

SAX ARTS & CRAFTS INC 98CV2346 052499 DANE CTY CIR CT

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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 17

DANE COUNTY

SAX ARTS & CRAFTS, INC.,

Petitioner,

v.

Case No. 98-CV-2346

WISCONSIN DEPARTMENT OF REVENUE,

Respondent,

COPY

DECISION AND ORDER

BACKGROUND

Petitioner Sax Arts & Crafts, Inc. ("Sax") has petitioned the court pursuant to § 227.53, Stats., to review the Wisconsin Tax Appeals Commission's (Commission) Decision dated August 12, 1998, which granted summary judgment to the Wisconsin Department of Revenue ("DOR" or "Department"). The Commission held as follows: (1) a sales tax was properly imposed upon Sax for its purchase in Wisconsin of unprinted paper stock to be used by third party Wisconsin printers 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"; (2) a use tax was properly imposed on Sax 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; (3) a sales tax was properly imposed upon Sax for its purchase in Wisconsin of

"finished art" which were used or consumed in the printing and production of Sax advertising catalogs, by independent Wisconsin printers, 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.

After review of the record and the applicable law, I affirm the Wisconsin Tax Appeals Commission's August 12, 1998, ruling.

FACTS

The facts are not in dispute. The period under review is March 1, 1988, through December 31, 1991. Sax is a Delaware corporation whose principal place of business is in New Berlin, Wisconsin. (Decision, p.2) Sax is a direct seller of arts and crafts supplies and of school supplies. (Commission's Findings of Fact 1) It sells by direct mail through catalogs distributed nationwide. (Id. 2, 3) Sax did not charge its institutional customers for its catalogs which were the overwhelming majority of its customers. (Id. 5)

The catalogs were printed in Wisconsin by Webcrafters and Perry Printing. (Id. 6) Sax purchased the paper used in printing the catalogs from Reliable Paper Company (also known as Leslie/Reliable) in Wisconsin and from Lindenmeyer Central in New Jersey. (Id. 7) At Sax's direction, the unprinted paper was shipped directly to the Wisconsin printers. (Id. 8, 11) Sax purchased all of the unprinted paper and retained title to the paper. (Id. 10, 15)

After printing the catalogs for Sax, the printers, at the direction of Sax, distributed the catalogs through the United States Postal Service directly to customers in and outside of Wisconsin. (Id. 8, 11, 17)

Neither Reliable nor Lindenmeyer collected any sales or use tax on the paper used by the printers to print the catalogs. (Id. 9) Sax had given Reliable a "blanket" resale certificate in 1969, and Leslie/Reliable a "blanket" resale certificate in 1976, with the exempt item listed as "Printing Paper". (Id. 20, 21) The Reliable certificate stated that it "continues in force until canceled by the purchaser or the Wisconsin Department of Revenue." (Exhibit A; R-Ap. 145) The Leslie/Reliable certificate stated that it "shall continue in force until revoked and shall be considered a part of each order given to the above named seller." (Exhibit B; R-Ap. 146) Sax did not revoke or alter either of these certificates prior to the purchases of paper at issue in this matter. (Commission's Findings of Fact 20, 21)

Approximately 2% of the catalogs were mailed to Wisconsin addresses, and the other 98% were mailed to locations outside of Wisconsin. (Id. 19) Sax voluntarily paid sales tax on 2% of the paper purchased from Reliable used for catalogs shipped within Wisconsin. (Id. 26) DOR also assessed sales or use tax on 2% of the paper purchased from Lindenmeyer, 2% of the inserts, 2% of the envelopes used to mail the catalogs and 2% of certain printing services. (Id. 25-27, 29) DOR also assessed sales or use tax on 100% of Sax's purchases from a Wisconsin vendor of envelopes used by recipients to order merchandise and on 100% of all of the tangible personal property and finished art used and consumed in the production of the catalogs. (Id. 28, 30, 31)

STANDARD OF REVIEW

There are three levels of deference that a court may give an administrative agency's statutory interpretations. The highest level of deference, "great weight", applies where (1) the agency is charged with the administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its "expertise or specialized knowledge" in arriving at its interpretation; and (4) its interpretation will provide "uniformity and consistency in the application of the statute." Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995).

The next highest level of deference, "due weight", is appropriate where the agency has some expertise in the area in question, but has not developed that expertise to the extent that would necessarily place it in a better position to make judgments concerning the interpretation of the statute than a court. Id. at 762. The court will uphold an agency's decision if it is reasonable, even if another interpretation is equally reasonable. However, under the "due weight" standard, the court will not sustain an agency's interpretation if another interpretation is more reasonable than the agency's interpretation.

The third level of deference, "de novo", is where the issue is clearly one of first impression and where the agency has no special experience in determining the issue. Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992). In determining whether an issue is one of first impression, one must look at the agency's experience in administering the particular statutory scheme - and that experience must necessarily derive from consideration of a variety of factual situations and circumstances. Barron Elec. Cooperative v. PSC, 212 Wis. 2d 752, 764, 569 N.W.2d 726 (Ct. App. 1997).

An agency's interpretation of an unambiguous statute is entitled to no deference. City of Milwaukee v. Lindner, 98 Wis. 2d 624, 634, 297 N.W.2d 828 (1980). Further, an administrative agency's decision that deals with the scope of its own power is not binding. Loomis v. Wisconsin Personnel Comm'n, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993).

The parties differ as to the appropriate standard of review. The winner before the agency invariably argues that we must pay great deference to the agency's decision, and the loser invariably argues for de novo review.

"Without question, the [Tax Appeals] commission has considerable experience in the administration of the sales tax statutes, and it has applied the provisions of § 77.52, Stats. - a statute it is charged to enforce and administer - in a variety of situations." Telemark Development v. Dept. of Revenue, 218 Wis. 2d 809, 820, 581 N.W.2d 585 (Ct. App. 1998). The commission has developed broad expertise in the area, but has not had adequate opportunity to develop a particular expertise on the precise question presented here. For these reasons, and also because its application of §§ 77.51-77.57 to the facts of this case necessarily implicates value and policy judgments, it is appropriate to pay due-weight deference to the commission's decision - affirming it if it is reasonable, unless another interpretation is more reasonable. See id. at 821.

The burden is on Sax to show that the commission's decision is unreasonable. Harnischfeger, 196 Wis. 2d at 661. "An agency's interpretation of a statute is reasonable if it accords with the language of the statute, the statute's legislative history, and the legislative intent; if the interpretation is consistent with the constitution, the statute read as a whole, and

the purpose of the statute; and if the interpretation is consistent with judicial analyses of the statute." Lisney v. LIRC, 171 Wis. 2d 499, 507, 493 N.W.2d 14 (1992).

APPLICABLE STATUTES (1989-90)

Definitions

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, 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 and includes:

* * *

(k) Any sale of tangible personal property to a purchaser even though such property may be used or consumed by some other person to whom such purchaser transfers the tangible personal property without valuable consideration, such as gifts, and advertising specialties distributed gratis apart from the sale of other tangible personal property or service.

* * *

(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.

* * *

Sales Tax

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 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.

* * *

Use tax

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.

* * *

General exemptions

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.

* * *

Exemption certificates

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

DECISION

According to the Commission, the taxable transaction is Sax's purchase of paper from Reliable. Sax voluntarily paid sales tax on 2% of the paper purchased from Reliable that was used for catalogs shipped within Wisconsin, but not on the 98% that was used for catalogs shipped outside of Wisconsin. Absent any exemptions, Sax should have paid sales tax on this purchase of paper pursuant to § 77.52, Stats. Reliable did not charge a sales tax based on blanket resale certificates provided by Sax, stating that printing paper was part of a transaction exempt from tax. The record contained no evidence that these certificates were no longer in effect. According to the Commission, the paper was not part of an exempt transaction, and pursuant to § 77.57, Stats., the burden shifted to Sax to show by clear and satisfactory evidence that it was entitled to an exemption for this purchase.

The following issues are before this court: (1) Whether the Commission's decision violates the Commerce Clause of the United States' Constitution; (2) Whether, absent any statutory exemption, the value of materials used or consumed in the purchase of the 2% of the printed catalogs that were mailed to Wisconsin residents is subject to use tax; (3) Whether the manufacturer's exemption does not apply because the printed catalogs were

not "destined for sale" within the meaning of § 77.54(2), Stats.; and (4) Whether § 77.51(19), Stats., did not create an exemption from sales tax for the temporary storage of the other 98% of the paper purchased from Reliable, upon which no tax was paid. The court will address each issue in turn.

(1) Whether the Commission's decision violates the Commerce Clause of the United States' Constitution

In Sax's initial brief to this court, it stated as follows: "Taken to its logical conclusion, the Commission's interpretation suggests that Wisconsin sales tax applies to paper incorporated into catalogs which are mailed to locations outside of Wisconsin, but does not apply to paper purchased in Wisconsin, printed in Wisconsin, and mailed to Wisconsin addresses." (Sax's Initial Brief, p.18) Sax concluded that this "appears to violate the Commerce Clause of the United States Constitution, in that it leads to per se discrimination against interstate commerce." (*Id.*) In support of this argument, Sax merely cited indirectly to the United States Supreme Court's decision in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

The Department responds that Sax's argument is untimely because Sax failed to exhaust its administrative remedies by raising it to the Commission, who could have decided that issue. Sax replies that it could not predict the Commission's decision and can raise the argument at this time. Sax does not dispute that the Commission could have decided this issue. See Hogan v. Musolf, 163 Wis. 2d 1, 21, 471 N.W.2d 216 (1991).

This court determines that Sax could have raised its constitutional argument before the

Commission.¹ Sax could have determined, assuming that the Commission adopted the Department's tax assessment, whether this would violate the Constitution in its view. The court in Cobb v. Public Service Comm'n, 12 Wis. 2d 441, 458, 107 N.W.2d 595 (1961), affirmed the circuit court's refusal to review a constitutional issue for which no rehearing request had been made, reasoning as follows:

it was incumbent upon appellants . . . to have raised the issue so that the commission could then have proceeded to have avoided the alleged error, if it existed.

The court reaffirmed this decision in Omernick v. Department of Natural Resources, 100 Wis. 2d 234, 248, 301 N.W.2d 437 (1981), providing as follows:

Cobb reflects a fundamental policy that parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record under sec. 227.20, Stats. [renumbered Sec. 227.57, Stats.]

See also Linse v. LIRC, 135 Wis. 2d 399, 405 n.1, 400 N.W.2d 481 (Ct. App. 1986) ("A constitutional issue must be raised and the record developed before the agency, even if the agency has no power to decide the issue.").

In any event, this court also determines that the argument is meritless, and therefore dismisses same. A state can only impose sales tax on in-state sales of tangible personal property. See Evco v. Jones, 409 U.S. 91 (1972) (where contracted service performed to produce tangible goods, state could not impose a tax on the sale of the goods themselves because the destination jurisdiction could do so). Therefore, there is no discrimination

¹In fact, Sax barely raised this issue in front of this court by making a passing reference to it in its initial brief.

against out-of-state sellers under any construction by the Commission of the sales tax statutes.

In fact, the Commission's decision actually favors interstate commerce over intrastate commerce. That is, under the Commission's interpretation of the applicable statutes, Wisconsin businesses are penalized because, under the applicable statutes and regulations in this case, sales/use tax must be paid on paper purchased in Wisconsin but not necessarily when bought out of state. In fact, this negative effect on Wisconsin business prompted new legislation to create an exemption in this situation.²

Furthermore, this court disagrees with Sax's contention that the Commission's "interpretation suggests that Wisconsin sales tax applies to paper incorporated into catalogs which are mailed to locations outside of Wisconsin, but does not apply to paper purchased in Wisconsin, printed in Wisconsin, and mailed to Wisconsin addresses. (Sax's Initial Brief, p.18) Sax admits that it voluntarily paid tax on the 2% of the paper purchased from Reliable that was used in catalogs delivered to Wisconsin residents. Thus, under the Commission's decision, which this court affirms in this decision, all paper purchased from Reliable will be taxed in exactly the same manner. Therefore, there is no violation of the Commerce Clause in this case.

²Section 77.54(43), Stats. (created by 1997 Wis. Act 27, § 2393q), provides as follows:

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.

- (2) **Whether, absent any statutory exemption, the value of materials used or consumed in the purchase of the 2% of the printed catalogs that were mailed to Wisconsin residents is subject to use tax**

Use tax is 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." § 77.53, Stats. The principal purpose of the use tax imposed under sec. 77.53, Stats., is to prevent a buyer from avoiding sales tax by engaging in purchase transactions outside this state. Revenue Dept. v. Milwaukee Brewers, 111 Wis. 2d 571, 577, 331 N.W.2d 383 (1983).

Sax purchased unprinted paper from Lindenmeyer (New Jersey) and catalog inserts from another New Jersey seller. Because these transactions occurred outside of Wisconsin, no sales tax of any kind could have been imposed upon those items. Pursuant to § 77.51(19), Stats., Sax is exempt from use tax on items "incorporated into other property to be transported outside the state and thereafter used solely outside the state." Accordingly, the Commission properly upheld the Department's imposition of use tax on only 2% of the items purchased from these out-of-state sellers. Absent an exemption, the value of materials used or consumed in the purchase of the 2% mailed to Wisconsin residents is subject to use tax.

- (3) **Whether the manufacturer's exemption does not apply because the printed catalogs were not "destined for sale" within the meaning of § 77.54(2), Stats.**

Sax argues that the purchase of unprinted paper is exempt from tax pursuant to the "manufacturing exemption" in § 77.54(2), Stats., which provides an exemption for the

following:

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 . . .

(emphasis added). As Sax points out, the Commission agreed that printers are manufacturers under Wis. Admin. Code § Tax 11.39(3)(x), and that an exemption applies to a person who supplies property to a printer for consumption in manufacturing **tangible personal property to be sold** pursuant to Wis. Admin. Code § Tax 11.56(6)(b). However, Sax's claim fails because the printed catalogs were not "destined for sale."

Sax admits that it did not sell the catalogs at issue to its customers. Rather, Sax distributed the catalogs for free. Sax argues that the catalogs were sold by the printers to Sax.

In support of its argument, Sax points to § 77.52(2m)(b), Stats., which provides as follows:

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.

(emphasis added). This court determines that § 77.52(2m)(b), Stats., does not apply to this case for the following reasons.

(a) These are not "services subject to tax under sub. (2)(a) . . . (11)"

Although the service of printing is generally subject to tax pursuant to § 77.52(2)(a)11, Stats., this subsection does not apply in this case because of the second sentence of that subsection, which provides as follows: "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." Therefore, printing for that purpose is not "subject to tax" under that subsection.

Sax argues that the printing service at issue is "subject to tax" under subsection 2(a)11, even though it is not taxed. This court disagrees. This very same subsection excludes the printing services at issue from taxation. This printing service performed for the 98% of catalogs shipped outside of Wisconsin is clearly exempt from (and therefore not "subject to") tax pursuant to the specific language of subsection 2(a)11. Consequently, subsection (2m)(b) does not apply to Sax in this situation.

(b) The catalogs were not "physically transferred to the customer"

As discussed above, this court has determined that § 77.52(2m)(b), Stats., does not apply to Sax in this situation. However, assuming for the sake of argument that this subsection did apply, this court still affirms the Commission's decision.

Sax does not dispute that as the purchaser of the printing service, it is "the customer" under § 77.52(2m)(b), Stats. The Commission stated that "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].'" (Decision, p.19) The catalogs were not physically transferred to the customer, Sax. Rather, the Wisconsin printers directly mailed the catalogs to Sax's customers across the country. The Commission also points out that ownership was not transferred, because Sax still owned the paper. However, Sax argues that "physically transferred" in other parts of the Wisconsin Administrative Code dealing with automobiles means being incorporated into and becoming a component part of

the product.

Even though this court may agree that Sax's interpretation of the statute is reasonable, Sax's interpretation of this statute is not more reasonable than the Department's interpretation. It is reasonable to interpret "physically transferred to the customer" to mean that the good was incorporated into the manufactured product, and that the product could be transferred to the customer directly (by mailing the catalogs to the customer) or indirectly (by mailing the catalogs, at the customer's direction, to the customer's clients). However, it is also equally reasonable to interpret that clause to mean that the catalogs are actually physically transferred to Sax directly. Under the due weight standard of review, this court must uphold the Commission's decision in this regard because both interpretations are equally reasonable.

In sum, Sax did not establish that it was entitled to the manufacturing exemption because the printed catalogs were not "destined for sale" pursuant to § 77.54(2), Stats. It is undisputed that Sax purchased the unprinted paper, and supplied it to the Wisconsin printers. Pursuant to §§ 77.51(13)(e) and (f), and 77.52(2m)(b), Stats., the entity that sells tangible personal property (such as paper to a printer) is the retailer, unless the printer subsequently resells that tangible property. Because no paper was ever sold to the Wisconsin printers, they could not then sell the paper to Sax. As the Commission stated in its decision, "Sax did not purchase from the printers what it already owned. It purchased printing services." (Decision, p.20) Consequently, Sax was required to pay sales tax on the 98% of the paper purchased from Reliable that was used in printing catalogs mailed from the printers free of charge to Sax's clients in other states.

(4) **Whether § 77.51(19), Stats., did not create an exemption from sales tax for the temporary storage of the other 98% of the paper purchased from Reliable, upon which no tax was paid**

Sax constructs an elaborate argument that Sax is not liable for sales tax; Sax argues that the paper was not "sold" in Wisconsin because the paper was not "used or consumed" in Wisconsin. Wisconsin imposes a sales tax upon all retailers for the "sale" of tangible personal property sold in Wisconsin. § 77.52(1), Stats. The term "sale" is defined as the "transfer . . . of tangible personal property . . . for use or consumption but not for resale as tangible personal property." § 77.51(14), Stats. (emphasis added). Section 77.51(14), Stats., defines "sale" as including "the transfer of the ownership of, title to, possession of, or the enjoyment of tangible personal property or services, for use or consumption." Sax further cites the definition of the term "use" in § 77.51(22), Stats.: "the exercise of any right or power over tangible personal property or taxable services incident to the ownership, possession or enjoyment of the property, or services..." Section 77.51(19), Stats., limits the definition of the term use to

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.

According to Sax's analysis, because the property was not "used" in Wisconsin, a sale, as defined in § 77.51(14), Stats., did not occur.

The Commission decided that Reliable did sell the unprinted paper to Sax:

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.

(Decision, p.22) This court agrees.

In § 77.51(14), Stats., the phrase "for use or consumption" is used in contradistinction to (and immediately followed by) "but not for resale." Department of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 50, 257 N.W.2d 855 (1977). The legislature intended that items purchased for resale not be taxed, since the sales tax is to be imposed on the ultimate retail sale. Id. Thus, the statute indicates that because Sax did not purchase the paper for resale to the printers or to Sax's clients, sales tax was properly assessed on Reliable's sale of the paper to Sax.

Sax's argument is inconsistent with the purpose of the use and sales tax statutes. The use tax is supposed to "prevent a buyer from avoiding a sales tax by purchasing goods outside the state." Department of Revenue v. Moebius Printing Co., 89 Wis. 2d 610, 622, 279 N.W.2d 213 (1979). Because the use is not taxable, Sax is attempting to create a sales tax exemption on a purchase from a Wisconsin seller by a Wisconsin buyer because the use is not taxable. As the court stated in Moebius:

The statutes clearly provide that if property is purchased at retail in the state and is used outside Wisconsin it is subject to sales tax. . . . 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 623-24.

The court stated similar reasoning in Woodward Communications, Inc. v. Department of Revenue, 143 Wis. 2d 512, 521 n.4, 422 N.W.2d 137 (Ct. App. 1988):

Woodward's construction of sec. 77.54(2), Stats., would exempt from the sales and use tax the entire process of producing and marketing shoppers' guides, from the purchase of the printers' ink to ultimate distribution, that such a broad exemption can only be created by express language, and that sec. 77.54(2) does not contain such express language.

For the reasons set forth in Moebius and Woodward, Sax's argument must be rejected.

It is a well-established rule of statutory construction that tax exemptions, since they are matters of legislative grace, are construed strictly against granting the exemption.

Revenue Department v. Greiling, 112 Wis. 2d 602, 605, 334 N.W.2d 118 (1983). "Doubts are resolved against the exemption and in favor of taxability." Id. Sax attempts to find an exemption in the definition section; Sax should not expect to find one there that is not in the exemption section, or to nullify that specific language. In sum, § 77.51(19), Stats., does not create an exemption from sales tax for the temporary storage of 98% of the catalogs distributed outside of Wisconsin.

In its decision, the Commission also pointed to the definition of "retailer" in § 77.51(13)(a), Stats.: "Every seller who makes any sale of tangible personal property. . . ." This court agrees that, given this broad definition of "retailer," the definition of "sale" in § 77.51(14), Stats., 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, "not for resale." This court agrees with the Commission's conclusion that Sax "used" the paper by directing that the paper be shipped from out-of-state manufacturers to in-state printers, instructing the Wisconsin printers what to print on the

paper, having the paper printed as instructed, and determining where and how the catalogs were to be sent out by the printers. (Decision, p.22)

Furthermore, the legislative history of the newly created law § 77.54(43), Stats., is highly persuasive that the legislature acted to create a sales tax exemption that had not existed before.

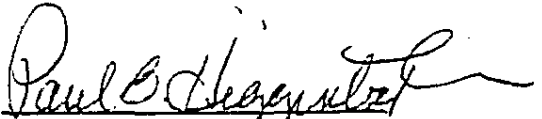
CONCLUSION

For the reasons stated above, the court **AFFIRMS** the Wisconsin Tax Appeals Commission's August 12, 1998, ruling. This case is dismissed

IT IS SO ORDERED.

Dated this 24 day of May, 1999.

BY THE COURT:


Paul B. Higginbotham, Judge
Circuit Court Branch 17

cc: AAG F. Thomas Creeron
Attorney Michael B. Apfeld
Attorney Jordan M. Goodman