

interests served by confidential informants. The denial was legally sufficient because the harm to the public interest in effective law enforcement from disclosing portions of records that could reveal the identity of a confidential informant outweighs the public interest in inspection of those records. The Supreme Court also concluded it is in the public interest to permit the department to provide pledges of confidentiality to citizens who may not otherwise step forward to assist law enforcement efforts.

The taxpayer has not appealed this decision.

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□ 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 are included:

Individual Income Taxes

1. Farm Loss Carryover (p. 19)

Individual and Corporation Franchise or Income Taxes

1. Statute of Limitations -- When Is a Return Considered Filed? (p. 21)

Sales/Use Taxes

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INDIVIDUAL INCOME TAXES

1. Farm Loss Carryover

Statutes: Section 71.05(6)(a)10 and (b)10, Wis. Stats. (1987-88)

Note: This tax release applies only with respect to taxable year 1988 and thereafter.

Background: Effective for taxable year 1986 and thereafter, sec. 71.05(6)(a)10, Wis. Stats. (1987-88), limits the amount of farm loss that may be deducted each year. The limitations are based on the amount of the taxpayer's nonfarm Wisconsin adjusted gross income.

Section 71.05(6)(b)10, Wis. Stats. (1987-88), effective for taxable year 1988 and thereafter, provides that farm losses added back to income in taxable year 1986 and thereafter may be carried forward for up to 15 years and subtracted to the extent that they are not offset against farm income of any year between the loss year and the taxable year for which the subtraction is claimed. The farm losses may be subtracted only to the extent that they do not exceed the net profits or net gains from the sale or exchange of capital or business assets in the current taxable year from the same farming business or portion of that business to which the limits on deductible farm losses applied in the loss year.

Facts: The taxpayer operates a large farm which is comprised of many parcels of farmland. For purposes of Wisconsin's farm loss limitation, the operation is considered one farm.

Question 1: For 1986, the taxpayer had a \$6,000 farm loss which was not allowed because of the Wisconsin farm loss limitation. For 1988, the taxpayer reports a \$3,000 long-term capital gain from the sale of a parcel of the farmland. Can the gain realized from the sale of the farmland be offset by the farm loss carryover from 1986?

Answer 1: Yes. Income from the sale of the farmland is considered income from the farm which can be offset by carryover losses from the same farm. The taxpayer can claim a \$3,000 subtraction modification on the 1988 Form 1 for the farm loss carryover. (Assuming there are no additional capital gains or losses, the taxpayer may also claim a \$1,800 subtraction on Form 1 for the long-term capital gain exclusion.) The farm loss carryover to 1989 is computed as follows:

	\$6,000	farm loss carryover to 1988
less	<u>3,000</u>	subtraction on 1988 Form 1 to offset income
	\$3,000	farm loss carryover to 1989

Question 2: During 1989, the taxpayer sells a second parcel of farmland to a real estate developer for residential housing development. This parcel is sold on the installment basis, and for 1989 the taxpayer reports \$900 interest income from the installment sale and \$2,000 long-term capital gain. Can the long-term capital gain and the interest income be offset by the \$3,000 remaining farm loss carryover?

Answer 2: The \$2,000 capital gain from the installment sale may be offset by the farm loss carryover. However, the interest income produced by the installment sale cannot be offset by the farm loss carryover. The interest income is considered to be nonfarm income. There was no farm business purpose in regard to the installment sale. The farm loss carryover to 1990 is computed as follows:

	\$3,000	farm loss carryover to 1989
less	<u>2,000</u>	subtraction on 1989 Form 1 to offset income
	\$1,000	farm loss carryover to 1990

Question 3: During 1990, the taxpayer reports \$7,500 of farm income on Schedule F. The taxpayer claims a \$1,000 subtraction on Form 1 for the remaining farm loss carryover. During 1991, the taxpayer reports gain from the 1989 installment sale and also incurs a farm loss. The farm loss is not allowed because of the Wisconsin farm loss limitation. Can any income which will be reported in 1992 from the installment sale be offset by the farm loss carryover from 1991?

Answer 3: Yes. Farm losses not allowed under sec. 71.05(6)(a)10, Wis. Stats. (1987-88), in years after the installment sale takes place can be used to offset gain reportable from the installment sale. The interest income reportable from the installment sale could not be offset by the farm loss carryover from 1991 for the reason set forth in the answer to question 2.

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INDIVIDUAL AND CORPORATION FRANCHISE OR INCOME TAXES**1. Statute of Limitations – When Is a Return Considered Filed?**

Statutes: Section 71.77(2) and (8), Wis. Stats. (1989-90)

Background: Section 71.77(2), Wis. Stats. (1989-90), provides that the department may issue an additional assessment against a taxpayer if notice is given to the taxpayer within four years of the date the income or franchise tax return was "filed." Section 71.77(8), Wis. Stats. (1989-90) provides that "For purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day".

Question 1: If a taxpayer files a return before the unextended due date, is the return considered filed when the taxpayer actually files the return or on the due date of the return?

Answer 1: If a taxpayer files a return before the unextended due date, the return is considered filed on the unextended due date.

Example: A calendar year taxpayer files his or her 1990 Wisconsin individual income tax return on February 11, 1991. The department has until April 15, 1995, (which is four years after April 15, 1991, the due date of the 1990 return), to issue a notice of additional assessment to the taxpayer for the 1990 tax return under sec. 71.77(2) and (8), Wis. Stats. (1989-90).

Question 2: If a taxpayer receives an extension of time to file, is the return considered filed on the

- a. unextended due date,
- b. date mailed by the taxpayer,
- c. date received by the department, or
- d. extended due date?

Answer 2: If a taxpayer requests an extension of time to file under sec. 71.03(7), 71.24(7), or 71.44(3), and files within the extension period, the return is considered filed on the date it is received by the department.

Example: XYZ Corporation, a calendar year taxpayer, receives a 6-month automatic extension to September 15, 1991, from the IRS. The department received XYZ's 1990 Wisconsin franchise tax return on August 5, 1991. The Wisconsin return was accompanied by a copy of the federal extension, therefore the federal extended due date of September 15, 1991, also applies to Wisconsin. The return was postmarked August 3, 1991.

The department has until August 5, 1995, (which is four years after the date the return was received by the department) to issue a notice of additional assessment for the 1990 tax year under sec. 71.77(2), Wis. Stats. (1989-90). The return is considered filed on the date received by the department.

Question 3: If a taxpayer files a late return, for purposes of sec. 71.77(2), Wis. Stats. (1989-90), is the return considered filed on the

- a. due date of the return,
- b. date mailed by the taxpayer, or
- c. date received by the department?

Answer 3: If a taxpayer files a late return, the return is considered filed on the date it is received by the department.

SALES/USE TAXES**1. Entry Fees for Runs and Races**

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

Background: Section 77.52(2)(a)2, Wis. Stats. (1989-90), provides that taxable services include sales of admissions to amusement, athletic, entertainment or recreational events or places. Section 77.52(2m)(a) provides that no part of the charge for a service may be deemed a sale of tangible personal property if the property transferred is incidental to the selling, performing or furnishing of the service.

Facts: For an entry fee of \$10.00, runners may participate in a 10k run. Each participant receives a T-shirt.

Question 1: Is the \$10.00 fee subject to Wisconsin sales tax?

Answer 1: Yes. The entry fee is taxable as an admission to an athletic or recreational event under sec. 77.52(2)(a)2, Wis. Stats. (1989-90).

Question 2: May the organizer of the event purchase the T-shirts exempt from sales tax, as a purchase for resale?

Answer 2: No. The T-shirts provided to the participants are incidental to the service provided and are not considered to be resold under sec. 77.52(2m)(a), Wis. Stats. (1989-90). Tax applies to the organizer's purchases of the T-shirts.

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

Statutes: Sections 77.51(2), (14), and (14r), 77.54(9a), and 77.55(1), Wis. Stats. (1989-90)

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 sec. 77.54(9a), Wis. Stats. (1989-90).

- A. State of Wisconsin or any agency thereof.
- B. Any county, city, village, town, or school district in Wisconsin.
- C. A county-city hospital established under sec. 66.47, Wis. Stats. (1989-90).
- D. A sewerage commission organized under sec. 144.07(4), Wis. Stats. (1989-90), or a metropolitan sewerage district organized under secs. 66.20 to 66.26 or 66.88 to 66.918, Wis. Stats. (1989-90).
- E. Any other unit of government in Wisconsin or any agency or instrumentality of one or more units of government in Wisconsin.
- F. Any corporation, community chest fund, foundation, or association 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. (1989-90), 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 improvement 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.

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 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 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 equipment and materials 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 Exempt 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 equipment and materials, Contractor A is responsible for the installation and incorporation of such equipment and materials 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., 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. Yes. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity B to Contractor A is deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since the contract states that the contractor provides all construction materials, a transfer of tangible personal property from Exempt Entity B to Contractor A occurs.

Consideration is the reduction in the contract price (e.g., change order) by the contractor for the materials purchased by Exempt Entity B.

Therefore, Contractor A is the consumer of the materials and equipment under sec. 77.51(2), Wis. Stats. (1989-90), and the sale of the materials and equipment to Contractor A is subject to Wisconsin sales or use tax.

Note: The sale of materials and equipment by Exempt Entity B to Contractor A may qualify for exemption from sales and use tax as an exempt occasional sale if it meets the requirements of sec. 77.54(7m), Wis. Stats. (1989-90). See Wisconsin Publication 206, "Occasional Sales Exemption for Nonprofit Organizations", for more information.

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 equipment and material 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 material 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., 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. Yes. Based on the information contained in the above contract, the transfer of materials and equipment by Exempt Entity D to Contractor C is deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since the contract states that the contractor provides all construction materials, a transfer of tangible personal property from Exempt Entity D to Contractor C occurs.

Consideration is the reduction in the contract price by the contractor (e.g., change order) for the materials purchased by Exempt Entity D.

Therefore, Contractor C is the consumer of the materials and equipment under sec. 77.51(2), Wis. Stats. (1989-90), and the sale of the materials and equipment to Contractor C is subject to Wisconsin sales or use tax.

Note: The sale of materials and equipment by Exempt Entity D to Contractor C may qualify for exemption from sales and use tax as an exempt occasional sale if it meets the requirements of sec. 77.54(7m), Wis. Stats. (1989-90). See Wisconsin Publication 206, "Occasional Sales Exemption for Nonprofit Organizations", for more information.

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 Exhibit 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 equipment and/or material 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 the 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 the Contractor E harmless from and against any and all claims asserted against the 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 material 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. (1989-90), 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 materials and equipment by Exempt Entity F to Contractor E is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989), to include the transfer of tangible personal property for a consideration.

Since no consideration was given (i.e., no reduction in the contract price for materials and equipment included in the contract and subsequently purchased by Exempt Entity F such as by change order), there is no sale.

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 equipment and materials are delivered to the job site, Exempt Entity H 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 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 equipment and materials, Contractor G is responsible for the installation and incorporation of such equipment and materials 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 equipment and materials purchased by it. Exempt Entity H shall insure its interest in such equipment and materials or shall arrange with Contractor G to be added as an additional insured to any insurance policy covering equipment and materials 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 equipment and materials 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, manufacturer's 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. (1989-90), 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 materials and equipment by Exempt Entity H to Contractor G is not deemed to be a taxable sale.

A sale is defined in sec. 77.51(14), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since no consideration was given (i.e., no reduction in the contract price for materials and equipment included in the contract and subsequently purchased by Exempt Entity H such as by change order), there is no sale.

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 equipment 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. (1989-90), 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 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), Wis. Stats. (1989-90), to include the transfer of tangible personal property for a consideration.

Since no consideration was given (i.e., no reduction in the contract price for materials and equipment included in the contract and subsequently purchased by Exempt Entity J such as by change order), there is no sale.

Summary: This tax release includes examples of excerpts from contracts the department has reviewed for purposes of determining the Wisconsin sales and use tax implications of real property construction for exempt entities. Facts and Questions 1 and 2 result in the imposition of Wisconsin sales or use tax. This is because the contract provides that the contractor is to provide all materials and equipment; however, if an exempt entity purchases any of the materials and equipment directly, a reduction in the contract price is made (e.g., change order). Facts and Questions 3, 4, and 5 do not result in the imposition of Wisconsin sales or use tax. This is because the signed contract does not include 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).

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3. Snowplowing, Sanding, and Salting

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

Wis. Adm. Code: Sections Tax 11.05(3)(m), June 1990 Register and Tax 11.67(1) and (2)(a), April 1990 Register

Question 1: Is snowplowing subject to Wisconsin sales or use tax?

Answer 1: No. Snowplowing is not a service subject to tax under sec. 77.52(2)(a), Wis. Stats. (1989-90).

Question 2: Is the sanding and salting of roads, sidewalks, or parking lots subject to Wisconsin sales or use tax?

Answer 2: No. Sanding and salting of roads, sidewalks, or parking lots is not a service subject to tax under section 77.52(2)(a), Wis. Stats. (1989-90).

Example 1: A person contracts with Company A to have its driveways and parking lots sanded during the winter months. Company A charges the person by the hour. The charge by Company A is not subject to sales tax. Company A must pay Wisconsin sales or use tax on its purchase of sand used in providing the service.

Example 2: A person contracts with Company B to have its sidewalks and parking lots salted during the winter months. Company B charges the person based on the amount of salt used. The charge by Company B is not subject to sales tax. Company B must pay Wisconsin sales or use tax on its purchase of salt used in providing the service.

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4. Water Removal and Cleaning Services After a Flood

Statutes: Section 77.52(2)(a)10, Wis. Stats. (1989-90)

Background: Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that the repair, service, cleaning, and maintenance of tangible personal property are taxable services unless the property would have been exempt to the customer when purchased. For purposes of repair, service, cleaning, and maintenance, carpeting is deemed to have retained its character as tangible personal property, regardless of the extent to which it is fastened to, connected with, or built into real property.

Facts and Question 1: A person's basement is flooded with a foot of water after a heavy rain. Company A agrees to remove the water from the person's basement for \$100.

Is the \$100 charge subject to Wisconsin sales tax?

Answer 1: No. Company A is performing a service to real property which is not subject to Wisconsin sales or use tax.

Facts and Question 2: A person's basement is flooded with a foot of water after a heavy rain. Company B agrees to remove the water from the person's basement and to clean the carpeting located in the basement for a fee of \$200.

Is the \$200 charge subject to Wisconsin sales tax?

Answer 2: Company B is providing a nontaxable service (removal of water) and a taxable service (cleaning of carpeting which is deemed to be tangible personal property). Company B must make an allocation of the \$200 charge for the taxable service and nontaxable service. Sales tax should be imposed on the portion of the \$200 charge that relates to the carpet cleaning.

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