

Are gross receipts from the donations received by the veteran's group subject to Wisconsin sales or use tax?

Answer 4: No. The transfer of the poppy for a voluntary donation is not a sale subject to Wisconsin sales tax.

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4. Municipal Water Softener

Statutes: Sections 77.51(2), 77.52(1), and 77.54(9a), Wis. Stats. (1989-90)

Wis. Adm. Code: Sections Tax 11.68, April 1990 Register and Tax 11.86, September 1984 Register

Background: Contractors who perform real property construction activities for governmental units or other exempt entities are the consumers of material used in the real property construction project. The contractor must pay sales or use tax on the cost of materials so used. The governmental units' exempt status does not pass through to the contractor's purchase of these materials.

Contractors' sales of items to exempt entities which retain their character as tangible personal property after installation are exempt under sec. 77.54(9a), Wis. Stats.

Facts and Question: A city water utility installs an iron-magnesium removal system into the municipal water system. The iron-magnesium removal system equipment will be installed in the pumphouse at the municipal well. The system is comprised of 2 chemical pre-treatment tanks approximately 6' high and 10' in diameter. The filtration system is 78" high.

Water from the well is pumped to the pre-treatment tanks, into the filtration system for treatment, then piped to the reservoir.

Does the iron-magnesium removal system become a real property improvement or retain its character as tangible personal property after installation?

Answer: Because the system processes water for sale, the iron-magnesium removal system retains its character as tangible personal property after installation. The city may purchase the installed system exempt from sales tax under sec. 77.54(9a), Wis. Stats.

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5. Sales and Purchases by Federal Credit Unions

Statutes: Sections 77.54(1) and 77.55(1), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.69(5), January 1983 Register

Background: Section 77.54(1), Wis. Stats. (1989-90), provides that Wisconsin may not tax the sale of and the storage, use, or other consumption in Wisconsin of tangible personal property and services it is prohibited from taxing under the Constitution or laws of the United States.

Section 77.55(1), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales tax for gross receipts from the sale of tangible personal property or taxable services to the 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.

Section 1768 of the United States Code, Title 12, provides that federal credit unions shall be exempt from all taxation imposed by the United States or by any state, territorial, or local taxing authority, except that any real property and any tangible personal property of a federal credit union shall be subject to federal, state, territorial, and local taxation to the same extent as other similar property is taxed. However, the duty or burden of collecting or enforcing the payment of a tax shall not be imposed upon a federal credit union and the tax shall not exceed the rate of taxes imposed upon the holdings in a domestic credit union.

Question 1: Are gross receipts from sales of tangible personal property and taxable services by federal credit unions subject to Wisconsin sales tax?

Answer 1: Yes. Gross receipts from retail sales of tangible personal property and taxable services by a federal credit union are subject to sales tax.

The exemption under sec. 77.54(1), Wis. Stats. (1989-90), does not apply because 12 USCS § 1768, does not prohibit a state from taxing sales of tangible personal property by federal credit unions where the incidence of tax does not fall upon the federal credit union (i.e., the incidence of tax falls upon the customer of the federal credit union).

The following are examples of taxable tangible property sold by federal credit unions which are subject to Wisconsin sales tax:

- A. Personalized imprinted checks.
- B. Collector's coins or currency sold at above face value.
- C. Commemorative metals and coin banks.
- D. Gold and silver bullion.
- E. Repossessed merchandise.

Question 2: Are purchases of tangible personal property and taxable services by federal credit unions subject to Wisconsin sales or use tax?

Answer 2: No. Purchases by federal credit unions of tangible personal property and taxable services used in the conduct of their trade or business as a federal credit union are not subject to Wisconsin sales or use tax.

With respect to purchases, the incidence of tax falls upon federal credit unions as purchasers which is prohibited under 12 USCS § 1768, and, therefore, exempt under sec. 77.54(1), Wis. Stats. (1989-90).

To relieve itself from liability for sales and use tax on sales to a federal credit union, a retailer selling tangible personal property or taxable services to a federal credit union should keep a copy of the purchase order clearly identifying the federal credit union as the purchaser.

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6. Services Performed on Utility Right-of-Way

Statutes: Section 77.52(2)(a)20, Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.86, September 1984 Register

Background: In the Tax Release titled "Tree Trimming on a Utility's Right-of-Way" in *Wisconsin Tax Bulletin #57*, July 1988, it was determined that gross receipts from tree trimming on a utility's right-of-way was not a taxable landscaping service under sec. 77.52(2)(a)20, Wis. Stats., pursuant to the Wisconsin Tax Appeals Commission decision of June 19, 1987, as modified by the Dane County Circuit Court stipulation and order dated September 21, 1987, in *Capital City Tree Experts, Inc. vs. Wisconsin Department of Revenue*.

Facts and Question 1: A contractor is hired by a utility to spray trees and shrubs on its right-of-way to prevent interference with overhead distribution lines or make distribution lines inaccessible to children.

Are the gross receipts from spraying trees or shrubs on a utility's right-of-way subject to Wisconsin sales or use tax?

Answer 1: No. Gross receipts from spraying trees and shrubs on a utility's right-of-way is not a taxable service under sec. 77.52(2)(a)20, Wis. Stats. (1989-90), pursuant to the *Capital City Tree Experts, Inc.* decision.

Facts and Question 2: After installing underground transmission and distribution lines in a new subdivision, a utility retained the services of a contractor to restore the land around the lines by filling in low areas with topsoil and laying sod.

Is the charge by the contractor to the utility subject to Wisconsin sales and use tax?

Answer 2: Yes. This is a taxable landscaping service under sec. 77.52(2)(a)20, Wis. Stats. (1989-90). The primary purpose of obtaining the service is to change the appearance of the area around the transmission and distribution lines. The *Capital City Tree Experts, Inc.* decision does not apply because the service is

not performed to prevent interference with overhead distribution lines or to make the lines inaccessible to children.

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7. Taxability of Computer Software

Statutes: Sections 77.51(14)(h) and (j) and 77.52(1) and (2)(a)10, Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.71, February 1986 Register

Background: Section Tax 11.71(2)(b), Wis. Adm. Code, provides that the retail sale, lease, rental, or license to use prewritten programs ("canned software") and basic operational programs, including the maintenance and enhancement of those programs are subject to Wisconsin sales or use tax.

Section Tax 11.71(3)(b), Wis. Adm. Code, provides that the providing of custom programs is not subject to Wisconsin sales or use tax. Custom programs are utility and application software which accommodate the special processing needs of the customer.

In a decision dated June 23, 1988, the Wisconsin Court of Appeals, District IV, held in the case of *Wisconsin Department of Revenue v. International Business Machines Corporation*, that revenues from the license of made-to-order computer programs to Wisconsin customers were not subject to sales tax. The department appealed this decision to the Wisconsin Supreme Court but the petition for review was denied.

In a decision dated May 23, 1989, the Wisconsin Tax Appeals Commission held in the case of *Health Micro Data Systems, Inc. vs. Wisconsin Department of Revenue*, that the taxpayer was a manufacturer of tangible personal property and, therefore, machinery and equipment it used in producing computer programs were not subject to Wisconsin sales or use tax. The computer programs were not modified for specific users. All were prewritten and needed little or no manufacturer assistance after installation. The department filed a notice of nonacquiescence with respect to this decision on an issue not relevant to this tax release.

The following facts and questions illustrate the department's position with respect to the taxability of computer software transactions it has reviewed in light of the *IBM* and *Health Micro Data* decisions.

Facts and Question 1: Vendor SV-1, a Wisconsin-based company, sells computer systems for manufacturers and distributors. Vendor SV-1 sells both the hardware and software to a customer. The base price of the software is \$20,000. The software is purchased independent of the hardware.

Other pertinent facts regarding Vendor SV-1 include:

- a. Prior to a sale, Vendor SV-1 personnel spend 40 to 60 hours in meetings with the customer to determine the needs of the customer.
 - b. The systems sold are made up of several modules (programs). Each module requires some modification. A minor modification might require adding another field or changing the length of a field. A major modification might require changing the method of computing discounts. Major modifications take 160 person-hours or more.
 - c. Vendor SV-1 will install and test the software on a customer's system which normally takes 20 to 40 hours.
 - d. Training is available and strongly recommended to customers.
 - e. Documentation provided to each customer includes a reference manual and actual source code (the programs). The documentation is customized for each system.
 - f. Vendor SV-1 provides modifications to the software as its principal form of maintenance. A modem is set up to enable Vendor SV-1's computer to talk with the customer's computer. When a problem is encountered the customer contacts Vendor SV-1 via a hotline. A Vendor SV-1 technician sitting at a computer in Milwaukee can make changes to the customer's program, compile it, test it and have it ready for the customer without leaving his or her desk. Telephone support constitutes 98% of the support provided.
 - g. Software upgrades are made periodically. These upgrades are purchased separately, usually at 10% of the current list price.
 - h. Professional services, including consulting, installing, training, modifications, and initial maintenance are billed separately.
- b. The programs are changed to meet the needs of Customer A. Modules are changed to customize matter numbers, change field formats, customize timekeeper numbers, customize account numbers, and provide additional reports.
 - c. Changes are also made to conform the programs to Customer A's operating environment. Interfaces to other software packages have been created. The software has been changed to accommodate Customer A's printing capabilities.
 - d. The programs are loaded onto Customer A's system by Vendor SV-2, with the actual code transferred by magnetic tape.
 - e. Maintenance "fixes" are released as necessary. Enhancements are released on a quarterly or semi-annual basis.

Is Customer A subject to sales or use tax on the programs and maintenance service it purchases from Vendor SV-2?

Answer 2: No. This transaction is considered to be a sale of custom software which is not subject to Wisconsin sales or use tax for the following reasons:

- a. The software purchased by Customer A is unique as compared to any other system sold by Vendor SV-2.
- b. Modifications are made to the time and billing programs and other support programs based on the particular needs and system requirements of Customer A.

Since the software is not subject to tax, the maintenance service to the software is not a service which is subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

Facts and Question 3: Vendor SV-3 sells a data entry program to Customer B. The sales price of the program is \$25,000. Other information regarding the data entry program sold to Customer B includes:

Are the programs and maintenance provided by Vendor SV-1 subject to Wisconsin sales or use tax?

Answer 1: No. The programs being sold by Vendor SV-1 are custom programs and are not subject to Wisconsin sales or use tax for the following reasons:

- a. Significant modifications are being made to virtually all programs to meet the specific needs of an individual customer.
- b. The extent of useful enhancements and maintenance support far exceed that which would be required for canned programs.

However, any charges for computer hardware are taxable.

Facts and Question 2: Vendor SV-2 sells software to Customer A (an accounting firm) for \$65,000. Other facts include:

- a. The software is a time/billing package used to track accountants' time and generate billings to clients.
- b. The program can be transmitted by any magnetic media or by phone, but is usually transferred by magnetic tape.
- c. Customer B can make specific modifications to add programs to the basic system.
- d. Customer B installs the software per Vendor SV-3's written instructions. Phone assistance is provided if needed.

- f. Maintenance is performed continuously. Enhancements are provided annually.

Is the sale of this software by Vendor SV-3 to Customer B subject to Wisconsin sales or use tax?

Answer 3: No. The software sold by Vendor SV-3 is not a "canned" program. Based on the decision in *IBM*, it is not subject to Wisconsin sales or use tax for the following reasons:

- The program, as ordered by Customer B, does not exist prior to the time Customer B orders it.
- Vendor SV-3 analyzes Customer B's environment and fills the order by tailoring existing modules to fit this environment.
- Maintenance to the programs is continuous, which is a trait of a custom program.

Facts and Question 4: Customer C bought a spreadsheet program for \$400 for use on its personal computer (PC). The software comes in a shrink-wrapped package and is available from many vendors.

Customer C's personnel installed the software on the PC. An installation program prompted the user for information such as type of monitor, type of printer and default drive.

Customer C's personnel took a course on how to use this program. In addition, several employees of Customer C spent in excess of 100 hours writing macros and designing templates which are being used in conjunction with the program for budgeting, accounts receivable aging, inventory tracking, and other functions.

Is the sale of this computer program for \$400 to Customer C subject to Wisconsin sales or use tax?

Answer 4: Yes. The spreadsheet program is "canned" software, the sale of which is subject to Wisconsin sales or use tax for the following reasons:

- The individual needs of Customer C were not considered in the design of the software.
- The program existed at the time Customer C purchased the software.
- The vendor makes no changes to the software because of Customer C's computer environment.

The work done by Customer C's employees does not impact on the nature of the software. Any customizing, other than changes made by the vendor prior to the sale, does not effect the taxability of the sale.

Facts and Question 5: Vendor SV-4 sells utility software, which captures and archives messages as jobs are run on mainframe

computers. The prospective customer contacts Vendor SV-4, usually after reviewing a brochure or trade magazine. Other pertinent facts regarding this software include:

- The programs exist at the time a customer places an order and modifications are not made to any programs prior to the shipment of the program to the customer.
- Programs are transferred to the customer on magnetic tape.
- The programs are loaded, installed, and tested by the customer.
- The program is licensed annually. Maintenance and enhancements are included in the license fee.
- A customer may modify the program ; however, modification to the object code (the program itself) voids the warranty.
- Corrections to the program are released as needed, usually every six months. Enhancements are issued about once a year.

Is the sale of the utility software by Vendor SV-4 subject to Wisconsin sales or use tax?

Answer 5: Yes. Vendor SV-4 is selling "canned" software which is subject to Wisconsin sales or use tax because the software exists at the time an order is placed and no changes are made to tailor the program to a customer's needs.

Facts and Question 6: Customer D contracts with Vendor SV-5 to obtain new computer software for use on its mainframe computer. Included in the licensing agreement is software which will assist in the following areas:

- Order entry and billing.
- Accounts receivable.
- Purchasing.
- Accounts payable.
- General ledger.
- Financial reporting and budgeting.
- Inventory control.
- Product structure.
- Materials planning.
- Production scheduling.
- Product standard costing.
- Shop floor control.
- Capacity planning.

After an extensive review by Customer D and a professional consultant (Consultant E) of products on the market, Customer D purchases software from Vendor SV-5 for \$100,000.

Additional facts regarding this software are as follows:

- The software purchased existed at the time Customer D placed the order. Vendor SV-5 did not change the pre-existing pro-

grams based on Customer D's data or specific hardware or software environment.

- b. The software was shipped to Customer D via magnetic tape.
- c. In order to make the software useful to Customer D, extensive modifications were necessary. Customer D did not employ Vendor SV-5 to install and modify the program. Instead, the testing and installation were initially completed by Consultant E.
- d. Consultant E had difficulties in modifying the software to make it operational. After one year, only two of the modules were operational and the service contract with Consultant E was terminated.
- e. After another unsuccessful attempt to get the system operational using another consulting company, Vendor SV-5 was hired to modify the software to make it operational. This occurred two years after the original sale.

Is the sale of this software for \$100,000 subject to Wisconsin sales or use tax?

Answer 6: Yes. The software originally sold by Vendor SV-5 to Customer D for \$100,000 is "canned" software. The sale of this software is subject to Wisconsin sales or use tax for the following reasons:

- a. Vendor SV-5 sold pre-written programs "as is".
- b. No changes were made to tailor the programs to Customer D's data or hardware or software environment.

Modifications made by Customer D or other third parties, subsequent to the initial sale, do not impact on the determination of taxability at the time of sale.

Facts and Question 7: What is the tax status of "system software"?

Answer 7: Section Tax 11.71(1)(c), Wis. Adm. Code, defines "system software" to mean "programs that perform the overall control and direction of a computer, and permit it to execute the instructions contained in utility software and applications software programs."

If system software is not accessible or modifiable by the end user, the software is considered to be part of the hardware. As such, it would be considered tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

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8. Tire Fee on New Vehicles

Statutes: Section 77.51(4)(a), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.26(1), April 1990 Register

Background: Section 77.51(4)(a), Wis. Stats. (1989-90), defines "gross receipts" to mean the total amount of the sale, lease or rental price from sales at retail of tangible personal property or taxable services, valued in money, whether received in money or otherwise, without any deduction on account of any tax included in or added to the purchase price. Gross receipts do not include any tax imposed by the United States, this state, or any municipality of this state upon or with respect to retail sales whether imposed upon the retailer or the consumer if measured by a state percentage of sales price or gross receipts.

Facts and Question: Section 342.14(1m), Wis. Stats. (1989-90), imposes a \$2 tire recovery fee for each tire, including spare tires, on a new motor vehicle upon the filing of an application for first certificate of title. The fee is paid to the Wisconsin Department of Transportation.

Is this tire recovery fee included in gross receipts of a sale of a new motor vehicle for purposes of imposing Wisconsin sales or use tax? For example, if a new vehicle is purchased for \$15,000, is sales tax imposed on \$15,000 or \$15,010 (the \$15,000 purchase price of the vehicle, plus the \$10 tire recovery fee for 5 tires)?

Answer: The Wisconsin sales tax is imposed on the \$15,000 purchase price of the vehicle. The \$10 tire recovery fee is not included in gross receipts under sec. 77.51(4)(a), Wis. Stats. (1989-90).

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9. Trade-In of Solely-Owned and Leased Automobiles

Statutes: Section 77.51(4)(b)3, Wis. Stats. (1989-90)

Background: Section 77.51(4)(b)3, Wis. Stats. (1989-90), states "In all transactions in which an article of tangible personal property is traded toward the purchase of an article of greater value, the gross receipts shall be only that portion of the purchase price represented by the difference between the full purchase price of the article of greater value and the amount allowed for the article traded."

When a customer offers to "trade in" a leased vehicle towards the purchase of another vehicle, the automobile dealer usually contacts the third party lessor to determine the buy out value of the lease. This value is taken into account in negotiating the price of the vehicle the customer wishes to purchase from the automobile dealer. If the deal is consummated, the dealer sells a vehicle to the customer and purchases the leased vehicle from the third party lessor.

Facts and Question 1: An automobile dealer sells Customer A an automobile having a selling price of \$18,000 in exchange for Customer A's solely-owned vehicle and \$14,000 cash.

What are the automobile dealer's gross receipts for purposes of imposing sales tax?

Answer 1: The dealer's gross receipts are \$14,000, which is the \$18,000 selling price less the trade-in of \$4,000.

Facts and Question 2: Customer B is leasing an automobile from a leasing company. Customer B enters into an agreement to purchase a new vehicle from an automobile dealer for a selling price of \$18,000. The dealer agrees to take possession of Customer B's leased vehicle by paying the leasing company the \$6,000 still due on the leased vehicle. The value of the leased vehicle is \$5,000.

What are the automobile dealer's gross receipts on the sale of the automobile to Customer B for purposes of imposing sales tax, and what are the dealer's sales tax obligations with respect to the leased vehicle?

Answer 2: This sale involves two transactions. With respect to the first transaction involving the sale of the automobile by the dealer to Customer B, the dealer should collect from the customer Wisconsin sales tax and, if applicable, county sales or use tax, based on gross receipts of \$18,000. Section 77.51(4)(b)3, Wis. Stats. (1989-90), which allows for the reduction of gross receipts by the amount of a "trade-in," does not apply to this sale because the purchaser (Customer B) does not own the leased automobile. The sale of the vehicle to Customer B by the automobile dealer is a separate transaction from the dealer's purchase of Customer B's old vehicle from the leasing company.

With respect to the second transaction, involving the sale of the leased vehicle by the leasing company to the dealer, if this vehicle is being purchased for resale by the dealer, the dealer should provide the leasing company with a properly completed resale certificate to exempt this sale from sales tax. If the vehicle is not purchased by the dealer for resale, the sale is subject to Wisconsin sales tax and, if applicable, county sales or use tax based on the buy out price of \$6,000.



PRIVATE LETTER RULINGS

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

The number assigned to each ruling is interpreted as follows: The "W" is for "Wisconsin", the first two digits are the year the ruling becomes available for publication (80 days after the ruling is issued to the taxpayer), the next two digits are the week of the year, and the last three digits are the number in the series of rulings issued that year. The date following the 7-digit number is the date the ruling was mailed to the requestor.

Certain information contained in the ruling that could identify the taxpayer requesting the ruling has been deleted. Wisconsin Publication 111, "How to get a Private Letter Ruling From the Wisconsin Department of Revenue," contains additional information about private letter rulings.

The following rulings are included:

W9106001, November 15, 1990

NOTE: This private letter ruling was previously published in *Wisconsin Tax Bulletin* 71, p. 20. It is being published again in its entirety to correct an error that appeared in the analysis. The analysis had stated that providing storage for a motor vehicle was subject to sales tax. Providing storage space for a motor vehicle is not subject to sales tax.

Type Tax: Sales/Use

Statutes: Sections 77.51(20) and 77.52(1) and (2)(a)2 and 9, Wis. Stats. (1987-88)

Issue: Mobile home lot rental

This letter responds to your request for a private letter ruling regarding the rental of mobile home lots for Wisconsin sales and use tax purposes.

Facts

You own a mobile home. You rent a lot on which your mobile home is affixed in a mobile home park. The mobile home is permanently affixed to the land and is connected to utilities. The rental of the lot includes water and sewer services. No other services or facilities are provided (i.e., electricity, garbage removal, clubhouse, pier, raft, pool, laundry room, picnic tables, playground, or other improvements).

Ruling Request

You ask whether the rental of the mobile home lot is subject to Wisconsin sales tax.

Ruling

The gross receipts from the rental of mobile home lots, which are not part of a campground facility that offers others services or facilities, are not subject to Wisconsin sales tax.

Analysis

Section 77.52(1), Wis. Stats. (1987-88), provides that a sales tax shall be imposed on the gross receipts from the lease or rental of tangible personal property at retail in Wisconsin. Section 77.51(20), Wis. Stats. (1987-88), defines "tangible personal property" to mean all tangible personal property of every kind and description. Land is commonly known to be real property.