

SALES AND USE TAX REPORT

2-94

June 1994

I. NEW SALES AND USE TAX LAWS

New sales and use tax laws have been enacted in 1994 which may affect you. This report explains these new laws. The Wisconsin Act number and the effective date of each new law are shown in parenthesis.

A. Buyer May File Claim for Refund of Sales and Use Taxes (1993 Act 437, effective for claims for refund filed on or after September 1, 1994.)

1. Conditions for Buyer to File Claim for Refund

A buyer may file a claim for refund of sales and use tax paid to a seller under any of the following 4 conditions:

a. Seller has ceased operating business

If the buyer also paid sales or use tax in error to sellers who have *not* ceased business, only the seller may file a claim for refund with the Department of Revenue for such tax, unless the buyer meets one of the other conditions described in 1.b., 1.c., or 1.d.

b. Buyer is being field audited

If the buyer being field audited paid sales or use tax to sellers in error pertaining (1) to periods being field audited and (2) to any periods *not* included in the field audit but still open to adjustment, the buyer may file with the Department of Revenue a claim for refund which includes both periods — those periods included and not included in the field audit. However, the claim relating to the period being field audited must be filed by the buyer with the Department of Revenue prior to the Department of Revenue's issuance of a notice of determination regarding the field audit.

c. Periods covered in the claim for refund are within the statute of limitations for buyer, but are closed to seller

If the buyer also paid sales or use tax to sellers in error which pertains to a period which is within the statute of limitations for both the buyer and seller, only the seller may file a claim for refund with the Department of Revenue for such tax, unless the buyer meets one of the other conditions described in 1.a., 1.b., or 1.d.

d. The claim for refund totals \$50 or more of tax

The \$50 or more of tax means that the total tax relating to all transactions contained in the claim for refund filed with the Department of Revenue is \$50 or more.

Note: The requirement in condition d. that the total tax must be \$50 or more does not apply to conditions 1.a., 1.b., and 1.c. above.

2. Other Provisions Relating to Buyer Claims for Refund

a. Statute of limitations for buyer filing a claim for refund

Four Years: A buyer has 4 years from the unextended due date of the buyer's franchise or income tax return to file a claim for refund (or if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the buyer's calendar or fiscal year). (See exception below.)

Example: Buyer erroneously paid \$100 of sales tax to seller in January, 1994. Buyer files its corporate franchise tax return on a calendar year basis. Since the \$100 of sales tax was paid in the 1994 calendar year, buyer has 4 years from March 15, 1995 (the unextended due date of the 1994 return) to file a claim for refund for the \$100.

Exception: If the time for issuing an audit determination is extended by agreement between the taxpayer (buyer) and the Department of Revenue, the buyer may, during the extended time period, file a claim for refund of sales and use taxes erroneously paid to a seller during the period being audited.

Note: If an audit determination has been issued, other limitations on filing a claim may also apply, as explained in Parts 2.b. and 2.c.

b. Field audit determination made prior to buyer's claim for refund

If a sales or use tax field audit determination has been issued to the buyer covering the period in which the buyer erroneously paid sales or use tax to a seller, the buyer may not file a claim for refund for such period after the date of the audit determination, for sales or use tax erroneously paid to the seller.

Example: A buyer is field audited for sales and use tax for years 1994-1997 and an audit determination for \$1,000 was received by the buyer on June 10, 1998. Buyer erroneously paid sales tax of \$200 to a seller in 1995, however, this overpayment was not addressed in the audit determination of June 10, 1998. The buyer may not file a claim for refund for the \$200 with the Department of Revenue.

- c. Office audit determination made prior to buyer's claim for refund

If a sales or use tax office audit determination has been issued to the buyer covering a period in which the buyer erroneously paid sales or use tax to a seller, the buyer may still file a claim for refund for sales or use tax erroneously paid to the seller for such period, provided the transaction on which the refund of sales or use tax is being claimed was not adjusted in the office audit determination.

- d. Rate of interest and date for computing interest on buyer claims for refund

Interest on refunds will be computed at 9% per annum, from the last day of the month following the month in which the tax was paid by the buyer to the seller, to the date the refund is paid.

Example: If a buyer paid \$50 tax to the seller in January, 1994, interest at 9% per annum will be computed from February 28, 1994 to the date the refund is paid.

- e. Buyer and seller may not both obtain refunds of tax

Refunds will not be allowed to both the buyer and seller for the tax on the same transaction. If refund claims for the same transaction are filed by both the seller and buyer, the Department of Revenue may pay either claim.

- f. Offsetting buyer's refund against any debts subject to attachment

If the refund is to be paid to a buyer, the department may set off amounts in the manner in which it sets off income tax and franchise tax refunds under sec. 71.93, and may set off amounts for child support or maintenance, or both, in the manner in which it sets off income taxes under secs. 46.255 and 71.93(3), (6), and (7).

- g. Buyer overpayments discovered in audits

If the Department of Revenue audits a buyer and the buyer erroneously overpaid tax to a seller during the audit period, the buyer may file a claim for refund for the tax paid in error. The auditor will include this overpayment in the audit determination.

Example: Sales tax of \$1,000 was incorrectly paid in 1994 by a buyer to a seller on custom software. A field audit of the buyer is being conducted for

1994-1997. The audit adjustments result in additional tax of \$2,500 for each of the 4 years (exclusive of \$1,000 overpayment to seller). The buyer's claim for refund of \$1,000 tax incorrectly paid to the seller in 1994 will reduce the additional tax due from the buyer for 1994 from \$2,500 to \$1,500 (\$2,500 - \$1,000).

- h. Form to use for filing a claim for refund

A claim for refund by a buyer must be filed on a form prescribed by the Department of Revenue and shall be signed by the buyer.

The Department of Revenue also has authority to require the seller's signature on the prescribed form, unless the Department of Revenue waives this requirement.

Note: A publication describing when buyers and sellers may file claims for refund of sales and use taxes, the form to use, time limits for filing, etc., will be available at Department of Revenue offices in September 1994.

B. Seller Required to Return Refunded Tax and Interest to Buyer (1993 Act 437, effective for claims for refund filed on or after September 1, 1994.)

If a seller files a claim for refund for sales or use tax and receives a refund of tax that the seller has collected from buyers, the seller shall return the tax and related interest to the buyers from whom the tax was collected.

The seller shall return to the Department of Revenue any part of a refund that the seller does not return to a buyer. Penalties may apply to the seller if the seller does not return the tax and interest as required by sec. 77.59(4)(c), Wis. Stats.

C. Penalties for Filing Incorrect Claims for Refund of Sales or Use Tax (1993 Act 437, effective for claims for refund filed on or after September 1, 1994.)

Negligence Penalty: A person who negligently files an incorrect and excessive claim for a refund of sales or use tax under sec. 77.59, Wis. Stats., is subject to a penalty of 25% of the difference between the amount claimed and the amount that should have been claimed.

Fraud Penalty: A person who fraudulently files an incorrect claim for a refund of sales or use tax under sec. 77.59, Wis. Stats., is subject to a penalty of 100% of the difference between the amount claimed and the amount that should have been claimed.

Note: "Person" includes a buyer or a seller who files an incorrect claim for refund.

D. Direct Pay Allowed for Eligible Businesses (1993 Act 437, effective for taxable years beginning on or after January 1, 1995.)

- 1. *What Is Direct Pay?*

Under the direct pay method, a purchaser who has a direct pay permit may purchase tangible personal property or taxable services without sales or use tax, even though no exemption applies. The Department of

Revenue may promulgate a rule which specifies the types of tangible personal property or services which do not qualify for purchase without tax using a direct pay permit.

Furnishing Seller With Evidence of Direct Pay Purchases

When making a purchase without sales or use tax under the direct pay method, the holder of the direct pay permit must furnish the seller with either:

- a. a copy of the direct pay permit, or
- b. a statement that the buyer holds a direct pay permit, the permit number, and the date the permit was issued.

Purchaser's Payment of Use Tax on Taxable Property or Services

The holder of a direct pay permit is liable for use tax when it stores, uses, or consumes the property or service in a taxable manner and must report use tax on the purchase price of the property or service on its sales and use tax return.

2. *Requirements for Obtaining a Direct Pay Permit.*

The Department of Revenue will issue a direct pay permit to an applicant, at the beginning of the applicant's taxable year, if the following seven requirements are fulfilled:

- a. because of the nature of the applicant's business, issuing the permit will significantly reduce the work of administering the sales and use taxes;
- b. the applicant's accounting system will clearly indicate the amount of tax the applicant owes;
- c. the applicant makes enough taxable purchases to justify the expense of regular audits by the Department of Revenue;
- d. the applicant is not liable under ch. 71, 72, 76, 77, 78, or 139, Wis. Stats., for delinquent taxes (including costs, penalties, surcharges, and interest) of \$400 or more if any part of the tax is delinquent for at least 5 months;
- e. it is in the state's best interests to issue the permit;
- f. the applicant purchases enough tangible personal property under circumstances that make it difficult to determine whether the property will be subject to sales or use tax; and
- g. the applicant holds a seller's permit under sec. 77.52(7), Wis. Stats., or a use tax registration certificate under sec. 77.53(9), Wis. Stats.

3. *How to Apply for a Direct Pay Permit.*

A person may apply for a direct pay permit by submitting to the Department of Revenue a completed form prescribed by the department and \$5.

4. *Direct Pay Permit Revocable and Not Transferable or Assignable.*

A holder of a direct pay permit may not transfer or assign it. The Department of Revenue may revoke a direct pay permit if the holder misuses it or the Department of Revenue determines that revocation is in the state's best interests.

5. *Recordkeeping Requirements for Holder of Direct Pay Permit*

A holder of a direct pay permit is required to keep a record of all retailers from whom it made a purchase for which it used a direct pay permit.

E. Exemption for Meals, Food, or Beverages Sold by Community-Based Residential Facilities (1993 Act 332, effective June 1, 1994.)

Sales of meals, food, food products, or beverages by a community-based residential facility, which are served at the community-based residential facility, are exempt from Wisconsin sales or use tax.

A "community-based residential facility" is defined in sec. 50.01(1g), Wis. Stats. (1991-92), as a place where 3 or more unrelated adults reside in which care, treatment, or services above the level of room and board, but not including nursing care, are provided to persons residing in the facility as a primary function of the facility, with certain exceptions.

F. Real Property Definition for Property Tax Doesn't Apply for Sales and Use Tax (1993 Act 308, effective April 29, 1994.)

Section 70.03, Wis. Stats., prior to being amended, defined the terms "real property," "real estate," and "land" when used in chs. 70, 71, 72, 73, 74, 75, 76, 77, 78, and 79 of the Wisconsin Statutes.

The amendment to sec. 70.03, Wis. Stats., deletes the reference to ch. 77. Chapter 77 of the Wisconsin Statutes relates to sales and use taxes.

G. Limit Seller's Liability When Department Is Unable to Collect From Purchaser (1993 Act 308, effective April 29, 1994.)

If a person purchases tangible personal property without Wisconsin sales or use tax by giving the seller a resale certificate, and the purchaser subsequently uses the property in a taxable manner, the seller may be held liable for the tax owed by the purchaser if:

1. The Department of Revenue is unable to collect the use tax from the purchaser, and
2. The seller provided incorrect information about the transaction to the department (e.g., seller misinformed the department as to whether it had a resale certificate on file for the purchaser).

H. \$10 Fee Waived if Late Filing Because of Death (1993 Act 408, effective for notices mailed on or after May 6, 1994.)

The \$10 late filing fee will not be imposed on a sales and use tax return that is filed late because of the death of the person required to file the return.

I. Allow Assessments in the Alternative (1993 Act 308, effective April 29, 1994.)

If the department determines that Wisconsin sales or use tax is owing and that the liability may be owed by more than one person, the department may assess the entire amount to each person, specifying that it is assessing in the alternative. Also, if the department determines that a liability exists and it may be sales tax or it may be use tax, the department may make an assessment for both sales and use taxes, specifying that it is assessing in the alternative.

Example: The department audits a contractor. The contractor installed equipment that was affixed to real estate. The department believes the equipment is still tangible personal property after installation. The contractor believes the equipment becomes real property after installation. The contractor did not pay Wisconsin sales or use tax on its purchase of the equipment.

The department may make an assessment in the alternative for 1) sales tax on the sale and installation of the equipment, and 2) use tax on the purchase of the equipment installed. Once a final determination is made as to whether the equipment is tangible personal property or real property after it is installed, one of the assessments will be cancelled.

J. Require Payment of All Tax Delinquencies for Seller's Permit Renewal (1993 Act 308, effective July 1, 1994.)

If a person's seller's permit has not been renewed because of delinquent tax liabilities, the permit will be renewed after payment of the following:

1. Delinquent amounts due under chs. 72, 76, 77, 78, and 139, Wis. Stats., and
2. Delinquent amounts due under ch. 71, Wis. Stats., that relate to the trade or business for which the seller's permit was issued.

Previously, only delinquent sales and use taxes, including related costs, penalties, and interest, had to be paid for a seller's permit to be renewed.

K. Include Fees and Surcharges in Amount Used to Determine if Seller's Permit Renewed (1993 Act 308, effective July 1, 1994.)

Seller's permits are automatically renewed on the day the permit expires, unless all the following conditions are met:

1. The permittee has a delinquent liability in respect to any tax, fee, or surcharge under ch. 71, 72, 76, 77,

78, or 139, Wis. Stats., including costs, penalties, and interest thereon.

2. The delinquent liability is \$400 or more.
3. Any part of the liability is delinquent for 5 months or longer.

Previously, under 1. above, fees and surcharges (e.g., temporary recycling surcharge) were not included in determining whether a delinquency was \$400 or more.

L. Exempt Sales to Local Exposition Districts (1993 Act 263, effective April 26, 1994.)

A sales and use tax exemption is provided for sales of tangible personal property and taxable services to a local exposition district under subch. II of ch. 229, Wis. Stats.

II. LOCAL EXPOSITION DISTRICT TAXES (1993 Act 263, effective April 26, 1994.)

The Legislature enacted provisions authorizing the creation of local exposition districts. These districts have the authority to impose a room tax, a food and beverage tax, and a rental car tax. The taxes are to be administered by the Department of Revenue.

The City of Milwaukee has created the Wisconsin Center District, a local exposition district. However, as of May 27, 1994, the time this report was sent to print, no resolution had been enacted by the district to impose the taxes.

The Department of Revenue must be notified at least 120 days before the effective date of the imposition of the taxes. Upon receiving such notification, the Department of Revenue will provide more information regarding the local exposition district taxes in the *Sales and Use Tax Report* and *Wisconsin Tax Bulletin*.

A publication describing the local exposition district taxes will be available in Department of Revenue offices soon after the Wisconsin Center District enacts the local exposition district taxes.

III. REMINDER: COUNTY TAX BEGINS IN OCONTO COUNTY

Beginning July 1, 1994, the county tax will be in effect in Oconto County. For more information regarding the county tax, refer to the December 1993 *Sales and Use Tax Report*.

If you are engaged in business in Oconto county and are a seasonal filer (i.e., a person doing business only a portion of the year), you should contact the Department of Revenue at P.O. Box 8902, Madison, WI 53708-8902 (telephone (608) 266-2776), if Oconto County is not listed on Schedule CT on the back of the Forms ST-12, State and County Sales and Use Tax Return, that were previously sent to you. The department will send to you new forms that include Oconto County.