

- b. Vendor SV-B'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-B's customer copies the tape, retains the tape in a vault for two years as a backup, and then discards the tape when a new release is issued.
- e. Vendor SV-B does not load the program into the customer's computer.
- f. Vendor SV-B provides maintenance and improvements to these programs for most of its customers.
- g. Vendor SV-B provides telephone support during and after installation.

Is the sale of the program and maintenance for the program by Vendor SV-B subject to Wisconsin sales and use tax?

Answer 2:

A. On or after May 1, 1992

Yes. The program sold by Vendor SV-B is a systems program. 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 program and maintenance relating to the program are subject to Wisconsin sales or use tax.

B. Prior to May 1, 1992

Yes. The program sold by Vendor SV-B is a systems program. 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"). Section Tax 11.71(2)(b), Wis. Adm. Code, provides that the sale of basic operational programs is subject to Wisconsin sales or use tax.

The *B.I. Moyle* decision does not apply because the facts stipulated in the *B.I. Moyle* decision are not identical to the facts presented above (i.e., the customer is not instructed to and does not return to Vendor SV-B the tape on which the program was transmitted).

Facts and Question 3: Vendor SV-C sells utility programs, which capture and archive messages as jobs are run on mainframe computers. The prospective customer contacts Vendor SV-C, usually after reviewing a brochure or trade magazine. Other pertinent facts regarding these programs include:

- a. Vendor SV-C's salespersons determine which operating system program is appropriate for the customer's operating system environment when an order is placed.
- b. The programs exist at the time a customer places an order, and modifications are not made to any programs prior to the shipment of the program to the customer.
- c. Programs are transferred to the customer on magnetic tape.

- d. Vendor SV-C's customer copies the tape and returns the tape to Vendor SV-C as instructed.
- e. No training is provided to the customer's personnel, although installation instructions and user instructions are included with the programs.
- f. The programs are loaded, installed, and tested by the customer.
- g. The program is licensed annually. Maintenance and enhancements are included in the license fee.
- h. A customer may modify the programs; however, modifications to the object code (the program itself) voids the warranty.
- i. Corrections to the programs are released as needed, usually every six months. Enhancements are issued about once a year.

Is the sale of the utility program by Vendor SV-C subject to Wisconsin sales or use tax?

Answer 3:

A. On or after May 1, 1992

Yes. Based on the criteria in sec. Tax 11.71(1)(e), Wis. Adm. Code, the computer programs are not custom programs. Therefore, the programs are tangible personal property, and the sale of the programs is subject to Wisconsin sales or use tax.

B. Prior to May 1, 1992

Yes. Answer 3.A. applies. The *B.I. Moyle* decision does not apply because the programs sold are not systems programs.

Facts and Question 4: Vendor SV-D sells computer systems for manufacturers and distributors. Vendor SV-D sells both the hardware and programs to a customer. The base price of the program is \$20,000. The program is purchased independent of the hardware.

Other pertinent facts regarding Vendor SV-D include:

- a. Prior to a sale, Vendor SV-D personnel spend 40 to 60 hours in meetings with the customer to determine the needs of the customer.
- b. The systems sold are made up of several modules (programs). Each module requires some modification. A minor modification might require adding another field or changing the length of a field. A major modification might require changing the method of computing discounts. Major modifications take 160 person-hours or more.
- c. Vendor SV-D will install and test the programs on a customer's system, which normally takes 20 to 40 hours.
- d. Training is available and strongly recommended to customers.
- e. Documentation provided to each customer includes a reference manual and actual source code (the programs). The documentation is customized for each system.
- f. Vendor SV-D provides modifications to the programs as its principal form of maintenance. A modem is set up to enable Vendor SV-D's computer to talk with the customer's computer. When a problem is encountered, the customer contacts Vendor SV-D via a hotline. A technician at Vendor

SV-D's headquarters can make changes to the customer's program, compile it, test it, and have it ready for the customer without leaving his or her desk. Telephone support constitutes 98% of the support provided.

- g. Program upgrades are made periodically. These upgrades are purchased separately, usually at 10% of the current list price.
- h. Maintenance is billed separately.

Are the programs and maintenance sold by Vendor SV-D subject to Wisconsin sales or use tax?

Answer 4:

A. On or after May 1, 1992

No. The programs as described above are "custom" programs for the following reasons:

1. Significant modifications are being made to virtually all programs to meet the specific needs of an individual customer.
2. The extent of useful enhancements and maintenance support far exceed that which would be required for "canned" programs.

"Custom" programs are not tangible personal property. Therefore, the sale of the program is not subject to Wisconsin sales or use tax. Since the sale of the program is not subject to tax, any maintenance to the program is not subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

However, any charges for computer hardware are taxable.

B. Prior to May 1, 1992

No. Answer 4.A. applies.

Facts and Question 5: Vendor SV-E sells a computer program to Customer A (an accounting firm) for \$65,000. Other facts include:

- a. The program is a time/billing package used to track accountants' time and generate billings to clients.
- b. The program is changed to meet the needs of Customer A. Modules are changed to customize fields (i.e. timekeeper numbers, matter numbers, account numbers, etc.), change field formats, and provide additional reports.
- c. Changes are also made to conform the program to Customer A's operating environment. Interfaces to other program packages have been created. The program has been changed to accommodate Customer A's printing capabilities.
- d. The program is loaded onto Customer A's system by Vendor SV-E, with the actual code transferred by magnetic tape.
- e. Maintenance "fixes" are released as necessary. Enhancements are released on a quarterly or semi-annual basis.

Is the sale of the computer program and maintenance service for the computer program provided by Vendor SV-E subject to Wisconsin sales or use tax?

Answer 5:

A. On or after May 1, 1992

No. The programs are "custom" programs for the following reasons:

1. The program purchased by Customer A is unique as compared to

any other system sold by Vendor SV-E.

2. Modifications are made to the time and billing programs and other support programs based on the particular needs and system requirements of Customer A.

“Custom” programs are not tangible personal property. Therefore, the sale of the program is not subject to Wisconsin sales or use tax. Since the sale of the program is not subject to tax, any maintenance to the program is not subject to tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

B. Prior to May 1, 1992

No. Answer 5.A. applies.

Facts and Question 6: Vendor SV-F sells a data entry program to Customer B. The sales price of the program is \$25,000. Other information regarding the data entry program sold to Customer B includes:

- a. Vendor SV-F will discuss operational environment, types of programs and hardware, and current data entry methods with the customer. This involves telephone conferences and may involve on-site visits.
- b. Pre-existing programs are modified to adjust for Customer B's current operating system. This is done by running several small programs (macros) which modify the existing modules.
- c. Customer B can select specific modules to be added to the basic system.
- d. The program can be transmitted by any magnetic media or by phone, but is usually transferred by magnetic tape.

e. Customer B installs the program per Vendor SV-F's written instructions. Phone assistance is provided if needed.

f. Maintenance is performed continuously. Enhancements are provided annually.

Is the sale of this program by Vendor SV-F to Customer B subject to Wisconsin sales or use tax?

Answer 6:

A. On or after May 1, 1992

No. Based on the decision in *IBM*, the sale is not subject to Wisconsin sales or use tax for the following reasons:

1. The program, as ordered by Customer B, does not exist prior to the time Customer B orders it.
2. Vendor SV-F analyzes Customer B's environment and fills the order by tailoring existing modules to fit this environment.
3. Maintenance to the programs is continuous, which is a trait of a custom program.

B. Prior to May 1, 1992

No. Answer 6.A. applies.

Facts and Question 7: Customer C purchased a spreadsheet program for \$400 for use on its personal computer (PC). The program comes in a shrink-wrapped package and is available from many vendors.

Customer C's personnel installed the program on the PC. An installation program prompted the user for information such as type of monitor, type of printer, and default drive. Customer C's personnel took a course on how to use this program. In addition,

several employees of Customer C spent in excess of 100 hours writing macros and designing templates which are used in conjunction with the program for budgeting, accounts receivable aging, inventory tracking, and other functions.

Is the sale of this computer program for \$400 to Customer C subject to Wisconsin sales or use tax?

Answer 7:

A. On or after May 1, 1992

Yes. The spreadsheet program is not a custom program because:

1. The individual needs of Customer C were not considered in the design of the program.
2. The program existed at the time Customer C purchased the program.
3. The vendor makes no changes to the program because of Customer C's computer environment. The work done by Customer C's employees does not impact on the nature of the program. Any customizing, other than changes made by the vendor prior to the sale or license, does not affect the taxability of the sale.

Therefore, the program is tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

B. Prior to May 1, 1992

Yes. Answer 7.A. applies.

Facts and Question 8: Customer D contracts with Vendor SV-G to obtain new computer programs for use on its mainframe computer. Included in the agreement are programs which will assist in the following areas:

- a. Order entry and billing.
- b. Accounts receivable.
- c. Purchasing.
- d. Accounts payable.
- e. General ledger.
- f. Financial reporting and budgeting.
- g. Inventory control.
- h. Product structure.
- i. Materials planning.
- j. Production scheduling.
- k. Product standard costing.
- l. Shop floor control.
- m. Capacity planning.

After an extensive review by Customer D and a professional consultant (Consultant E) of products on the market, Customer D purchases computer programs from Vendor SV-G for \$100,000.

Additional facts regarding these programs are as follows:

- a. The programs purchased existed at the time Customer D placed the order. Vendor SV-G did not change the pre-existing programs based on Customer D's data or specific hardware or software environment.
- b. The programs were shipped to Customer D via magnetic tape.
- c. In order to make the programs useful to Customer D, extensive modifications were necessary. Customer D did not employ Vendor SV-G to install and modify the program. Instead, the testing and installation were initially completed by Consultant E.
- d. Consultant E had difficulties in modifying the program to make it operational. After one year, only two of the modules were operational. The service contract with Consultant E was terminated.

- e. After another unsuccessful attempt to get the system operational using another consulting company, Vendor SV-G was hired to modify the programs to make them operational. This occurred two years after the original license of the base programs.

Is the sale of these programs for \$100,000 by Vendor SV-G subject to Wisconsin sales or use tax?

Answer 8:

A. On or after May 1, 1992

Yes. The programs are not custom programs based on the criteria set forth in sec. Tax 11.71(1)(e), Wis. Adm. Code:

1. Vendor SV-G sold pre-written programs "as is."
2. No changes were made by Vendor SV-G prior to the licensing to tailor the programs to Customer D's data or hardware or software environment.

Modifications made by Customer D or other third parties, subsequent to the initial licensing, do not impact on the determination of taxability at the time of sale.

Therefore, the programs are tangible personal property, the sale of which is subject to Wisconsin sales or use tax.

B. Prior to May 1, 1992

Yes. Answer 8.A. applies.

8 Winterizing and Dewinterizing a Residence

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

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

Background: 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 all items of tangible personal property are subject to Wisconsin sales or use tax unless, at the time of such repair, service, etc., a sale of such type of tangible personal property would have been exempt from sales or use tax. The service, maintenance, etc., to real property is not a service subject to Wisconsin sales or use tax.

Section 77.52(2)(a)10, Wis. Stats. (1989-90), also provides that property which retains its character as tangible personal property for purposes of repair, service, maintenance, etc., includes (this list is not all-inclusive):

- A. Water heaters.
- B. Bathroom fixtures (this includes sinks, toilets, and bathtubs and related faucets).
- C. Sinks.

Section Tax 11.68(5)(d), Wis. Adm. Code, provides that buildings and improvements to buildings, such as sanitation and plumbing systems, are real property.

Section Tax 11.68(6)(a)9, Wis. Adm. Code, provides that a mobile home located in a mobile home park on land owned by a person other than the mobile home owner is tangible personal property.

Section 77.54(31), Wis. Stats. (1989-90), provides that the sale of and the storage, use, or consumption of, but not the lease or rental of, used mobile homes that are primary housing units under sec. 340.01(29), Wis. Stats. (1989-90), are exempt from

Wisconsin sales or use tax. A mobile home exceeding 45 feet in length is considered a primary housing unit.

Facts and Question 1: Company ABC is a plumbing contractor. Company ABC will winterize and dewinterize Individual D's cottage in Wisconsin for a charge of \$50.

Winterizing the cottage consists of:

- A. Draining the water in the cottage's water heater.
- B. Opening all water faucets in the cottage to allow water to drain.
- C. Attaching a hose to the water heater and blowing air into the water heater that travels through the plumbing system in the cottage. Most of the water remaining in the pipes drains out the faucets.
- D. Once it appears that no water is dripping from the faucets, antifreeze is poured into the sinks, toilet bowls, and tanks to prevent freezing of any water remaining in the pipes.

Dewinterizing the cottage consists of:

- A. Closing all the water faucets prior to the water being turned on by the local utility.

- B. Once the water is turned on by the local utility, the water pipes within the plumbing system of the cottage are checked for any water leaks.

Is the charge by Company ABC for winterizing and dewinterizing Individual D's cottage subject to Wisconsin sales tax?

Answer 1: No. Although Company ABC does provide service to tangible personal property when winterizing and dewinterizing the cottage (water heater, sinks, faucets, toilets), the primary purpose of the service is to ensure that no water is left in the pipes within the plumbing system (real property) that could cause damage. Because the service is to real property, it is not subject to Wisconsin sales tax.

Facts and Question 2: Assume the same facts as in Facts and Question 1 except that the winterizing and dewinterizing service is performed on a mobile home, not exceeding 45 feet in length, located on land in Wisconsin owned by someone other than the mobile home owner.

Is the charge by Company ABC for winterizing and dewinterizing the mobile home subject to Wisconsin sales tax?

Answer 2: Yes. The entire mobile home, including the plumbing system,

is tangible personal property for purposes of repair, service, maintenance, etc. Therefore, Company ABC is performing a service to tangible personal property which is subject to Wisconsin sales tax under sec. 77.52(2)(a)10, Wis. Stats. (1989-90).

Note: If the mobile home was located on land owned by the mobile home owner, and was permanently affixed to the real estate, the winterizing and dewinterizing service is to real property and is not subject to Wisconsin sales or use tax.

Facts and Question 3: Assume the same facts as in Facts and Question 1 except that the winterizing and dewinterizing service is performed on a mobile home exceeding 45 feet in length, located on land in Wisconsin owned by someone other than the mobile home owner.

Is the charge by Company ABC for winterizing and dewinterizing the mobile home subject to Wisconsin sales tax?

Answer 3: No. Although the mobile home is tangible personal property, the sale of the mobile home, because it would be used and qualifies as a primary housing unit, is exempt from Wisconsin sales tax under sec. 77.54(31), Wis. Stats. (1989-90). Therefore, any service to the mobile home is exempt from Wisconsin sales tax as provided in sec. 77.52(2)(a)10, Wis. Stats. (1989-90). □



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