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CIRCUIT COURT
DANE COUNTY, WI
2022CV002831

BY THE COURT:

DATE SIGNED: June 29, 2023

Electronically signed by Honorable Nia Trammell
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 6

DANE COUNTY

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

Case No. 22 CV-2831

v.

Administrative Agency Review: 30607

OSHKOSH CORPORATION,

Respondent.

**PETITION FOR JUDICIAL REVIEW
DECISION AND ORDER**

Petitioner, Wisconsin Department of Revenue (the “DOR”) seeks review of the Wisconsin Tax Appeals Commission (the “Commission”) decision issued on October 10, 2022, in *Oshkosh Corporation v. Wisconsin Dept. of Revenue*, Dk. No. 20-S-058 (“Final Ruling and Order”).¹ The Final Ruling and Order determined the DOR unlawfully refused to issue a sales tax refund to Oshkosh Corporation (“Oshkosh”) and reverse use tax assessments for certain indirect material purchases. The central question to this review is whether the purchase of “indirect materials,” such as office supplies and computers, which Oshkosh purchased to fulfill its contracts with the federal government, are exempt from Wisconsin’s sales tax.

¹ The Petition for Judicial Review is brought under §§ 73.015, 227.52, and 227.53, Stats.

The DOR argues that no “sale” of the indirect materials to the federal government ever occurred and Oshkosh was the end consumer. It posits that Oshkosh neither transferred possession of the indirect materials it purchased to the federal government nor did the federal government “consume the property,” which the DOR contends is required for such transaction to qualify as a sale under § 77.51(14), Stats. Oshkosh argues such purchases are exempt because Wisconsin sales tax and use assessments only attach to the final transfer of a product to the end consumer, and not to “intermediate transfers.”

Having read the briefs, statutes, and applicable case law, and after examining the record, the Court AFFIRMS the Commission’s Final Ruling and Order.

BACKGROUND

The Court will briefly summarize the facts at issue. Unless otherwise noted, both parties stipulated to these facts in the record before the Commission. (Dkt. 10).

Oshkosh is a Wisconsin-based manufacturer, which produces various kinds of specialty vehicles. *Id.* at 86. The United States government regularly contracts with Oshkosh to design and manufacture vehicles for the U.S. military. *Id.* Oshkosh routinely purchases both direct and indirect materials to fulfill its obligations under these government contracts. *Id.* at 87. Direct materials are things such as raw steel, tires, and parts for vehicles. *Id.* Indirect materials may include office supplies and computers. *Id.*

The contracts to produce military products are subject to the Federal Acquisition Regulations. *Id.*; 48 C.F.R. 1 et seq. The Federal Acquisition Regulations require the inclusion of certain model provisions in any contract entered into with the U.S. government, as well as provide specific rules for accounting for indirect costs accrued in the performance of those contracts. *Id.*; 48 C.F.R. 31.203. Several of these government contracts provide for the

contracting party to transfer title of the direct and indirect materials used under the contract to the government, as well as allocate the risk of loss and damage to the materials to the government. *Id.* at 88; 48 C.F.R. 52.245-1(h). The contracts also impose certain requirements for how a contractor maintains and documents indirect materials and requires contractors to allow the federal government to access their property and inspect any indirect material purchases at any time. *Id.*; 48 C.F.R. 52.245-1(g), (j).

At issue in this case are five contracts, which the U.S. government entered into with Oshkosh for the production of various military vehicles. *Id.* at 91-92. Oshkosh performed under these contracts from October 1, 2006, through September 30, 2010. *Id.* at 92. During these four years, Oshkosh incurred various expenses for purchases of indirect material associated with these government contracts. *Id.* During this same period, Oshkosh was either assessed a Wisconsin use tax assessment (“UTA”) or paid Wisconsin sales and use tax on these indirect materials, totaling approximately \$714,660.² *Id.* at 93.

Under §§ 70.109 and 77.52(1)(a), Stats., Wisconsin imposes a tax on all sales at the point of retail occurring in the state. “Sale” is defined as “...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), or services for use or consumption but not for resale as tangible personal property, or items, property, or goods under s. 77.52 (1) (b), (c), or (d)...” Wis. Stat. § 77.51(14). Some types of sale, such as a sale involving the “transfer of ownership of tangible property,” have associated “sales timing” statutes, which dictate when a sale or purchase is considered completed for taxation purposes. Wis. Stat. § 77.585(8)(a).

² As the parties note and agreed upon in the stipulated facts before the Commission, the amount at issue in this case is based on the agreed-upon methodology of sampling over 20,000 accounting entries for purchase transactions and selected an appropriately randomized sample. (Doc. 10, page 92).

On November 6, 2017, Oshkosh filed a claim with the DOR requesting reversal of the UTA assessed against it and a refund for the sales and use tax it paid in connection with some of these indirect material purchases. *Id.* at 94. Oshkosh alleged that the DOR erroneously characterized the indirect material purchases as “sales” when they were in fact “resales” specifically excluded from taxation by statute. *Id.* Oshkosh also filed a claim alleging additional instances of the same erroneous tax payments on December 5, 2017. *Id.* On June 17, 2018, the DOR rejected both of Oshkosh’s claims; it found no resale to the federal government had ever occurred. *Id.* at 95. The DOR concluded that the transfer of title for indirect materials Oshkosh purchased was a “legal fiction,” which did not meet the definition of “sale” in Wisconsin law. *Id.* Oshkosh appealed this decision to the DOR’s Resolution Unit, which denied the appeal on January 7, 2020. *Id.*

Oshkosh subsequently appealed the DOR’s decision to the Commission on March 9, 2020. *Id.* at 95. The Commission reversed the DOR and ruled in favor of Oshkosh in the Final Ruling and Order dated October 10, 2022. It found that § 77.51(14), Stats., unambiguously states a “sale” has occurred when a title has been transferred. *Id.* The Commission stated that Oshkosh did purchase indirect materials for resale to the federal government and that subsequent sale occurred when Oshkosh transferred title to the materials to the government as dictated by the model provisions of the Federal Acquisitions Regulations. *Id.* at 260. It concluded that Oshkosh was “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.” *Id.* at 260.

On November 17, 2022, the DOR filed a petition for review of the Commission’s Final Ruling and Order, which is now before this court.

STANDARD OF REVIEW

An administrative decision affecting the substantial interests of a person is subject to judicial review. Wis. Stat. § 227.52. The Court’s review of the agency’s decision is confined to the record that was created before the agency “unless the criteria to expand the record set out in § 227.57(1) are met.” *Cnty. of Dane v. Pub. Serv. Comm’n of Wis.*, 2022 WI 61, ¶27, 403 Wis. 2d 306, 976 N.W.2d 790. The Court’s consideration of the petition is further limited to (1) whether the Commission kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Van Erman v. State Dept. of Health & Soc. Servs.*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978).

When the Court reviews a state agency’s conclusions of law, deference is not owed to the administrative agency’s legal conclusions. *Tetra Tech EC, Inc. v. Wisconsin Dept. of Revenue*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21; see Wis. Stat. § 227.57(10), (11) (“Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.”) Review is de novo. *Id.* The Court, however, gives “due weight” to an agency’s “experience, technical competence, and specialized knowledge.” *Tetra Tech*, 2018 WI at ¶108, 382 Wis. 2d 496, 914 N.W.2d 21. If the Court finds that an agency “has erroneously interpreted a provision of law and a correct interpretation compels a particular action,” the Court must set aside or modify the action, or remand to the agency for further action under a correct interpretation of the law. Wis. Stat. § 227.57(5).

ANALYSIS

At issue, in this case, is whether the Commission erred in concluding that a sale occurred when Oshkosh transferred the title of certain indirect materials to the federal government, meaning Oshkosh was not the final retail customer and was entitled to a refund of taxes paid on said purchases. The facts are not in dispute; the parties agree Oshkosh purchased indirect materials and later transferred their title to the federal government. What remains is the legal question of whether the transfer of title constitutes a sale as defined by § 77.51(14), Stats.

Generally, the primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. To effectuate this goal, courts first turn to a statute's plain language. *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). In reviewing the plain language of a statute, the word choices of the legislature are accorded their common, ordinary, and accepted meaning, unless the words are technical or specially defined. *State v. Warbelton*, 2008 WI App 42, ¶ 13, 308 Wis. 2d 459, 747 N.W.2d 717. Courts are to interpret statutes with the aim of giving "reasonable effect to every word." *Kalal*, 2004 WI 58, ¶ 3, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of a statute is plain and unambiguous, the court must apply its plain meaning and stop there. *Id.*

Section 77.51(14) states: "'Sale' includes *any* of the following: the transfer of ownership of, *title to*, possession of, *or* enjoyment of tangible personal property, *or* services for use or consumption *but not for resale....*" Wis. Stat. § 77.51(14)(emphasis added). The Commission is correct that this statute is not ambiguous: it states *any* of the listed actions, which are joined by the disjunctive "or," constitute a sale. The statute does not require possession for every sale. Similarly, a sale under the statute is not predicated on "use and consumption" of the goods in

addition to the transfer of title, ownership, or possession. A transfer of title alone is sufficient to be a “sale” under § 77.51(14).

The federal government’s contracts with Oshkosh speak to when title vests in the federal government for materials. Title vests no later than when performance using the materials commences:

(4) If this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost under this contract –

(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor’s delivery of such material; and

(ii) Title to all other material shall pass to and vest in the Government upon –

(A) Issuance of the material for use in contract performance;

(B) Commencement of processing of the material or its use in contract performance; or

(C) Reimbursement of the cost of the material by the Government, whichever occurs first.

48 C.F.R. § 52.245-2(c)(4) (May 2004); *id.* § 52.245-1(e)(2)(iii) (June 2007) (same); 48 C.F.R. § 52.232- 32(f) (Jan. 2008). More specifically, the federal regulations provides that “[t]itle to the property described in this paragraph (f) shall vest in the Government. Vestiture shall be immediately upon the date of the first performance-based payment under this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.” 48 C.F.R. § 52.232-32(f) (Jan. 2008).

The federal government contracts called for Oshkosh to produce various military vehicles. (Dkt. 10 at 91-92). Oshkosh performed under these contracts from October 1, 2006, through September 30, 2010 and incurred various expenses for purchases of indirect material associated with performance of the contracts. *Id.* at 92. Undisputedly, Oshkosh purchased indirect materials, which it then, under the title vesting provisions applicable to its contracts, transferred title of said indirect materials to the federal government. (Dkt. 10 at 87, ¶ 5, 91-92,

¶¶ 13-14). This is a “sale” under the plain and unambiguous meaning of § 77.51(14). Oshkosh’s initial purchases of indirect materials were “sales for resale,” which is not subject to sales tax. See Wis. Stat. § 77.52(1)(a) (sales tax imposed on sale “at retail”); Wis. Stat. § 77.51(13rm) (defining “retail sale” or “sale at retail” as “any sale . . . for any purpose other than resale”) It purchased the indirect materials and resold them to the federal government.

Given the language in the federal contracts, the Court is not persuaded by arguments that Oshkosh should be treated as the final consumer of the indirect materials; the federal contracts cannot be reasonably construed to find that Oshkosh used or consumed the indirect materials before transferring title to the federal government. See e.g., *McDonnell Douglas Corp. v. Dir. of Revenue*, 945 S.W.2d 437, 438 (Mo. 1997)(Analogous case where the Missouri court concluded that the contractor was entitled to resale exemption, noting that “the contracts at issue in this case specifically provide for the vesting of title in the government of the property purchased by [the contractor] for the performance of the contracts before the property was used or consumed....”) The Court finds no error in the Commission’s conclusion that Oshkosh’s purchase of indirect materials constituted a “sale for resale” and is therefore exempt from taxation. (Dkt. 10 at 293-94).

The DOR cites *Dept. of Revenue v. Horne Directory, Inc.*, 105 Wis. 2d 52, 57, 312 N.W.2d 820, 823 (1981) for the proposition that “the statute governing when a sale is completed trumps contractual provisions to the contrary.” (Dkt. 12 at 11). *Horne*’s focus on the title transfer provision of the statute was of narrow scope; it did not answer whether a “transfer of title” equates to a “sale.” But, as Oshkosh aptly notes, “[t]he statute governing when a sale is completed’ is not Wis. Stat. § 77.51(14), where the DOR has tried to shoehorn a use-or-consumption requirement into the phrase ‘for use or consumption but not resale.’ Rather, ‘the

statute governing when a sale is completed' is Wis. Stat. § 77.585(8)(a)." (Dkt. 13 at 15). The latter statute is limited in application to sales involving the "transfer of ownership" and not a "transfer of title."

The Court disagrees with the DOR that § 77.585(8)(a) adds a requirement that must take place before an action constitutes a sale under § 77.51(14). Section 77.585(8)(a) states "[a] sale or purchase *involving transfer of ownership or tangible personal property*...is completed at the time possession is transferred...." Wis. Stat. § 77.585(8)(a). This statute merely specifies which kind of sale it applies to. It does not purport to apply to sales involving the transfer of title, possession, enjoyment of, or services –only "transfer of ownership." As Oshkosh points out in its brief, the DOR's interpretation would render the language superfluous if it were interpreted to apply to all of the types of sales defined in § 77.51(14). This interpretation is reinforced by the fact that the legislature has signified several instances via statute where it seeks to more specifically define when a "sale" has occurred; it does not do this for sale by title transfer. In the absence of such language, the Court will not read such a requirement into the statute.

The DOR and the Commission warn that there is a "slippery slope" in concluding that Oshkosh's title transfer of indirect materials to the federal government is a sale for resale under § 77.51(14). (Dkt. 10, page 270). The DOR argues that this conclusion is contrary to legislative intent and may incentivize corporations to improperly assign indirect material costs to tax exempt entities. It maintains that Oshkosh's passing of 'title' to the federal government is a mere "legal fiction as the federal government did not take control of or possession of any these materials." (Dkt. 12 at 14). The DOR further asserts that parties would be able to "avoid taxation by merely changing how they labeled their transactions," and that "the federal regulations at issue are not intended to allow federal contractors to avoid state sales taxes." (Dkt. 12 at 14).

The Court has long adhered to the maxim that “[j]udicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute.... [The Court... assume[s] that the legislature’s intent is expressed in the statutory language.” *Kalal*, 271 Wis. 2d 633, ¶ 44, 681 N.W.2d 110. Because the Court relies on the plain and unambiguous language of § 77.51(14) in interpreting the statute, there is no need to search for legislative intent. *Id.* The plain language of § 77.51(14) must be applied unless such application would lead to absurd or unreasonable results. *Gasper v. Parbs*, 2001 WI App 259, ¶ 8, 249 Wis. 2d 106, 637 N.W.2d 399.

Section 77.55(1)(a) exempts the United States “from the computation of the amount of the sales tax the sales price from the sale of any tangible personal property.” Wis. Stat. § 77.55(1)(a). The distinguishing characteristic here is that the resale or the sale at retail is to the federal government, which is itself tax-exempt. See Wis. Stat. §§ 77.51(13rm) and 77.52(1)(a). No such privilege would exist if the transfer of title was between private parties. Where the final customer is a private party, the consumer pays sales tax on a retail sale.

The DOR also cites federal regulations, which provide that “the right to an exemption from a sales or use tax may not rest on the Government’s immunity from direct taxation by States and localities.” 48 C.F.R. § 29.303(b). However, Oshkosh’s purchase of indirect materials is exempt from tax as a “sale . . . for resale” under §§ 77.51(13rm) and 77.51(14). The resale exemption is not solely derived from the Government’s immunity from direct taxation by the State of Wisconsin. Indirect materials purchased by Oshkosh and then resold to a private party remain tax exempt because it would still be a sale for resale.

Notably, the transfer of title of indirect materials to the federal government from Oshkosh comes with guardrails. The indirect materials are limited to use in connection with the federal contracts at play, and Oshkosh is required to maintain the indirect materials under the federal regulations; the federal government retains the right to access the indirect materials, inspect them and ultimately control how the indirect materials are disposed. See, e.g., 48 CFR § 52.245-2(d), (e), (i), (f) (May 2004); 48 C.F.R. § 52.245-1 (June 2007) (b), (c), (e), (i), (g), (j) (June 2007). Furthermore, the federal contracts define and allocate the risk of loss between Oshkosh and the federal government for the indirect materials. Id. 48 C.F.R. § 52.245-2(g) (May 2004); 48 C.F.R. § 52.245-1(h) (June 2007); 48 C.F.R. § 52.232-32(g) (Jan. 2008). This right to inspect and the allocation of risk of loss has been noted to vest title and beneficial ownership in the federal government as decided decades ago by the Wisconsin Supreme Court. See e.g. *Teledyne Indus., Inc. v. City of Milwaukee*, 65 Wis. 2d 557, 573, 223 N.W.2d 586, 594 (1974). The title transfer transaction between Oshkosh and the federal government represents more than just a “legal fiction.”

The Court is not convinced that the Commission’s application of § 77.51(14) leads to unreasonable or absurd results. The plain and unambiguous language selected by the legislature must be upheld and the choice among competing policy considerations raised by § 77.51(14) is left to the discretion of the legislature, not the Court. *Wisconsin Dept. of Revenue v. Nagle-Hart, Inc.*, 234 N.W.2d 350, 354, 70 Wis. 2d 224 (1975).

ORDER

For the reasons above, the Wisconsin Tax Appeal Commission’s Final Ruling and Order is AFFIRMED.