

which makes payments on account of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for, medical care (including social security benefits). Taxpayer A files federal Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits, and receives the Internal Revenue Service's approval to be exempt from social security and Medicare taxes.

Is Taxpayer A subject to the temporary surcharge?

Answer 1: No. For purposes of the temporary surcharge, "trade or business" is defined in sec. 1402(c) of the Internal Revenue Code (IRC), relating to the federal self-employment tax. Generally, individuals who are exempt from self-employment tax (other than certain statutory employees) are not considered to have trade or business income for purposes of the temporary surcharge. Since IRC sec. 1402(g) provides an exemption from self-employment tax for members of certain recognized religious groups, their income is not treated as trade or business income. Therefore, Taxpayer A is not subject to the temporary surcharge.

Facts and Question 2: Taxpayer B, who is engaged in farming as a sole proprietorship, has a net farm profit of \$5,000 for calendar year 1991. He files federal Form 4029 and receives the Internal Revenue Service's approval to be exempt from social security and Medicare taxes because he is a member of a recognized religious group that is conscientiously opposed to private or public insurance.

Is Taxpayer B subject to the temporary surcharge?

Answer 2: Yes. For purposes of the temporary surcharge imposed on noncorporate farms, "farming" is defined in IRC sec. 464(e)(1). Section 77.92(1), Wis. Stats. (1989-90). That Code section does not refer to a definition of a trade or business, and the definition of "trade or business" in IRC sec. 1402(c) does not apply to farming. Therefore, an individual who is engaged in the business of farming is not exempted from the temporary surcharge just because he or she is exempt from federal self-employment tax. Since Taxpayer B has at least \$1,000 of net farm profit, he is subject to the \$25 temporary surcharge imposed on individuals engaged in farming.



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:

W9202001, October 18, 1991

Type Tax: Sales/Use

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

Issue: Computer software

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications of the sale of computer software.

Facts

Corporation A is an affiliate of a trade association. It sells forms developed by the trade association.

In order to make these forms available to institutions through an automated loan origination system, Corporation A has entered into an agreement with the owner of a software product to integrate the standard forms which Corporation A sells into its software. The integrated software is called "Link B."

The Link B software, without further modifications, will only produce a particular set of forms consisting of the standard forms which Corporation A sells. Nearly all of the purchasers of Link B use some forms in addition to, or in place of, these standard forms.

In order to accommodate customers' desires to customize the loan document package which the software will produce, Corporation A will modify the Link B software for the customer. Corporation A will charge the customer for the basic Link B software plus a fee for making modifications, based on an hourly rate for the time involved.

The cost of a Link B software varies, depending upon whether it is installed on a single computer or a network system and the extent of modifications made for the customer.

Corporation A installs or assists the customer in installing the software on the customer's computer system and tests or assists the customer in testing to ensure it works properly.

A diskette with a copy of the program is provided to the customer, primarily as a backup. User manuals are also provided to the customer. There is no separate charge for the backup diskettes or manuals.

Software maintenance services are provided by Corporation A to all software purchasers. A monthly fee is charged based on the number of transactions processed. Maintenance services include the availability of personnel to answer telephone inquiries regarding use of the software. Corporation A also provides modifications to the software to incorporate revisions to the forms produced by the software, increase the speed, efficiency, or ease of operation of the software, or add additional capabilities to or improve the functions of the software.

For a separate charge, Corporation A provides training services. The training is usually done at the customer's business location. The training course takes approximately 2 1/2 days.

Ruling Request

Is the sale of Link B software and the sales of related maintenance and training services subject to Wisconsin sales or use tax?

Ruling

When Corporation A sells Link B software that has been modified to produce a customized loan document package, this is the sale of a custom program which is not subject to Wisconsin sales or use tax. Related maintenance and training services are also not subject to Wisconsin sales or use tax.

When Corporation A sells Link B software that produces a standard set of forms with no modifications, it is the sale of a prewritten "canned" program which is subject to Wisconsin sales or use tax. Related maintenance services are also subject to Wisconsin sales or use tax. Training services related to the sale of this software are not subject to Wisconsin sales or use tax.

The sale of training materials, such as books and manuals, furnished to customers separate from the training service is subject to Wisconsin sales or use tax. If the training materials are provided to customers as part of the training service, the transfer of the training materials to the customers is not subject to Wisconsin sales and use tax. However, Corporation A is considered to be the consumer of such materials and its purchase of the materials from its supplier is subject to Wisconsin sales or use tax.

Analysis

Section Tax 11.71(3)(b), Wis. Adm. Code, provides that the sale of custom programs is not taxable. Paragraph (e) provides that the sale of maintenance and enhancement services to custom programs is not taxable.

Section Tax 11.71(2)(b), Wis. Adm. Code, provides that the sale of prewritten programs and basic operational programs, including the maintenance and enhancement of those programs, is taxable.

Section Tax 11.71(1)(e), Wis. Adm. Code, provides that "*The determination of whether a program is a custom program shall be based upon all the facts and circumstances, including the following:*

1. *The extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system.*
2. *Whether the program is loaded into the customer's computer by the vendor and the extent to which the installed program must be tested against the program's specifications.*
3. *The extent to which the use of the software requires substantial training of the customer's personnel and substantial written documentation.*
4. *The extent to which the enhancement and maintenance support by the vendor is needed for continued usefulness.*
5. *There is a rebuttable presumption that any program with a cost of \$10,000 or less is not a custom program.*
6. *Custom programs do not include basic operational programs.*
7. *If an existing program is selected for modification, there must be a significant modification of that program by the vendor so that it may be used in the customer's specific hardware and software environment."*

Corporation A's Link B software meets these criteria when:

1. Corporation A's personnel engage in significant* presale consultation and analysis to determine what forms the software is to produce and what is needed to modify the program to produce forms which meet the customer's specifications,
2. Corporation A installs or assists in the installation and testing of the software to ensure that the agreed upon forms are properly produced,
3. Corporation A provides substantial* documentation in the form of user manuals and training sessions for the customer's personnel,
4. Corporation A provides maintenance and updating services to its customers including answering telephone inquiries and supplying modifications to the software to enable it to produce new or revised forms as they become available,
5. The program may cost over \$10,000 depending on the customer's computer system and modification needed, and
6. Corporation A makes significant* modifications to the Link B software in that loan documents are being customized to meet the specific needs of a customer.

* Determining significant and substantial is done on a case-by-case basis with a particular set of facts as to time spent, modifications made, and effort required.

Section Tax 11.71(1)(k), Wis. Adm. Code, defines "prewritten programs" to mean programs prepared, held or existing for general use normally for more than one customer, including programs developed for in-house use or custom program use which are subsequently held or offered for sale.

The Link B software when not modified to provide for customized loan documents meets the definition of prewritten programs and is subject to Wisconsin sales or use tax.

Section Tax 11.71(2)(c), Wis. Adm. Code, provides that training services are not taxable.

Section Tax 11.67(1), Wis. Adm. Code, provides that when a transaction involves the transfer of tangible property along with the performance of a service, the true objective of the purchaser must be considered to determine whether such transaction is a sale of tangible personal property or the performing of a service with the transfer of property being merely incidental to the performance of the service. Corporation A's customer's true objective is to obtain the training service Corporation A provides, and the transfer of training materials is incidental to the performance of the training service.

Under sec. Tax 11.67(2)(a), Wis. Adm. Code, persons engaged in performing a service who transfer tangible personal property incidentally in rendering the service are the consumers of the tangible personal property, and the sale of such property to them is subject to Wisconsin sales or use tax.

Therefore, if Corporation A sells the materials separate from providing the training services, it is required to charge Wisconsin sales or use tax on the sale of the materials. It may purchase the materials it sells without Wisconsin sales or use tax by giving its supplier a properly completed resale certificate. If the materials are provided to customers as part of the training service, Corporation A is the consumer of the training materials and is subject to Wisconsin sales or use tax on its purchase of the materials.

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W9202002, October 23, 1991

Type Tax: Sales/Use

Statutes: Section 77.54(30)(a)2, (c), (d), and (e), Wis. Stats. (1989-90)

Issue: Exemptions - fuel and electricity (residential)

This letter responds to your request for a private letter ruling regarding the sales and use tax status of charges for electricity and natural gas sold for use in common areas in apartment buildings.

Fact

As a result of a request for refund received by Utility Company A, you are questioning whether sales tax applies to charges for

electricity and natural gas sold for use in common areas in apartment buildings (i.e., laundry rooms, hall lighting, exit lighting, entrance lighting, and exterior parking lot lighting). Your general classification of accounts for the Public Service Commission define a residential account as being a single living unit, while accounts serving multiple residential accounts are commercial in nature.

Request

Utility Company A requests a clarification of sec. 77.54(30)(a)2, (c) and (d), Wis. Stats. (1989-90), so that the utility may properly collect sales taxes for the State of Wisconsin.

Ruling

The gross receipts from the sale of electricity and natural gas sold by Utility Company A for use in common areas in apartment buildings during the months of November through April qualify for exemption from Wisconsin sales and use tax.

Analysis

Section 77.54(30)(a)2, Wis. Stats. (1989-90), exempts from sales and use tax the gross receipts from the sale of electricity and natural gas sold for residential use during the months of November, December, January, February, March and April. Section 77.54(30)(d), Wis. Stats. (1989-90), defines residential use to mean use in a structure or portion of a structure which is a person's permanent residence.

Section Tax 11.57(2)(L)7, Wis. Adm. Code, June 1991 Register, provides that residential use includes use in apartment houses, nursing homes and farm houses even though they are on a commercial or rural meter.

Section 77.54(30)(e), Wis. Stats. (1989-90), provides that when sales of electricity or natural gas are made to accounts which are properly classified as residential pursuant to schedules which are filed for rate tariff purposes with the Public Service Commission, and which are in force at the time of the sale, the seller of electricity or natural gas is not required to obtain exemption certificates from their customers. However, because the common areas in the apartment buildings are classified as commercial for the Public Service Commission, the landlords must give the utility properly completed exemption certificates for the sales to be exempt.

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W9203003, October 25, 1991

Type Tax: Sales/Use

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

Issue: Exemptions - fund-raising activities

This letter responds to your request for a private letter ruling regarding the sales and use tax status of the "XYZ Program."

Facts

In the XYZ Program, for a contribution, the Hospital A Auxiliary ("the Auxiliary") will turn on a light, or a string of lights, on a Christmas tree on the hospital grounds in recognition or memory of an individual of the contributor's request. No physical light is purchased by the contributor, and the same lights are used on the Christmas tree each year. It is a program to encourage donations to the Auxiliary. The Auxiliary has paid sales tax on the contributions related to the XYZ Program in the past.

Request

The Auxiliary requests a determination of whether the contributions relating to the XYZ Program are subject to Wisconsin sales tax.

Ruling

The Auxiliary's receipts from contributions relating to the XYZ Program are not subject to Wisconsin sales tax.

Analysis

Section 77.52(1), Wis. Stats. (1989-90) imposes Wisconsin sales tax on retail sales, leases or rentals of tangible personal property. Section 77.52(2)(a), Wis. Stats. (1989-90), imposes Wisconsin sales tax on selling, performing, or furnishing specified services. Section 77.51(14), Wis. Stats. (1989-90) defines "sale, lease or rental" to include any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption.

Since contributions in the program do not meet the definition of "sale, lease or rental," and since the Auxiliary is not providing a service which has been specified as a taxable service, there is no basis for imposing sales tax on the Auxiliary's receipts from contributions related to the XYZ Program.

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W9206004, November 18, 1991

Type Tax: Sales/Use

Statutes: Sections 77.52(2)(a)1 and 11 and (2m) and 77.54(20)(c)5, Wis. Stats. (1989-90)

Issue: Conference services

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications of providing conference facilities and services.

Facts

Company XYZ, a for-profit firm, contracted with College A to host a Conference at College A in Wisconsin. The agreement calls for College A to provide lodging facilities, meeting/recreational facilities, meals and additional catering, and administrative services, including printing and mailing brochures.

For a fee of between \$350 and \$500, a person may register for the conference. This fee includes conference activities, use of recreational facilities at the conference, snacks, and lunches. Participants may also obtain lodging and morning and evening meals for additional charges on a per night and per meal basis. The charge by College A to Company XYZ for the meals and lodging was the same amount Company XYZ charged conference participants for meals and lodging. Wisconsin sales tax was not charged on any amounts charged to participants.

College A billed Company XYZ for the services it provided as follows:

Printing	\$2,999.29	
Sales Tax	<u>149.96</u>	
Total		\$ 3,149.25
Postage		4,759.23
Lodging	732.50	
Sales Tax	<u>36.63</u>	
Total		769.13
Meals	912.00	
Sales Tax	<u>45.60</u>	
Total		957.60
Facilities		438.77
Administration Fees		324.00
Catering Fees	263.00	
Sales Tax	<u>13.15</u>	
Total		276.15
Life Guards		22.50
Custodial Chargeback		<u>18.00</u>
Total Billed		<u>\$10,714.63</u>

Company XYZ did not provide College A with any resale or other exemption certificate.

Ruling Request

Did College A properly impose Wisconsin sales or use tax on the taxable services it provided to Company XYZ?

Ruling

College A correctly imposed Wisconsin sales tax on its sales of printing provided to Company XYZ. In addition, the portion of facilities fees which relate to the use of amusement, athletic, entertainment, or recreational facilities is subject to Wisconsin sales tax. The sales of meals, lodging, and catering to Company XYZ are not subject to Wisconsin sales tax.

Analysis

Section 77.52(2)(a), Wis. Stats. (1989-90), provides that the sale of certain services are subject to Wisconsin sales tax. Services subject to tax include fees for the privilege of access to amusement, athletic, entertainment, or recreational facilities (subd. 2), and the printing of tangible personal property (subd. 11). Providing education is not a taxable service.

Section 77.52(2)(a)1, Wis. Stats. (1989-90), provides that the furnishing of rooms or lodging to transients by corporations organized and operated exclusively for religious, charitable, or educational purposes, provided that no part of the net earnings of such corporations and associations inures to the benefit of any private shareholder or individual, is not a taxable service.

Section 77.54(20)(c)5, Wis. Stats. (1989-90), provides that taxable sales shall not include meals, food, food products, or beverages furnished in accordance with any contract or agreement by a public or private institution of higher education.

Section Tax 11.67(2), Wis. Adm. Code, provides that persons engaged in the business of providing services are consumers, not retailers, of tangible personal property which they use incidentally in providing their services. Wisconsin sales and use tax applies to the sale of such property to them.

Since Company XYZ is providing an educational service to participants when they hold a conference, any property they use incidentally in providing that educational service is subject to Wisconsin sales or use tax, unless a specific exemption applies. Based on the information provided, Company XYZ is furnishing brochures, snacks, and lunches, in addition to educational materials, incidentally in providing the educational service to participants. Therefore, the sale of these items by College A to Company XYZ is subject to Wisconsin sales tax except where the exemption for meals applies under sec. 77.54(20)(c)5, Wis. Stats. (1989-90). The sale of furnishing access to recreational facilities by College A to Company XYZ is subject to Wisconsin sales tax.

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