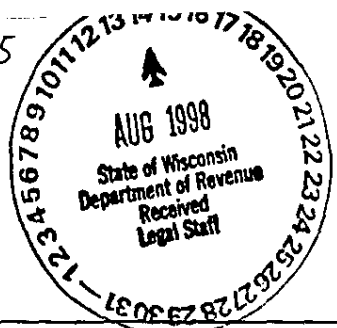


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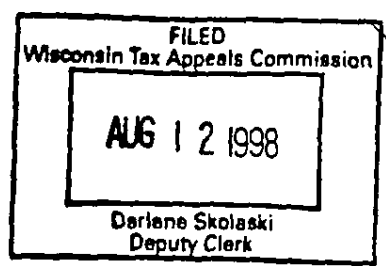
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**STATE OF WISCONSIN  
TAX APPEALS COMMISSION**



**SAX ARTS & CRAFTS, INC.,**  
a Delaware corporation  
2405 South Calhoun Road  
New Berlin, WI 53151

DOCKET NO. 96-S-904

*Dmt  
FA Supp  
10/23/98*

*CS*

Petitioner,

vs.

**RULING AND ORDER**

**WISCONSIN DEPARTMENT OF REVENUE**  
P.O. Box 8933  
Madison, WI 53708

**AWARDING SUMMARY**

**JUDGMENT**

Respondent.

**COMMISSIONER DAVID PROSSER, JR.:**

The above-entitled matter comes before the Commission on stipulated facts, followed by petitioner's motion for summary judgment. The stipulation included seven exhibits. The parties submitted briefs, with respondent filing additional exhibits. Petitioner is represented by Attorneys Jordan M. Goodman and David A. Hughes, of Horwood Marcus & Berk, Chartered. Respondent is represented by Attorney Robert C. Stellick, Jr.

Based upon the entire record, the Commission finds, rules, and orders as follows:

**UNDISPUTED MATERIAL FACTS**

On this motion for summary judgment, the Commission adopts the

facts as stipulated by the parties. However, the facts in the stipulation pertaining to SAX'S BUSINESS ACTIVITIES are restated here in slightly abridged form. The facts in the stipulation under the heading PROCEDURAL BACKGROUND, including the jurisdictional facts, are somewhat reorganized and restated for purposes of clarity.

### BUSINESS FACTS

1. Sax Arts & Crafts, Inc. ("Sax" or "petitioner") is a Delaware corporation, incorporated in 1984. Sax maintains its principal place of business in New Berlin, Wisconsin.

2. Sax is a direct seller of school supplies, arts and crafts supplies, and other related items.

3. Sax had annual sales in excess of \$2.5 million and had more than 25 employees for each calendar year 1988-1991.

4. Sax distributed catalogs that advertised its merchandise to customers and potential customers on a nationwide basis.

5. Sax did not charge its institutional customers, which represent the overwhelming majority of its customers, or potential institutional customers, for the catalogs. However, Sax may have charged its individual customers and potential individual customers \$5.00 for catalogs. To the extent such charges are substantiated, the Wisconsin Department of Revenue ("respondent") has agreed to adjust its assessment accordingly.

6. During the period under review — namely, March 1, 1988 -

December 31, 1991 — the Wisconsin printers that printed Sax's catalogs were Webcrafters (Madison) and Perry Printing (Waterloo).

7. Sax purchased the unprinted paper used to print its catalogs from Reliable Paper Company, also known as Leslie or Leslie Reliable Combined or Reliable\Leslie Paper Company ("Reliable"), a Wisconsin paper merchant; and from Lindenmeyer Central ("Lindenmeyer"), an out-of-state paper merchant and manufacturer with facilities in New Jersey and Illinois.

8. These paper merchants, at the direction of Sax, had the unprinted paper, all of which came from paper manufacturers located outside Wisconsin, shipped directly from the paper manufacturers to the Wisconsin printers.

9. During the period under review, Reliable, Lindenmeyer, and the paper manufacturers did not collect sales or use tax from Sax on the paper at issue.

10. Sax paid for all the paper at issue after the paper was delivered to the Wisconsin printers.

11. Sax chose the printers to whom it directed shipment of unprinted paper from the paper manufacturers.

12. The paper manufacturers shipped the unprinted paper at issue to the Wisconsin printers via common carrier or via delivery vehicles operated by the paper manufacturers.

13. During the period under review, Sax had arrangements with

each printer that the printer would accept delivery of the unprinted paper at issue that Sax purchased; and each Wisconsin printer, in fact, accepted delivery of the unprinted paper that Sax purchased.

14. The Wisconsin printers to whom Sax had the unprinted paper at issue delivered notified Sax that the paper was delivered.

15. The Wisconsin printers did not take title to and did not give Sax valuable consideration for the paper at issue. The printers took possession of all the paper at issue, but the paper remained the property of Sax while in the hands of the printers.

16. After printing the catalogs, the Wisconsin printers, at the direction of Sax, distributed the catalogs through the United States Postal Service to customers and potential customers located both within and without Wisconsin.

17. During the period under review, approximately 98% of Sax's catalogs were distributed outside Wisconsin, using the United States Postal Service.

18. In 1969, Sax issued a blanket Resale Certificate to Reliable; Sax did not revoke or alter this Certificate prior to the purchases of paper at issue in this matter.

19. In 1976, Sax issued a blanket Resale Certificate to Leslie/Reliable; Sax did not revoke or alter this Certificate prior to the purchases of paper at issue in this matter.

20. During the period under review, Sax also purchased tangible personal property, such as consumer commercial labels, spill-x neutralizers, flammable labels, ink rollers, bogan adapter, and lamps that were used or consumed by the Wisconsin printers in printing the Sax catalogs. This property was either transferred by Sax to its Wisconsin printers or Sax had the property shipped from the vendors directly to the printers.

21. During the period under review, Sax purchased finished photography and photographic processing services from Pohlman Studios, which is located in Wisconsin and is a Wisconsin retailer.

22. During the period under review, Sax purchased Linotronic type-setting services from Future Impressions, which is located in Wisconsin and is a Wisconsin retailer.

23. Sax provided finished art to Wisconsin printers that also received unprinted paper from Sax: namely, photographs from Pohlman, typeset copy from Future Impressions, color separations from Royle Printing, typography from Trade Press, and proofs from Reimers Photo.

24. The Wisconsin printers used or consumed the services and finished art detailed in Findings 21, 22, and 23 to produce the Sax catalogs.

#### PROCEDURAL AND JURISDICTIONAL FACTS

25. During the period under review, Sax timely filed Wisconsin sales and use tax returns. It remitted Wisconsin sales or use tax on 2% of the unprinted paper purchased from Reliable and incorporated into Sax catalogs,

which reflected the percentage of catalogs mailed to Wisconsin addresses. It did not remit sales or use tax on the 98% of the paper from Reliable incorporated into Sax catalogs but mailed to addresses outside Wisconsin. Respondent subsequently assessed Sax sales tax on this other 98% of the paper purchased.

26. Respondent also assessed Sax for 2% of the unprinted paper which it purchased out-of-state from Lindenmeyer but later mailed as Sax catalogs to Wisconsin addresses. Sax had made no tax payment on any of its Lindenmeyer purchases. In addition, respondent assessed Sax for 2% of Sax's purchases of inserts from Webcraft Mail Systems, used in the production of the catalogs. Webcraft Mail Systems is an out-of-state vendor.

27. Respondent assessed Sax for 2% of certain printing services purchased from C. P. Gauger, JDP Designs, and Webcrafters for the printing of Sax catalogs mailed to Wisconsin addresses. These vendors appear to be located in Wisconsin.

28. Respondent assessed Sax for 100% of certain purchases of tangible personal property, such as labels, spill-x neutralizers, and ink rollers, used or consumed in printing Sax catalogs. These purchases were made from such vendors as American Labelmark, an out-of-state vendor, and Dealer's Office Equipment, a Wisconsin vendor.

29. Respondent assessed Sax for 2% of its purchase of envelopes used to contain Sax catalogs for mailing to Wisconsin addresses. The

envelopes were purchased from Mail-Well, an out-of-state vendor.

30. Respondent assessed Sax for 100% of its purchases of envelopes which were inserted into Sax catalogs and used by recipients to order Sax merchandise. These envelopes were purchased from Western States, a Wisconsin vendor.

31. Respondent assessed Sax for 100% of its purchases of finished art consisting of photographs, graphic designs, and color separations that were consumed or used in the production, manufacturing or printing of Sax's catalogs. This "finished art" was purchased from Reimers Photo, S.M. Graphics, Step-by-Step Graphics, Future Impressions, Pohlman Studios, Trade Press, and Royle Printing. All vendors are located in Wisconsin except Step-by-Step Graphics, which is located in Illinois.

32. Respondent made its adjustments in the corporation's returns following a field audit of Sax. The assessment amounted to \$65,309.87 in tax and \$30,627.87 in interest, for a total of \$95,937.74. The assessment notice was issued on May 23, 1994. This assessment was based on an auditing sample agreed to by Sax.

33. On July 8, 1994, Sax filed a timely petition for redetermination of the unagreed to portions of the Department's notice. This was followed up in July 1996 with an explanation of why Sax believed it was entitled to the manufacturing exemption under Wis. Stats. § 77.54.

34. On September 5, 1996, respondent denied the petition for



redetermination concluding that, among other issues, Sax's purchases of unprinted paper were subject to Wisconsin sales tax.

35. Thereafter, petitioner timely appealed to the Commission. Its petition challenges respondent's assessment on legal grounds; it does not dispute respondent's computations.

**APPLICABLE STATUTES  
(1989-90)**

**77.51 Definitions.** Except where the context requires otherwise, the definitions given in this section govern the construction of terms in this subchapter.

\* \* \*

**(11)** "Printing" and "imprinting" include lithography, photolithography, rotogravure, gravure, letterpress, silk screen printing, multilithing, multigraphing, mimeographing, photostating, steel die engraving and similar processes.

\* \* \*

**(13)** "Retailer" includes:

(a) Every seller who makes any sale of tangible personal property or taxable service.

\* \* \*

**(14)** "Sale", "sale, lease or rental", "retail sale", "sale at retail", or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services ....

\* \* \*

**(19)** "Storage" and "use" do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being

processed, fabricated, or manufactured into, attached to or incorporated into other property to be transported outside the state and thereafter used solely outside the state.

(20) "Tangible personal property" means all tangible personal property of every kind and description ....

\* \* \*

(22)(a) "Use" includes the exercise of any right or power over tangible personal property or taxable services incident to the ownership, possession or enjoyment of the property....

(b) In this subsection "enjoyment" includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property. "Enjoyment" also includes, but is not limited to, having shipped into this state by an out-of-state supplier printed material which is designed to promote the sale of property or services, or which is otherwise related to the business activities, of the purchaser of the printed material or printing service.

\* \* \*

#### **77.52 Imposition of retail sales tax.**

(1) For the privilege of selling, leasing or renting tangible personal property, including accessories, components, attachments, parts, supplies and materials, at retail a tax is imposed upon all retailers at the rate of 5% of the gross receipts from the sale, lease or rental of tangible personal property, including accessories, components, attachments, parts, supplies and materials, sold, leased or rented at retail in this state.

\* \* \*

(2) For the privilege of selling, performing or furnishing the services described under par. (a) at retail in this state to consumers or users, a tax is imposed upon all persons selling, performing or furnishing the services at the rate of 5% of the gross receipts from the sale, performance or furnishing of the services.

(a) The tax imposed herein applies to the following types of services:

\* \* \*

11. The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting. This subdivision does not apply to the printing or imprinting of tangible personal property which will be subsequently transported outside the state for use outside the state by the consumer for advertising purposes.

\* \* \*

**(2m)(a)** With respect to the services subject to tax under sub. (2), no part of the charge for the service may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing or furnishing of the service, except as provided in par. (b).

(b) With respect to the services subject to tax under sub. (2)(a)7, 10, 11 and 20, all property physically transferred to the customer in conjunction with the selling, performing or furnishing of the service is a sale of tangible personal property separate from the selling, performing or furnishing of the service.

\* \* \*

**(13)** For the purpose of the proper administration of this section and to prevent evasion of the sales tax it shall be presumed that all receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property ... is not a taxable sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property ... is purchased for resale or is otherwise exempt.

\* \* \*

**77.53 Imposition of use tax.**

(1) An excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property or taxable services described in s. 77.52 purchased from any retailer at the rate of 5% of the sales price of the property or taxable services.

(2) Every person storing, using or otherwise consuming in this state tangible personal property or taxable services purchased from a retailer is liable for the tax imposed by this section. The person's liability is not extinguished until the tax has been paid to this state, but a receipt with the tax separately stated from a retailer engaged in business in this state or from a retailer who is authorized by the department, under such rules as it prescribes, to collect the tax and who is regarded as a retailer engaged in business in this state for purposes of the tax imposed by this section given to the purchaser under sub. (3) relieves the purchaser from further liability for the tax to which the receipt refers.

\* \* \*

**77.54 General exemptions.** There are exempted from the taxes imposed by this subchapter:

\* \* \*

(2) The gross receipts from sales of and the storage, use or other consumption of tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of tangible personal property in any form destined for sale....

\* \* \*

(25) The gross receipts from the sale of and the storage of printed material which is designed to advertise and promote the sale of merchandise, or to advertise the services of individual business firms, which printed material is purchased and stored for the purpose of subsequently transporting it outside the state by the

purchaser for use thereafter solely outside the state.

\* \* \*

**77.57 Liability of purchaser.** If a purchaser certifies in writing to a seller that the property purchased will be used in a manner or for a purpose entitling the seller to regard the gross receipts from the sale as exempted by this subchapter from the computation of the amount of the sales tax and uses the property in some other manner or for some other purpose, the purchaser is liable for payment of the sales tax. The tax shall be measured by the sales price of the property to the purchaser....

### CONCLUSIONS OF LAW

1. Although the stipulation of facts agreed to by the parties was supplemented by exhibits from respondent, there is no genuine issue of material fact, and this matter is appropriate for partial summary judgment for each party as a matter of law.

2. A sales tax was properly imposed upon Sax Arts & Crafts, Inc., for its purchase in Wisconsin of unprinted paper stock to be used by third party printers in Wisconsin for the printing and producing of Sax advertising catalogs for distribution out-of-state, when the catalogs were distributed without charge and thus not "destined for sale."

3. A use tax was properly imposed on Sax Arts & Crafts, Inc., for its storage, use, or other consumption in Wisconsin of unprinted paper stock when it purchased the paper out-of-state for catalogs which were printed in Wisconsin and then distributed without charge in Wisconsin.

4. A sales tax was properly imposed upon Sax Arts & Crafts,

Inc., for its purchase in Wisconsin of "finished art" consisting of photographs, graphic designs, and color separations which were used or consumed in the printing and production of Sax advertising catalogs, by independent printers in Wisconsin, and subsequently distributed without charge to customers and potential customers throughout the country. To the extent that this "finished art" was purchased outside the state and used for the same purpose, a use tax may be imposed on only that percentage of the "finished art" used for the production of advertising catalogs that remain in Wisconsin for free distribution.

#### **RULING**

Petitioner moved for summary judgment following a stipulation of facts. Although the stipulation went a long way toward eliminating factual disputes, the subsequent motion requires us to employ the traditional analysis for summary judgment set out in Wis. Stats. § 802.08, and in cases such as *Grams v. Boss*, 97 Wis. 2d 332, 338-339 (1980), and *Universal Die & Stamping, Inc. v. Justus*, 174 Wis. 2d 556, 560 (1993). In order to prevail on its motion, petitioner must show that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. Any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Gouger v. Hardtke*, 167 Wis. 2d 504, 511 (1990).

Here, the stipulation of facts was supplemented by several exhibits from respondent. These exhibits do not alter the material facts. In addition,

there are several inconsistencies in the facts. For example, fact Paragraph No. 23 lists five vendors as supplying "finished art" to Sax, while fact Paragraph No. 31 indicates that Sax was assessed for its purchases from seven named vendors. Paragraph No. 27 lists C.P. Gauger and JDP Designs, although they are not mentioned in any earlier Paragraph. These details do not alter material facts. In Point VI, *infra*, Western States may have printed the Sax envelopes used for ordering Sax products, but that potential material fact is not alleged by either party.

Hence, we conclude that there is before us no genuine issue as to any material fact, and this matter is appropriate for summary judgment as a matter of law.

This case involves several questions about the applicability of sales or use tax to transactions leading up to the printing and distribution of free advertising catalogs. Our task is to examine the relevant statutory language, attempting to discern the intent of the legislature, and then to apply the statutes to the various facts.

#### STATUTORY BACKGROUND

The sales and use tax statutes are part of Chapter 77, Wisconsin Statutes.

Section 77.51 is a lengthy Definitions section.

Section 77.52 is entitled **Imposition of retail sales tax**. It imposes a sales tax on the privilege of "selling, leasing or renting tangible

personal property" and the privilege of "selling, performing or furnishing" certain services, and provides additional detail.

Section 77.53 is entitled **Imposition of use tax**. It imposes "an excise tax" on the "storage, use or other consumption in this state of tangible personal property or taxable services." A purchaser will be relieved of the tax when a parallel sales tax has been paid. § 77.53(2).

Section 77.54 sets out general exemptions from both sales and use taxes.

Section 77.55 sets out exemptions from the sales tax, while § 77.56 sets out exemptions from the use tax.

Section 77.57 is entitled **Liability of purchaser** and provides, in part: "If a purchaser certifies in writing to a seller that the property purchased will be used in a manner or for a purpose entitling the seller to regard the gross receipts from the sale as exempted by this subchapter from the computation of the amount of the sales tax and [then] uses the property in some other manner or for some other purpose, the purchaser is liable for payment of the sales tax...." [Emphasis added]

Sections 77.58 — 77.62 deal with other provisions in the subchapter not relevant to this dispute.

The period under review in this matter is March 1, 1988, through December 31, 1991. Therefore, we resort to the Wisconsin Statutes for 1989-



90, watching for amendments before or after that would alter the law for any part of the period under review.

## DISCUSSION OF ISSUES

### I

The first issue is whether a tax was properly imposed upon the purchase in Wisconsin of unprinted paper to be used in catalogs printed in Wisconsin by third parties but mailed free of charge to addresses outside the state.

Sax purchased unprinted paper from Reliable, a Wisconsin merchant. The paper was shipped directly from out-of-state manufacturers to Wisconsin printers (Webcrafters and Perry Printing) at Sax's direction, to be used in printing Sax catalogs. Two per cent of this paper was used for catalogs shipped to Wisconsin; 98% of the paper was used for catalogs shipped outside Wisconsin. Sax never had physical possession of the paper stock or printed catalogs at issue; all catalogs were distributed by mail without charge to the recipients.

Sax paid tax on the 2% of unprinted paper used for catalogs shipped within Wisconsin. It did not pay tax on the other paper and was assessed tax upon the 98% of unprinted paper for catalogs shipped out-of-state. Sax objected.

Wisconsin Statutes § 77.52 reads in part:

(1) For the privilege of selling ... tangible personal property .. at retail a tax is imposed upon all retailers

at the rate of 5% of the gross receipts from the sale ... of tangible personal property ... sold ... at retail in this state.

The unprinted paper stock was tangible personal property. Reliable neither collected nor paid any sales tax on the sale of this paper to Sax because in 1969 and 1976, Sax had provided Reliable with blanket resale certificates which were still in effect. See § 77.52(13). Sax's issuance of these certificates and Reliable's recognition of these certificates shifted to Sax the burden of showing by clear and satisfactory evidence that it was entitled to an exemption for its purchases of unprinted paper for the catalogs. See § 77.57.

Sax points to § 77.54(2) as the basis for its exemption. This is the "manufacturing" exemption which exempts:

(2) The gross receipts from the sales of ... tangible personal property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of tangible personal property in any form destined for sale.... [Emphasis supplied]

We have no trouble in finding that the unprinted paper became an ingredient in tangible personal property (catalogs) or lost its identity in the manufacture of tangible personal property (catalogs). The question is whether these catalogs may be viewed as "destined for sale" inasmuch as the catalogs at issue were distributed without charge.

Sax contends that its Wisconsin printers, Webcrafters and Perry Printing, are manufacturers under Wisconsin Administrative Code § Tax

11.39(3)(x). To this contention, there is no dispute. Sax also cites Wisconsin Administrative Code § Tax 11.56(6)(b) to the effect that an exemption applies to a person who supplies property to a printer for consumption in manufacturing tangible personal property to be sold.<sup>1</sup>

But Sax cannot show that the catalogs at issue were sold to its customers. Consequently, it attempts to show that the catalogs at issue were sold *by the printers* to Sax. These transactions, it argues, constitute the destined "sales" which made the Sax purchases of unprinted paper exempt from tax under the manufacturing exemption.

To substantiate its position, petitioner cites § 77.52(2m)(b), which states:

With respect to the services subject to tax under sub. (2)(a) 7, 10, 11 and 20, all property physically transferred to the customer in conjunction with the selling, performing or furnishing of the service is a sale of tangible personal property separate from the selling, performing or furnishing of the service.

There are several reasons why petitioner's reliance upon this language to prove a sale by the printers is mistaken. First, the sale of unprinted paper by Reliable to Sax, or, conversely, the purchase of unprinted paper by Sax from Reliable, is the transaction under review. This transaction is covered by § 77.52(1)(a), not § 77.52 (2)(a). The former subsection deals with sales of *tangible personal property*; the latter subsection deals with sales of

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<sup>1</sup> Under Wisconsin Administrative Code § Tax 11.56(6)(a)1, "paper stock" is listed as an example of the property which qualifies for this exemption.

services. Subsection (2)(a) is not applicable, and that is the subsection referred to in § 77.52(2m)(b).

Second, even if the services in subsection (2)(a) were conceptually viewed as applicable, the critical subdivision — namely, subdivision 11, which deals with printing of tangible personal property for a consideration for consumers who furnish the materials used in printing — does *not* apply here because of the precise language in the second sentence of the subdivision:

This subdivision does not apply to the printing or imprinting of tangible personal property which will be subsequently transported outside the state for use outside the state by the consumer for advertising purposes. [Emphasis supplied]

Fact Paragraph No. 4 acknowledges that the catalogs are for advertising. Hence, when § 77.52(2m)(b) refers to “services subject to tax under subs. (2)(a) ... 11 ...,” it is not referring to the services here because the printing services were for advertising catalogs that were shipped out-of-state.

Third, there is very serious doubt whether the catalogs at issue were “physically transferred to the customer in conjunction with the selling, performing or furnishing of the service [of printing] ....” [Emphasis supplied] Some catalogs — those actually sold to customers or potential customers by Sax — were likely physically transferred to Sax; but the catalogs at issue here were put in the mail by the printers for shipping out-of-state. As a result, the catalogs were not physically transferred to Sax in any literal sense. Nor were they transferred to Sax in an ownership sense, as Sax already owned the

paper. Sax would have a more compelling argument that the catalogs had been physically transferred to it if the printers had supplied the paper for the catalogs. But that would be a completely different fact situation than the one we are faced with in this case.

Petitioner's argument confuses a simple fact situation. Sax wanted to publish catalogs with its advertising. It could have set up its own print shop and printed its own catalogs. Instead, it hired independent Wisconsin printers to do the jobs. These printers could have furnished the paper for the catalogs. Instead, they used the paper furnished by Sax. This paper was not inexpensive. It is difficult to imagine that Sax would have paid the same amount to its printers for the catalogs, irrespective of who supplied the paper.

Here, the parties have stipulated not only that Sax supplied the paper to the printers but also that "the paper ... remained the property of Sax while in the hands of the printers." Fact Paragraph No. 15. Sax did not purchase from the printers what it already owned. It purchased printing services. Consequently, we agree with respondent's analysis that after Sax purchased unprinted paper from Reliable, there was no follow-up "sale," as required for the manufacturing exemption.

Sax constructs a second argument — that tangible personal property must not only be "sold" but also sold "for use or consumption" in order to be subject to the Wisconsin sales tax. Sax's argument is as follows: Wisconsin imposes a sales tax "upon all retailers at the rate of 5% of the gross

receipts from the sale ... of tangible personal property ... sold ... in this state."

§ 77.52(1). [Emphasis supplied] "Sale, lease or rental" is defined in § 77.51(14):

(14) "Sale", "sale, lease or rental", ... or equivalent terms include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property ... for use or consumption but not for resale as tangible personal property .... [Emphasis supplied]

The term "use" is defined in § 77.51(22):

(22)(a) "Use" includes the exercise of any right or power over tangible personal property ... incident to the ownership, possession or enjoyment of the property ....

(b) In this subsection "enjoyment" includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property....

However, this definition of "use" appears to be affected by § 77.51(19), which reads:

(19) "Storage" and "use" do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into other property to be transported outside the state and thereafter used solely outside the state.

Petitioner contends that the unprinted paper at issue was never "used" in Wisconsin, because of the provisions in § 77.51(19); thus, it was not

subject to sales tax.

We disagree.

Wisconsin's sales tax is imposed upon the privilege of selling property or services at retail. "Retailer" is defined in § 77.51(13)(a) as "Every seller who makes any sale of tangible personal property...." [Emphasis supplied] Given this broad definition of "retailer," § 77.51(14), which defines "sale," must distinguish indicia of ownership "for use or consumption" from indicia of ownership "for resale."

Reliable "sold" the unprinted paper to Sax because it transferred the ownership of the paper, transferred the title to the paper, and transferred the possession or enjoyment of the paper, for consideration, as stipulated, "not for resale." Some other paper — at least in theory — was turned into catalogs that were resold. But the paper at issue here was turned into catalogs that were distributed without charge. This paper was "not for resale."

When the ownership of this paper was transferred, the paper was "used" — that is, Sax lawfully exercised power over it. Sax directed that the paper be shipped from out-of-state manufacturers to in-state printers. Sax instructed the printers what to print on the paper, and they printed the paper as instructed. Sax then determined where and how the catalogs were to be sent out by the printers. To contend that Sax did not "use" the paper in every real sense would be to disregard reality.

Hence, petitioner attempts to discover an exemption in a definition. As noted above, § 77.51(19) states that "use" does not include keeping, retaining or exercising any right or power over tangible personal property (1) for the purpose of subsequently transporting it outside the state for use solely outside the state or (2) for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into other property to be transported outside the state and thereafter used solely outside the state.

The ultimate purpose of Sax's purchase of the paper at issue was to produce catalogs for distribution outside Wisconsin. The first clause of § 77.51(19) does not apply to our facts because Sax did not bring the paper to Wisconsin merely to hold it or store it temporarily before shipping it out-of-state. Sax brought the paper to Wisconsin so that it could be printed — manufactured — and then mailed out to particular customers or potential customers. If any clause applies, it is the second clause — the manufacturing clause. But this general clause does not apply because a specific manufacturing exemption exists elsewhere, in § 77.54(2); and that exemption requires that the personal property manufactured be "destined for sale."

Three sections of the statutes, § 77.54, § 77.55, and § 77.56, set out exemptions from sales and use tax. A taxpayer should not expect to find in the Definitions section of this subchapter tax exemptions not contained in the Exemptions sections. Nor should a taxpayer rely on language in the Definitions section to nullify specific language in the Exemptions section.



It should be noted that tax exemptions, deductions, and privileges are purely matters of legislative grace. Tax statutes are to be strictly construed against the granting of the same. A taxpayer who claims an exemption must point to an express provision granting such an exemption by language which clearly specifies the exemption, and thus bring himself clearly within its terms.<sup>2</sup>

This ground has been covered before in *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610 (1979). In *Moebius*, the Supreme Court considered sales by Moebius of printed materials (illustrated brochures, catalogs, and folders) ordered by and delivered to customers in Wisconsin who gave Moebius certificates of exemption. Moebius supplied all the materials it printed, and Moebius did not collect or pay tax on materials it believed its customers would use outside the state. The Court said (89 Wis. 2d at 621):

During the tax period in issue no statutory provision in the sales tax law expressly exempted sales in Wisconsin of tangible personal property generally — or printed advertising material specifically — which were to be used solely outside the state. However, sec. 77.51(16) [now § 77.51(19)], Stats., exempts from the use tax the retention of tangible personal property in Wisconsin for the purpose of subsequently transporting it outside the state for use solely outside the state. Moebius argues that the legislature intended the sales tax and use tax to be complementary; that in sec. 77.51(16) [§ 77.51(19)], Stats., the legislature expressly exempted from the use

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<sup>2</sup> *Comet Co. v. Department of Taxation*, 243 Wis. 117, 123 (1943); *Fall River Canning Co. v. Department of Taxation*, 3 Wis. 2d 632, 637 (1958); *Ramrod, Inc. v. Department of Revenue*, 64 Wis. 2d 499, 504 (1974); and *Revenue Department v. Greiling*, 112 Wis. 2d 602, 605 (1983).

tax the retention of tangible personal property in Wisconsin for subsequent transportation and later use solely outside Wisconsin; and that the intended complementariness of the sales and use tax statutes requires the court to interpret the sales tax statute to include an exemption which corresponds to the use tax exemption, namely, a sale[s] tax exemption for the sale in Wisconsin of printed materials for use solely outside the state. We conclude that the overall complementariness of the use tax and sales tax does not justify this court's reading into the statute a sales tax exemption which was not specifically set forth by the legislature.

The Court concluded:

Moebius' reading of the statutes would exempt from the sales tax the sale of all tangible personal property — not only printed advertising material — which is purchased and retained in Wisconsin for the purpose of subsequently transporting it outside the state by the purchaser for use thereafter solely outside the state. If the legislature intended this result it failed to state it.

*Id.* at 623-624.

Respondent points out that after the period under review, the legislature amended the law to create a specific exemption for raw materials which will be processed into printed materials for transportation and use outside Wisconsin. Newly-created subsection (43) of § 77.54, embodied in Section 2393q of 1997 Act 27, reads:

**(43)** The gross receipts from the sale of and the storage, use or other consumption of raw materials used for the processing, fabricating or manufacturing of, or the attaching to or incorporating into, printed materials that are transported and used solely outside this state.

The legislative history of this new subsection is persuasive that the legislature acted to create a sales tax exemption that had not existed before.

Sax's third argument concerning the unprinted paper purchased from Reliable is that respondent should not have invoked the 1969 and 1976 resale certificates from Sax as a basis to impose a tax on Sax under § 77.57 because (1) the certificates were "dated well prior to the years at issue" and (2) the certificates were intended to cover the purchase of paper that was resold. The fact is, however, the Sax certificates were not withdrawn and were recognized by Reliable as authority to proceed without tax in its sales to Sax. Without exemption certificates on file, Reliable would have been expected to collect sales tax from Sax. Sax is in no position now to complain about certificates it filed and had been taking advantage of for more than 20 years.

To sum up, respondent correctly assessed petitioner on the unprinted paper purchased from Reliable for use in its advertising catalogs printed by others in Wisconsin and distributed outside the state without charge.

## II

The second issue is whether a tax was properly imposed upon unprinted paper purchased outside Wisconsin to be used in advertising catalogs printed in Wisconsin and subsequently mailed by the printers to addresses in Wisconsin.

Sax purchased unprinted paper from Lindenmeyer, an out-of-state paper merchant. The paper was shipped directly to Wisconsin printers at Sax's direction to be used in printing Sax catalogs. Two per cent of this paper was used for catalogs shipped to Wisconsin; 98% was used for catalogs shipped outside Wisconsin. Sax never had physical possession of the paper stock or the printed catalogs at issue. The catalogs at issue were mailed to addresses in Wisconsin without charge.

Sax also purchased certain inserts for the catalogs from Webcraft Mail Systems of New Jersey. Two per cent of these inserts were in the catalogs mailed to Wisconsin. We do not have in the record any facts which show that these inserts were printed and constituted advertising before they were shipped to Wisconsin.

Sax made no payment to respondent in connection with its out-of-state purchases from Lindenmeyer and Webcraft Mail Systems. Respondent assessed Sax for the 2% of purchases used for catalogs mailed to addresses in Wisconsin. The question is whether Wisconsin can impose a use tax for its "storage, use or other consumption" of the paper and inserts in Wisconsin.

The tax is a use tax, not a sales tax, because the sales occurred outside Wisconsin. Had respondent attempted to impose a use tax on the 98% of paper or inserts brought into the state for manufacturing and then transported out again and used solely outside the state, it would have failed. But respondent recognized that that "use" was excluded by § 77.51(19).

In *Moebius Printing Co.*, *supra*, the Court said (89 Wis. 2d at 622-623):

The use tax is imposed upon the person for the storage, use or other consumption in this state of tangible personal property or taxable services ... the sale of which has not been reached by the sales tax.... If tangible personal property or a service is not stored, used or otherwise consumed in this state within the statutory meaning of those words, then no event taxable under the use tax provisions has occurred, even if the sale of that property or service in Wisconsin would be taxable under sec. 77.52, Stats. ....

As can be seen in the definitions of storage and use, the use tax is imposed on certain privileges of ownership, but not on all of them.

Respondent seeks here to apply the use tax only to the storage, use or other consumption of tangible personal property that remains in this state and is not resold. This assessment is consistent with § 77.51(19), § 77.51(22), and § 77.53 and is affirmed.

### III

The third issue is whether a tax was properly imposed upon 2% of printing services purchased by Sax in Wisconsin from C.P. Gauger, JDP Designs, and Webcrafters. These 2% were for catalogs mailed to Wisconsin addresses.

Under § 77.52(2), a sales tax is imposed "For the privilege of selling, performing or furnishing the services described under par. (1) at retail in this state to consumers or users...." This language applies to the services

performed by C. P. Gauger, JDP Designs, and Webcrafters. These services are pinpointed in paragraph (a)11, which speaks of

... producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting.

If this were the only language in the subdivision, all printing done for Sax would be subject to sales tax. However, the subdivision goes on:

This subdivision does not apply to the printing or imprinting of tangible personal property which will be subsequently transported outside the state for use outside the state by the consumer for advertising purposes.

Because of this sentence, 98% of the printing done for Sax was tax exempt. But the other 2% was subject to tax and was properly assessed.

#### IV

The fourth issue is whether a tax was properly imposed upon 100% of certain purchases of tangible personal property, such as labels, spill-x neutralizers, ink rollers, bogan adapter, and lamps used or consumed in printing Sax catalogs. These purchases were made from American Labelmark and Dealer's Office Equipment. Petitioner and respondent stipulate that "this issue will be decided consistent with the decision for" the unprinted paper which Sax purchased from Reliable. Hence, reference should be made to point I.

## V

The fifth issue is whether a tax was properly imposed on 2% of the envelopes used to contain finished catalogs mailed out by the Sax printers. The 2% refers to the catalogs mailed to addresses in Wisconsin. These container envelopes were purchased from Mail-Well, an out-of-state vendor.

Because the purchase of the envelopes was from an out-of-state vendor, the tax at issue is a use tax issue and follows the same analysis as the purchase of unprinted paper from Lindenmeyer under point II. The use tax was properly imposed on the 2% of the envelopes that remained in Wisconsin without resale.

## VI

The sixth issue is whether a tax was properly imposed on 100% of the purchases of envelopes used for ordering merchandise by recipients of Sax catalogs. These envelopes, which were inserted by the printers into the Sax catalogs, were purchased from Western States, a Wisconsin vendor.

We understand this to be a sales tax question involving the purchase of unprinted envelopes. It should be disposed of consistent with point I with 100% of the envelopes subject to tax.

If the envelopes were printed by Western States before being transported to the catalog printers — a fact which does not appear in evidence — Wis. Stats. § 77.54(25) might apply. But we decline to decide that question without facts requiring a decision.

## VII

The seventh issue is whether a tax was properly imposed on 100% of the purchases of finished art consisting of photographs, graphic designs, and color separations that were consumed or used in the production, manufacturing, and printing of Sax's catalogs.

Sax purchased "finished art" from six in-state vendors and one out-of-state vendor. Apparently, it paid no tax on any of these purchases. Respondent imposed a tax on all of them.

If the "finished art" is viewed as tangible personal property,<sup>3</sup> the tangible personal property became an ingredient or component part of the manufactured catalogs. As noted above, these catalogs were not resold. Hence, 100% of the finished art purchased in Wisconsin was subject to tax. However, only 2% of the "finished art" purchased outside Wisconsin was subject to use tax under the principles set out in point II. Consequently, only 2% of the purchases from Step-by Step Graphics, an Illinois vendor, should be taxed.

### CONCLUSION

Wisconsin Statutes § 802.08(6) provides that, "If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be

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<sup>3</sup> Fact Paragraphs 21 and 22 speak of "services". By contrast, fact Paragraph 23 concerning "finished art" appears to speak of tangible personal property.



awarded to such party even though the party has not moved therefor."

We conclude that respondent is entitled to summary judgment on all issues before the Commission except petitioner's purchase of "finished art" from Step-by-Step Graphics of Illinois. In that case, petitioner is entitled to summary judgment for any assessment exceeding 2%. The record does not establish that this matter involves a tax on any advertising printed outside Wisconsin and then brought to Wisconsin in order to be incorporated into catalogs which are subsequently transported out-of-state. Consequently, we do not take any position on that question.

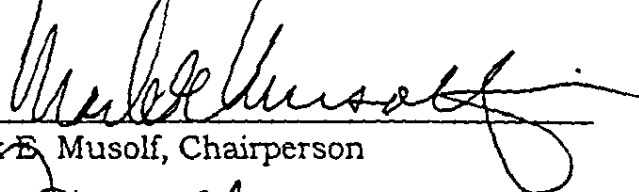
Therefore,

**IT IS ORDERED**

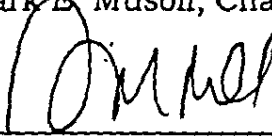
That petitioner's motion for summary judgment is denied, except for appropriate relief involving petitioner's purchases of "finished art" from Step-by-Step Graphics of Illinois; respondent is awarded summary judgment affirming its denial of the petition for redetermination, except with respect to its 100% assessment of purchases from Step-by-Step Graphics; and respondent is directed to provide relief to petitioner involving provable sales of its catalogs to customers, as noted in fact Paragraph 5.

Dated at Madison, Wisconsin, this 12th day of August, 1998.

**WISCONSIN TAX APPEALS COMMISSION**



Mark E. Musolf, Chairperson



Don M. Millis, Commissioner



David Prosser, Jr., Commissioner

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"