

chinery and equipment Company ABC purchased during 1991 that was used in the research and development of the product is now being used exclusively and directly in the manufacture of the tangible personal property.

Are the gross receipts from the repair, by a repair company, of the machinery and equipment used to manufacture the product exempt from Wisconsin sales or use tax on or after January 1, 1992 (the date when the machinery and equipment is first used exclusively and directly in manufacturing)?

Answer 1: Yes. The repair of the machinery and equipment on or after January 1, 1992, is exempt from Wisconsin sales or use tax. The repair is exempt from Wisconsin sales or use tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90), because, at the time of the repair it would have been exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1989-90), if it had been purchased.

There is no requirement in sec. 77.52(2)(a)10, Wis. Stats. (1989-90), that the machinery and equipment had to have been used exclusively and directly in manufacturing at the time of purchase in order for the repair to be exempt from tax.

Facts and Question 2: Assume the same facts as in Facts and Question 1. Instead of having the repair of the machinery and equipment performed by another company, Company ABC performs its own repairs.

Is the sale of repair parts to Company ABC (that Company ABC uses to repair the machinery and equipment) exempt from Wisconsin sales or use tax on or after January 1, 1992 (the date when the machinery and equipment is first used exclusively and directly in manufacturing)?

Answer 2: Yes. The gross receipts from the sale of repair parts used to repair the machinery and equipment on or after January 1, 1992, are exempt from Wisconsin sales or use tax. The repair parts are exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1989-90), because at the time the repair parts are used in repairing the machinery and equipment, the machinery and equipment is used exclusively and directly in manufacturing.

There is no requirement in sec. 77.54(6)(a), Wis. Stats. (1989-90), that the machinery and equipment had to have been used exclusively and directly in manufacturing when purchased in order for the exemption to apply to the repair parts. □

5 Sales and Purchases by School Districts

Statutes: Sections 77.52(2)(a) and 77.54(4), (7m), (9) and (9a), Wis. Stats. (1989-90)

Wis. Adm. Code: Section Tax 11.03, September 1991 Register

Background: Section 77.54(4), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales or use tax for sales of tangible personal property by an elementary or secondary school exempted as such from payment of income tax under ch. 71, Wis. Stats. (1989-90), whether public or private.

“Elementary school” is defined in sec. Tax 11.03(1)(a), Wis. Adm. Code, as any school providing any of the first 8 grades of a 12 grade system and kindergarten where applicable. “Secondary school” is defined in sec. Tax 11.03(1)(a), Wis. Adm. Code, as a school providing grades 9 through 12 of a 12 grade system and includes the junior and senior trade schools described in sec. 119.30, Wis. Stats. (1989-90).

Section 77.54(9), Wis. Stats. (1989-90), provides an exemption from Wisconsin sales or use tax for the gross receipts from sales of tickets or admissions to public and private elementary and secondary school activities, where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes, provided that no part of the net earnings inures to the benefit of any private shareholder or individual.

Section 77.54(9a)(b), Wis. Stats. (1989-90), provides an exemption from sales or use tax for gross receipts from sales to, and the storage, use, or consumption of tangible personal property and taxable services by, any school district.

“School districts” is defined in sec. 115.01(3), Wis. Stats. (1989-90), as the territorial unit for school administration. School districts are classified as common, union high, unified, and 1st class city school districts.

Section 77.52(2)(a), Wis. Stats. (1989-90), provides that sales of certain services are subject to Wisconsin sales or use tax. Specifically excluded are sales of accommodations for periods of less than one month when furnished by corporations or associations organized and operated exclusively for religious, charitable, or educational purposes, provided that no part of the net earnings inures to the benefit of any private shareholder or individual.

Sales by School Districts

Question 1: Are sales of tangible personal property by a school district subject to Wisconsin sales or use tax?

Answer 1: No. Sales of tangible personal property by a school district are not subject to Wisconsin sales or use tax.

The exemption in sec. 77.54(4), Wis. Stats. (1989-90), for sales of tangible personal property by elementary and secondary schools also applies to school districts.

Example: Sales or rentals of the following tangible personal property by a school district are not subject to Wisconsin sales or use tax (this list is not all-inclusive):

- A. Books, yearbooks, annuals, magazines, directories, bulletins, papers, or similar publications.
- B. Pens, pencils, and other school supplies.
- C. School lunches and vending machine items.
- D. Photocopies.
- E. Used school equipment such as desks, computers, televisions, furniture, cabinets, and blackboards.
- F. Band uniforms and musical instruments.
- G. Athletic uniforms and sports equipment.
- H. Cars used in driver's education.
- I. The transfer of building materials to a contractor, which the contractor will use in real property construction, in exchange for a reduction in the contract price to the school district.

Question 2: Are the sales of services under sec. 77.52(2)(a), Wis. Stats. (1989-90), by a school district subject to Wisconsin sales or use tax?

Answer 2: Yes, except the following are not taxable:

- A. Sales of tickets or admissions to public and private elementary and secondary school activities (including school district activities) where the entire net proceeds therefrom are expended for educational, religious, or charitable purposes. (Note: There is no requirement that the sale of tickets or admissions be made by an elementary or secondary school to qualify for the exemption from Wisconsin sales and use tax under sec. 77.54(9), Wis. Stats. The only requirements of the statute are that the sale of tickets or admissions be for a school activity and that the proceeds be used for educational, religious, or charitable purposes.)
- B. Occasional sales. For more information about the occasional sales exemption, refer to Wisconsin Publication 206, *Sales Tax Exemption for Nonprofit Organizations*.
- C. Accommodations furnished by schools or school districts organized and operated exclusively for religious, charitable, or educational purposes, provided no part of the net earnings inures to the benefit of any private shareholder or individual.

Example 1: The following services sold by a school district are subject to Wisconsin sales or use tax (this list is not all-inclusive):

- A. Rentals of auditoriums or gymnasiums, including any charges for lights, heat, janitor fees, and equipment, when used by persons for their own recreation, entertainment, or amusement where the renter does not charge an admission.
- B. Admissions to recreational facilities such as golf courses, swimming pools, ball fields, and gym-

nasiums which are open to the general public for recreational purposes.

- C. Providing parking or providing parking space for motor vehicles and aircraft, and docking or storage space for boats.

Example 2: The following services sold by a school district are not subject to Wisconsin sales or use tax (this list is not all-inclusive):

- A. Admissions to school activities such as athletic events, art and science fairs, concerts, dances, films or other exhibits, lectures, and school plays, if the net proceeds are used for educational, religious, or charitable purposes.
- B. Rental of auditoriums or gymnasiums, including any charges for lights, heat, janitor fees, and equipment, when used by a promoter or professional group which will sell admissions to the public for recreational, athletic, amusement, or entertainment purposes.
- C. Library and book fines.
- D. Tuition and course instruction fees.
- E. Dormitory or housing charges and furnishing rooms to students and nonstudents.

Purchases by School Districts

Question: Are purchases of tangible personal property and taxable services by a school district subject to Wisconsin sales or use tax?

Answer: No, provided the school district gives its supplier a purchase order or similar document indicating the school district is the purchaser.

Example: Purchases of the following items by a school district are exempt from Wisconsin sales or use tax (this list is not all-inclusive):

- A. Paper, pens, pencils, file folders, and other office supplies.
- B. Office and school furniture.
- C. Athletic equipment.
- D. Musical instruments.
- E. Computer equipment.
- F. Meals and lodging. For information on sales of meals and lodging to employes of a school district, refer to the tax release on this subject which appeared in *Wisconsin Tax Bulletin* 58, page 21.
- G. Landscaping services.
- H. Printing services.

6 Statute of Limitations When Person Reports Use Tax on Individual Income Tax Return

Statutes: Sections 77.58(3)(a) and (b) and 77.59(3) and (8), Wis. Stats. (1989-90)

Background: Section 77.58(3)(a), Wis. Stats. (1989-90), provides that every person who purchases tangible personal property or services, the storage, use, or other consumption of which is subject to use tax, and who has not paid the use tax due to a retailer required to collect the tax shall file a return to report the tax.

Prior to taxable year 1988, persons who were not required to hold a seller's permit, use tax registration certificate, or consumer use tax registration certificate, were required to

report their Wisconsin use tax liability on Wisconsin Form UT-5, Consumer Use Tax Return.

Beginning with taxable year 1988, persons who do not hold a seller's permit, use tax registration certificate, or consumer use tax registration certificate may report Wisconsin use tax on Form UT-5 or on their Wisconsin individual income tax return (Form 1, 1A, WI-Z, or 1NPR).

Section 77.59(3)(intro.), Wis. Stats. (1989-90), provides that the department may make a determination of a person's sales and use tax liability if the department provides written notice to that person within 4 years after the due date of that person's income or franchise tax return or, if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar year or fiscal year.

Section 77.59(8), Wis. Stats. (1989-90), provides, in part, that if a person fails to file a report or return to report Wisconsin sales or use tax required, the department may determine the proper tax due at any time and without regard to when such failure occurred.

Question: For purposes of determining the period within which the department may determine a person's sales and use tax liability, is a sales and use tax return considered filed if an individual, who does not hold a seller's permit or use tax certificate, reports Wisconsin use tax on his or her Wisconsin individual income tax return?

Answer: Yes. If an individual reported sales/use tax on his or her Wisconsin individual income tax return, a sales and use tax return is considered filed for the period covered by the Wisconsin individual income tax return. The department must determine sales and use tax

liability within the time period prescribed in sec. 77.59(3), Wis. Stats. (1989-90), unless the individual files a fraudulent return with the intent to defeat or evade the tax required.

7 Taxability of Computer Programs (Software)

Statutes: Sections 77.51(14)(h) and (j) and 77.52(1) and (2)(a)10, Wis. Stats. (1989-90), and sec. 77.51(20), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 269

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

Note: This tax release supersedes the tax release titled "Taxability of Computer Software" that appeared in *Wisconsin Tax Bulletin* 72 (July 1991). It explains the Wisconsin sales and use tax treatment of the sale of computer programs.

"Sale" for purposes of this tax release includes the license or lease of computer software.

Background: Effective May 1, 1992, sec. 77.51(20), Wis. Stats. (1989-90), was amended by 1991 Wisconsin Act 269 to clarify that tangible personal property includes computer programs, except custom computer programs.

The determination of whether a computer program is a custom program is based on the criteria set forth in sec. Tax 11.71(1)(e), Wis. Adm. Code, and the Court of Appeals decision in *Wisconsin Department of Revenue vs. International Business Machines Corporation (IBM)* (June 23, 1988).

In the *IBM* decision, the Court of Appeals held that gross receipts from the license of made-to-order computer programs to Wisconsin customers were not subject to Wisconsin sales tax. The department appealed this

decision to the Wisconsin Supreme Court, but the petition for review was denied.

Since all computer programs, except custom programs, are tangible personal property, the sale of such computer programs is subject to Wisconsin sales or use tax under secs. 77.52(1) and 77.53(1), Wis. Stats. (1989-90), with one exception. Exception: Prior to May 1, 1992, the sale of computer software that is identical to the computer software that was at issue in the Circuit Court for Dane County decision of *Wisconsin Department of Revenue vs. B. I. Moyle and Associates, Inc.* (November 12, 1991), and is sold in the same manner as stipulated in the facts of the *B.I. Moyle* case, is not subject to Wisconsin sales or use tax. In the *B.I. Moyle* decision, the Circuit Court for Dane County held that the computer programs at issue were intangibles and not subject to taxation. The department withdrew its appeal to the Court of Appeals of this decision.

Facts and Questions: The following questions and answers illustrate the department's position regarding the taxability of sales of computer programs prior to and on or after May 1, 1992.

Facts and Question 1: Vendor SV-A develops and markets computer programs for users of computers that improve operating system performance and user productivity. The programs are system programs (i.e., basic operational programs as defined in sec. Tax 11.71(1)(c), Wis. Adm. Code), which activate and control the computer hardware. Other pertinent facts include:

- a. The exact programs or modules sold by Vendor SV-A exist at the time that the customer places an order. Vendor SV-A does not change the preexisting programs or modules based upon the custo-

mer's data or specific hardware or software environment.

- b. Vendor SV-A's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.
- c. A copy of the program in machine readable form is made by transferring a copy of the program from the master magnetic tape to a blank tape which is then sent to the customer.
- d. Vendor SV-A instructs its customers to return the tape as soon as copies of the programs contained on the tape have been read into the customers' system. Vendor SV-A reuses the returned tapes to transmit the same or other programs to other customers.
- e. The customer has the option of making their own backup copies of the programs on their own tape or other media.
- f. Vendor SV-A does not load the programs into the customer's computer.
- g. Vendor SV-A provides maintenance and improvements to these programs for most of its customers.
- h. Vendor SV-A provides telephone support during and after installation.

Is the sale of the programs and maintenance of the programs by Vendor SV-A subject to Wisconsin sales and use tax?

Answer 1:

A. On or after May 1, 1992

Yes. The programs sold by Vendor SV-A are systems programs and are tangible personal property. Section Tax 11.71(1)(e)6, Wis. Adm. Code, specifically provides that custom programs do not include basic operational programs (commonly referred to as "systems programs"). Since the systems programs are not custom programs, they are tangible personal property under sec. 77.51(20), Wis. Stats. (1989-90), as amended by 1991 Wisconsin Act 269. Therefore, the sale of the programs and any maintenance associated with the programs are subject to Wisconsin sales or use tax.

B. Prior to May 1, 1992

No. The *B.I. Moyle* decision applies to the programs sold by Vendor SV-A because the stipulated facts of the *B.I. Moyle* decision are identical to the facts presented above (i.e., the computer programs sold are systems programs and the customer returns to Vendor SV-A, as instructed, the tape on which the programs were transmitted). The programs are intangibles and, therefore, the sale and maintenance of the programs are not subject to Wisconsin sales or use tax.

Facts and Question 2: Vendor SV-B sells programs which assist a computer's operating system in monitoring usage levels to help prevent system crashes. The programs are systems programs. Other pertinent facts include:

- a. The exact programs or modules Vendor SV-B licenses exist at the time that the customer places an order. Vendor SV-B does not change the preexisting programs or modules based upon the customer's data or specific hardware or software environment.