

ment is not exempt from Wisconsin sales or use tax under sec. 77.54(6)(a), Wis. Stats. (1993-94).

Note: In *Johnsonville Sausage, Inc. v. Wisconsin Department of Revenue* (CCH 202-257, November 11, 1982), the Wisconsin Tax Appeals Commission held that scales used in the taxpayer's inspection area to weigh meat as it entered the plant, were not used exclusively and directly in manufacturing and, therefore, were not exempt from Wisconsin sales or use tax. □

6 Meals, Food, Food Products, and Beverages Given Away

Statutes: Sections 77.51(5), (13)(e), and (14)(k), 77.52(1), (2)(a)1 and (2m)(a), and 77.54(6)(b) and (20), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.28(2)(intro.) and 11.48(2)(e), March 1991 Register, Tax 11.51(1), December 1992 Register, and Tax 11.67(1), November 1993 Register

Background: Section 77.51(13)(e), Wis. Stats. (1993-94), defines "retailer" to include "A person selling tangible personal property to a service provider who transfers the property in conjunction with the selling, performing or furnishing of any service and the property is incidental to the service..."

Section 77.51(14)(k), Wis. Stats. (1993-94), defines "sale at retail" to include "Any sale of tangible personal property to a purchaser even though such property may be used or consumed by some other person to whom such purchaser transfers the tangible personal property without valuable consideration, such as gifts, and advertising specialties distributed gratis apart from the sale of other

tangible personal property or service."

Section 77.52(2m)(a), Wis. Stats. (1993-94), provides in part that with respect to taxable lodging services, no part of the charge for the service may be deemed a sale or rental of tangible personal property if the property transferred by the service provider is incidental to the selling, performing, or furnishing of the service.

Section 77.51(5), Wis. Stats. (1993-94), 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."

Section Tax 11.28(2)(intro.), Wis. Adm. Code, provides that persons who make gifts of tangible personal property or distribute tangible personal property gratis to others are the consumers of the property.

Section Tax 11.48(2)(e), Wis. Adm. Code, provides that hotels, motels, and inns are the consumers of all items used to conduct their business.

Section Tax 11.67(1), Wis. Adm. Code, 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 shall determine whether the 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.

Section 77.54(20)(intro.), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for "the gross receipts from the sales of, and the storage, use or other consumption of, food, food products and beverages for human consumption."

Section 77.54(20)(b), Wis. Stats. (1993-94), provides that "food, food products, and beverages" do not include:

- A. Medicines, tonics, vitamins, and medicinal preparations in any form
- B. Fermented malt beverages
- C. Intoxicating liquors
- D. Soda water beverages, bases, concentrates, and powders intended to be reconstituted by consumers to produce soft drinks, and fruit drinks and ades (such as lemonade and orangeade) not defined as fruit juices.

Section 77.54(20)(c), Wis. Stats. (1993-94), provides that gross receipts from the following sales are taxable:

- A. Meals, food, food products, and beverages sold for direct consumption on the premises (except for sales at hospitals, etc.)
- B. Sales of the following items for off-premise consumption:
 1. Meals and sandwiches (heated or not)
 2. Heated food or heated beverages
 3. Soda fountain items such as sundaes, milk shakes, malts, ice cream cones, and sodas
 4. Candy, chewing gum, lozenges, popcorn and confections.

Section 77.54(6)(b), Wis. Stats. (1993-94), provides an exemption from Wisconsin sales or use tax for containers, labels, sacks, cans, boxes, drums, bags, or other packaging and shipping materials for use in packing, packaging, or shipping tangible personal property, if such items are used by the purchaser to transfer merchandise to customers. Also exempt are packaging and shipping materials for use in packing, packaging, or shipping meat or meat products, regardless of whether such items are used to transfer merchandise to customers.

Facts and Questions 1a - 1c: Motel A provides a free breakfast with the purchase of lodging for one night. Motel A purchases fruit, milk, cereal, bakery goods (rolls, bagels, muffins, bread), ground coffee beans, frozen juice, napkins, plastic utensils, and paper plates and cups from a vendor. Motel A prepares the coffee and juice, and the food and beverages are placed on a table in the lobby. Motel A's customers may take as much or as little as they want of the food and beverage items.

Question 1a: When Motel A transfers food and beverages to its customers with the sale of lodging, is Motel A:

- selling food and beverages; or
- selling lodging, with the transfer of the food and beverages being incidental to the lodging?

Answer 1a: Motel A is selling lodging, which is taxable under sec. 77.52(2)(a)1, Wis. Stats. (1993-94). The transfer of food and beverages is incidental to the lodging because a person's primary objective when purchasing lodging services is to have a place to stay, rather than to purchase food or beverages (sec. 77.51(5), Wis. Stats. (1993-94)).

Since Motel A is not selling the food and beverages, it is the consumer of the food and beverages (sec. 77.52(2m)(a), Wis. Stats. (1993-94)).

Question 1b: Are Motel A's purchases of the following food, food products, and beverages subject to Wisconsin sales or use tax?

- Fruit
- Milk
- Cereal
- Bakery goods (rolls, bagels, muffins, and bread)
- Ground coffee beans
- Frozen juice

Answer 1b: No. Motel A's purchases of these items are exempt from Wisconsin sales or use tax under sec. 77.54(20)(intro.), Wis. Stats. (1993-94), as food, food products, and beverages for human consumption that are not for consumption on the premises of the vendor.

Question 1c: Are Motel A's purchases of the following non-food items subject to sales or use tax?

- Napkins
- Plastic utensils
- Paper plates and cups

Answer 1c: Yes. Motel A must pay sales or use tax on its purchases of these items because they are tangible personal property and no exemption applies (sec. 77.52(1), Wis. Stats. (1993-94)).

Facts and Question 2: Tavern A provides pretzels, potato chips, dry roasted peanuts, popped popcorn and napkins to its customers at no charge.

Are Tavern A's purchases of pretzels, potato chips, dry roasted peanuts,

popped popcorn, and napkins subject to Wisconsin sales or use tax?

Answer 2: Tavern A is the consumer of pretzels, potato chips, dry roasted peanuts, popped popcorn, and napkins provided to customers without charge (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Tavern A's purchases of pretzels, potato chips, and dry roasted peanuts are not subject to Wisconsin sales or use tax because they are exempt food items (sec. 77.54(20)(intro.), Wis. Stats. (1993-94)). Tavern A's purchase of popcorn (whether popped or unpopped) is not exempt from Wisconsin sales or use tax (sec. 77.54(20)(c)2.d, Wis. Stats. (1993-94)). Tavern A's purchase of napkins is subject to Wisconsin sales or use tax under sec. 77.52(1), Wis. Stats. (1993-94), because the napkins are tangible personal property and no exemption applies.

Facts and Question 3: Wholesale Distributor A purchases frozen sausage and pepperoni pizzas, bakes them, and provides samples to customers in grocery stores. Wholesale Distributor A transfers the pizza samples to customers on napkins.

Are Wholesale Distributor A's purchases of frozen sausage and pepperoni pizzas and napkins subject to Wisconsin sales or use tax?

Answer 3: Wholesale Distributor A is the consumer of the frozen sausage and pepperoni pizzas and napkins it provides to customers (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Wholesale Distributor A's purchases of the frozen pizzas are not subject to Wisconsin sales or use tax because the frozen pizzas are exempt food items (sec. 77.54(20)(intro.), Wis.

Stats. (1993-94)). Wholesale Distributor A's purchase of napkins is not subject to Wisconsin sales or use tax under sec. 77.54(6)(b), Wis. Stats. (1993-94), because the napkins are used to transfer a meat product. (**Caution:** If the pizzas are vegetarian or cheese, Wholesale Distributor A's purchase of the napkins is subject to Wisconsin sales or use tax.)

Facts and Question 4: Restaurant A provides free meals to its employees. In providing the free meals, Restaurant A uses food and beverage items (e.g., hamburger patties, buns, catsup, mustard, onions, and soda) and disposable items (e.g., napkins, paper wrappers, place mats, and plastic utensils) from its inventory.

Note: It is assumed that Restaurant A is not selling the meals to its employees because all of the following conditions are met: 1) no consideration is given by the employee for the meal because the employee does not pay cash for the meal, 2) no deduction is made from the employee's wages for the meals, 3) the employee does not receive the meals in lieu of cash to bring the employee's compensation up to the legal minimum wage, and 4) the employee does not have the option to receive cash for the meals not consumed (sec. Tax 11.87(2)(i), Wis. Adm. Code). Restaurant A is the consumer of all the food, beverage, and disposable items (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Are Restaurant A's purchases of the food, beverage, and disposable items subject to Wisconsin sales or use tax?

Answer 4: Restaurant A's purchases of the hamburger patties, buns, catsup, mustard, and onions are not subject to Wisconsin sales or use tax because these items are exempt food items not for direct consumption on the vendor's premises (sec.

77.54(20)(intro.), Wis. Stats. (1993-94)). Restaurant A's purchase of soda is subject to Wisconsin sales or use tax because soda is not an exempt food item (sec. 77.54(20)(b), Wis. Stats. (1993-94)). Restaurant A's purchase of napkins, placemats, and plastic utensils is subject to tax under sec. 77.52(1), Wis. Stats. (1993-94), because they are tangible personal property and no exemption applies. Restaurant A's purchase of paper wrappers used to wrap the hamburgers is exempt from tax under sec. 77.54(6)(b), Wis. Stats. (1993-94), because they are used to package a meat product.

Facts and Question 5: Restaurant A provides a coupon to a customer for free french fries because the customer had to wait too long for the food that was ordered. When the customer redeems the coupon, french fries, napkins, and disposable containers are transferred to the customer without charge.

Are Restaurant A's purchases of french fries, napkins, and disposable containers subject to Wisconsin sales or use tax?

Answer 5: Restaurant A is the consumer of all of these items (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Restaurant A's purchase of french fries is not subject to Wisconsin sales or use tax because french fries are an exempt food item (sec. 77.54(20)(intro.), Wis. Stats. (1993-94)). Restaurant A's purchases of napkins and disposable containers are subject to Wisconsin sales or use tax under sec. 77.52(1), Wis. Stats. (1993-94), because they are tangible personal property and no exemption applies.

Facts and Question 6: Motel B provides a free breakfast with the

purchase of a night's lodging. Motel B provides the "guest" with a coupon for a free breakfast at the restaurant located in Motel B. The restaurant is a separate legal entity from Motel B. The restaurant charges Motel B for the breakfast coupons redeemed by Motel B's guests.

Are the sales of the breakfasts by the restaurant to Motel B subject to Wisconsin sales or use tax?

Answer 6: Motel B is the consumer of the breakfasts purchased from the restaurant and provided to the guests without charge (secs. 77.51(5) and 77.52(2m)(a), Wis. Stats. (1993-94)). Motel B is a retailer of lodging, and the breakfasts transferred to customers are incidental to the lodging provided by Motel B.

The restaurant is the retailer of the breakfasts (sec. 77.51(13)(e), Wis. Stats. (1993-94)). The restaurant's sales of the breakfasts to Motel B are taxable under sec. 77.54(20)(c), Wis. Stats. (1993-94), because they are sales for direct consumption on the premises of the restaurant (i.e., the retailer of the breakfasts).

Facts and Questions 7a & 7b: Bank A offers free pizza slices and popcorn to customers who enter the bank. Bank A purchases frozen pizzas and unpopped popcorn from Grocery Store B and heats the pizza and pops the popcorn in the bank's kitchen. In some cases, the pizza offered to customers is purchased prepared and delivered by Pizza Company C.

Question 7a: Are Bank A's purchases of frozen pizza and popcorn subject to Wisconsin sales or use tax?

Answer 7a: Bank A is the consumer of the frozen pizza and popcorn (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Bank A's purchase of the frozen pizza is not subject to Wisconsin sales or use tax because the frozen pizza is an exempt food item (sec. 77.54(20)(intro.), Wis. Stats. (1993-94)). Bank A's purchase of popcorn is subject to Wisconsin sales or use tax under sec. 77.54(20)(c)2.d., Wis. Stats. (1993-94), because popcorn is not an exempt food item.

Question 7b: Is Pizza Company C's sale of the prepared pizza to Bank A subject to Wisconsin sales or use tax?

Answer 7b: Bank A is the consumer of the pizza (sec. 77.51(14)(k), Wis. Stats. (1993-94), and sec. Tax 11.28(2)(intro.), Wis. Adm. Code).

Pizza Company C's sale of the prepared pizza to Bank A is subject to Wisconsin sales or use tax under sec. 77.54(20)(c)2.b., Wis. Stats. (1993-94), because the prepared pizza is a heated food. □

7 Sales of Education Services and Course Materials

Statutes: Sections 77.51(13g) and (15)(a), 77.52(1) and (2)(a), and 77.53(1) and (2), Wis. Stats. (1993-94)

Wis. Adm. Code: Sections Tax 11.67(1) and (2), November 1993 Register and Tax 11.97, March 1991 Register

Facts: Company ABC, a Wisconsin corporation, is in the business of providing education courses and course materials in Wisconsin. The majority of the courses and course materials are purchased from Compa-

ny XYZ, an out-of-state corporation, which is registered to collect Wisconsin sales or use taxes because it has nexus in Wisconsin. Company ABC charges persons a fee to attend the courses in Wisconsin.

The various types of courses and course materials Company XYZ sells to Company ABC are as follows:

A. *Type A Courses:* Company XYZ will provide an instructor and participant manuals to Company ABC for a particular course. Company ABC will pay Company XYZ \$200 per participant in the course, \$1,000 for the instructor furnished by Company XYZ, and actual travel expenses incurred by the instructor. Company ABC charges each participant in the course \$350 to attend.

B. *Type B Courses:* Company XYZ will provide for a specific charge an instructor manual and participant manuals to Company ABC for a particular course. Company ABC provides the instructor. Company ABC charges each participant \$250 to attend.

All course materials provided by Company XYZ to Company ABC are to be used only in the courses provided. If a participant does not attend after course materials have been sent to Company ABC, the materials must be returned to Company XYZ.

Question 1: Is the charge by Company ABC to participants attending its Type A and Type B continuing education courses subject to Wisconsin sales tax?

Answer 1: No. Company ABC is providing an education service which is not a service specifically provided for as being subject to Wisconsin sales tax under sec. 77.52(2)(a), Wis. Stats. (1993-94).

Question 2: Is Company XYZ's charge to Company ABC for providing Type A courses (i.e., providing an instructor and participant manuals) subject to Wisconsin sales tax?

Answer 2: No. For Type A courses, Company XYZ is selling an education service to Company ABC when it provides an instructor and manuals, which is not a service specifically provided for as being subject to tax under sec. 77.52(2)(a), Wis. Stats. (1993-94). (Note: Company XYZ is the consumer of the participant manuals used in providing the education services to Company ABC and is subject to Wisconsin sales or use tax on manuals used to provide education services in Wisconsin.)

Question 3: Is Company XYZ's charge to Company ABC for providing Type B courses, (i.e., providing only manuals) subject to Wisconsin sales tax?

Answer 3: Yes. The sale of manuals by Company XYZ to Company ABC is subject to Wisconsin sales or use tax. Company ABC is the consumer of manuals it transfers incidentally in providing nontaxable education services to participants. Company XYZ is a retailer under sec. 77.51(13)(e), Wis. Stats. (1993-94), and is therefore subject to sales tax on its sales of the manuals to the consumer of those manuals (Company ABC). □