Stip. ¶ 27.

[39] Stip. ¶ 44. Walgreens operated three retail drugstores in Minnesota that primarily sold specialty drugs during some of the Years at Issue. Stip. ¶ 43. None of the legend drugs sold by Walgreens was included in the use tax returns or refund claims filed by WSP. *Id.*

$20,075.64 in 2012; none in 2013.[40] These wholesale transactions are not included among the Transactions in Issue, and WSP does not seek refunds related to these sales.[41]

II. PROCEDURAL BACKGROUND

WSP's predecessor-entities include Medmark, Schraft's, Walgreens Specialty-Illinois, and OptionMed.[42] The parties have stipulated that WSP "is the successor in interest to Medmark, Schraft's, Walgreens Specialty-Illinois and OptionMed." [43]

Either a predecessor entity or WSP paid the two-percent Minnesota Legend Drug Tax on the wholesale cost of the legend drugs sold through the Transactions in Issue.[44] Subsequently, either the predecessor entity or WSP timely filed with the Commissioner a refund claim seeking a refund of the entire amount of the tax it had paid.[45] By means of a single order, the Commissioner denied all of the refund claims, which totaled $14,434,159.70.[46]

WSP timely appealed to this court. WSP now acknowledges that its refund claims for 2008, 2009, 2011, and 2012 must be slightly reduced.[47] Consequently, the refunds WSP claims here involve the following tax amounts:[48]

---

[40] Stip. ¶ 45.

[41] Stip. ¶ 52, 57, 63, 65.

[42] Stip. ¶¶ 5-13.

[43] Stip. ¶ 13.

[44] Stip. ¶¶ 49-51, 52-57, 58-61, 62, 64, 66.

[45] Stip. ¶¶ 49-51, 53-56, 58-60, 62, 64, 66; Exs. J3-J15 (claim filings).

[46] Ex. J1 (Order Denying Claim for Refund dated Sept. 29, 2015).

[47] Stip. ¶¶ 52, 57, 63, 65. The slight reductions account for WSP's modest wholesale sales, as to which WSP no longer claims refunds are due.

[48] Stip. ¶¶ 52, 57-60, 62-66. The stated amounts do not include interest.

Period	Amount
2008	$432,819.71
2009	$1,521,436.40
2010	$2,929,988.58[49]
2011	$3,701,980.83
2012	$4,032,582.30
2013	1,814,714.82
Total:	**$14,433,522.64**

III. STATUTORY FRAMEWORK

Beginning in 1992, the Legislature imposed gross receipts taxes on hospitals, surgical centers, pharmacies, health care providers, and wholesale drug distributors.[50] At the same time, it also imposed the Legend Drug Tax on the receipt of prescription drugs for resale or use in Minnesota.[51] Revenues from these "Provider Taxes," all of which were imposed at a rate of two-percent during the Years at Issue, "are used to pay for the MinnesotaCare program, which provides state-subsidized health care coverage for low-income individuals." [52]

During the Years at Issue, Minnesota law provided for the Legend Drug Tax as follows: "A person that receives legend drugs for resale or use in Minnesota ... is subject to a tax equal to the price paid for the legend drugs multiplied by the tax percentage specified in this section...."

---

[49] Paragraph 61 of the parties' Partial Stipulation of Facts incorrectly states that the total amount of WSP's 2010 refund claim is $1,020,069.14, whereas the correct figure—according to paragraphs 58 through 60—is $2,929,988.58.

[50] *See* Act of Apr. 23, 1992, ch. 549, art. 9, § 7, 1992 Minn. Laws 1487, 1613 (hospital, health care provider, and wholesale drug distributor taxes); Act of May 24, 1993, ch. 345, art. 13, § 12, 1993 Minn. Laws 2322, 2442 (adding surgical center tax); Act of May 27, 1993, ch. 6, § 25, 1993 Minn. Laws 3446, 3463 (adding pharmacy tax). The enumerated provisions were subsequently codified by statute. *See* Minn. Stat. § 295.52, subds. 1, 1a, 1b, 2, 3 (1994).

[51] Act of Apr. 23, 1992, ch. 549, art. 9, § 7, 1992 Minn. Laws 1487, 1613 (codified at Minn. Stat. § 295.52, subd. 4 (1994)); *see also* Minn. Stat. § 295.50, subd. 15 (2016) (defining "[l]egend drug" as one "that is required by federal law to bear one of the following statements: 'Caution: Federal law prohibits dispensing without prescription' or 'Rx only' ").

[52] Affidavit of Michael Goodwin (June 16, 2017), Ex. 3 (Minnesota House Research, *MinnesotaCare Provider Taxes*, June 2015, at 1).

Minn. Stat. § 295.52, subd. 4(a) (2016). "Liability for the tax is incurred when legend drugs are received or delivered in Minnesota by the person." *Id.*

IV. THE PARTIES' CONTENTIONS

WSP contends that it is not subject to the Legend Drug Tax for the Transactions in Issue.[53] WSP argues that "[i]t received the legend drugs in other states where it held them in inventory," and that "it did not [itself] deliver the drugs into Minnesota" but, instead, "delivered them to a common carrier outside of Minnesota." [54] WSP thus reasons that it "did not 'use' the legend drugs in Minnesota, and therefore the Use Tax does not apply." [55] Asserting that "Minnesota cannot constitutionally impose the Use Tax on the receipt (or storage or other use) of drugs in another state," [56] WSP argues that its position is supported by the canon of statutory construction that "the Legislature does not intend to violate the United States Constitution." [57]

In the alternative, but in a manner consistent with the foregoing, WSP argues that "there are constitutional defects in the Use Tax as applied [by the Commissioner] under both the Due Process and Commerce Clauses of the United States Constitution." [58] As to due process, although WSP acknowledges that it had "entity ... nexus with Minnesota," it argues that "there was no nexus with the activity being taxed by Minnesota (the receipt of legend drugs outside the state),"

---

[53] Appellant's Mem. Supp. Summ. J. 2-3, 16-18.

[54] Appellant's Mem. Supp. Summ. J. 2.

[55] Appellant's Mem. Supp. Summ. J. 2; *see also id.* at 18 (arguing that because WSP "neither received nor delivered legend drugs in Minnesota, it owed no Use Tax and is entitled to a refund"). The parties refer to the Legend Drug Tax as the "Use Tax." For reasons that will appear, we do not.

[56] Appellant's Mem. Supp. Summ. J. 16.

[57] Appellant's Mem. Supp. Summ. J. 17 (citing Minn. Stat. § 645.17(3) (2016)).

[58] Appellant's Mem. Supp. Summ. J. 3.

and that "[s]uch 'transactional nexus' is a constitutional requirement." [59] WSP makes a similar argument under the Commerce Clause: "[T]he Use Tax is not applied to an activity with a substantial nexus to Minnesota. Rather, the tax is applied to the receipt of legend drugs outside of Minnesota." [60] WSP also contends that, as applied to the Transactions in Issue, the Legend Drug Tax "discriminates against interstate commerce and flunks the internal consistency test." [61] WSP thus contends that it "is entitled to refunds of the Use Tax," [62] and to summary judgment.[63]

The Commissioner contends that WSP is subject to the Legend Drug Tax for the Transactions in Issue.[64] The Commissioner reasons that WSP: (1) "received drugs at one of its ... pharmacies in Michigan, Pennsylvania, Oregon or Texas;" and, after taking orders, (2) "shipped the drugs to the doctor's office in Minnesota or customer's home in Minnesota." [65] According to the Commissioner, WSP thus "received 'legend drugs for resale or use in Minnesota,' and incurred liability for the tax when the drugs were delivered in Minnesota." [66]

---

[59] Appellant's Mem. Supp. Summ. J. 3; *see also id.* at 21-26.

[60] Appellant's Mem. Supp. Summ. J. 26; *see also id.* at 26-28 (developing WSP's Commerce Clause nexus argument).

[61] Appellant's Mem. Supp. Summ. J. 3; *see also id.* at 28-35 (developing WSP's additional Commerce Clause arguments).

[62] Appellant's Mem. Supp. Summ. J. 3.

[63] Appellant's Mem. Supp. Summ. J. 35. WSP also raised an issue, which we need not further discuss, about computation of the Legend Drug Tax on purchases from its principal supplier. *See id.* at 18-20.

[64] Appellee's Mem. Supp. Summ. J. 1, 9-10 (filed June 16, 2017).

[65] Appellee's Mem. Supp. Summ. J. 9-10.

[66] Appellee's Mem. Supp. Summ. J. 10; *see also id.* at 1 (arguing that the Legend Drug Tax "applies to prescription medications that are received for resale or use in Minnesota and is imposed when the drugs are received or delivered in Minnesota").

The Commissioner next argues that "the application of the Use Tax to [WSP] is constitutional." [67] Specifically, the Commissioner argues that "[t]he use tax as applied to [WSP] comports with the Commerce Clause," [68] and that "[t]he use tax [also] comports with due process." [69] The Commissioner thus contends that "as a matter of law, [WSP] is not entitled to a refund and the Commissioner is entitled to summary judgment." [70]

V. GOVERNING PRINCIPLES

Summary judgment shall be rendered if the pleadings, the record in the case, and any supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60,69 (Minn. 1997). When, as here, parties file cross-motions for summary judgment, they tacitly agree that there are no genuine issues of material fact. *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993). Summary judgment is a suitable vehicle for addressing the application of law to undisputed facts. *See A. J. Chromy Constr. Co. v. Commercial Mech. Servs., Inc.*, 260 N.W.2d 579, 581 (Minn. 1977).

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2016). Legislative intent is determined "primarily from the language of the statute itself." *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010) (quoting *Gleason v. Geary*, 214 Minn. 499, 516, 8 N.W.2d 808, 816 (1943)). Courts use statutory canons of interpretation to determine a statute's meaning. *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 (Minn. 2009). Under pertinent canons, "words and phrases are

---

[67] Appellee's Mem. Supp. Summ. J. 1.

[68] Appellee's Mem. Supp. Summ. J. 10-21.

[69] Appellee's Mem. Supp. Summ. J. 21-23.

[70] Appellee's Mem. Supp. Summ. J. 1-2.

construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning ... are construed according to such special meaning or their definition." Minn. Stat. § 645.08(1) (2016). "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16. Courts must presume that "the legislature does not intend to violate the Constitution of the United States or of this state." Minn. Stat. § 645.17(3) (2016).

When initially ascertaining the meaning of a particular provision, courts consider related provisions: "It is a cardinal rule of statutory construction that a particular provision of a statute cannot be read out of context but must be taken together with other related provisions *to determine its meaning.*" *Kollodge v. F. & L. Appliances, Inc.*, 248 Minn. 357, 360, 80 N.W.2d 62, 64 (1956) (emphasis added). Courts thus "interpret each section in light of the surrounding sections to avoid conflicting interpretations," *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000), and to "harmonize and give effect to all its parts," *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 73-74, 93 N.W.2d 690, 698 (1958). Likewise, separate statutes *in pari materia*—those "relating to the same person or thing or having a common purpose"—are construed in light of one another. *Apple Valley Red–E–Mix, Inc. v. State*, 352 N.W.2d 402, 404 (Minn. 1984). "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16.

VI. ANALYSIS

The contested provision reads in its entirety:

> Subd. 4. **Use tax; legend drugs.** (a) A person that receives legend drugs for resale or use in Minnesota, other than from a wholesale drug distributor that is subject to [the Wholesale Drug Distributor Tax], is subject to a tax equal to the price paid for the legend drugs multiplied by the tax percentage [of two percent] specified in this section. Liability for the tax is incurred when legend drugs are received or delivered in Minnesota by the person.
>
> (b) A tax imposed under this subdivision does not apply to purchases by an individual for personal consumption.

Minn. Stat. § 295.52, subd. 4.

A. Plain Meaning

The first sentence of Subdivision 4(a) imposes a tax on the *receipt* of legend drugs: "A *person* that *receives* legend drugs for resale or use in Minnesota ... is subject to a tax ...." Minn. Stat. § 295.52, subd. 4(a) (emphasis added). *Person* is broadly defined to include "an individual, partnership, limited liability company, corporation, association, governmental unit or agency, or public or private organization of any kind." Minn. Stat. § 295.50, subd. 9c (2016). To *receive* is "[t]o take (something offered, given, sent, etc.)" or "to come into possession of or get from some outside source." *Receive*, *Black's Law Dictionary* (10th ed. 2014). Thus, as a general matter, a person who takes possession of legend drugs destined for resale or use in Minnesota is subject to tax. The tax is *not* imposed: (1) when the drugs are received "from a wholesale drug distributor that is subject to [the Wholesale Drug Distributor Tax]," Minn. Stat. § 295.52, subd. 4(a); or (2) when purchased "by an individual for personal consumption," *id.*, subd. 4(b).

Two points are in order before proceeding to the next sentence of Subdivision 4(a). First, under the plain meaning of the opening sentence, drugs received *anywhere in the world* would

seem subject to the tax, so long as they are intended "for resale or use in Minnesota."[71] Generally, however, a state may not tax activities occurring wholly outside its borders. *See, e.g., Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777-78 (1992); *Baertsch v. Minn. Dep't of Revenue*, 518 N.W.2d 21, 25 (Minn. 1994) ("The United States Supreme Court has made it clear the Due Process and Commerce Clauses prevent a state from imposing a tax on people, property or transactions which do not have a sufficient nexus with the taxing state."). The specification of intended *dispositions*—"resale or use in Minnesota"—does not prevent possible extraterritorial reach, because the activity taxed is the *receipt* of drugs, not their subsequent disposition.

Second, the statutory headnote denominating the Legend Drug Tax a "use tax" is somewhat misleading. Use taxes typically cover a range of activities far broader than simply *receiving* goods. As one authoritative commentator has noted:

> [S]tate statutes generally define "use," "storage," and "consumption" in sweeping terms for use tax purposes.... New York's statute broadly defines a "use" as
>
> > [t]he exercise of any right or power over tangible personal property or over any of the services which are subject to tax ... by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax....

Walter Hellerstein & John A. Swain, *State Taxation* ¶ 16.02[1] (3d ed. 2017) [hereinafter Hellerstein] (alterations to New York statute in original). The Minnesota Supreme Court has long recognized the breadth of Minnesota's use tax. *See Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 258 (Minn. 1992) ("The legislature has broadly defined 'use' for the purposes

---

[71] "Resale" and "use" are not statutorily defined for purposes of the Provider Taxes. *See* Minn. Stat. § 295.50 (2016) (defining certain terms for purposes of Minn. Stat. §§ 295.50-.59 (2016)).

of the use and sales tax statutes: ' "Use" ' includes the exercise of any right or power over tangible personal property ....' " (quoting Minn. Stat. § 297A.61, subd. 6 (1990))). Because Subdivision 4(a) taxes solely the activity of *receiving* goods—only one of many possible "uses"—it imposes a tax far narrower that a typical use tax. The use-tax denomination is immaterial to our analysis in any event. *See* Minn. Stat. § 645.49 (2016) ("The headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute.").

The second sentence of Subdivision 4(a) specifies the circumstances triggering liability for the tax imposed by the first sentence: "Liability for *the tax* is incurred when legend drugs are *received or delivered in Minnesota* by *the person*." (emphasis added). "[T]he tax" and "the person" plainly refer to the exaction and person specified in the opening sentence. To *receive*, once again, is "to come into possession of" something. *Receive*, *Black's Law Dictionary* (10th ed. 2014). To *deliver* means "to give or hand over," "transfer," or "to make deliveries, as of merchandise." *Deliver*, *Webster's New World College Dictionary* (5th ed. 2014); *see also Delivery*, *Black's Law Dictionary* (10th ed. 2014) ("The formal act of voluntarily transferring something; [especially], the act of bringing goods, letters, etc. to a particular person or place."). The preposition *in* means, among other things, "inside; within." *In*, *Webster's New World College Dictionary* (5th ed. 2014). Accordingly, liability for the tax attaches only if the person: (1) takes possession of drugs within Minnesota, or (2) transfers drugs within Minnesota.

We now return to the two points raised above. First, as previously noted, the opening sentence of Subdivision 4(a)—when read in isolation—appears to create a tax of worldwide application upon the activity of receiving drugs intended for resale or use in Minnesota. The second sentence reveals, however, that the tax actually applies only if those drugs are (1) received

or (2) delivered *within* Minnesota. By establishing these geographic conditions precedent to liability, the second sentence of Subdivision 4(a) limits application of the tax imposed by the first sentence to in-state activities only.

Second, the narrow scope of the Legend Drug Tax—its imposition upon only the *receipt* of drugs, rather than upon their *use* more generally—further limits application of the tax. The United States Supreme Court has recognized that, in certain circumstances, "distribution" within a state of tangible personal property acquired wholly outside the state can constitute a taxable in-state "use." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 26, 31-33 (1988).[72] The question of whether distribution *actually* qualifies as a taxable activity, however, depends upon the scope of the particular use tax statute at issue. Hellerstein ¶ 16.04 (so commenting).[73] Here, the statute taxes only the act of *receiving* legend drugs. Thus, although "distribution" or "delivery" may

---

[72] Holmes, a Louisiana retailer, caused merchandise catalogs purchased and printed outside of Louisiana to be "directly mailed to residents of Louisiana." *D.H. Holmes*, 486 U.S. at 26. "The catalogs were shipped free of charge to the addressee, and their entire cost ..., including mailing, was borne by Holmes." *Id.* Holmes acknowledged "that the purpose of the catalogs was to promote sales at its stores and to instill name recognition in future buyers." *Id.* at 26-27. Holmes alleged that it was not subject to Louisiana's use tax "as properly applied," and that "the use tax violated the Commerce Clause of the Federal Constitution." *Id.* at 28. The Supreme Court deferred to the state court's conclusion "that the distribution of the catalogs constituted use under" the state's use tax statute. *Id.* at 31. The Court also ruled that the Louisiana use tax comported with the Commerce Clause, concluding in part that "Holmes' distribution of its catalogs reflects a substantial nexus with Louisiana." *Id.* at 32. *See also* Hellerstein ¶ 16.04 (discussing the application of use tax statutes to property distributed in-state (without charge), such as promotional materials not distributed in connection with sales, awards and prizes, free samples, and catalogs).

[73] Specifically, Hellerstein comments:

> A taxpayer's out-of-state purchase of tangible personal property for in-state distribution without charge ... may raise ... issues peculiar to the use tax. Even if the distributed items are not exempt from tax under the resale exemption, the question remains whether the taxpayer's distribution of the items—or the distribution of the items on behalf of the taxpayer—constitutes a taxable "use," "storage," or "consumption" within the meaning of the statutes.

Hellerstein ¶ 16.04.

qualify as taxable uses under a broadly worded use tax provision, the Legend Drug Tax does *not* impose a tax on either of those activities.

B. Application to the Transactions in Issue

The parties have stipulated to the material characteristics of the Transactions in Issue. WSP placed orders for specialty drugs from its locations outside of Minnesota.[74] Wholesalers and manufacturers delivered specialty drugs to WSP locations outside of Minnesota for storage in inventory.[75] WSP sold specialty drugs only after receiving doctors' prescriptions for individual patients at one of WSP's locations outside of Minnesota.[76] All specialty drugs WSP sold to Minnesota customers were filled from WSP's inventory maintained outside of Minnesota.[77] We agree with WSP that it was not subject to the Legend Drug Tax for the Transactions in Issue.

The parties have stipulated that WSP qualifies as a "person" for purposes of the Legend Drug Tax,[78] and we agree. *See* Minn. Stat. § 295.50, subd. 9c (broadly defining "person"). The parties have also stipulated that WSP took possession of all legend drugs subsequently sold through the Transactions in Issue at WSP facilities outside of Minnesota.[79] We therefore conclude that WSP is a "person" who "received" all legend drugs subsequently sold through the Transactions in Issue *outside* of Minnesota. *See* Minn. Stat. § 295.52, subd. 4(a) (imposing the tax on any "person that receives legend drugs"). Put another way, WSP did not receive any of those legend drugs *within* of Minnesota. Consequently, the Transactions in Issue do not satisfy the

---

[74] Stip. ¶ 29.

[75] Stip. ¶ 41.

[76] Stip. ¶ 42.

[77] Stip. ¶ 41.

[78] Stip. ¶ 48.

[79] Stip. ¶ 41.

conditions precedent to liability for the Minnesota Legend Drug Tax. *See id.* ("Liability for the tax is incurred when legend drugs are received or delivered in Minnesota by the person."). We therefore grant WSP's motion for summary judgment.

C. Commissioner's Interpretation is Unsupported

In support of her motion for summary judgment, the Commissioner *initially* argued that WSP is subject to the Legend Drug Tax for the Transactions in Issue because WSP "received 'legend drugs for resale or use in Minnesota,' and incurred liability for the tax when the drugs were delivered in Minnesota." [80] When responding to WSP's motion, however, the Commissioner abandoned this straightforward, textual argument.

First, the Commissioner now insists that the activity taxed by Subdivision 4(a) is *not* the taxpayer's *receipt* of legend drugs.[81] According to the Commissioner, the tax is instead imposed on something else. At times the Commissioner suggests that the tax is an exaction upon the resale or use of drugs: "[F]or purposes of the Use Tax, the taxable combination of events are the in-state 'resale or use' and 'delivery' of the drugs ...." [82] At other times, however, she suggests that the tax is imposed on the drugs themselves: "By its terms, the statute does not, as [WSP] claims, tax its out-of-state 'receipt' of the drugs, but instead taxes drugs that [WSP] ships into the state, at the

---

[80] Appellee's Mem. Supp. Summ. J. 10.

[81] Appellee's Reply Mem. Supp. Summ. J. 2 (filed June 30, 2017) ("The Use Tax is not imposed on [WSP's] 'receipt' of the drugs ...."); *id.* at 3 ("[T]he statute does not, as [WSP] claims, tax its out-of-state 'receipt' of the drugs ...."); *id.* at 9 ("the Use Tax does not tax 'receipt' ....").

[82] Appellee's Reply Mem. Supp. Summ. J. 1; *see also id.* at 2 (arguing that the tax is imposed "on the undisputedly local combined events of 'resale or use' and delivery"); *id.* at 6 ("[T]he statute taxes the 'resale or use' of the drugs in Minnesota, not the 'receipt' of the drugs elsewhere."); *id.* at 14 ("[T]he taxable event is triggered by business activity in Minnesota: resale or use of a legend drug in Minnesota and delivery into Minnesota.").

time the drugs are delivered ...." [83] The Commissioner's vacillation is immaterial, because each proposed alternative is equally foreclosed by the plain meaning of Subdivision 4(a), which provides in pertinent part: "A person that receives legend drugs ... is subject to a tax ...."

Second, the Commissioner's response treats the Legend Drug Tax as a true use tax—a tax on the *use* of legend drugs: "[A]though the statute does not require that [WPS] itself 'use' the drug, [WPS] did use the drugs by distributing them to Minnesota customers ...." [84] This argument improperly relies on the statutory headnote denominating the Legend Drug Tax a "use tax" and, implicitly, on a conception of *use* sufficiently broad to cover distribution. The text of Subdivision 4(a), however, forecloses any argument that it imposes a *use* tax. For by its plain meaning, the statute taxes the *receipt* of legend drugs only. Accordingly, WSP is not subject to the Legend Drug Tax for its *distribution* or *delivery* of legend drugs.

The Commissioner's abandonment of her opening position—her related efforts to displace the Subdivision 4(a) tax from the act of *receiving* legend drugs to the act of *delivering* them—reflects her implicit acknowledgment that any attempt by Minnesota to tax the out-of-state receipt of drugs would raise clear constitutional concerns: "The proper construction of § 295.52, subd. 4(a) advanced above *avoids any constitutional problem.*" [85] Unfortunately, the Commissioner's twin expedients are contrary to the plain meaning of Subdivision 4(a). In any

---

[83] Appellee's Reply Mem. Supp. Summ. J. 3; *see also id.* at. 9 ("[T]he Use Tax does not tax 'receipt' but instead taxes drugs received for resale or use in Minnesota, at the time the drugs are delivered in Minnesota."); *id.* at 16 (arguing that the tax applies "to legend drugs that are ultimately used in Minnesota").

[84] Appellee's Reply Mem. Supp. Summ. J. 4.

[85] Appellee's Reply Mem. Supp. Summ. J. 9 (emphasis added); *see also id.* at 6 ("[T]here is no constitutional problem ... because the statute taxes the 'resale or use' of the drugs in Minnesota, not the 'receipt' of the drugs elsewhere."); *id.* at 7 ("The Commissioner's construction, which taxes only in-state activity, resolves the constitutional problem.").

event, avoiding the possible extraterritorial reach of Subdivision 4(a)'s first sentence simply involves reading the second sentence in accordance with its plain meaning: as triggering liability for the *receipt* of drugs only if that receipt occurs *within Minnesota*. There is no need to alter the activity upon which the statute imposes the tax or to misinterpret it as a "use" tax that comprehends distribution and delivery.

We acknowledge that the second sentence of Subdivision 4(a) provides that *delivery* of drugs within Minnesota can trigger liability for the Legend Drug Tax.[86] But delivery itself—within Minnesota or elsewhere—is not an activity taxed by the first sentence, as is *receipt*. Even if the inclusion of delivery in the second sentence rendered Subdivision 4(a)'s meaning uncertain (and therefore subject to judicial construction), the Commissioner's proposal—that the provision taxes the *delivery* of drugs—is unreasonable, because it is directly contrary to the statute's text, which taxes solely the *receipt* of drugs. *See State v. Jones*, 848 N.W.2d 528, 535 (Minn. 2014) (noting that "[a] statute is ambiguous only when the statutory language is subject to more than one reasonable interpretation," and that "[w]hen the Legislature's intent is discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted" (internal quotation marks and citations omitted)).

Moreover, even if Subdivision 4(a) were ambiguous, principles of statutory construction exclude the Commissioner's position. When ascertaining the legislative intent behind an ambiguous statute, a court may consult "the former law" and "other laws upon the same or similar subjects." Minn. Stat. § 645.16(5); *Auto Owners Ins. Co. v. Perry*, 749 N.W.2d 324, 328 (Minn. 2008). *Delivery* was added to the statute in 1997: (1) in conjunction with the *removal* of

[86] *See* Appellee's Reply Mem. Supp. Summ. J. 3-4 (arguing that WSP "effectively reads the second component of the taxable transaction, the in-state receipt or delivery of the drugs, out of the statute, and thus fails to read the statute as a whole.").

nonresident pharmacies (like WSP) from the definition of "wholesale drug distributor" subject to the Distributor Tax under Subdivision 3;[87] and (2) at a time when individuals *were* subject to the Legend Drug Tax.[88] It is probable, therefore, that the Legislature added "delivered in Minnesota" to Subdivision 4(a) to trigger the duty of nonresident pharmacies with Minnesota nexus (like WSP) to *collect* the Legend Drug Tax from their Minnesota customers purchasing drugs for personal use.[89] Because individuals have been exempt from the tax since 2008,[90] "delivered in Minnesota" is now an anachronism. In any event, there is no textual support for the Commissioner's assertion that delivery is a taxable activity in its own right, rather than merely a potential trigger of liability.

Furthermore, as already indicated, interpreting delivery within Minnesota as triggering imposition of the Legend Drug Tax on a nonresident pharmacy's *out-of-state receipt* of drugs would require the conclusion that the Legislature intended to impose an extraterritorial tax. There is no reason to believe, however, that the Legislature meant to give the Legend Drug Tax unconstitutional reach. Indeed, we are required to presume just the opposite. *See* Minn. Stat. § 645.17(3) ("[i]n ascertaining the intention of the legislature" courts should presume that "the legislature does not intend to violate the Constitution of the United States"); *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005) ("[I]f the language of a law can be given two constructions, one constitutional and the other unconstitutional, the constitutional one

---

[87] Act of June 2, 1997, ch. 225, art. 3, §§ 9, 11, 1997 Minn. Laws 2267, 2319.

[88] Minn. Stat. § 295.52, subd. 4 (1996) (imposing the Legend Drug Tax on any person who "receives prescription drugs for ... use in Minnesota"); Act of Apr. 21, 1998, ch. 389, art. 16, § 13, 1998 Minn. Laws 981, 1178-79 (expressly imposing the tax on any person who "receives prescription drugs for use in Minnesota *from a nonresident pharmacy*") (emphasis added) (codified at Minn. Stat. § 295.52, subd. 4(b) (1998)).

[89] *See* Appellant's Mem. Supp. Summ. J. 10-13 (so arguing).

[90] Act of Mar. 7, 2008, ch. 154, art. 14, § 5, 2008 Minn. Laws 69, 258-59 (codified at Minn. Stat. § 295.52, subd. 4(b)).

must be adopted, although the unconstitutional construction may be more natural." (citation omitted)).

We agree with the Commissioner that exempting Minnesota sales of legend drugs by WSP (and similarly situated nonresident pharmacies) may not have been what the legislature intended when it exempted individual end users from the Legend Drug Tax in 2008.[91] But "courts cannot supply that which the legislature purposely omits or inadvertently overlooks." *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971). Nor may we, as the Commissioner has done, rewrite or amend the statute by "look[ing] past the statute's language to construct what we may consider to be a more sensible statute." *See State v. Smith*, 899 N.W.2d 120, 123 & n.2 (Minn. 2017). We therefore deny the Commissioner's motion for summary judgment.

B.S.D.

---

[91] *See* Appellee's Mem. Supp. Summ. J. 6-7 (arguing that the Wholesale Drug Distributor Tax and the Legend Drug Tax are "complementary" taxes intended to cover all Minnesota legend drug sales). We need not address the Commissioner's complementary-tax argument because—even if the Legend Drug Tax were *intended* as a complementary tax—it cannot lawfully *function* in that manner as currently written. For applying the tax to the Transactions in Issue would involve extraterritorial reach by taxing WSP's out-of-state receipt of legend drugs. Although the complementary tax doctrine allows a state to defend an *apparently* discriminatory tax *it otherwise has authority to impose* by pointing to a separate tax, the operation of which eliminates the apparent discriminatory effect of the first, the doctrine does not authorize the imposition of a tax that is beyond the state's taxing power. *See* Hellerstein ¶ 16.01[2] ("The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale *by imposing the tax on a subject within its taxing power*—the use, storage, or consumption of property within the state." (emphasis added)).