

not reduce the sales price subject to Wisconsin use tax from the sale of the motor fuel by Company C which is stored, used, or consumed in Wisconsin by Company D.

There is no provision in the definition of sales price in sec. 77.51(15)(a) and (b), Wis. Stats. (1991-92), that allows the purchaser to reduce the sales price subject to use tax by a partial refund from the IRS of the federal motor fuel tax paid on the sale.

Facts and Question 4: Assume the same facts as in Facts and Question 3, except that Company D claims a credit on its federal corporate income tax return using federal Form 4136 for the federal motor fuel tax it paid to Company C on the purchase of motor fuel.

May Company D file a claim for refund of the use tax it paid to the department on that part of the sales price that represents the federal motor fuel tax allowed as a credit by the IRS on Company D's federal corporate income tax return?

Answer 4: No. The same answer as given to Facts and Question 3 applies.

Facts and Question 5: Company E sells motor fuel to Company F. The amount of the sale of the motor fuel includes the federal motor fuel tax. Company E does not charge Company F Wisconsin sales tax on the sale of the motor fuel. Company F does not report Wisconsin use tax on its Wisconsin sales and use tax return for the purchase of the motor fuel.

Subsequent to the sale of the motor fuel by Company E, Company F files a claim for refund with the IRS for the federal motor fuel tax it paid on the motor fuel purchased from Company E. The claim for refund is made using federal Form 843.

Company F is audited by the department. It is determined that Company F should have reported Wisconsin use tax on its purchase of motor fuel from Company E.

Is the measure of use tax used in making an assessment the total amount paid to Company E for the motor fuel, including the federal motor fuel tax that was later refunded by the IRS?

Answer 5: Yes. The measure of use tax used in making the assessment is the sales price of the motor fuel, which includes the federal motor fuel tax.

The definition of sales price in sec. 77.51(15)(a) and (b), Wis. Stats. (1991-92), does not provide a reduction in the computation of sales price for a refund to the purchaser by a third party. The amount received by Company E for the sale of motor fuel to Company F has not changed and, therefore, the sales price subject to Wisconsin use tax remains the same.

8 Sales of Candy, Confections, and Desserts

Statutes: Section 77.54(20)(a) and (c)2.d, Wis. Stats. (1991-92)

Wis. Adm. Code: Section Tax 11.51(2), December 1992 Register

Background: Section 77.54(20)(c)2, Wis. Stats. (1991-92), provides that gross receipts from the sales of candy and confections for off-premises consumption are subject to Wisconsin sales or use tax.

Facts and Question 1: Company A sells sweet, sugary food products with a variety of names that are generally descriptive of the major flavor ingredients contained in the product. The products are often coated with choco-

late or yogurt and may contain one or more of the following ingredients:

- Cake
- Chocolate
- Frosting
- Fruit or preserves
- Fudge
- Nuts or nut butters

The size of each individual item allows it to be eaten by one person in a single bite or a few bites. The products are packaged as either an assortment of types or all one type. Each package contains several individual items which are separated from one another by dividers, paper trays, or individual wrappers.

Are the gross receipts from Company A's sales of its products subject to Wisconsin sales and use tax?

Answer 1: Yes. Sales of candy and confections for off-premises consumption are subject to Wisconsin sales or use tax under sec. 77.54(20)(c)2.d, Wis. Stats. (1991-92). The items sold by Company A are candy and/or confections. They are presented as boxes of candy in their packaging, size, and content.

Facts and Question 2: Company B sells products which are made by placing layers of frosting, nuts, fudge, fruit preserves, or combinations of these between layers of cake. The product may be coated with chocolate or yogurt. Each item is advertised to contain multiple portions or servings. The individual items are most often sold separately but may be sold as a package with 2 or 3 items per package.

Are the gross receipts from Company B's sales of its products subject to Wisconsin sales and use tax?

Answer 2: No. Sales of desserts which are not candy or confections

are exempt from Wisconsin sales or use tax under sec. 77.54(20), Wis. Stats. (1991-92). □

TEMPORARY RECYCLING SURCHARGE

9 Temporary Recycling Surcharge — Types of Business Activity in Wisconsin

Statutes: Section 77.93, Wis. Stats. (1991-92)

Note: The temporary recycling surcharge applies to taxable years ending after April 1, 1991, and ending before April 1, 1999. This tax release supersedes the instructions to the 1990 Form S and the 1991 and 1992 individual, corporation, and tax-option (S) corporation tax returns and the information in the December 1991 and 1992 editions of Publication 400, *Wisconsin's Temporary Recycling Surcharge*. The tax release applies for taxable years ending after April 1, 1991.

Background: The temporary recycling surcharge applies to the following entities for the privilege of doing business in Wisconsin:

- Corporations and insurance companies that are required to file a Wisconsin franchise or income tax return and are engaged in business in Wisconsin.
- Individuals, estates, and trusts that are required to file a Wisconsin income tax return and that are engaged in a trade or business in Wisconsin or have income as a statutory employe in Wisconsin.
- Partnerships that are required to file a Wisconsin partnership return and that are engaged in a trade or business in Wisconsin.

However, an individual, estate, trust, or partnership is not subject to the surcharge if:

- It is not engaged in farming and has less than \$4,000 (\$1,000 for taxable years beginning before 1994) of gross receipts from all trade or business activities or as a statutory employe for federal income tax purposes.
- It is engaged solely in farming and has less than \$1,000 of net farm profit for federal income tax purposes.
- It is engaged in both farming and other trade or business activities and has less than \$4,000 (\$1,000 for taxable years beginning before 1994) of gross receipts from all nonfarm trade or business activities and less than \$1,000 of net farm profit for federal income tax purposes.

As used in this tax release, the terms "doing business," "engaged in business," and "nexus" in the state have similar meanings and refer to the degree of activity necessary before a state or foreign country has jurisdiction to impose an income tax or franchise tax measured by net income on the taxpayer.

Facts and Question 1: Individual A, an Illinois resident, sold his vacation home located in Wisconsin and realized a capital gain of \$15,000. The home had not been used for business purposes. Individual A is required to file a 1993 Wisconsin income tax return, Form 1NPR, because he has at least \$2,000 of gross income from Wisconsin sources. For federal income tax purposes, Individual A reports \$43,000 of business income from a business located in Illinois. The income from the Illinois business is not subject to Wisconsin income taxation. Individual A has no trade or business activities in Wisconsin.

Is Individual A subject to the temporary recycling surcharge?

Answer 1: No. Individual A is not subject to the temporary recycling surcharge because he is not doing business in Wisconsin.

Facts and Question 2: Individual B, a Wisconsin resident, reports \$75,000 of net business income on the federal income tax return, Form 1040, filed with his 1993 Wisconsin income tax return, Form 1. The business is located in Iowa; it has no activity in Wisconsin. Since Individual B is a Wisconsin resident, the income from the business is taxable for Wisconsin income tax purposes.

Is Individual B subject to the temporary recycling surcharge?

Answer 2: No. Individual B is not subject to the temporary recycling surcharge because he is not doing business in Wisconsin.

Facts and Question 3: Corporation A, which is incorporated outside Wisconsin but licensed to do business in Wisconsin, has no business activity in Wisconsin during 1993. However, it transacts business outside Wisconsin. Corporation A is required to file a 1993 Wisconsin franchise or income tax return since it is licensed to do business in Wisconsin, but it has no Wisconsin franchise or income tax liability.

Is Corporation A subject to the temporary recycling surcharge?

Answer 3: No. Corporation A is not subject to the temporary recycling surcharge because it is not engaged in business in Wisconsin.

Note: The treatment is the same for regular (C) corporations and tax-option (S) corporations.

Facts and Question 4: Corporation B is incorporated outside Wisconsin but licensed to do business in Wisconsin. It sells tangible personal property. During 1993 its activity in Wisconsin does not exceed the solicitation of orders, which orders are approved outside the state and are filled by delivery from a point outside the state. Corporation B is required to file a 1993 Wisconsin franchise or income tax return since it is licensed to do business in Wisconsin, but it has no Wisconsin franchise or income tax liability.

Is Corporation B subject to the temporary recycling surcharge?

Answer 4: No. Corporation B is not subject to the temporary recycling surcharge because its activity in Wisconsin is protected by Public Law 86-272. Under Public Law 86-272, a state may not impose its income tax or franchise tax measured by net income on a business that is incorporated in another state and sells tangible personal property if the *only* activity of that business is the solicitation of orders by its salespersons or representatives, which orders are sent

outside the state for approval or rejection and are filled by delivery from a point outside the state.

Note: The treatment is the same for regular (C) corporations and tax-option (S) corporations.

Facts and Question 5: Corporation C, which is incorporated in Wisconsin, has no business activity in Wisconsin during 1993. However, Corporation C does transact business outside Wisconsin. Corporation C is required to file a 1993 Wisconsin franchise or income tax return since it is organized under Wisconsin law, but it has no Wisconsin franchise or income tax liability.

Is Corporation C subject to the temporary recycling surcharge?

Answer 5: No. Corporation C is not subject to the temporary recycling surcharge because it is not engaged in business in Wisconsin.

Note: The treatment is the same for regular (C) corporations and tax-option (S) corporations.

Facts and Question 6: Corporation D is incorporated in Wisconsin. It sells tangible personal property. During 1993 its activity in Wisconsin does not exceed the solicitation of orders by its salespersons in the state, which orders are approved outside the state and are filled by delivery from a point outside the state. However, this activity constitutes nexus in Wisconsin. Corporation D is required to file a 1993 Wisconsin franchise or income tax return since it is organized under Wisconsin law and, therefore, Public Law 86-272 does not apply. Corporation D is subject to Wisconsin franchise or income tax on the net income attributable to Wisconsin.

Is Corporation D subject to the temporary recycling surcharge?

Answer 6: Yes. Corporation D is subject to the temporary recycling surcharge because it is engaged in business in Wisconsin and that activity is not protected by Public Law 86-272.

Note: The treatment is the same for regular (C) corporations and tax-option (S) corporations. □