

trict IV, June 25, 1992). This is an appeal from an order of the Circuit Court for Dane County, which found that certain machinery and equipment used in the taxpayer's business is exempt from Wisconsin sales and use taxes under the exemption for recycling activities set forth in sec. 77.54(26m), Wis. Stats. See *Wisconsin Tax Bulletin* 71, page 12, for a summary of that decision.

The issue in this case is whether the taxpayer's machinery and equipment purchases, and its purchase of engine starting fluid, come under the recycling exemption.

The taxpayer recycles solid waste. It prepares, sorts, weighs, and processes scrap metal for use by smelters, foundries, and steel mills. In 1984, 1985, and 1986, it purchased lugger boxes and roll-off boxes; tarps and bands to cover the lugger boxes; truck scales, including repair and replacement parts; platform scales; a dead-lift roll-off hoist mounted on one of its trucks; replacement hydraulic hose for its trucks; and starting

fluid used to start crane engines. It paid no sales or use tax on those purchases.

The taxpayer uses the lugger and roll-off boxes solely to collect scrap metal at its suppliers' premises, to transport the scrap to its premises, and to deliver recycled metal to its customers. Customer delivery does not exceed 10% of the total use of the boxes. The record shows that the taxpayer places the boxes at scrap collection sites. It picks up the full boxes, leaves replacement boxes, and transports the scrap metal in the boxes to its premises.

Tarps and bands are used solely to cover the boxes to prevent the metal from falling out in transit. Truck and platform scales are used solely to weigh the metal to determine its purchase or sale price. Dead-lift roll-hoists are mounted on trucks and used to lift the boxes onto and off the trucks. Hydraulic hoses are replacement parts for the trucks. Starting fluid is used in cold weather to start engines on cranes the taxpayer has on

its premises to move heavy pieces of scrap metal.

The recycling exemption applies to the gross receipts from the sale and use of "recycling machinery and equipment . . . exclusively and directly used for . . . recycling activities . . ." The department contends that the machinery and equipment at issue are not "exclusively and directly used for" the taxpayer's recycling business, and that the starting fluid is not machinery or equipment and, in any event, the fluid is not used in connection with the machinery or equipment coming within the exemption.

The Court of Appeals concluded that the machinery and equipment are not directly used for recycling activities, within the meaning of sec. 77.54(26m), Wis. Stats., and are therefore not exempt, and the starting fluid is not machinery, equipment, or parts therefor, and is not exempt under that statute.

The taxpayer has appealed this decision to the Wisconsin Supreme Court. □



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:

Sales and Use Taxes

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SALES AND USE TAXES

1 Advertising Material Printed Out-of-State and Delivered in Wisconsin

Statutes: Sections 77.51(22) and 77.53(2) and (3), Wis. Stats. (1989-90)

Background: In a decision dated July 27, 1982, the Wisconsin Court of Appeals, District IV, held in the case of *Wisconsin Department of Revenue vs. J.C. Penney, Inc.*, that a retailer's catalogs published by a printer located outside Wisconsin that did not have nexus in Wisconsin, and shipped directly to the retailer's customers in Wisconsin by mail or common carrier, were not subject to Wisconsin use tax. The Court concluded that J.C. Penney, Inc., had not "used" the catalogs in Wisconsin as defined in sec. 77.51(15), Wis. Stats. (1975-76). Because the catalogs moved by mail or common carrier from Minnesota to Wisconsin, they remained the property of the printer until they were delivered. Therefore, J.C. Penney, Inc., did not exercise any right or power over the tangible personal property in Wisconsin and was not subject to use tax on its purchase of the catalogs from the printer.

The department proposed sec. 77.51(15)(b), Wis. Stats., created by 1983 Wisconsin Act 27 (later renumbered sec. 77.51(22)(b) by 1983 Wisconsin Act 189), in an attempt to reverse the *J.C. Penney* decision and provide that for purposes of defining use, "'enjoyment' includes a purchaser's right to direct the disposition of property, whether or not the purchaser has possession of the property. 'Enjoyment' also includes, but is not limited to, having shipped into this state by an out-of-state supplier printed material which is designed to promote the sale of property or services, or which is otherwise related to the business activities, of the purchas-

er of the printed material or printing service."

However, in a decision dated May 21, 1985, the Circuit Court for Dane County in the case of *J.C. Penney, Inc., et al. vs. Wisconsin Department of Revenue*, held that the 1983 creation of sec. 77.51(15)(b), Wis. Stats., did not reverse previous court actions prohibiting the imposition of use tax on J.C. Penney, Inc., for catalogs it had printed by an out-of-state printer and sent to Wisconsin customers by mail or common carrier because J.C. Penney did not exercise any right or power over the catalogs. The department did not appeal this decision.

Section 77.53(2), Wis. Stats. (1989-90), imposes a Wisconsin use tax on every person storing, using, or otherwise consuming in Wisconsin tangible personal property purchased from a retailer.

Section 77.53(3), Wis. Stats. (1989-90), imposes a Wisconsin use tax on every retailer engaged in business in Wisconsin and making sales of tangible personal property for delivery into this state.

Facts and Question 1: Company ABC is a corporation with nexus in Wisconsin and is registered to collect Wisconsin sales or use tax. Company ABC contracts with Company XYZ (a Minnesota corporation that does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax) to print some advertising flyers. Company XYZ produces the flyers, and upon the direction of Company ABC, mails the flyers by U.S. Mail to Company ABC's potential customers located in Wisconsin.

Is Company ABC subject to Wisconsin use tax under sec. 77.53(2), Wis. Stats. (1989-90), on its purchase of the advertising flyers from Company XYZ, which Company XYZ mailed

to Company ABC's potential customers located in Wisconsin?

Answer 1: No. Since Company XYZ mails the flyers it prints by U.S. Mail directly to Company ABC's potential customers in Wisconsin, the flyers remain the property of Company XYZ until they are delivered to Company ABC's potential customers, at which time the flyers become the property of the potential customers. Therefore, Company ABC does not "use" the flyers it purchases from Company XYZ in Wisconsin based on the *J.C. Penney* decision dated May 21, 1985, and is not subject to Wisconsin use tax on its purchase of the flyers.

Note: This answer applies regardless of whether company ABC has nexus in Wisconsin.

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that Company XYZ (the printer) has nexus in Wisconsin and is registered to collect Wisconsin use tax.

Is Company XYZ subject to Wisconsin use tax under sec. 77.53(3), Wis. Stats. (1989-90), for its sale of advertising flyers to Company ABC, which Company XYZ mails to Company ABC's potential customers in Wisconsin?

Answer 2: Yes. Section 77.53(3), Wis. Stats. (1989-90), provides that every retailer engaged in business in Wisconsin who makes sales of tangible personal property for delivery into Wisconsin is required to collect Wisconsin use tax from the purchaser. Company XYZ is engaged in business in Wisconsin (has nexus) and makes a sale of tangible personal property (flyers) which it has delivered into Wisconsin.

The *J.C. Penney* decision dated May 21, 1985, does not apply in this

situation, because the imposition of use tax is not based on use by the purchaser in Wisconsin, but rather on the sale of tangible personal property for delivery in Wisconsin by an out-of-state retailer engaged in business in Wisconsin.

Caution: If Company XYZ does not have nexus in Wisconsin and is not registered to collect Wisconsin use tax, the provisions of sec. 77.53(3), Wis. Stats. (1989-90), do not apply.

Note: The potential customers in Wisconsin are not subject to Wisconsin use tax for the flyers they receive because they are given away free to them; therefore, there are no gross receipts on which to impose the use tax. □

2 Processing Contaminated Soil

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

Wis. Adm. Code: Section Tax 11.68(10), June 1991 Register

Background: Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that except when installing tangible personal property which when installed will constitute a real property improvement, the service to or cleaning of tangible personal property is subject to Wisconsin sales or use tax. Therefore, when a person is servicing or cleaning tangible personal property which that person will install or reinstall, the servicing or cleaning is not subject to Wisconsin sales or use tax.

Soil, when removed from the earth, is tangible personal property. However, placing soil in its final resting place is a real property improvement.

Facts and Question 1: Company A is in the business of recycling or clean-

ing contaminated soil. Company A removes the soil from the earth, processes it to remove the contaminants through use of machinery at the site where the soil is removed, and replaces the processed soil back into the earth where it was removed.

Is the charge by Company A for this service subject to Wisconsin sales or use tax?

Answer 1: No. Company A is cleaning soil which is tangible personal property. However, since Company A places the soil in its final resting place, this constitutes a real property improvement. Therefore, the charge by Company A is not subject to Wisconsin sales or use tax.

Facts and Question 2: Assume the same facts as in Facts and Question 1, except that Company A loads the soil it removes from the earth onto its truck and transports the soil to its facility at a different location where the soil is processed. Once the soil is processed, Company A returns the soil to the location where it was removed and places the processed soil back into the earth.

Is the charge by Company A for this service subject to Wisconsin sales or use tax?

Answer 2: No. Company A is cleaning soil which is tangible personal property. However, since Company A places the soil in its final resting place, this constitutes a real property improvement. Therefore, the charge by Company A is not subject to Wisconsin sales or use tax.

Facts and Question 3: Company A removes soil from the earth for Company B and processes it to remove contaminants, but it does not place the soil back into the earth. Instead, Company B stores the soil for future use at some other location.

Is the charge by Company A for this service subject to Wisconsin sales or use tax?

Answer 3: Yes. Since Company A does not return the soil to its final resting place, it is performing a service to tangible personal property. The service to tangible personal property is subject to Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

Facts and Question 4: Company B contracts with Company C to have soil removed, cleaned, and placed back into the earth. Company C removes the soil from the earth and hauls it to Company A which Company C has contracted with to process the soil to remove contaminants. Company C hauls the soil back to where it was removed and places it in its final resting place.

- A. Is the charge by Company A to Company C subject to Wisconsin sales or use tax?
- B. Is the charge by Company C to Company B subject to Wisconsin sales or use tax?

Answer 4:

- A. Yes. The charge by Company A to process the soil is subject to Wisconsin sales tax because Company A is performing a service to tangible personal property. It does not perform the real property improvement of placing the soil in its final resting place.
- B. No. The charge by Company C is not subject to Wisconsin sales or use tax because Company C is performing a real property improvement. □

3 Purchases and Sales by Pet Stores, Pet Breeders, and Kennels

Statutes: Sections 77.52(1) and (15) and 77.53(1), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.12(2)(d), June 1991 Register

Background: Section 77.52(15), Wis. Stats. (1989-90), provides that if a purchaser who gives a resale certificate makes any use of the property other than retention, demonstration, or display while holding it for sale, lease, or rental in the regular course of operations, the use is taxable at the time of first use. The use tax is based on the purchase price of such property.

Facts and Question 1: When purchasing pet food and other pet supplies, a pet store owner gives its supplier a resale certificate, because most of the pet food and supplies are resold to customers. However, some of the pet food and supplies are used in the store to feed and take care of the pets which are held for sale.

Does the pet store owner owe use tax on the pet food and supplies used in feeding and caring for the pets in the store?

Answer 1: Yes. Although the pets are being held for sale, the pet food and supplies used in feeding and caring for them are used by the store owner and are subject to use tax under sec. 77.53(1), Wis. Stats. (1989-90). The use tax is based on the pet store's purchase price of such food and supplies.

Facts and Question 2: The XYZ Co. is in the business of breeding and raising dogs for sale. Are its purchases of dog food used in the business subject to sales or use tax?

Answer 2: Yes. Sales of tangible personal property are subject to sales or use tax under sec. 77.52(1) or sec. 77.53(1), Wis. Stats. (1989-90), unless an exemption applies. No exemption applies for purchases of such dog food. Since sec. Tax 11.12(2)(d), Wis. Adm. Code, June 1991 Register, specifically excludes from the definition of "farming" the raising of dogs, cats, or other pets, the farming exemption does not apply.

Facts and Question 3: ABC Kennels is in the business of boarding dogs and cats. Their services include feeding, grooming, supervision, and providing indoor and outdoor exercise areas. ABC Kennels purchases food which is used to feed the dogs and cats which customers bring to it for boarding.

- A. Are the charges made by ABC Kennels to its customers for boarding dogs and cats subject to sales tax?
- B. What is the sales and use tax treatment of the feed ABC Kennels purchases to feed the dogs and cats it boards?

Answer 3:

- A. Yes. The boarding of dogs and cats is a service to tangible personal property which is taxable under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).
- B. By providing a properly completed resale certificate to its supplier, ABC Kennels may claim a resale exemption on feed for the dogs and cats it boards. This feed is considered to be transferred in conjunction with providing the taxable boarding service. □

4 Repair of Machinery and Equipment Purchased for Research and Development and Subsequently Used in Manufacturing

Statutes: Sections 77.52(2)(a)10 and 77.54(6)(a), Wis. Stats. (1989-90)

Background: Section 77.54(6)(a), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales or use tax for gross receipts from the sale of or the storage, use, or consumption of machines and specific processing equipment and repair parts or replacements for such machines and specific processing equipment exclusively and directly used by a manufacturer in manufacturing tangible personal property and safety attachments for those machines and equipment.

Section 77.52(2)(a)10, Wis. Stats. (1989-90), provides that the gross receipts from the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of tangible personal property are subject to Wisconsin sales or use tax, unless at the time of such repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance the type of property repaired, serviced, etc., would have been exempt to the customer from sales or use tax.

Facts and Question 1: Company ABC is a new company that is experimenting with the development of a new product. Company ABC purchased various machinery and equipment during 1991 to research and develop the new product. The sale of the machinery and equipment to Company ABC was subject to Wisconsin sales or use tax.

On January 1, 1992, the research and development of the product is completed and Company ABC begins manufacturing the product. The ma-