

Wisconsin Department of Revenue

SALES AND USE TAX REPORT

1-09

March 2009



IMPORTANT NOTICE ABOUT THE SALES AND USE TAX REPORT!

The report that you are currently reading is going paperless!

Beginning in January of 2010, the *Sales and Use Tax Report* will no longer be issued on paper. The *Sales and Use Tax Report* will continue to be available on the Department of Revenue's web site.

NOTE: This article relates ONLY to the *Sales and Use Tax Report*. It **does not** relate to your *Wisconsin Sales and Use Tax RETURN*.

Don't miss future issues of the *Sales and Use Tax Report*. Subscribe to the sales and use tax electronic mailing list to receive notification when a new *Sales and Use Tax Report* has been posted to the Department of Revenue's web site. The notification will include a link to the reports. Subscribers will also receive important sales and use tax updates.

Subscribe at www.revenue.wi.gov/html/lists.html, or go to the department's web site at www.revenue.wi.gov; click the link on the left side for "E-Services," then click any link titled "Electronic Mailing Lists." You will be provided with a number of mailing lists to which you may subscribe. (Notification of new *Sales and Use Tax Reports* will be sent to subscribers of the "Sales & Use Tax" subscriber list.) There is no charge for subscriptions.

I. REMINDER – NEW CATALOG EXEMPTION BECOMES EFFECTIVE APRIL 1, 2009

A Wisconsin sales and use tax exemption was created in 2007 Wisconsin Act 20 (effective April 1, 2009) for the gross receipts from the sale of and the storage, use, or other consumption of catalogs, and the envelopes in which the catalogs are mailed, that are designed to advertise and promote the sale of merchandise or to advertise the services of individual business firms (sec. 77.54(25m), Wis. Stats.).

The current exemption for printed advertising materials purchased and stored for the purpose of subsequently transporting them outside Wisconsin by the purchaser for use solely outside Wisconsin will no longer apply to catalogs and the envelopes in which they are mailed (sec. 77.54(25), Wis. Stats.).

Also effective April 1, 2009, Wisconsin sales and use tax will not apply to the printing or imprinting of tangible personal property that results in printed materials that are exempt as printed advertising materials (sec. 77.54(25), Wis. Stats.) or certain catalogs and their mailing envelopes (sec. 77.54(25m), Wis. Stats.). (*Currently, Wisconsin sales and use tax does not apply to the printing or imprinting of tangible personal property which will be subsequently transported outside Wisconsin for use outside Wisconsin by the consumer for advertising purposes.*)

"Catalog" means a printed and bound, stitched, sewed, or stapled book containing a list and description of property or services for sale, regardless of whether a price is specified.

Qualifying envelopes include paper envelopes, flat cardboard mailing envelopes, and padded envelopes. "Envelopes" do not include cardboard boxes, even if the cardboard box is sold flat and assembled into a 3-dimensional box prior to inserting the catalog(s).

II. NEW TAX LAWS

The Wisconsin Legislature has enacted the following changes to the Wisconsin sales and use tax laws. These provisions are contained in 2009 Wisconsin Act 2. This act can be accessed at <http://www.legis.wi.gov/2009/data/acts/09Act2.pdf>.

A. Computer Software (2009 Wis. Act 2, amend sec. 77.51(20), and create secs. 77.51(1n), (1p), and (10r), effective March 6, 2009.)

The definition of tangible personal property is amended to include prewritten computer software, regardless of how it is delivered to the purchaser. Under prior law, tangible personal property included computer programs except custom computer programs.

Effective March 6, 2009, this provision reverses the decision in *Wisconsin Department of Revenue vs. Menasha Corporation* (Wisconsin Supreme Court, No. 2004AP3239, July 11, 2008). In this decision, the Supreme Court ruled that the SAP R/3 System software purchased by the taxpayer was custom software that is not subject to Wisconsin sales or use tax when sold, leased, or licensed.

Definitions of "computer," "computer software," and "prewritten computer software" were added to the law. The definitions are as follows:

Computer - An electronic device that accepts information in digital or similar form and that manipulates such information to achieve a result based on a sequence of instructions.

Computer software - A set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

Prewritten computer software - Computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of 2 or more “prewritten computer software” programs or prewritten portions of computer software does not cause the combination to be other than “prewritten computer software.” “Prewritten computer software” includes software designed and developed by the author or other creator to the specifications of a specific purchaser if it is sold to a person other than the specific purchaser. For purposes of this subsection, if a person modifies or enhances computer software of which the person is not the author or creator, the person is the author or creator only of the person’s modifications or enhancements. “Prewritten computer software” or a prewritten portion of computer software that is modified or enhanced to any degree, with regard to a modification or enhancement that is designed and developed to the specifications of a specific purchaser, remains “prewritten computer software,” except that if there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement is not “prewritten computer software.”

Computer Software Maintenance Contracts

The tax treatment of a computer software maintenance contract follows the tax treatment of the purchase of the software to which the contract relates. Therefore, if a person’s purchase of software was exempt from Wisconsin sales and use tax, then that person’s purchase of the software maintenance contract for that software would also be exempt from Wisconsin sales and use tax.

For example, in 2007, Company A purchased software similar to SAP R/3 System software (exempt custom software at the time of purchase). Company A’s purchase of a maintenance contract for this software is exempt from sales and use tax, regardless of whether the maintenance contract is purchased before or after March 6, 2009 (i.e., the date that the sale of this type of software becomes taxable).

When a software maintenance contract for **taxable software** includes both taxable and nontaxable products or services, the following applies:

- ***Maintenance contracts for taxable computer software or taxable computer programs - Contracts sold prior to 10-1-09**** – If the contract includes taxable and nontaxable products or ser-

vices, the entire charge for the contract is taxable unless it is determined by the department that another method, such as allocation or primary purpose, more accurately reflects the tax.

- ***Maintenance contracts for taxable computer software or taxable computer programs - Contracts sold 10-1-09 and thereafter**** – If the contract includes taxable and nontaxable products or services, the entire sales price for the contract is taxable unless, at the retailer’s option, the retailer can identify by reasonable and verifiable standards from the retailer’s books and records that are kept in the ordinary course of its business for other purposes, including purposes unrelated to taxes, the portion of the price that is attributable to products or services that are not subject to the tax. That portion of the sales price is not taxable.

*The 10-1-09 date is significant because of certain provisions in the Main Street Equity Act referenced below.

- B. Main Street Equity Act a/k/a Streamlined Sales and Use Tax Provisions** (2009 Wis. Act 2, effective October 1, 2009. Affected provisions in the law are too numerous to list individually. See the language of 2009 Wis. Act 2 at <http://www.legis.wi.gov/2009/data/acts/09Act2.pdf>.)

The Wisconsin Legislature has passed the legislation necessary to conform Wisconsin’s sales and use tax laws to the requirements of the Streamlined Sales and Use Tax Agreement (SSUTA) and allow Wisconsin to petition to become a member of the Streamlined Sales Tax Governing Board (SSTGB). The conforming legislation becomes effective in Wisconsin on October 1, 2009. If the petition for membership is approved by the existing members of the SSTGB, Wisconsin will be the 23rd state to become a member of the SSTGB. The 22 other states that have already enacted the necessary legislation are: Arkansas, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Washington and Wyoming.

Some of the goals of the SSUTA that will benefit Wisconsin retailers and/or consumers include the following: simplifying and modernizing the sales and use tax system to reduce the burdens of sales and use tax compliance, creating uniformity among the states with respect to definitions used to determine the tax base, creating uniformity between the state and local tax bases, creating one central, electronic registration system for all member states, creating uniform sourcing rules for all of the member states, simplifying the administration of exemptions for both retailers and purchasers and simplifying the sales tax return and the methods to remit the taxes due. Even with all of these common goals, the SSUTA still protects each state’s

sovereign right to determine which items are or are not taxable in its state.

To date, nearly 1,100 retailers have already **voluntarily** registered under the Streamlined Sales Tax Project (SSTP) for those states that have conformed their laws to the SSUTA – regardless of whether they have a physical presence in all those states – and are collecting and remitting the applicable sales or use tax for those states. These retailers have recognized that the uniformity and simplification provisions required by the SSUTA before a state can become a full member of the SSTP have reduced their compliance burden to the point that they are willing to **voluntarily** collect the applicable sales or use tax on all of their taxable sales made into these states.

Although conforming Wisconsin's laws to the provisions of the SSUTA will not allow Wisconsin, or any other state, to **require** every out-of-state retailer that delivers taxable products into Wisconsin to collect Wisconsin sales and use tax, it at least gives the State of Wisconsin and the counties and the special districts that have adopted the applicable sales and use taxes an opportunity to receive some of the sales and use taxes that otherwise may go uncollected. In addition, it helps level the playing field between Wisconsin brick and mortar retailers and their mail order and online competitors.

Additional information detailing the changes that will occur because of Wisconsin's adoption of this legislation will be posted on the department's web site and published in future issues of the *Wisconsin Tax Bulletin* and *Sales and Use Tax Report*.

If you would like additional information concerning the national Streamlined Sales Tax Project, please visit the SSTP web site at: <http://www.streamlinedsalestax.org/>.

C. Sales and Use Taxes Imposed on Digital Goods (2009 Wis. Act 2, effective October 1, 2009. Affected provisions in the law are too numerous to list individually. See the language of 2009 Wis. Act 2 at <http://www.legis.wi.gov/2009/data/acts/09Act2.pdf>.)

Imposition - Sales Tax: Effective October 1, 2009, state, county, and stadium sales taxes and the premier resort area tax are imposed on the sale, lease, license, or rental of specified digital goods and additional digital goods at retail for the right to use the specified digital goods or additional digital goods on a permanent or less than permanent basis and regardless of whether the purchaser is required to make continued payments for such right. (Section 77.52(1)(d), Wis. Stats.)

Imposition - Use Tax: Effective October 1, 2009, state, county, and stadium use taxes are imposed on the storage, use, or other consumption of specified digital goods and additional digital goods purchased from any retailer, if the purchaser has the right to use

the specified digital goods or additional digital goods on a permanent or less than permanent basis and regardless of whether the purchaser is required to make continued payments for such right. (Section 77.53(1), Wis. Stats.)

Exemptions: An exemption is provided for the sale of and the storage, use, or other consumption of specified digital goods or additional digital goods, if the sale, license, lease, or rental of and the storage, use, or other consumption of such goods sold in a tangible form is exempt from taxation under Subchapter III, Chapter 77, Wis. Stats. (Section 77.54(50), Wis. Stats.)

Definitions: The following definitions apply for purposes of the sales and use tax treatment of digital goods:

a. "Specified digital goods" means digital audio works, digital audiovisual works, and digital books. For purposes of Subchapter III, Chapter 77, Wis. Stats., the sale of or the storage, use, or other consumption of a digital code is treated the same as the sale of or the storage, use, or other consumption of any specified digital goods for which the digital code relates. (Section 77.51(17x), Wis. Stats.)

b. "Additional digital goods" means all of the following, if they are transferred electronically: (1) greeting cards; (2) finished artwork; (3) periodicals; and (4) video or electronic games. For purposes of Subchapter III, Chapter 77, Wis. Stats., the sale of or the storage, use, or other consumption of a digital code is treated the same as the sale of or the storage, use, or other consumption of any additional digital goods for which the digital code relates. (Section 77.51(1a), Wis. Stats.)

c. "Digital audio works" means works that result from the fixation of a series of musical, spoken, or other sounds that are transferred electronically, including prerecorded or live music, prerecorded or live readings of books or other written materials, prerecorded or live speeches, ringtones, or other sound recordings but not including audio greeting cards sent by electronic mail. (Section 77.51(3pa), Wis. Stats.)

d. "Digital audiovisual works" means a series of related images that, when shown in succession, impart an impression of motion, along with accompanying sounds, if any, and that are transferred electronically. "Digital audiovisual works" includes motion pictures, musical videos, news and entertainment programs, and live events, but does not include video greeting cards or video or electronic games. (Section 77.51(3p), Wis. Stats.)

e. "Digital books" means works that are generally recognized in the ordinary and usual sense as books and are transferred electronically. "Digital books" includes any literary work, other than a digital audio work or digital audiovisual work, that is expressed in words, numbers, or other verbal or numerical

symbols or indicia, if the literary work is generally recognized in the ordinary and usual sense as a book, work of fiction or nonfiction, or a short story, but does not include newspapers or other news or information products, periodicals, chat room discussions, or blogs. (Section 77.51(3pb), Wis. Stats.)

f. "Digital code" means a code that provides the person who holds the code a right to obtain an additional digital good, a digital audiovisual work, digital audio work, or digital book and that may be obtained by any means, including tangible forms and electronic mail, regardless of whether the code is designated as song code, video code, or book code. "Digital code" includes codes used to access or obtain any specified digital goods, or any additional digital goods that have been previously purchased, and promotion cards or codes that are purchased by a retailer or other business entity for use by the retailer's or entity's customers.

"Digital code" does not include the following: (a) code that represents any redeemable card, gift card, or gift certificate that entitles the holder of such card or certificate to select any specified digital goods or additional digital goods at the cash value indicated by the card or certificate; or (b) digital cash that represents a monetary value that a customer may use to pay for a future purchase. (Section 77.51(3pc), Wis. Stats.)

g. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. (Section 77.51(3po), Wis. Stats.)

h. "Finished artwork" means the final art used for actual reproduction by photomechanical or other processes or for display purposes. "Finished artwork" also includes all of the following items regardless of whether such items are reproduced: drawings, paintings, designs, photographs, lettering, paste-ups, mechanicals, assemblies, charts, graphs, and illustrative materials. (Section 77.51(3rm), Wis. Stats.)

i. "Ringtones" means digitized sound files that are downloaded onto a device and that may be used to alert the customer regarding a communication, but not including ringback tones or other digital audio files that are not stored on the purchaser's communication device. (Section 77.51(13rm), Wis. Stats.)

j. "Transferred electronically" means accessed or obtained by the purchaser by means other than tangible storage media. (Section 77.51(21q), Wis. Stats.)

Sourcing - Sales of Digital Goods: The location of a sale of a specified digital good or additional digital good is determined as follows:

Note: For purposes of the location of a sale of a specified digital good or additional digital good, "receives" means taking possession or making first use of,

whichever is first, the specified digital good or additional digital good. (Section 77.522(1)(a)1., Wis. Stats.)

(a) If a purchaser receives the digital good at a seller's business location, the sale occurs at that business location.

(b) If a purchaser does not receive the digital good at a seller's business location, the sale occurs at the location where the purchaser, or the purchaser's designated donee, receives the digital good, including the location indicated by the instructions known to the seller for delivery to the purchaser or the purchaser's designated donee.

(c) If the location of a sale of the digital good cannot be determined under par. (a) or (b), the sale occurs at the purchaser's address as indicated by the seller's business records, if the records are maintained in the ordinary course of the seller's business and if using that address to establish the location of the sale is not in bad faith.

(d) If the location of a sale of the digital good cannot be determined under par. (a), (b), or (c), the sale occurs at the purchaser's address as obtained during the consummation of the sale, including the address indicated on the purchaser's payment instrument, if no other address is available and if using that address is not in bad faith.

(e) If the location of a sale of the digital good cannot be determined under par. (a), (b), (c), or (d), including the circumstance in which the seller has insufficient information to determine the location under par. (a), (b), (c), or (d), the sale occurs at the location from which the digital good was first available for transmission by the seller, not including any location from which the digital good was merely transferred electronically. (Section 77.522(1) and (2), Wis. Stats.)

Sourcing – Licenses of Digital Goods: The location of a license of a specified digital good or additional digital good is determined as follows:

(a) With regard to the first or only payment on the license of the digital good, the license occurs at the location determined under "Sourcing – Sales of Digital Goods," above.

(b) If the digital good is moved from the place where the digital good was initially delivered, the subsequent periodic payments on the license occur at the digital good's primary location as indicated by an address for the digital good that is provided by the licensee and that is available to the licensor in records that the licensor maintains in the ordinary course of the licensor's business, if the use of such an address does not constitute bad faith. The location of a license as determined under this paragraph shall not be altered by any intermittent use of the digital good at different locations. (Section 77.522(1) and (2), Wis. Stats.)