


stock when it purchased the paper out-of-state for catalogs which were printed in Wisconsin and then distributed without charge in Wisconsin; and

- 3) A sales tax was properly imposed upon the taxpayer for its purchase in Wisconsin of “finished art” which were used or consumed in the printing and production of the taxpayer’s advertising catalogs, by independent Wisconsin printers, and subsequently distributed without charge to customers and potential customers throughout the country.

The taxpayer has appealed this decision to the Court of Appeals.

WITHHOLDING OF TAXES

 **Officer liability.** *Irvin L. Hougom vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 28, 1999). The issue in this case is whether the taxpayer is a responsible person under sec. 71.83(1)(b)2, Wis. Stats., liable for the unpaid withholding taxes of Scenic Trailways, Inc. (“the corporation”).

The taxpayer was an officer of the corporation since 1971, when the corporation first applied for a withholding tax employer identification number from the department. During 1991-1995 the taxpayer held the office of president and was personally involved with the day-to-day operations of the corporation. The taxpayer was a signer on the corporate checking account and personally

issued checks on that account. The taxpayer also entered into agreements with the department agreeing to pay delinquent withholding taxes. Prior to the personal liability issue at question, the taxpayer received and paid three personal liability assessments for prior periods.

The Commission concluded the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., and was personally liable for the unpaid withholding taxes. The taxpayer had the corporate **authority** to direct the payment of taxes and did not do so; he had a **duty** to direct payment and did not do so; and he **intentionally breached that duty**.

The taxpayer has not appealed this decision.



Tax Releases

“Tax releases” are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases

apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.

The following tax releases is included:

1 Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction

Note: This tax release replaces the tax release by the same title that appeared in *Wisconsin Tax Bulletin 74* (October 1991), pages 22 to 30. This tax release applies prospectively and retroactively to all periods open to adjustment under the statute of limitations. Revisions from the previous tax release include the addition of exempt entities in the section titled “Background” as a result of laws enacted, and changing Answer B in Facts and Questions 1 and 2 and the rationale for Answer B in Facts and Questions 3, 4, and 5.

Statutes: Sections 77.51(2) and (14), 77.54(9a), and 77.55(1), Wis. Stats. (1997-98)

Sales and Use Taxes

1. Purchases of Building Materials by Exempt Entities for Use by Contractor in Real Property Construction (p. 27)

SALES AND USE TAXES

Note: The following tax release interprets the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county and 0.1% stadium sales and use taxes may also apply. For informa-

tion on sales or purchases that are subject to the county or stadium sales and use tax, refer to Wisconsin publication 201, *Wisconsin Sales and Use Tax Information*.

Wis. Adm. Code: Section Tax 11.04 (January 1979 Register)

Background: “Exempt entity,” for purposes of this tax release, means any one of the following entities listed in secs. 77.54(9a) and 77.55(1), Wis. Stats. (1997-98).

- A. United States, its unincorporated agencies and instrumentalities, and any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States.
- B. State of Wisconsin or any agency thereof.
- C. The University of Wisconsin Hospitals and Clinics Authority.
- D. Any county, city, village, town, or school district in Wisconsin.
- E. A county-city hospital established under sec. 66.47, Wis. Stats. (1997-98).
- F. A sewerage commission organized under sec. 281.43(4), Wis. Stats. (1997-98), or a metropolitan sewerage district organized under secs. 66.20 to 66.26 or 66.88 to 66.918, Wis. Stats. (1997-98).
- G. Any other unit of government in Wisconsin or any agency or instrumentality of one or more units of government in Wisconsin.
- H. Any joint local water authority created under sec. 66.0735, Wis. Stats. (1997-98).
- I. A local exposition district under subch. II of ch. 229.
- J. Any corporation, community chest fund, foundation, or asso-

ciation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, except hospital service corporations under sec. 613.80(2), Wis. Stats. (1997-98), no part of the net income of which inures to the benefit of any private stockholder, shareholder, member, or corporation.

A contractor is a consumer of tangible personal property when engaged in real property construction activities, such as improving, altering, installing, repairing, or otherwise servicing real property, and Wisconsin sales or use tax applies to the sale of tangible personal property to the contractor.

When a contractor is a consumer, its gross receipts from labor and material related to real property construction activities are not subject to sales tax. In most instances, the contractor will pay a sales or use tax on its purchases of property consumed in real property construction activities.

Section Tax 11.04(3), Wis. Adm. Code, provides that when a contractor and an exempt entity enter into a construction contract to improve real property, which provides that the contractor is to furnish the building materials and equipment, it is presumed, until the contrary is established, that deliveries of building materials and equipment to the contractor are made pursuant to purchases made by the contractor.

A supplier’s sales of building materials and equipment made **directly** to an exempt entity are not subject to Wisconsin sales or use tax, even though such tangible personal property is later used by a contractor in the erection of a building or structure, or in the alteration, repair, or im-

provement of real property for the exempt entity. Suppliers of building materials and equipment may presume that a sale is made **directly** to an exempt entity if the supplier receives a purchase order from the exempt entity, and payment for the building materials and equipment is received from the exempt entity.

Cautions:

- A contractor may be responsible for sales or use tax on materials used in real property construction for an exempt entity if the contractor is also the supplier of the materials to the exempt entity. See *Wisconsin Tax Bulletin 80* (January 1993), page 37 for more information.
- This tax release is not intended to address the sale and installation of tangible personal property that remains tangible personal property after installation, or taxable services, such as landscaping. Refer to Wisconsin Publications 207 and 210 for more information.

Summary: The following examples illustrate that if an exempt entity properly purchases materials directly from suppliers, the transfer of possession (but not ownership, title, or enjoyment) of those materials and equipment from the exempt entity to the contractor for use in real property construction for the exempt entity is not taxable, regardless of whether:

1. The contract specifies that the contractor is to provide all materials and equipment, the exempt entity purchases the materials and equipment directly from suppliers, and the exempt entity obtains a reduction in the contract price for the direct purchased materials and equipment (e.g., change order), or

2. The contract excludes those materials and equipment the exempt entity will purchase directly from suppliers, resulting in no need for a reduction in the contract price (e.g., change order).

Facts and Question 1: Contractor A enters into a contract to construct a building for Exempt Entity B. The contract states in part as follows [emphasis added]:

“Contractor A hereby proposes to furnish **all labor and materials** and perform all work for the New Building, in strict accordance with the specifications and drawings mentioned therein, as prepared by the Architect, for the following amount.”

“Exempt Entity B reserves the right to purchase or rent directly any materials and equipment for the work of construction, where the total cost of an item or of any aggregation of items to be ordered from one supplier is two thousand dollars (\$2,000) or more. At the end of this section is set forth a list of items or materials and equipment which are identified for consideration by Exempt Entity B for direct purchase or rent. For any item (or aggregate of items from one supplier) purchased or rented by Exempt Entity B, the gross price of such item (as computed by Contractor A hereinafter), plus sales or use tax that would have been applicable to such item if not purchased or rented by Exempt Entity B, shall be deducted from the contract sum to be paid to Contractor A pursuant to its agreement with Exempt Entity B.”

“The contract sum constitutes the maximum cost to Exempt Entity B of the work performed for the work of construction and includes all labor and services and the total cost, including applicable taxes, of all materials and equipment to be purchased and/or for the completion of the work of construction. Contractor

A is required to list its suppliers/vendors or recommended suppliers/vendors and value or cost of the item(s) set forth at the end of this section. Contractor A shall provide all services necessary to Exempt Entity B for Exempt Entity B to purchase the materials and equipment, including preparation of proposed purchase orders, recommendations of vendors and suppliers, and receipt, storage, and protection of materials and equipment. Exempt Entity B will purchase from the vendors and suppliers listed and/or recommended by Contractor A, unless Exempt Entity B is able to secure more advantageous prices. Any discounts, savings, and rebates from the costs and values given by Contractor A of the items identified at the end of this section will belong to Exempt Entity B. Contractor A will furnish any materials and equipment not provided in its listing or which Exempt Entity B is not able to obtain within the maximum cost provided to Exempt Entity B.”

“For any materials and equipment purchased by Exempt Entity B so as to utilize its tax exempt status, Exempt Entity B is and shall be responsible to ensure and arrange that all such materials and equipment are delivered to the job site or such other place as may be designated by Contractor A. Until such materials and equipment are delivered to the job site or such other place as designated by Contractor A, Exempt Entity B has sole and complete responsibility for such materials and equipment, including without limitation any loss or damage thereto. Upon delivery to the job site or such place as designated by Contractor A, Contractor A shall be responsible for examining or inspecting such materials and equipment to assure Exempt Entity B that they are acceptable and in conformance with the contract documents. Any defect or deficiency shall be called to the attention of Ex-

empt Entity B immediately upon delivery in order that Exempt Entity B may obtain any necessary adjustment or replacement of such materials and equipment. If any defect or deficiency is not called to Exempt Entity B’s attention immediately, and as a result Exempt Entity B is not able to obtain a proper adjustment and/or replacement of such materials, such defect or deficiency shall be the responsibility of Contractor A to remedy. Upon acceptance of such materials and equipment, Contractor A is responsible for the installation and incorporation of such materials and equipment into the work of construction in accordance with its agreement with Exempt Entity B and the contract documents generally.”

- A. Is the sale of materials and equipment to Exempt Entity B by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity B’s transfer to Contractor A of materials and equipment used by Contractor A in the construction of the New Building, in accordance with the above contract?

Answer 1:

- A. No. Sales of materials and equipment to Exempt Entity B by suppliers, other than Contractor A, are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate that Exempt Entity B is the purchaser and Exempt Entity B pays for the materials and equipment with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of ma-

materials and equipment by Exempt Entity B to Contractor A is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to 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.

Since Exempt Entity B retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor A. Since Contractor A does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity B, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor A takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity B, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Facts and Question 2: Contractor C enters into a contract to construct a building for Exempt Entity D. The contract provides in part as follows [emphasis added]:

“Contractor C hereby proposes to furnish all labor and materials and perform all work for the New Building, in strict accordance with the specification and drawings mentioned therein, as prepared by the Architect, for the following amount.”

“Exempt Entity D reserves the right to purchase or rent directly any mate-

rials and equipment for all construction where the total cost of an item or of any aggregation of items to be ordered from one supplier, is two thousand dollars (\$2,000) or more.”

“Each contract and each subcontract shall state a maximum cost to Exempt Entity D which maximum cost shall include all labor and services and the total cost of all materials and equipment to be purchased by Exempt Entity D and/or Contractor C and/or the subcontractor. Contractor C and each subcontractor shall provide all services necessary to Exempt Entity D for Exempt Entity D to purchase the materials and equipment, including preparation of proposed purchase orders, recommendations of vendors and suppliers, receipt, storage, and protection of materials and equipment. Contractor C or subcontractor shall provide Exempt Entity D with a list of all items to be furnished by Exempt Entity D, and the maximum cost to Exempt Entity D of all of such materials. Exempt Entity D will purchase from the vendors and suppliers recommended by Contractor C or subcontractor, unless Exempt Entity D is able to secure more advantageous prices. Any discounts, savings and rebates will belong to Exempt Entity D. Contractor C or subcontractor will furnish any materials and equipment not provided in the listing or which Exempt Entity D is not able to obtain within the maximum costs provided to Exempt Entity D.”

“Exempt Entity D shall cause all materials and equipment purchased by Exempt Entity D to be delivered to Contractor C or subcontractor. Contractor C or subcontractor shall be responsible to examine or inspect such materials and equipment to assure Exempt Entity D that they are acceptable and in conformance with the contract documents. Any defect or deficiency shall be called to the

attention of Exempt Entity D immediately upon delivery in order that Exempt Entity D may obtain any necessary adjustment. If any defect or deficiency is not called to Exempt Entity D’s attention immediately, and as a result Exempt Entity D is not able to obtain a proper adjustment, such defect or deficiency shall be the responsibility of Contractor C and of subcontractor.”

“Contractor C and subcontractor shall have the same responsibilities for the provision and the installation of materials and equipment provided by Exempt Entity D as he would have if purchased by Contractor C or subcontractor except as specifically amended by this Article.”

- A. Is the sale of materials and equipment to Exempt Entity D by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity D’s transfer to Contractor C of materials and equipment used by Contractor C in the construction of the New Building, in accordance with the above contract?

Answer 2:

- A. No. Sales of materials and equipment to Exempt Entity D by suppliers, other than Contractor C, are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate that Exempt Entity D is the purchaser and Exempt Entity D pays for the materials and equipment with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Ex-

empt Entity D to Contractor C is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to 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.

Since Exempt Entity D retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor C. Since Contractor C does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity D, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor C takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity D, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Facts and Question 3: Contractor E enters into a contract to construct a building for Exempt Entity F. The contract includes a rider which states in part as follows:

“Exempt Entity F will make direct purchases and rentals in accordance with Exhibits I and II to this Rider. The rights and duties of the parties under these exhibits are incorporated by this reference.”

Exhibit I of the rider, entitled “Procedures for Direct Owner Purchases,” provides as follows:

“Exempt Entity F is exempt from Wisconsin Sales and Use Taxes on purchases made by it. To obtain such exemption, purchases must be made by Exempt Entity F directly, billed to Exempt Entity F directly, and paid by Exempt Entity F directly.”

“Exempt Entity F intends to purchase or rent directly any materials and equipment for general construction where the total cost of an item or any aggregation of items to be ordered from one supplier is One Thousand Dollars (\$1,000.00) or more, and where the other conditions of this procedure are satisfied.”

“Contractor E shall separately state the total cost (excluding sales and use taxes) of all materials and equipment that may be purchased or rented directly by Exempt Entity F. In addition, Contractor E shall submit a schedule of all such purchases that may be made by Exempt Entity F including vendor’s name, general description of item(s) to be purchased, and the price limit for each item.”

“Contractor E shall provide all services necessary to Exempt Entity F for Exempt Entity F to purchase the materials and equipment including preparation of proposed purchase orders, recommendations of suppliers and vendors, receipt, storage and protection of materials and equipment. Exempt Entity F will purchase from the vendors and suppliers recommended by the contractor, unless Exempt Entity F is able to secure more advantageous prices. Any discounts, savings and rebates will belong to Exempt Entity F. If Exempt Entity F is not able to obtain any materials or equipment within the price limit provided, the excess shall be subtracted from the Contract Sum. All purchases by Exempt Entity F shall be used for the sole benefit of Exempt Entity F.”

“Exempt Entity F shall cause all materials and equipment directly purchased by Exempt Entity F to be delivered to Contractor E, who shall accept delivery as Exempt Entity F’s agent and promptly notify the Owner thereof. When the materials are delivered to the job site, Contractor E shall promptly inspect them and bring to the attention of Exempt Entity F and its Architect, any defects therein. Contractor E shall assist in contacting the supplier in an effort to correct or adjust any defect.”

“Contractor E shall have the same responsibilities for installation of materials and equipment provided by Exempt Entity F as he would have if purchased by Contractor E except as specifically amended by this Exhibit.”

“For the purpose of this Exhibit the term “work” has the same meaning as set forth in the contract documents except for the furnishing of materials and equipment purchased directly by Exempt Entity F.”

“Exempt Entity F shall indemnify and hold Contractor E harmless from and against any and all claims asserted against Contractor E relating to the liability for Sales or Use Tax (including interest and penalties and, in the event of litigation, all reasonable expenses, including attorney’s fees and accountant’s fees incurred by Contractor E in connection therewith) on any materials or equipment purchased or rented directly by Exempt Entity F, provided that (a) Contractor E promptly tenders to Exempt Entity F the defense, negotiation, or other handling of such claim, (b) Exempt Entity F shall have the right, at its own expense, to assume the defense of the claim, and (c) Contractor E shall cooperate fully with Exempt Entity F in providing any and all information which Exempt Entity F reasonably requests in connection with the defense of the claim.”

“The procedures of this section shall not apply to any materials or equipment manufactured or fabricated by Contractor E, nor to any materials or equipment as to which Contractor E itself would be the vendor, nor as to any materials and equipment which would be supplied and installed by the same entity.”

“The supplier will invoice Exempt Entity F. The invoice shall name Exempt Entity F as the purchaser and reference the purchase order number.”

“Contractor E shall review the invoice and recommend approval, partial approval or rejection. He shall also recommend to Exempt Entity F what retention, if any, should be withheld from the supplier. He shall then forward the invoice to the Architect.”

“The Architect will then approve or disapprove Contractor E’s recommendation. If approval is given, the Architect will forward the invoice to Exempt Entity F for direct payment.”

“Exempt Entity F will write checks and remit directly to the supplier and transmit a copy of the payment form to the Architect.”

The contract and contract price do not include any of the materials and equipment sold directly to Exempt Entity F by suppliers.

- A. Is the sale of materials and equipment to Exempt Entity F by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity F’s transfer to Contractor E of materials and equipment used by Contractor E in the construction of the New Building, in accordance with the above contract?

Answer 3:

- A. No. Sales of materials and equipment to Exempt Entity F directly by suppliers, other than Contractor E, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate Exempt Entity F is the purchaser and Exempt Entity F pays the supplier with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Exempt Entity F to Contractor E is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to 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.

Since Exempt Entity F retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor E. Since Contractor E does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity F, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor E takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity F, such possession is as a bailee

and not an owner and, therefore, no sale has taken place.

Facts and Question 4: Contractor G enters into a contract to construct a building for Exempt Entity H. The contract states in part as follows:

“Exempt Entity H reserves the right to purchase directly any equipment and materials for the work of construction, where the total cost of an item or of any aggregation of items to be ordered from one supplier is \$2,000 or more.”

“At the end of this section is set forth a list of items of materials and equipment which are identified for direct purchase by Exempt Entity H. For any item purchased by Exempt Entity H, the gross price of such item (as computed by Contractor G), plus sales or use tax that would have been applicable to such item if not purchased by Exempt Entity H, shall not be part of the contract sum to be paid to the contractor.”

“Contractor G will furnish any materials and equipment not provided in its listing. Contractor G will also furnish any materials and equipment which Exempt Entity H is not able to obtain within the maximum cost provided to Exempt Entity H, or which Exempt Entity H desires Contractor G to purchase and the contract shall be increased by the amount for such items originally provided in Contractor G’s bid.”

“For any materials and equipment purchased by Exempt Entity H so as to utilize its tax exempt status, Exempt Entity H shall receive, store and protect all materials and equipment until provided to Contractor G at the job site or such place as designated by Contractor G. Until such materials and equipment are delivered to the job site, Exempt Entity H has sole and complete responsibility for such materials and equipment, in-

cluding without limitation, any loss or damage thereto. Upon delivery to the job site or such place as designated by Contractor G, Contractor G shall be responsible for examining or inspecting such materials and equipment to assure Exempt Entity H that they are acceptable and in conformance with the contract. Any defect or deficiency shall be called to the attention of Exempt Entity H immediately upon delivery in order that Exempt Entity H may obtain any necessary adjustment or replacement of such materials and equipment. Upon acceptance of such materials and equipment, Contractor G is responsible for the installation and incorporation of such materials and equipment into the work of construction in accordance with its agreement with Exempt Entity H and the contract documents generally.”

“Exempt Entity H shall at all times have and possess all incidents of ownership with respect to materials and equipment purchased by it. Exempt Entity H shall insure its interest in such materials and equipment or shall arrange with Contractor G to be added as an additional insured to any insurance policy covering materials and equipment located at the project site.”

“As agent for Exempt Entity H, Contractor G shall, at the request of Exempt Entity H, negotiate and communicate with the suppliers of materials and equipment purchased by Exempt Entity H concerning scheduled deliveries, shortage, deficiencies, disputes and other such matters; provided, that Exempt Entity H shall remain responsible for any late delivery, shortage, deficiency dispute or other such manner, in order to permit Exempt Entity H to pursue and protect fully Exempt Entity H’s rights against suppliers, manufacturers and others.”

“Any discounts, savings and rebates on purchase of materials and equipment shall belong to Exempt Entity H.”

- A. Is the sale of materials and equipment to Exempt Entity H by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity H’s transfer to Contractor G of materials and equipment used by Contractor G in the construction of the New Building, in accordance with the above contract?

Answer 4:

- A. No. Sales of materials and equipment to Exempt Entity H directly by suppliers, other than Contractor G, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate Exempt Entity H is the purchaser and Exempt Entity H pays the suppliers with its own funds.
- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Exempt Entity H to Contractor G is not a sale subject to Wisconsin sales or use tax.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to 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.

Since Exempt Entity H retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor G. Since Contractor G does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity H, it does not have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor G takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity H, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Facts and Question 5: Contractor I enters into a contract to construct a building for Exempt Entity J. The contract states in part as follows:

“Exempt Entity J will purchase certain materials and equipment directly, for receipt and incorporation into the work by Contractor I.”

“Exempt Entity J will purchase directly property, as listed in the Contractor I bid form, for incorporation into the work by Contractor I.”

“Contractor I shall solicit from suppliers or manufacturers competitive costs of items listed in the contract. Contractor I shall incorporate into the Exempt Entity J Purchase Listing, the tax exempt dollar amount of each item.”

“The cost of materials and equipment purchased directly by Exempt Entity J as used in the bid form shall be excluded from the contract sum to be paid to Contractor I.”

The contract and contract price do not include any materials and equip-

ment sold directly to Exempt Entity J by suppliers.

- A. Is the sale of materials and equipment to Exempt Entity J by suppliers subject to Wisconsin sales and use taxes?
- B. Is there any Wisconsin sales or use tax due as a result of Exempt Entity J's transfer to Contractor I of materials and equipment used by Contractor I in the construction of the New Building, in accordance with the above contract?

Answer 5:

- A. No. Sale of materials and equipment to Exempt Entity J directly by suppliers, other than Contractor I, in conformance with the above contract are exempt from Wisconsin sales or use tax under sec. 77.54(9a), Wis. Stats. (1997-98), provided the purchase orders to suppliers indicate Exempt Entity J is the purchaser and Exempt Entity J

pays the suppliers with its own funds.

- B. No. Based on the information contained in the above contract, the transfer of possession of the materials and equipment by Exempt Entity J to Contractor I is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14)(intro.), Wis. Stats. (1997-98), to 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.

Since Exempt Entity J retains ownership of the materials and equipment, there is no transfer of ownership or title of the materials and equipment to Contractor I. Since Contractor I does not have the right to direct the disposition of the materials and equipment purchased by Exempt Entity J, it does not

have enjoyment of the materials and equipment as the term is defined in sec. 77.51(22)(b), Wis. Stats. (1997-98). Although Contractor I takes possession of the materials and equipment for purposes of incorporating them into real property for Exempt Entity J, such possession is as a bailee and not an owner and, therefore, no sale has taken place.

Note: If a contractor or exempt entity remitted sales or use tax on a transfer described in the Facts and Questions 1 and 2 above based on the prior tax release that appeared in *Wisconsin Tax Bulletin 74* (October 1991), pages 22 to 30, it may file a claim for refund with the Wisconsin Department of Revenue for those periods open to adjustment under the statute of limitations. For information on filing claims for refund, refer to Wisconsin Publication 216, "Filing Claims for Refund of Wisconsin Sales or Use Tax." □



Private Letter Rulings

"Private letter rulings" are written statements issued to a taxpayer by the department, that interpret Wisconsin tax laws based on the taxpayer's specific set of facts. Any taxpayer may rely upon the ruling to the extent the facts are the same as those in the ruling.

The ruling number is interpreted as follows: The "W" is for "Wisconsin"; the first four digits are the year and week the ruling becomes available for publication (80 days after it is issued to the taxpayer); the last three digits are the number in the series of rulings issued that year.

The date is the date the ruling was issued.

Certain information that could identify the taxpayer has been deleted. Additional information is available in Wisconsin Publication 111, "How to Get a Private Letter Ruling From the Wisconsin Department of Revenue."

The following private letter rulings are included:

Corporation Franchise and Income Taxes

Nonresident trusts - situs
W9926002 (p. 34)

Wisconsin treatment of S corporations and their QSSSs
W9933003 (p. 36)

✱ **W9926002** ✱

April 6, 1999

Type Tax: Corporation Franchise and Income

Issue: Nonresident trusts - situs