

STATE OF WISCONSIN
TAX APPEALS COMMISSION

OSHKOSH CORPORATION,

DOCKET NO. 20-S-058

Petitioner,

Vs

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

FINAL RULING AND ORDER

ELIZABETH KESSLER, CHAIR:

This case has come before the Commission for decision on Cross-Motions for Summary Judgment. Petitioner, Oshkosh Corporation (Oshkosh), appears by Marcus Weden, Nat Dorfman, Brad Ressler, Tony Greenhill, and Michael Witwer, of Oshkosh Corporation and of Ernst & Young, Milwaukee, Wisconsin. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Jeffrey A. Evans. Both parties have filed materials in support of their respective positions.

The fundamental question in this case is whether or not certain materials, characterized by both parties as “indirect materials,” were purchased by Oshkosh for resale to the federal government, and thus exempt from Wisconsin Sales and Use Tax under Wis. Stat. § 77.51(14). Oshkosh argues that the title to these materials are transferred to the federal government under the terms of contracts between Oshkosh and the federal government, and therefore they are exempt. The Department argues that Oshkosh cannot contract away tax liability for materials such as office supplies and security cameras, when such indirect materials are in the possession of and used by Oshkosh and not physically transferred to the federal government.

We find that under Wis. Stat. 77.51(14), it appears that Oshkosh can by contract transfer the title of these indirect materials to the federal government, and thus avoid paying Wisconsin taxes on this personal property.

Jurisdictional Facts

1. Petitioner Oshkosh Corporation (“Oshkosh”) is a designer, manufacturer and marketer of access equipment, specialty vehicles and truck bodies for the primary markets of access equipment, defense, fire & emergency and municipal, refuse hauling, concrete placement as well as airport services. Oshkosh is a Wisconsin corporation, with its principal place of business located at 1917 Four Wheel Drive, Oshkosh, Wisconsin, 54902. Jt. Stip. ¶ 1.

2. During the four-year period October 1, 2006, through September 30, 2010 – the “Refund Period” – Oshkosh incurred various expenses for indirect materials that were allocated to the Five Government Contracts. For each of these purchases,

Oshkosh contends it either was assessed a use tax assessment (“Wisconsin UTA”) or paid Wisconsin sales and use tax (“Wisconsin SUT”) on the indirect materials that were purchased and allocated to the Five Government Contracts during the Refund Period as follows. Jt. Stip. ¶ 15.

3. Oshkosh was assessed a UTA or paid Wisconsin SUT on the indirect materials that were purchased and allocated to the Five Government Contracts during the Refund Period as follows:

<u>Year Ending</u>	<u>Use Tax Assessed and Sales & Use Tax Paid by Oshkosh on Indirect Materials Purchased & Allocated to the Five Government Contracts (Projected Tax Amounts)</u>
September 30, 2007	\$90,399.02
September 30, 2008	\$26,348.86
September 30, 2009	\$68,405.04
September 30, 2010	\$529,507.78

Jt. Stip. ¶ 24.

4. Oshkosh filed two claims, one on November 6, 2017 and one on December 5, 2017, requesting the Department to reverse the UTA and refund the Wisconsin SUT that it paid on purchases that it contends it resold and transferred to the federal government during the period October 01, 2006 through September 30, 2010. Jt. Stip. ¶ 25-27.

5. On June 27, 2018, the Wisconsin Department of Revenue issued a Notice of Field Audit Refund that rejected Oshkosh’s two requests of UTA reversal and refund claims for the Wisconsin SUT that it paid on the indirect materials that Oshkosh

purchased and allocated to the Five Government Contracts during the Refund Period. This Notice of Field Audit Refund also addressed other elements of Oshkosh's refund claims for the Refund Period that are unrelated to the Five Government Contracts. Jt. Stip. ¶ 28.

6. On August 03, 2018, Oshkosh filed with the Resolution Unit, Wisconsin Department of Revenue, an appeal seeking redetermination of the Department's denial of its requests for UTA reversal and refund claims for the Wisconsin SUT that it paid on the indirect materials that Oshkosh purchased and allocated to the Five Government Contracts during the Refund Period. Jt. Stip. ¶ 29.

7. On January 7, 2020, the Department issued a Notice of Action denying Oshkosh's appeal and request for redetermination of the Department's denial of its requests for UTA reversal and refund claims for the Wisconsin SUT that it paid on the indirect materials that Oshkosh purchased and allocated to the Five Government Contracts during the Refund Period. This Notice of Action was a final determination subject to review by the Wisconsin Tax Appeals Commission. Jt. Stip. ¶ 30.

8. Within 60 days of the issuance of the Notice of Action, Oshkosh timely filed the Petition with the Wisconsin Tax Appeals Commission that commenced this proceeding. Jt. Stip. ¶ 31.

Material Facts

1. Oshkosh's various business operations are organized into four reportable segments for financial reporting purposes: access equipment, defense, fire &

emergency and commercial. Between 20 and 25% of Oshkosh's consolidated net sales each year are typically from its defense segment ("Oshkosh Defense"). Jt. Stip. ¶ 2.

2. The United States government is Oshkosh Defense's primary customer. Oshkosh Defense has designed, manufactured and sold military tactical wheeled vehicles to the United States government - the U.S. Department of Defense - for more than 90 years. Jt. Stip. ¶ 3.

3. The military products developed, manufactured, and then sold by Oshkosh to the United States government are subject to the Federal Acquisition Regulations, 48 C.F.R. § 1 et seq. Jt. Stip. ¶ 4.

4. Oshkosh purchases both direct materials and indirect materials to fulfill its obligations under its government contracts. Both direct materials and indirect materials are reimbursed by the federal government. Jt. Stip. ¶ 5.

5. Examples of direct materials include, but are not limited to, raw materials such as steel, tires and parts for military vehicles. Jt. Stip. ¶ 6.

6. Examples of indirect materials include, but not limited to, office supplies and equipment, computer supplies and equipment, building repairs and supplies, repairs to security cameras, cranes inspection, gas purchases, building prototypes, step rear ladders, hand tools, cleaning supplies, vehicle leases, landscaping services and supplies, promotion items, corporate cash management handbooks, posters, books, and training supplies. None of the indirect material items at issue are eligible for the manufacturing sales and use tax exemption provided under Wis. Stat.

§§77.54(2) and (6)(am)(1). Certain indirect materials qualified for the manufacturing exemptions under Wis. Stat. §§77.54(2) and (6)(am)(1) and are not at issue. Jt. Stip. ¶ 7.

7. The Federal Acquisition Regulations provide specific rules for accounting for indirect costs. 48 C.F.R. § 31.203. Jt. Stip. ¶ 8.

8. Oshkosh complies with the accounting rules for indirect costs in accordance with the following steps:

a. When Oshkosh incurs an indirect purchase, the acquisition is booked to a general ledger account and a specific cost center pursuant to generally accepted accounting principles (“GAAP”). Jt. Stip. ¶ 9(a).

b. The specific cost centers used by Oshkosh are only associated with federal government contract pools. A government contract pool is a group of accounts that have a similar relationship to the base being managed (e.g., accounts that are related to engineering costs are grouped together). The government contract pools are used to aggregate purchases of indirect materials that are booked into various cost centers into a defined group of accounts. To be compliant with the Federal Acquisition Regulations and to properly allocate indirect costs to the defense business, Oshkosh developed a list of cost pools which logically accumulates indirect costs into groupings of accounts that have similar relationships to the base being managed. Jt. Stip. ¶ 9(b).

c. These government pools are then allocated to Oshkosh’s government defense business and then to specific government contracts by Oshkosh’s government accounting group. Since the Oshkosh legal entity has several business

units, the allocation of the pools to Oshkosh Defense is determined by applying a percentage allocation that indicates which portion of the overall pool was specifically related to the government defense business. Jt. Stip. ¶ 9(c).

d. The accounting practices described herein are performed in accordance with GAAP. Moreover, these procedures performed in accordance with GAAP are commonly accepted practices within the defense business and/or government contracting industry. Jt. Stip. ¶ 9(d).

9. Several of the model contract provisions in the Federal Acquisition Regulations provide for the transfer of title of both the direct materials and indirect materials used in connection with a government contract from the contracting party to the federal government. Jt. Stip. ¶ 10.

10. For the 2007 through 2010 periods at issue, there were three primary model contract provisions in the Federal Acquisition Regulations that provided for the transfer of title to indirect materials from a contracting party to the United States government: 48 C.F.R. 52.245-1(e) (June 2007), 48 C.F.R. 52.232-32(f) (January 2008), and 48 C.F.R. 52.245-2(c) (May 2004). Jt. Stip. ¶ 11.

11. This case relates to five government contracts that Oshkosh entered into with the United States' government that included at least one of these three clauses providing for the transfer of title to indirect materials from Oshkosh to the United States government. These five contracts are collectively referred to in this case as the "Five Government Contracts". Jt. Stip. ¶ 13.

12. A description of each of these five contracts and identification of the relevant clause included in the contract that provides for the transfer of title to indirect materials from Oshkosh to the United States government is set forth in the table below:

Contract No.	Description	Contract Clause(s) that Provide for the Transfer of Title to Indirect Materials from Oshkosh to the Federal Government
W56HZV-09-D-0024	Manufacturing of Heavy Expanded Mobility Tactical Trucks, Palletized Load Systems, Heavy Equipment Transports and ancillary equipment. Recapitalizing (i.e., repairing and rehabilitating) used Heavy Expanded Mobility Tactical Trucks and Palletized Load Systems	48 C.F.R. 52.245-1(e) (June 2007) 48 C.F.R. 52.232-32(f) (January 2008)
W56HZV-04-D-0322	Rebuilding of certain heavy tactical vehicles including the Palletized Load System, the Palletized Load System Trailer, the Heavy Equipment Transport, the Load Handling System, the Common Bridge Transporter, and the Heavy Expanded Mobility Tactical Truck	48 C.F.R. 52.245-2(c) (May 2004)
W56HZV-09-D-0111	Manufacturing of M-ATV vehicles. The M-ATV is a Mine Resistant Ambush Protected All-Terrain Vehicle ("M-ATV"). The primary mission of the M-ATV is to provide protected ground mobility capable of operating in a threat environment involving ambushes employing the use of mines, improvised explosive devices, rocket propelled grenades, explosively formed penetrators and small arms fire	48 C.F.R. 52.245-1(e) (June 2007) 48 C.F.R. 52.232-32(f) (January 2008)

DAAE07-01-D-S014	Manufacturing of Palletized Load System Trucks and Chassis, Palletized Load System Trailers, Heavy Expanded Mobility Tactical Trucks including tankers, tractors, wreckers and cargo trucks, HEMTT Extended Service Program Vehicles, Heavy Equipment Transporter Tractors, and Common Bridge Transporters	48 C.F.R. 52.245-2(c) (May 2004)
M67854-06-D-5028	Manufacturing of the Logistics Vehicle System Replacement (LVSR)	48 C.F.R. 52.245-2(c) (May 2004)

Jt. Stip. ¶ 14.

13. The amount of the claims at issue in this case are based on the agreed upon methodology and the sample of over 20,000 accounting entries for purchase transactions from the Refund Period that the Wisconsin Department of Revenue selected using a statistically appropriate randomized sample. Of these accounting entries for purchase transactions, 771 related to the purchase of indirect materials that were allocated to the five government contracts and that Oshkosh maintains are exempt from the Wisconsin sales and use tax. Jt. Stip. ¶ 16.

14. During the four-year period October 1, 2006, through September 30, 2010 - the "Refund Period" - Oshkosh incurred the following expenses for indirect materials that were allocated to the Five Government Contracts as required by the accounting rules for indirect costs included in the Federal Acquisition Regulations:

<u>Year Ending</u>	<u>Indirect Material Purchases that Were Allocated to the Five Government Contracts (Projected Sample)</u>
September 30, 2007	\$1,807,980.39
September 30, 2008	\$526,977.19
September 30, 2009	\$1,368,100.84
September 30, 2010	\$10,590,155.60

Jt. Stip. ¶ 17.

15. Approximately 43% of these indirect material purchases were for computer equipment and computer software. Jt. Stip. ¶ 18.

16. Approximately 32% of these indirect material purchases were for office equipment and supplies, paper, ink, publications, books, and binders. Jt. Stip. ¶ 19.

17. Approximately 11% of these indirect material purchases were for general operating and plant supplies including tools, wires, safety supplies and cabinets. Jt. Stip. ¶ 20.

18. Approximately 3% of these indirect material purchases were for leased forklifts and other vehicles. Jt. Stip. ¶ 21.

19. Approximately 0.3% of these indirect material purchases were for building and grounds maintenance expenses including landscaping. Jt. Stip. ¶ 22.

20. The remaining approximately 10% of these indirect material purchases were for miscellaneous computer equipment, office supplies, general

operating supplies, and plant supplies incurred in small dollar transactions. Jt. Stip. ¶ 23.

Summary Judgment Standard

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The effect of simultaneous motions for summary judgment is an assertion that the facts presented are not in dispute and only questions of law remain for determination. *Healthcare Services, Inc. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 402-085 (WTAC 2016). The parties in this matter have stipulated to the material facts.

In Wisconsin, personal property is presumed taxable. Wis. Stat. § 70.109. "Exemption from payment of taxes is an act of legislative grace; therefore, the party seeking the exemption bears the burden of proving entitlement." *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶ 13, 302 Wis. 2d 245, 733 N.W.2d 322.

When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the language is clear and unambiguous on its face, we must construe the statute in accordance with its ordinary meaning and may not resort to extrinsic aids." *Id.*

Applicable Law

Wis. Stat. § 77.51

(13rm) "Retail sale" or "sale at retail" means any sale, lease, or rental for any purpose other than resale, sublease, or subrent.

(14)"Sale" includes any of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d)...

DECISION

The language of Wis. Stat. § 77.51(14) is not ambiguous. It quite straightforwardly states that a "Sale" includes any of the following: **the transfer of ownership of, title to, possession of, or enjoyment of tangible personal property, or items, property, or goods...**" (Emphasis added.)

This seems to us a slippery slope, in which businesses can evade paying taxes in the State of Wisconsin by creating what amounts to a fictional resale, but which satisfies the letter of the law. Part of the cost of doing business involves the purchase of office supplies, computers, landscaping services or equipment, operating supplies and costs, security cameras, and many of the other items identified as "indirect materials" by Oshkosh. The fact that such materials are used by Oshkosh in service of its contracts with the federal government should be understood as a cost of doing business. Other business organizations in Wisconsin must pay taxes on the personal property they use in doing business (with exceptions). Merely transferring the title of such materials should not constitute a sale. The record is silent on whether or not such items are ever

used by or to the direct benefit of any agency of the federal government, but in context, it seems clear that only Oshkosh obtains such direct benefits. Does this mean that a furniture manufacturer can now contract with a large client to transfer the title of their office supplies and operating equipment, avoiding taxation? Or a dairy product manufacturer can contract with restaurants, grocery stores, or food service companies can transfer the title of their forklifts and cleaning supplies?

Although it seems unlikely that this was the intent of the legislature, the language of Wis. Stat. § 77.51(14) is not ambiguous. The plain language of the statute indicates that a "sale" includes the transfer of title to tangible personal property. We must therefore find in favor of Oshkosh.

CONCLUSIONS OF LAW

1. Under Wis. Stat. § 77.51(14), the term sale "includes any of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property." Title transfer alone in this matter is sufficient to constitute a sale.

2. Petitioner is entitled to a refund of Wisconsin Sales and Use Taxes paid on indirect materials the titles for which were transferred to the federal government during the refund period.

ORDER

Based on the foregoing, it is the order of this Commission that Petitioner's Motion for Summary Judgment is Granted and Respondent's Motion for Summary

Judgment is Denied. The Department is ordered to refund the Wisconsin Sales and Use Taxes at issue in this appeal.

Dated at Madison, Wisconsin, this 10th day of October, 2022.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner

Did not participate

Kenneth J. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
101 E Wilson St, 5th Floor
Madison, Wisconsin 53703

NOTICE OF APPEAL INFORMATION

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

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

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

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

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

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

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

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

This notice is part of the decision and incorporated therein.