

XYZ and is a common carrier licensed by the Interstate Commerce Commission.

The Customer will purchase coal from ABC with possession of the coal passing from ABC to the Customer at ABC's Wisconsin facility. The price for the coal purchased by the Customer from ABC will be established by contract and will exclude any charges for transportation of the coal from Kentucky to Wisconsin. The

Customer will separately contract with GHI for the transportation of the coal from Kentucky to Wisconsin. The Customer will pick up the coal at ABC's Wisconsin facility at which time ABC will invoice the Customer for the coal it picks up. GHI will invoice the Customer for the transportation charges attributable to the coal then purchased by the Customer from ABC. Any increase or decrease in transportation charges shall be borne by the Customer and not ABC.

Is the charge by GHI to the Customer for transportation subject to Wisconsin sales or use tax charges?

Answer 2: Yes. Since the transportation occurred prior to the sale of the coal to the Customer, GHI is subject to Wisconsin sales or use tax on the amount charged to the Customer for transportation charges. It is irrelevant that the transportation charge is billed separately from the coal. □



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 private letter rulings are included:

Sales and Use Taxes

Computer software for disabled individuals

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Member incentive program - electric thermal storage units

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Salary surveys

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✳ W9214005, January 13, 1992

Type Tax: Sales and Use

Issue: Computer software for disabled individuals

Statutes: Section 77.52(1), Wis. Stats. (1989-90), and section 77.54(22)(a) and (b), as amended by 1991 Wis. Act 39

This letter responds to your request for a private letter ruling regarding the sales and use tax status of Package A, a computer software package to be used by severely handicapped individuals.

Facts

ABC Company, a division of XYZ, Inc., is a provider of medical supplies and equipment in Minnesota. As part of this business, ABC Company is a dealer for the Package A company. Package A is a software product designed to operate on IBM or IBM compatible microcomputers providing people who are severely disabled with written and spoken communications and environmental controls. When installed on a personal computer with a variety of peripheral equipment, it allows the individual tremendous freedom in his daily living. The individual is enabled to perform tasks others normally take for granted, such as turning lights on, dialing a phone, typing a letter, changing a TV channel, etc. Peripheral devices are available, such as a voice synthesizer that verbalizes what the individual has typed into the computer.

Package A can potentially be used by any disabled individual who:

1. Can read newspaper print.
2. Can close and open at least one switch on command.
3. Can be positioned to view a computer monitor.
4. Can spell (not necessary but helps).
5. Is a quadriplegic (not necessary).
6. Is nonverbal (not necessary).

Package A is not individually designed, constructed or altered solely for the use of a particular physically disabled person.

The peripheral equipment does substitute for portions of the body. For example, the user may control the system using a "sip-and-puff" unit, which substitutes for their hands. The system may include a voice synthesizer which substitutes for the user's voice. However, none of this equipment is "worn" in the sense that orthotics are worn.

Request

You have requested a ruling regarding the Wisconsin sales and use tax status of the Package A software, the personal computer hardware and all peripheral equipment.

Ruling

Gross receipts from sales of the Package A software, the personal computer hardware and all peripheral equipment are subject to Wisconsin sales tax under sec. 77.52(1), Wis. Stats. (1989-90). These sales do not qualify for exemption under sec. 77.54(22), Wis. Stats., as amended by 1991 Wis. Act 39.

Analysis

Prewritten programs are defined in sec. Tax 11.71(1)(k), Wis. Adm.

Code, February 1986 Register, as programs prepared, held, or existing for general use normally for more than one customer, including programs developed for in-house use or customer program use which are subsequently held or offered for sale or lease. Since the Package A software has been designed for potential use by any disabled individual who can perform certain functions, it meets the definition of prewritten program.

Section Tax 11.71(2)(b), Wis. Adm. Code, February 1986 Register, provides that the sale, lease, rental or license to use prewritten programs and basic operational programs is subject to Wisconsin sales or use tax. Therefore, the sale, lease, rental or license to use the Package A software is subject to Wisconsin sales or use tax.

Section Tax 11.71(2)(a), Wis. Adm. Code, February 1986 Register, provides that the sale, lease, or rental of new or used automatic data processing equipment, and charges for the installation, service and maintenance of this equipment are subject to Wisconsin sales or use tax. Therefore, the sale, lease or rental of personal computer hardware and peripheral equipment sold, leased or rented for use with the Package A product is subject to Wisconsin sales or use tax.

The exemption from Wisconsin sales and use tax provided under sec. 77.54(22)(a), Wis. Stats. (1989-90), requires that the device be individually designed, constructed or altered solely for the use of a particular physically disabled person so as to become a brace, support, supplement, correction or substitute for the bodily structure, including the extremities of the individual. Because the Package A program is prewritten and is not individually designed, constructed or altered solely for the use of a particular physically disabled person, it does

not qualify for exemption under sec. 77.54(22)(a), Wis. Stats. (1989-90).

Section 77.54(22)(b), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales and use tax for artificial limbs, artificial eyes, hearing aids and other equipment worn as a correction or substitute for any functioning portion of the body. Since the Package A software, the personal computer hardware and the peripheral equipment are not worn as a correction or substitute for any functioning portion of the body, such sales do not qualify for exemption under sec. 77.54(22)(b), Wis. Stats. (1989-90). □

✳ W9222008, March 5, 1992

Type tax: Sales and Use

Issue: Horse training

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

This letter responds to your request for a private letter ruling regarding the Wisconsin sales and use tax implications of the services you provide at GHI Company (GHI).

Facts

GHI was incorporated in another state. It commenced construction of a facility dedicated exclusively to "training" horses. It does business as the "X and Y Training Facility" to emphasize its nationally and internationally recognized head trainers and to substantiate its exclusive purpose of horse training.

GHI's business consists of training Western reining horses and Western pleasure horses which are almost exclusively registered Quarter Horses. Only horses requiring training in these disciplines are accepted at GHI,

with the exception of an occasional "breaking" of a horse of another breed.

The training service provided at GHI requires that the horse is only allowed on the premises if it is being trained. Older horses typically stay one to six months for specific correction. Younger horses are broken to ride, trained to perform, shown, and returned to the client once their training is completed over 12 to 18 months. Horses must be accepted at GHI and routinely "flunk out" if they fail to meet training standards.

A typical client lives out-of-state or internationally and has their own horse facility. They do not send a horse to GHI for boarding, but rather to be trained. The horse must be domiciled with GHI during the training. Clients are advised that once the training is over, the horse is returned to the client or a boarding facility.

GHI does not advertise that it will board horses. The only exception to its policy of not keeping a horse at its facility if it is not being trained is with respect to brood mares. Brood mares being trained are removed from training in the late months of pregnancy and pastured.

In addition to training horses, employes are hired by GHI for the agricultural duties of growing hay, oats, and corn, primarily to service the horse training operations.

GHI does act as an occasional intermediary between buyers and sellers of horses to facilitate its principal business of training. The buyers and sellers maintain possession and title of the horses, negotiate prices and terms, and arrange for delivery, etc. GHI merely introduces the buyers and sellers as a means of facilitating its training operations. GHI does not buy or sell horses itself.

Ruling Request

1. Is any of the charge by GHI for training horses subject to Wisconsin sales or use tax because boarding of the horses is provided?
2. Is GHI subject to Wisconsin sales or use tax as a result of brokering horses?
3. Is GHI required to register for a Wisconsin seller's permit?

Ruling

1. No part of the charge by GHI for training horses is subject to Wisconsin sales or use tax, even though GHI provides boarding. The training of horses is the primary objective of GHI, a service which is not subject to Wisconsin sales or use tax.
2. GHI is not a retailer required to collect Wisconsin sales or use tax when it brokers horses.
3. Since GHI is not selling tangible personal property or taxable services subject to Wisconsin sales or use tax, it is not required to register for a Wisconsin seller's permit.

Analysis

Training and Boarding

Section 77.52(2)(a), Wis. Stats. (1989-90), provides that certain services are subject to Wisconsin sales or use tax. These services include the service or maintenance of tangible personal property, but do not include training.

Section Tax 11.12(6)(a)2, Wis. Adm. Code, provides that the training of animals is not subject to Wisconsin sales or use tax. Section Tax 11.12(6)(b)1 and 2, Wis. Adm. Code,

provide that the boarding and grooming of animals is subject to Wisconsin sales or use tax.

In the case of *Historic Sites Foundation, Inc., d/b/a Circus World Museum v. Wisconsin Department of Revenue* (S-10066, January 21, 1986), the Wisconsin Tax Appeals Commission held that when a taxpayer provides both nontaxable and taxable services, the primary objective of the service provider may be used to determine whether the sale of the services is subject to Wisconsin sales tax.

Since GHI is providing both taxable and nontaxable services (i.e., boarding and training), the primary objective of GHI in providing its services may be used in determining whether the sales of services by GHI to clients are subject to Wisconsin sales or use tax.

The primary objective of GHI is to provide training for horses. The facts show this to be true because:

1. GHI advertises itself as a training facility.
2. GHI does not advertise that it provides boarding services.
3. Boarding services are only provided to horses that are being trained by GHI.
4. When a horse is finished being trained by GHI, it may no longer be boarded at the facility.

Brokering Horses

Section 77.52(1), Wis. Stats. (1989-90), imposes the Wisconsin sales tax on retailers for sales of tangible personal property or taxable services made at retail in Wisconsin.

Section Tax 11.55(1), Wis. Adm. Code, provides that a person who has

possession of personal property owned by an unknown or undisclosed principal and has the power to transfer title to that property to a third party, and who exercises that power, is a retailer.

GHI, when brokering horses, has possession of horses owned by clients but does not have the power to transfer title to those horses to a third party, and does not exercise that power. Therefore, GHI is not a retailer of horses and is not subject to Wisconsin sales or use tax when a horse is sold, if acting in that capacity.

Registering for a Sellers Permit

Section 77.52(7), Wis. Stats. (1989-90), provides that every person desiring to operate as a seller within Wisconsin shall file with the department an application for permit for each place of operation. Subsection (12) provides that a person who operates as a seller in Wisconsin without a permit is guilty of a misdemeanor.

"Seller" is defined in sec. 77.51(17), Wis. Stats. (1989-90), as a person selling, leasing, or renting tangible personal property, or selling, performing, or furnishing services of a kind the gross receipts from the sale, lease, rental, performance, or furnishing of which are required to be included in the measure of the sales tax.

Based on the facts above, GHI does not sell, rent, or lease tangible personal property or sell, perform, or furnish services which are subject to sales tax. Therefore, GHI is not required to register for a Wisconsin seller's permit. □

✱ **W9220007**, February 26, 1992

Type Tax: Sales and Use

Issue: Member incentive program — electric thermal storage units

Statutes: Sections 77.51(2), (4)(a)(intro.), (14)(k) and (22)(a) and (b), 77.52(1) and 77.53(1), Wis. Stats. (1989-90)

This letter responds to your request for a private letter ruling regarding the sales and use tax status of electric thermal storage units.

Facts

AB Cooperative (ABC), an electrical distribution cooperative located in Wisconsin, has recently implemented a new "member incentive program" with participation from its power supplier, Cooperative DE (CDE), also located in Wisconsin. The "member incentive program" is beneficial to all three parties listed below, as follows:

- a. The member obtains a new home heating unit at one-third of true cost in exchange for allowing on/off operation of the heating unit to be controlled by ABC, by means of radio signals.
- b. ABC benefits in that their "peak demands" for electricity they purchase and distribute to their members are reduced. This reduction in demand results in a reduced rate per KWH from their power supplier, CDE.
- c. CDE benefits due to the fact that "demands" on their peak generation capacity periods are reduced, thus reducing the level at which their generators need to operate.

The "member incentive program" discussed above involves Electric Thermal Storage or ETS units, which come in four sizes. The largest ETS unit, a 6 KW unit, costs approximately \$855.00. CDE buys these ETS units from the manufacturer. CDE in turn sells these ETS units to ABC for their cost of \$855.00.

When the ABC member buys the ETS unit and agrees to have the ETS unit's on/off operation radio controlled, as explained above, the member is billed one-third of the ETS unit's cost, or \$285.00. At the time of sale the ownership of the ETS unit passes to the ABC member. As these ETS units are installed, ABC bills CDE for its one-third share of the ETS units' costs.

The ETS units are not installed by ABC. An electrician must be hired by the member for installation of the unit.

There are two types of ETS units. One type is a room unit which is placed on the floor and attached to the wall, by a bracket. This unit is connected directly to the member's service entrance box using 240v wiring (it does not plug into an outlet). The other type of ETS unit is a central storage furnace. The central storage furnace is connected to heating ducts and also requires 240v wiring as a direct connection to the member's service entrance box. The ETS unit may replace the member's furnace or the unit may work in conjunction with the furnace.

Request

ABC is requesting a determination of the "measure" of Wisconsin sales and/or use tax for the "member incentive program."

Ruling

The amount that ABC bills to its members for ETS units (1/3 of the ETS unit cost) is subject to Wisconsin sales tax. The net amount billed from CDE to ABC (the full amount of the sale from CDE to ABC, less the amount that ABC later receives from CDE) is also subject to Wisconsin sales or use tax.

Analysis

The first issue to resolve is whether the billing by ABC to its members for the ETS units is subject to Wisconsin sales or use tax.

Since the ETS unit is not installed by ABC, but rather, the member who contracts with an electrician for installation, the sale of the ETS unit by ABC to the member is considered a retail sale as defined in sec. 77.51(14), Wis. Stats. (1989-90). The amount billed by ABC to the member is subject to Wisconsin sales tax as provided by sec. 77.52(1), Wis. Stats. (1989-90).

The other issue is whether the amount ABC pays CDE is subject to Wisconsin sales or use tax. Sec. 77.51(22)(a), Wis. Stats. (1989-90), defines "use" to include the exercise of any right or power over tangible personal property incident to the ownership, possession or enjoyment of the property. Under sec. 77.51(22)b, Wis. Stats. (1989-90), "enjoyment" includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property.

In the "member incentive program," ABC retains the right to control the on/off operation of the ETS units. This control constitutes "enjoyment" and "use" of the ETS units, resulting in a use tax liability for ABC under sec. 77.53(1), Wis. Stats. (1989-90).

Since ABC is using the ETS units, a resale exemption does not apply to its purchases of ETS units from CDE if the ETS units are identified as those used in the "member incentive program." Sec. 77.53(12), Wis. Stats. (1989-90) states:

"If a purchaser who gives a certificate makes any storage or use of the property or service other than retention, demonstration or display while holding it for sale in the regular course of operations as a seller, the storage or use is taxable as of the time the property or service is first so stored or used."

Therefore, any ETS units purchased without tax using resale certificate are taxable to ABC at the time it first has the right to control the on/off operation of the units.

The use tax liability of ABC is based on the net amount of its purchase from CDE. Since 1/3 of the ETS unit cost is billed back to CDE, this is a delayed discount given by CDE to ABC. Use tax applies to the remaining 2/3 of the ETS unit cost to ABC. □

✳ **W9219006**, February 17, 1992

Type tax: Sales and Use

Issue: Salary surveys

Statutes: Sections 77.51(5) and 77.52(1) and (2m), Wis. Stats. (1989-90)

This letter responds to your request for a private letter ruling regarding the application of sec. Tax 11.67, Wis. Adm. Code, April 1990 Register, to the service of compiling salary surveys for Wisconsin employers.

Facts

XYZ Company enlists Wisconsin employers as members of and participants in a survey group. As members of the survey group, each employer provides salary data specific to that employer. The data from the group of employers is compiled and statistically analyzed by XYZ Company. This information is then forwarded to the participants in the form of a printed salary survey. The fee charged for belonging to the survey group includes procurement and compilation of the data, a copy of the survey data, attendance at an annual survey seminar and a limited amount of interpretation and consulting services related to applying the data to specific employer circumstances.

In addition, XYZ Company, in an effort to expand the base of employers providing data, may offer the option to an employer which has not provided data in the current survey period to pay the participation fee in the current period and receive a copy of the data. This fee would include interpretation and consulting services related to the current data. This late entrant would continue the membership and provide data in the next survey period. The survey data is not available to any employer not included in the membership group.

Sales tax related to the outside printing service for the survey is paid to the Wisconsin printer by XYZ Company.

Request

XYZ Company is requesting a ruling of whether the transfer of the tangible personal property (printed survey data) is incidental to the service provided to the employers and therefore not subject to further sales tax.

Ruling

The fee charged by XYZ Company for membership in the survey group is subject to Wisconsin sales tax.

Analysis

Sec. Tax 11.67(1), Wis. Adm. Code, April 1990 Register, provides that when a transaction involves the transfer of tangible personal 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 performance of a service with the transfer of property being merely incidental to the performance of the

service. If the objective of the purchaser is to obtain the personal property, a taxable sale of that property is involved.

Section 77.51(5), Wis. Stats. (1989-90), defines "incidental" to mean "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose of the service. Tangible personal property transferred by a service provider is incidental to the service if the purchaser's main purpose or objective is to obtain the service rather than the property, even though the property may be necessary or essential to providing the service."

It is the department's position that the main purpose or objective of the members of the survey group is to obtain the printed survey data. The printed survey data serves as a wage manual for evaluating compensation levels for new employees as well as new positions. In this capacity, the printed survey data serves as a management tool usable on a day-to-day basis. Although a nominal amount of consulting is provided as part of the fee, the consulting is largely a separate endeavor which is billed for as provided. Accordingly, a taxable sale of tangible personal property is made.

XYZ Company may purchase binders and printing for the survey data without Wisconsin sales or use tax by providing its suppliers with properly completed resale certificates. □