



Private Letter Rulings

“Private letter rulings” are written statements issued to a taxpayer by the department, that interpret Wisconsin tax laws based on the taxpayer’s specific set of facts. Any taxpayer may rely upon the ruling to the extent the facts are the same as those in the ruling.

The ruling number is interpreted as follows: The “W” is for “Wisconsin”; the first four digits are the year and week the ruling becomes available for publication (80 days after it is issued to the taxpayer); the last three digits are the number in the series of rulings issued that year. The date is the date the ruling was issued.

Certain information that could identify the taxpayer has been deleted. Additional information is available in Wisconsin Publication III, “How to Get a Private Letter Ruling From the Wisconsin Department of Revenue.”

The following private letter rulings are included:

Corporation Franchise and Income Taxes

Reorganizations
W9807002 (p. 30)

Sales and Use Taxes

Computer software – programs
(canned vs. custom)
W9810003 (p. 31)

Exemptions – telecommunication
services purchased for resale
W9801001 (p. 33)

✱ **W9807002**, November 24, 1997

Type Tax: Corporation Franchise and Income

Issue: Reorganizations

Statutes: Sections 71.02(1), 71.20(1), and 71.22(1), Wis. Stats. (1995-96), as amended by 1997 Wisconsin Act 27

This letter is in response to your request for a private letter ruling as to the Wisconsin franchise or income tax consequences of converting DEF Company (DEF) into a new limited purpose national banking association with trust powers, but without deposit-taking powers, which would be formed pursuant to 12 United States Code (“USC”) § 35.

Facts

DEF is now a Wisconsin-chartered state bank, organized under subchapter II of chapter 221 of the Wisconsin Statutes.

Currently XYZ Corporation (XYZ) owns all the outstanding stock of XYZ Corporation of Wisconsin (XYZW), which, at the time of the proposed transaction, will own all the outstanding stock of DEF.

DEF would be converted into a new limited purpose national banking association with trust powers, but without deposit-taking powers, which would be

formed pursuant to 12 USC § 35. This conversion is accomplished by authorization of the Office of the Comptroller of Currency pursuant to § 35, followed by execution and filing of articles of association under 12 USC § 21 and of an organization certificate under 12 USC §§ 22 and 23. The new association would not be a depository institution and thus would not have FDIC-insured deposits. Assuming the new association would be classified as a division of its sole owner, the transaction for tax purposes would be classified as a liquidation of the existing corporation which would be tax free under section 332 of the Internal Revenue Code.

XYZW would be eliminated by merger into XYZ. This merger is likely to take place prior to the conversion of DEF, but since it is independent of the conversion the merger may occur afterward. This merger will qualify as a section 332 liquidation under the Code.

Separate from the conversion, trust business in certain banks owned by XYZ may be transferred from the banks to DEF. Such transfer will be for the purpose of consolidating all trust activities.

Since DEF will be conducting trust operations in several states, it is preferable to be a national

banking association because these entities are authorized by the Comptroller of the Currency to operate an interstate trust business. In addition, the proposed conversion would improve DEF's ability to predict and comply with fiduciary regulations, because there is a far larger body of case law and regulatory authority governing national banks with trust powers, than similar Wisconsin-chartered banks. DEF does not now take deposits from the general public and its only deposits are from related entities, which it would discontinue.

The elimination of XYZW is to simplify the structure of the "X" affiliated group. XYZW holds most of the Wisconsin and Illinois institutions owned by XYZ and was used principally as an acquisition vehicle. Mid-tier holding companies such as XYZW are no longer viewed as necessary, and it is anticipated that most of "X's" banks (not including DEF) will eventually be combined into one bank for administrative efficiency.

Request

You have requested that the Department rule that, if DEF is reorganized as a national banking association pursuant to 12 USC § 35, does not have deposits insured under the Federal Deposit Insurance Act, and has a single owner, it will be treated for Wisconsin franchise and income tax purposes as a division of its single owner.

Ruling

If DEF is reorganized as a national banking association pursuant to 12 USC § 35, does not have deposits insured under the Federal Deposit Insurance Act, and has a single owner, it will be treated for Wisconsin franchise and income tax purposes as a division of its single owner, provided it would be treated as a division under Treasury Regulation § 301.7701-2(c)(2)(i).

Analysis

For Wisconsin franchise and income tax purposes, the term "corporation" includes "corporations, publicly traded partnerships treated as corporations in section 7704 of the internal revenue code, limited liability companies treated as corporations under the internal revenue code, joint stock companies, associations, common law trusts and all other entities treated as corporations under section 7701 of the Internal Revenue Code ..." Section 71.22(1), Wis. Stats., as amended by 1997 Wisconsin Act 27, effective for taxable years beginning on or after January 1, 1997.

A single-owner entity that is disregarded as a separate entity under section 7701 of the Internal Revenue Code is disregarded as a separate entity for Wisconsin franchise and income tax purposes, and its owner is subject to the tax on or measured by the entity's income. Sections 71.02(1), 71.20(1), and 71.22(1), Wis. Stats., as amended

by 1997 Wisconsin Act 27. Therefore, if DEF is disregarded as a separate entity for federal income tax purposes, it will be disregarded as a separate entity for Wisconsin franchise and income tax purposes. Instead, it will be treated as a division of its single owner.

Since the Wisconsin Department of Revenue will not issue private letter rulings involving interpretations of the Internal Revenue Code and Treasury Regulations, the department will not rule that Treasury Regulation § 301.7701-2(c)(2)(i) applies, nor will the department rule that Treasury Regulation § 301.7701-2(c)(2)(ii) does not apply in this situation. □

✳ **W9810003**, December 17, 1997

Type Tax: Sales and Use

Issue: Computer software – programs (canned vs. custom)

Statutes: Sections 77.51(20) and 77.52(1), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.71 (April 1993 Register)

Thank you for your request for a private letter ruling and the additional information that was provided by telephone, regarding the Wisconsin sales tax treatment of computer software sold by ABC Company (ABC).

Facts

ABC develops and markets software products for both mainframe and client service environments. The products are

functionally rich, focused on user needs, and require minimal user training. The software can be used immediately with little or no modification of customer development practices and standards and can be quickly integrated into day-to-day operations.

Other facts are as follows:

- The exact programs or modules licensed exist at the time that the customer places the order. Prior to licensing ABC software, the customer has the option to evaluate the product without charge for up to 45 days.
- An analysis is performed of the customer's hardware and software to determine the make, model, operating system, and all other software running within the computer. Based on this information, ABC creates a tape which allows the software to operate on the customer's computer system. The uniqueness is due to the combination of pre-existing modules selected by the customer and the addition of identifications and passwords specific to that customer.
- In addition to the software, the customer is sent installation and security parameters. In the event that the customer desires use of the software at a different location or on a different system, the software will continue operating in a new client server environment but not in a different mainframe installation unless new passwords are provided

to the customer for the mainframe product.

- The software is loaded, installed, and tested by the customer. User manuals are provided depending on the type of software. Training is provided depending on the software.
- An assumption is made that the cost of the software is more than \$10,000.
- Maintenance and improvements are provided to the software without charge for 12 months from the initial license date. Thereafter, the customer can continue maintenance by paying an annual fee. Maintenance includes updates to the software as well as technical support by telephone.
- No modifications are made to the existing program modules in order that they be useable by the customer. No fixes (i.e., short-term programming solutions to potential problems) are provided by ABC.
- Sales tax is charged to the customer and remitted to the department on all software licensed in Wisconsin.

Request

You ask whether the license of software described above is subject to Wisconsin sales or use tax.

Ruling

The software described above is tangible personal property. Therefore, the gross receipts from the license of such software are

subject to Wisconsin sales or use tax.

Analysis

Section 77.52(1), Wis. Stats. (1995-96), imposes a Wisconsin sales tax on sales of tangible personal property and taxable services at retail in Wisconsin.

“Tangible personal property” for purposes of imposing Wisconsin sales tax is defined in sec. 77.51(20), Wis. Stats. (1995-96), to include computer programs, except custom computer programs.

Section Tax 11.71(1)(e), Wis. Adm. Code (April 1993 Register), defines “custom programs” to mean utility and application software which accommodate the special processing needs of the customer. The determination of whether a program is a custom program shall be based upon the facts and circumstances, including the following:

1. The extent to which the vendor or independent consultant engages in significant presale consultation and analysis of the user's requirements and system.
2. Whether the program is loaded into the customer's computer by the vendor and the extent to which the installed program must be tested against the program's specifications.
3. The extent to which the use of the software requires substantial training of the customer's personnel and

- substantial written documentation.
4. The extent to which the enhancement and maintenance support by the vendor is needed for continued usefulness.
 5. There is a rebuttable presumption that any program with a cost of \$10,000 or less is not a custom program.
 6. Custom programs do not include basic operational programs or prewritten programs.
 7. If an existing program is selected for modification, there must be a significant modification to the program by the vendor so that it may be used in the customer's specific hardware and software environment.

Although the cost of the software is more than \$10,000 and maintenance is available, the following facts lead to the determination that the software is not custom:

- There is no significant presale consultation by ABC. Analysis by ABC consists merely of receiving a description from the customer of its hardware and software and selecting the existing modules for that particular hardware and software.
- ABC does not load the software on the customer's hardware, nor do they test the software on the customer's hardware.

- There has been no showing that maintenance is necessary for continued usefulness.
- Training is provided only for certain software.
- No modifications are made to the existing modules to make the software useable by the customer.

The decision by the Court of Appeals in the case of *Wisconsin Department of Revenue v. International Business Machines* (CCH 202-983, June 23, 1988), is not controlling since the stipulated facts in that case are not identical to the facts above. In *IBM*, the pre-existing modules were extensively modified for an individual customer.

Additionally, the issue in *IBM* was whether the software in question was tangible personal property or an intangible under the case of *Janesville Data Center, Inc. v. Wisconsin Department of Revenue* (CCH 201-498, June 30, 1978). The Supreme Court determined that coded "data" was an intangible.

In *IBM*, it was determined that coded "instructions" were also intangible. The Wisconsin Legislature has since limited that holding by defining computer programs, except custom programs, as tangible personal property. Therefore, the focus is now on whether the programming is custom, or not, as described above. □

✳ **W9801001**, October 14, 1997

Type Tax: Sales and Use

Issue: Exemptions – telecommunication services purchased for resale

Statutes: Sections 77.51(14)(intro.), 77.52(13) and (14), and 77.53(1) and (2), Wis. Stats. (1995-96)

Wis. Adm. Code: Section Tax 11.66 (September 1997 Register)

This letter responds to your request for a private letter ruling.

Facts

As stated in your request, GHI Corporation (GHI) is an Internet service provider located in Wisconsin. GHI charges its customers a monthly fee for Internet access. GHI sells individual consumers the use of telephone communications lines used to access computers. In accessing the Internet, GHI's customers use their own computers and modem to communicate with other computers using access to telephone lines provided by GHI.

GHI purchases bulk long distance access services in the form of an access circuit that allows a large quantity of individual users to communicate simultaneously over this line. GHI purchases local telephone access services using approximately "X" lines. GHI has more customers than the lines purchased but, at any given peak usage time, the amount of lines are sufficient to handle

customer demand. Local lines are equipped with interstate access to tie in with long distance providers.

The lines to which access is purchased may be used on occasion by GHI solely for testing the quality of the lines to ensure that newly added lines are properly connected to the computer modems necessary for Internet access. In addition, GHI uses three of the lines for its own business and does not provide customers with access to these lines.

Request

You ask the following questions:

1. Is GHI's purchase of access to local and long distance telephone lines subject to Wisconsin sales or use tax?
2. How should GHI and suppliers account for lines that are not exempt from Wisconsin sales or use tax?

Ruling

1. GHI's purchase of access to local and long distance telephone lines, which are used in providing Internet access to customers, is not subject to Wisconsin sales or use tax because the access is for resale. GHI's occasional use of the lines to inspect for quality does not invalidate the resale exemption.

GHI's use of access to local and long distance telephone lines (e.g., used to contact suppliers and customers regarding billings, used for

office fax machine, etc.) is subject to Wisconsin sales or use tax because the access originates in Wisconsin, is charged to a service address in Wisconsin, and is not resold.

2. GHI should provide its supplier with a properly completed resale certificate. If a supplier provides both access which is resold by GHI and access which is consumed by GHI in a taxable manner, GHI should indicate to its supplier which access is not resold so that the supplier allocates its billing correctly between charges subject to and not subject to tax.

Note: If the seller fails to charge tax on the sale of access to local and long distance lines that is not resold, GHI is required to report and remit to the department the Wisconsin sales or use tax on its purchase of such access.

Analysis

1. Section 77.51(14)(intro.), Wis. Stats. (1995-96), defines "sale," for purposes of imposing Wisconsin sales or use tax, to include the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services for use or consumption but not for resale as tangible personal property or services.

Section Tax 11.66(4)(c), Wis. Adm. Code (September 1997 Register), further provides access services that resellers

purchase, repackage, and resell to customers are not subject to Wisconsin sales or use tax.

GHI, in providing Internet access, is transferring to customers the enjoyment of access to telephone lines that allow connection of the customer's computer to other computers. Therefore, GHI is reselling the access to telephone lines it purchases.

2. Section 77.52(13), Wis. Stats. (1995-96), provides that, in order to prevent the evasion of sales tax, it is presumed that all receipts are subject to tax until the contrary is established. The burden of proving that a sale of services is not a taxable sale is upon the person who makes the sale unless that person takes from the purchaser a certificate that the service is purchased for resale.

Section 77.52(14), Wis. Stats. (1995-96), provides that the seller must take a certificate in good faith. A certificate can be taken in good faith by a seller if the seller does not know or has no reason to know that the purchaser will not resell the service.

Section 77.53(1) and (2), Wis. Stats. (1995-96), imposes a Wisconsin use tax on the storage, use, or consumption of taxable services in Wisconsin. A person's liability for the tax is not extinguished until the tax has been paid to the state. □