

TAX REPORT

2-91

Sales/Use Tax

SEPTEMBER 1991

I. NEW WISCONSIN SALES AND USE TAX LAWS

The Wisconsin Legislature enacted new sales and use tax laws in 1991 which may affect you. This report explains these new laws. The Wisconsin Act number and the effective date of each new law is shown in parenthesis after the title. If you have any additional questions regarding these new laws, contact any Department of Revenue office.

1. Claims for Refund of Sales and Use Taxes Must Be Made By Persons Who Remitted the Tax to the Department (1991 Act 39, amend sec. 77.59(4)(intro.), effective for claims for refund filed on or after October 1, 1991.)

Claims for refund of sales and use taxes may be made only by the person who remitted the sales and use taxes to the department. This provision reverses the Wisconsin Court of Appeals, District IV, decision in *Dairyland Harvestore, Inc., vs. Wisconsin Department of Revenue; Badgerland Harvestore Systems, Inc., f.k.a. Badgerland Harvestore Products vs. Wisconsin Department of Revenue*, dated August 17, 1989, which held that all persons who paid excess sales or use taxes, whether to retailers or the department, could file claims for refund with the department.

Example: Customer A purchases computer software from Company B for \$2,000. Company B charges sales tax of \$100 on this sale of software and remits the \$100 of tax to the department on its monthly sales tax return. Customer A later determines it should not have paid sales tax on the software.

Under this new provision, Customer A may not file with the department a claim for refund of the \$100 sales tax it paid to Company B. Company B is the *only* person that may file a claim for refund regarding this sale because it is the person that remitted the \$100 tax to the department.

2. Impose Tax on Materials Removed From Wisconsin for Use Out-of-State (Except Advertising Materials) (1991 Act 39, repeal sec. 77.51(19) and amend sec. 77.51(18), effective October 1, 1991.)

The definitions of "storage" and "use" are revised to provide that purchases of tangible personal property

(except advertising materials) from a retailer are subject to Wisconsin use tax if the tangible personal property is stored or used in Wisconsin, regardless of whether the property is subsequently used outside Wisconsin.

Example 1: A Wisconsin corporation with branch offices in neighboring states purchases computer hardware for use in its branch offices from a supplier located outside Wisconsin. The supplier does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax. The supplier has the hardware shipped to Wisconsin by common carrier. The computer hardware is stored in Wisconsin by the Wisconsin corporation and subsequently shipped to its branch offices for installation and set up when needed.

New Law: The Wisconsin corporation is required to report Wisconsin use tax on the purchase price of the computer hardware.

Old Law: The Wisconsin corporation is not required to report Wisconsin use tax on the purchase price of the computer hardware.

Note: For purposes of this example and the following examples, new law means the (1989-90) Wisconsin Statutes revised by 1991 Act 39. Old law means the (1989-90) Wisconsin Statutes.

Example 2: Assume the same facts as in Example 1 except that the supplier delivers the computer hardware into Wisconsin using its own trucks (rather than by common carrier). As a result, the supplier has nexus in Wisconsin and is registered to collect Wisconsin use tax.

New Law: The supplier is required to collect Wisconsin use tax on the sales price of the computer hardware.

Old Law: The supplier is not required to collect Wisconsin use tax on the sale of the computer hardware if the Wisconsin corporation gives the supplier a properly completed exemption certificate indicating that the property is to be stored in Wisconsin for subsequent use outside Wisconsin.

Example 3: A construction contractor located in Wisconsin purchases lumber from a supplier located outside Wisconsin. The supplier does not have nexus in Wisconsin and is not registered to collect Wisconsin

use tax. The lumber is shipped to the contractor in Wisconsin by common carrier. The lumber is subsequently incorporated into real property in Iowa.

New Law: The contractor is required to report Wisconsin use tax on the purchase price of the lumber.

Old Law: The contractor is not required to report Wisconsin use tax on the purchase price of the lumber.

Example 4: Assume the same facts as Example 3 except that the supplier delivers the lumber to Wisconsin in its own trucks, rather than by common carrier. As a result, the supplier has nexus in Wisconsin and is registered to collect Wisconsin use tax.

New Law: The supplier is required to collect Wisconsin use tax on the sales price of the lumber.

Old Law: The supplier is not required to collect Wisconsin use tax on the sale of the lumber if the contractor gives the supplier a properly completed exemption certificate indicating that the property is to be stored in Wisconsin for subsequent use outside Wisconsin.

3. Revise Imposition of Sales Tax on Telecommunication Services (1991 Act 39, repeal and recreate sec. 77.52(2)(a)5 and create sec. 77.51(17m) and (21m), effective October 1, 1991.)

I. New Provision

The sale of telecommunication services as defined in sec. 77.51(21m), Wis. Stats., is subject to Wisconsin sales or use tax if both conditions in A and B listed below are met.

- A. The service originates in Wisconsin.
- B. The service is charged to a service address in Wisconsin. A "service address" is the location of telecommunication equipment from which telecommunication services are originated or at which telecommunication services are received by a buyer. If there is no defined location, the service address is where a buyer makes primary use of telecommunication equipment as defined by the telephone number, authorization code, or location where bills are sent.

II. Prior Law

The sale of telecommunication services of whatever nature was subject to sales or use tax if both the conditions in A and B (1 or 2 of B) were met.

- A. The service originated in Wisconsin, and
- B. The service was charged to a:
 1. Subscriber located in Wisconsin, or
 2. Telephone located in Wisconsin

For information and examples of these conditions under prior law, refer to sec. Tax 11.66, Wis Adm. Code (March 1991 Register).

Note: Telecommunication services paid for by the insertion of coins in a coin-operated telephone are not subject to sales tax under either the new provision or prior law.

4. Change Effective Date of County Tax (1991 Act 39, amend sec. 77.70, effective August 15, 1991.)

If a county adopts the county sales and use tax by county ordinance, the county sales and use tax becomes effective either January 1, April 1, July 1, or October 1 as chosen by the county, provided the Secretary of Revenue receives the ordinance at least 120 days prior to the effective date chosen.

Previously, the county sales and use tax could only become effective on April 1, with the condition that the ordinance be received by the Secretary of Revenue at least 120 days prior to such April 1.

5. Exempt Natural Gas and Other Fuels Used in Farming (1991 Act 39, amend sec. 77.54(3)(a) and create sec. 77.54(30)(a)5, effective October 1, 1991.)

Fuel sold for use in farming, including but not limited to agriculture, dairy farming, floriculture, and horticulture, is exempt from Wisconsin sales and use tax.

Example: Natural gas and other fuels for furnaces and boilers in buildings used in farming are exempt from sales and use tax.

6. Exempt Repair Parts and Accessories of Exempt Medical Equipment (1991 Act 39, amend sec. 77.54(22)(intro.), effective August 15, 1991.)

The sale of parts and accessories for the following property is exempt from sales and use tax:

- a. Artificial devices individually designed, constructed, or altered solely for the use of a particular physically disabled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure, including the extremities of the individual.
- b. Artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body.
- c. Artificial teeth sold by a dentist.
- d. Eye glasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.
- e. Crutches and wheelchairs, including motorized wheelchairs and scooters, for the use of persons who are ill or disabled.
- f. Antiembolism elastic hose and stockings that are prescribed by a physician and sold to the ultimate consumer.

- g. Adaptive equipment that makes it possible for handicapped persons to enter, operate, or leave a vehicle, as defined in sec. 27.01(7)(a)2, Wis. Stats., if that equipment is purchased by the individual who will use it, a person acting directly on behalf of that individual, or a nonprofit organization.

The items described in a. through g. above have been and continue to be exempt from tax. However, under prior law, parts and accessories for the types of personal property described in a. through g., above, were subject to Wisconsin sales or use tax.

7. Exempt Motor Vehicles and Other Registered Items Transferred to In-Laws (1991 Act 39, repeal and recreate sec. 77.54(7), effective August 15, 1991.)

The transfer by an individual of a motor vehicle, snowmobile, mobile home not exceeding 45 feet in length, boat, trailer, semitrailer, all-terrain vehicle, or aircraft is exempt from Wisconsin sales or use tax as an occasional sale if:

- a. Transferred to a child, spouse, parent, father-in-law, mother-in-law, daughter-in-law, or son-in-law of the individual (transferor),
- b. The item has been registered or titled or is required to be registered or titled in Wisconsin in the name of the individual (transferor) (Note: A boat may be registered or titled in Wisconsin or under the laws of the United States.), and
- c. The individual (transferor) is not engaged in the business of selling the type of item that is transferred.

Previously, the occasional sales exemption did not apply to transfers of these items to in-laws (i.e. father-in-law, mother-in-law, daughter-in-law, or son-in-law) of the transferor.

8. Limit Exemption for Meals Sold by Hospitals, Etc., to Meals Served on the Premises (1991 Act 39, amend sec. 77.54(20)(c)4, effective October 1, 1991.)

Sales of meals, food, food products, or beverages (other than "mobile meals on wheels") sold by hospitals, sanatoriums, nursing homes, retirement homes, or day care centers registered under ch. 48, Wis. Stats., that are served at a location other than these facilities are subject to Wisconsin sales and use tax. Sales of "mobile meals on wheels" to elderly or handicapped persons remain exempt from Wisconsin sales and use tax.

Example 1: A hospital operates a catering business. The hospital contracts with a customer to provide a luncheon meal at the customer's business location away from the hospital. The sales of these meals are subject to Wisconsin sales or use tax.

Previously, all sales of meals, food, food products, and beverages by hospitals, sanatoriums, nursing homes, retirement homes, or day care centers registered under ch. 48, Wis. Stats., were exempt from Wisconsin sales or use tax, regardless of where they were served.

9. Expand Exemption for Sales of New Mobile Homes (1991 Act 39, amend sec. 77.51(4)(b)6, effective October 1, 1991.)

A sales and use tax exemption is provided for 35% of the sales price of a new mobile home that is transported in two unattached sections if the total size of the combined sections, not including additions and attachments, is at least 984 square feet measured when the sections are ready for transportation.

Previously, the 35% exemption for new mobile homes applied only to those that were primary housing units under sec. 340.01(29), Wis. Stats. This exemption continues to apply.

10. Exempt Materials, Supplies, and Equipment Used in Construction, Renovation, or Development of Professional Sports and Entertainment Home Stadiums (1991 Act 37, create sec. 77.54(41), effective October 1, 1991.)

A sales and use tax exemption is created for "the sale of building materials, supplies and equipment to; and the storage, use or other consumption of those kinds of property by; owners, contractors, subcontractors or builders if that property is acquired solely for or used solely in, the construction, renovation or development of property that would be exempt under s. 70.11(36)."

Section 70.11(36), Wis. Stats., exempts "Property consisting of or contained in a sports and entertainment home stadium; including but not limited to parking lots, garages, restaurants, parks, concession facilities, entertainment facilities, transportation facilities, and other functionally related or auxiliary facilities and structures; including those facilities and structures while they are being built; constructed by, leased to or primarily used by a professional athletic team that is a member of a league that includes teams that have home stadiums in other states, and the land on which that stadium and those structures and facilities are located."

11. Clarify Real Property Construction Includes Fabrication of Modular Units Affixed to Realty (1991 Act 39, amend sec. 77.51(2), effective August 15, 1991.)

Real property construction activities include the fabrication of modular units designed and fabricated for a specific prefabricated building to be affixed to land at a particular location designated by the purchaser before the fabrication of the modular units. The modular units must have a realty function and must become a permanent accession to the realty.

Persons performing such fabrication activities are the consumers of tangible personal property used in the fabrication, and Wisconsin sales or use tax applies to the sale of tangible personal property to them.

Example: Mr. and Mrs. John Doe want to build a vacation home on their lake front property. Mr. and Mrs. Doe contract with Builder B, who specializes in erection and finishing of prefabricated custom homes.

Builder B and Mr. and Mrs. Doe decide on plans and specifications of the home. Builder B contracts with Company C to prefabricate the home, at the Wisconsin plant of Company C, pursuant to plans and specifications submitted by Builder B.

Company C delivers, on its own trucks, the sections or components of the home to be erected on the foundation at the building site which was constructed by Builder B to the exact specifications of the plan submitted to Company C by Builder B. The driver, employed by Company C, stays at the job site until the erection is completed and the truck is unloaded.

Company C is a subcontractor performing real property construction activity. The amount charged by Company C to Builder B is for real estate construction activities not subject to Wisconsin sales tax. Company C is the consumer of all materials used by Company C in the construction of the home and must pay Wisconsin sales or use tax on the purchase or use of the materials.

Builder B is a contractor performing real property construction activities. The amount charged by Builder B to Mr. and Mrs. Doe is for real estate construction activities not subject to Wisconsin sales tax. The amounts charged by suppliers to Builder B for tangible personal property used by Builder B in construction of the home (such as additional nails and lumber Builder B purchased from a lumber yard) are subject to Wisconsin sales or use tax.

12. **Theft of Sales and Use Tax Moneys** (1991 Act 39, create sec. 77.60(11), effective August 15, 1991.)

A person who collects state and county sales and use tax moneys from a consumer, user, or purchaser and who intentionally fails or refuses to pay these tax moneys to the department by the due date for payment, or who fraudulently withholds, appropriates, or uses these tax moneys, is guilty of theft under sec. 943.20, Wis. Stats., which is a felony if the amount involved is more than \$1,000. This applies regardless of the person's interest in these tax moneys.

Payment to creditors in preference to the payment of the tax moneys to the department by any person is prima facie evidence of an intent to fraudulently use these tax moneys.

13. **Allow Taxpayer To File Claim For Refund During Waiver Period** (1991 Act 39, renumber sec. 77.59(3)(a) to 77.59(3m) and amend sec. 77.59(3m) as renumbered, effective August 15, 1991.)

If the taxpayer and department have executed a waiver agreement to extend the time in which the department may make an assessment or refund, the taxpayer may file a claim for refund within the waiver period.

Example: The 1987 calendar tax year of John Doe would be closed to adjustment, by the four-year statute of limitations, on April 15, 1992. On March 1, 1992, John Doe and the department execute a waiver agreement which extends the statute of limitations for making an assessment or refund by one year, to April 15, 1993. This provision provides that John Doe may file a claim for refund for the 1987 year during the waiver period of April 16, 1992 to April 15, 1993.

14. **Time Period For Department To Act On Claim For Refund May Be Extended** (1991 Act 39, amend sec. 77.59(4)(intro.), effective for claims filed on or after October 1, 1991.)

The one-year time period during which the department is directed to act on any claim for refund or claim for credit may be extended if the taxpayer consents in writing to an extension.

II. LOOKING FOR ANSWERS TO WISCONSIN TAX QUESTIONS?

Consider subscribing to the **WISCONSIN TAX BULLETIN**.

For an annual fee of \$6.00, the **Wisconsin Tax Bulletin (WTB)** provides you with up-to-date information about Wisconsin income, franchise, sales/use, gift, inheritance, and excise tax laws. It contains articles, summaries of court decisions, private letter rulings, and question and answer discussions of important tax issues you may not find elsewhere.

The WTB is published quarterly by the Wisconsin Department of Revenue in January, April, July, and October. In addition to the 4 issues, you will receive the annual WTB special issue which describes new tax laws.

To order, send a \$6.00 check made payable to "DOCUMENT SALES" to:

Wisconsin Department of Administration
Document Sales
Box 7840, 202 South Thornton Avenue
Madison, WI 53707