

Recently Adopted Rules Summarized

Summarized below is information regarding administrative rules which have recently been revised. Included is information regarding sec. Tax 11.69 revised effective November 1, 1996, and secs. Tax 2.47, 11.28, 11.46, 11.51, 11.87, and 11.95, revised effective January 1, 1997.

In addition to the summaries of the changes, the text of some of the revised rules is reproduced, excluding notes and examples. In the amendments, material lined through (~~lined through~~) represents deleted text, and underscored (underscored) material represents new text.

To order up-to-date administrative rules of the Department of Revenue, you can use the order blank on page 59 of this Bulletin to obtain the Revenue section of the Wisconsin Administrative Code.

Tax 2.47 is repealed and recreated to prescribe the method of apportioning the net business income of interstate motor carriers, as required by secs. 71.04(8)(c) and 71.25(10)(c), Wis. Stats. The rule extends the application of the 2-factor apportionment formula for motor carriers of property to interstate bus companies, since the definition of "public utility" in secs. 71.04(8)(b) and 71.25(10)(b) includes any business entity providing service to the public and engaged in the transportation of persons for hire. For computing ton miles with respect to the carriage of persons, the rule provides that each person is equivalent to 200 pounds, consistent with sec. Tax 2.46, which assumes an average weight of 150 pounds per person and 50 pounds for luggage. The repeal and recreation of the rule first applies to taxable years beginning on or after January 1, 1997. The text of Tax 2.47 is as follows:

2.47 APPORTIONMENT OF NET BUSINESS INCOMES OF INTERSTATE MOTOR CARRIERS (1) DEFINITION. In this section, "ton mile" means the movement of one ton of persons or property, or both, the distance of one mile. For carriage of persons, each person shall be considered the equivalent of 200 pounds.

(2) GENERAL. For taxable years beginning on or after January 1, 1997, the apportionable income of an interstate motor carrier of persons or property, or both, doing business in Wisconsin, shall be apportioned to Wisconsin on the basis of the arithmetical average of the following 2 factors:

(a) The ratio of the gross receipts from carriage of persons or property, or both, first acquired for carriage in Wisconsin to the total gross receipts from carriage of persons or property, or both, everywhere.

(b) The ratio of ton miles of carriage in Wisconsin to ton miles of carriage everywhere.

(3) SUBSTITUTION OF FACTORS. Whenever gross receipts data is not available the department may authorize or direct substitution of a similar factor, such as gross tonnage, and whenever ton mile data is not available the department may similarly authorize substitution of a similar factor, such as revenue miles.

(4) MERCANTILE AND MANUFACTURING BUSINESSES. This section does not apply to any mercantile or manufacturing business which engages in some interstate carriage as an incident of the mercantile or manufacturing business.

Tax 11.28, relating to gifts and other advertising specialties given away, is revised as follows:

Tax 11.28(title) is amended to "Gifts and other advertising specialties" to more accurately reflect the content of the rule.

Tax 11.28(1)(a), (3)(b), and (5) are amended to conform language and punctuation to Legislative Council Rules Clearinghouse (Clearinghouse) standards.

Tax 11.28(2)(title) is amended to "Gifts and sales incentive plans" to more accurately reflect the content of that subsection.

Tax 11.28(2)(intro.) to (e) are renumbered Tax 11.28(2)(a) to (f), and pars. (b) and (e) as renumbered are amended, to conform to Clearinghouse standards. In addition, titles are created for renumbered Tax 11.28(2)(a) ("General") and (2)(e) ("Awards"). Tax 11.28(2)(b) as renumbered is also amended to reflect the department's current position relating to determining whether a retailer has accepted an exemption certificate in good faith, and to reflect sec. 77.56(3), Wis. Stats., which provides an exemption from use tax for property purchased without tax for resale which is donated to an entity exempt from sales or use tax under sec. 77.54(9a), Wis. Stats. The text for Tax 11.28(2)(b) is as follows:

11.28(2)(b) *Grand opening gifts.* A person who sells tangible personal property to a retailer who uses the property as gifts at a "grand opening" or similar event, such as an open house, celebrity appearance or "farm days," cannot accept a resale certificate in good faith if the seller is aware, or should be aware ~~with the exercise of reasonable diligence~~, of how the property will be used. ~~The seller shall be deemed to be aware of how the property is to be used if the retailer does not normally purchase this type of item or if the retailer does not normally purchase from the seller in this volume.~~ In cases where a seller furnishes free property to a retailer for use as gifts at a "grand opening" or similar event, the ~~person~~ seller furnishing the property to the retailer without charge is subject to the sales or use tax pursuant to s. Tax 11.14(2)(c) on its cost of the property donated, unless the property is exempt from use tax under s. 77.56(3), Stats., because it is donated to an entity exempt from sales or use tax under s. 77.54(9a), Stats.

Tax 11.28(3)(c) is repealed and recreated to reflect the department's current position that a resale exemption applies to property given away with a required purchase of another item, whether the purchased item is taxable or exempt. The text of Tax 11.28(3)(c) is as follows:

11.28(3)(c) *Coupons issued and redeemable by retailers.* 1. When a retailer distributes coupons which its customer may use to obtain free tangible personal property, the following shall apply:

a. When purchasing tangible personal property which will be given away to customers who must purchase other property to obtain the free property, a retailer may use a resale certificate to purchase the free property without payment of the sales tax, since the transaction is deemed a sale of both the free property and the other property. The sale of the free property and other property by the retailer is subject to Wisconsin sales or use tax, unless an exemption applies.

b. A retailer may not use a resale certificate when purchasing taxable property which the retailer knows, or should know, is to be given away to customers without the customers being required to purchase other property to receive the free property. If the property that is given away was acquired without tax for resale, the retailer shall report the use tax based on the cost of the property.

2. The taxable gross receipts of retailers, who issue cents-off coupons which reduce the price of merchandise they sell, and who receive no reimbursement from a manufacturer, are the reduced amounts charged the customer.

Tax 11.28(4)(c) is amended to clarify the department's position that food products given away are not subject to tax if an exemption applies under sec. 77.54(20), Wis. Stats. The text of Tax 11.28(4)(c) is as follows:

11.28(4)(c) ~~Except for meals, retailers~~ Retailers are subject to the sales and use tax on their cost of taxable property transferred when coupons are redeemed without consideration from a

sales agency, the consumer or any other person unless an exemption applies. ~~No use tax arises when a meal prepared from exempt food is given away, and the retailer shall not pass on any tax to the consumer of a free meal.~~

Tax 11.46(3)(c) is repealed and recreated to clarify that groceries sold at camps are subject to tax unless the exemption under sec. 77.54(20), Wis. Stats., applies. The text of Tax 11.46(3)(c) is as follows:

11.46(3)(c) Food, food products and beverages as defined in s. 77.54(20)(a) and (b), Stats., excluding those food, food products and beverages listed in s. 77.54(20)(c), Stats., sold at a camp for consumption off the premises of the camp. "Off the premises of the camp" means a location outside the boundaries of the camp.

Tax 11.46(5)(intro.) is amended to conform grammar, punctuation, and style to Clearinghouse standards.

Tax 11.51(1) is amended to conform punctuation and style to Clearinghouse standards, and to properly reflect sec. 77.54(20), Wis. Stats., which provides that food, food products, and beverages are subject to tax if sold for direct consumption on the premises. The requirement that these items must be used in the "home preparation of meals" to be exempt is not supported by statute. The text of Tax 11.51(1) is as follows:

11.51(1) GENERAL. All sales of tangible personal property are taxable except when a specific exemption applies. One of the exemptions is for "food, food products and beverages", which generally exempts all basic food items for human consumption ~~necessary for the home preparation of meals off the premises of the grocer.~~ This exemption, however, does not include many items normally available in grocery and food stores, such as soda water beverages, including bases or concentrates to produce soft drinks and fruit drinks, beer, intoxicating liquors, candy, paper products and detergents. The following lists in sub. (2)(a) and

(b) shall serve as a guide to grocers to determine the kinds of items that are taxable and exempt.

Tax 11.51(2)(a) and (b) are amended to conform style to Clearinghouse standards, and to reflect a Wisconsin Tax Appeals Commission decision (*Artesian Water Company*, April 8, 1994), which held that bottled water was exempt. In par. (a), "Water, bottled, sparkling, spring and distilled." is amended to "Water, carbonated and flavored." In addition "Can openers." and "Wax paper." are placed in proper alphabetical order. In par. (b), "Water, uncarbonated and unflavored." is added, "Peanut butter." is properly alphabetized, and in "Granola bars," "Peanuts," and "Raisins," the phrase "see par. (a)." is replaced with "except candy or yogurt coated."

Tax 11.69, relating to financial institutions, is revised as follows:

Tax 11.69(1), (2), (3), and (4) are renumbered Tax 11.69(2), (3), (4), and (1), to conform format to Clearinghouse standards. Subsection (1) as renumbered is amended to conform language to Clearinghouse standards and to add "savings bank" to the definition of financial institution. Subsection (2) as renumbered is amended to conform language to Clearinghouse standards. In sub. (3) as renumbered, pars. (a) to (h) are renumbered pars. (b), (d), (c), (e), (h), (f), (a), and (g) to conform format to Clearinghouse standards, and par. (g) as renumbered is amended to reflect the department's position that a financial institution is not considered the retailer of checks in situations where the check printer is the retailer.

In sub. (4) as renumbered, par. (c) is renumbered par. (d) and new par. (c) is created, to address purchases for resale, previously addressed in par. (b). Paragraphs (a), (b), and (d)

are amended to conform language and punctuation to Clearinghouse standards, and par. (b) is further amended to reflect the department's position that a financial institution may not purchase for resale items it will give to customers without charge. The text of Tax 11.69(3)(g) and (4)(b) and (c) is as follows:

11.69(3)(g) Personalized imprinted checks, except where the ~~financial institution has paid the tax on its purchases of such checks from a retailer and the financial institution resells the checks to customers at the same price or a price lower than its purchase price~~ check printer is the retailer of the checks to customers. A check printer is the retailer of checks where it sets the price for the checks, provides the order forms for the checks and invoices or bills the customer for the checks, even though the financial institution collects the order from the customer, charges the customer's account on behalf of the check printer and remits the amount due from the account to the check printer.

11.69(4)(b) Any tangible personal property purchased by a financial institution to be given away ~~or sold at cost or less than cost~~ to a customer, whether or not based upon the amount of a deposit, is taxable at the time it is purchased. This property includes calendars, playing cards, plat books, maps and any other items transferred to customers to promote business. Checking account and savings account forms provided to customers free of charge are also subject to the tax. ~~When such items are sold by a financial institution at a price in excess of cost, the financial institution is a retailer and shall report the sales tax on such sales. The financial institution may purchase such property without tax by giving its supplier a properly completed resale certificate when acting as a retailer.~~

(c) Purchases of tangible personal property that the financial institution will resell, rather than give away, may be purchased without tax by giving its supplier a properly completed resale certificate.

Tax 11.69(5)(a) is amended to clarify that sales for resale are not taxable, and to include savings banks in

the listing of financial institutions. The text of Tax 11.69(5)(a) is as follows:

11.69(5)(a) Sales to state chartered credit unions, and to federal and state chartered banks ~~and~~ savings and loan associations and savings banks are taxable, unless resold by the credit union, bank, savings and loan association or savings bank.

Tax 11.87(1)(a) to (g) are renumbered Tax 11.87(1)(b) to (h) and new par. (a) is created, to reflect the amendment to sec. 77.54(20)(c)4, Wis. Stats., by 1993 Wisconsin Act 332, which exempted meals sold on premises by community-based residential facilities. In addition par. (b) as renumbered is amended to clarify that whether food is exempt from tax is determined under sec. 77.54(20), Wis. Stats. The text of Tax 11.87(1)(a) and (b) is as follows:

11.87(1)(a) "Community-based residential facility" has the meaning in s. 50.01(1g), Stats.

(b) "Exempt food" means food, food products and beverages not subject to the sales and use tax as provided in s. 77.54(20), Stats.

Tax 11.87(3)(a) is amended to reflect the exemption for meals sold on premises by community-based residential facilities.

Tax 11.87(3)(d) is amended to properly reflect sec. 77.54(20), Wis. Stats., as explained in the summary for Tax 11.51(1). The text of Tax 11.87(3)(d) is as follows:

11.87(3)(d) Groceries. Sales of the basic food items food, food products and beverages for human consumption purchased for the home preparation of meals exempt from tax under s. 77.54(20), Stats. This includes sales of prepackaged ice cream, ice milk or sherbet in pint or larger sizes, whether prepackaged by the vendor or a supplier. Sales of smaller sized containers of these products are taxable. Sales of ice cream, ice milk, sherbet or yogurt as cones, sundaes, sodas, shakes and

frozen chocolate bars made from these products are taxable.

Tax 11.87(3)(e) is amended to change "supplemental social security" to "supplemental security income" to reflect correct terminology.

Tax 11.95, relating to the retailer's discount, is repealed and recreated to improve format per Clearinghouse standards, to reflect the creation of the stadium sales and use tax by 1995 Wisconsin Act 56, and to reflect the amendment to sec. 77.61(4)(c), Wis. Stats., by 1995 Wisconsin Act 280, which provides for a minimum amount of retailer's discount. The text of Tax 11.95 is as follows:

11.95 RETAILER'S DISCOUNT

(1) COMPUTATION. (a) Effective for Wisconsin sales and use tax returns filed for periods ending on or after January 1, 1997, for timely reporting state, county and stadium sales or use tax collected on their retail sales, except as provided in par. (b), retailers may deduct 0.5% of the sales and use tax payable on retail sales.

(b) If, for each reporting period required under s. 77.58(1), Stats., multiplying the sales and use tax payable on retail sales by 0.5% results in \$10 or less, the retailer's discount is the lesser of \$10 or the amount of the sales and use tax payable on retail sales.

(2) RETAILER'S DISCOUNT ALLOWED. The retailer's discount is allowed if the taxes are paid on or before the due date of the return, or on or before the expiration of any extension period if one has been granted.

(3) RETAILER'S DISCOUNT NOT ALLOWED. The retailer's discount is not allowed if any one of the following applies:

(a) The payment of sales and use tax is delinquent.

(b) The sales and use tax payable is as a result of a deficiency determination or filing an amended return after the due date of the return, or after the expiration of any extension period if one has been granted.

(c) The use tax payable is imposed pursuant to s. 77.53(2), Stats. □