



Tax Releases

“Tax Releases” are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.

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INDIVIDUAL INCOME TAXES

1 Native Americans - Enrolled Members of a Tribe

Statutes: Section 71.02, Wis. Stats. (1999-00)

Background: In the McClanahan case, the United States Supreme Court defined the three factors which, when all were present, exempt a Native American from state taxation. These factors are:

1. The individual must be an enrolled member of a tribe,
2. The individual must be living on the reservation of the tribe of which the individual is a member, and
3. All of the income earned for which the exemption is claimed must be earned on the tribal reservation.

Facts and Question: A Native American has lived and worked on the Menominee reservation for several years. The individual was eligible to become an enrolled member of the Menominee Indian Tribe since his birth in January 1960. However, the individual did not actually become an enrolled member of the Menominee Indian Tribe until October 20, 2000. Is the income that was earned prior to

the time the individual actually became an enrolled member of the tribe exempt from Wisconsin income tax?

Answer: No. Income is exempt from Wisconsin income tax only if the individual is an enrolled member of a tribe, who lives and works on his or her tribal reservation. Even though the individual had the right since birth to become an enrolled member of the Menominee Indian Tribe, the exemption does not apply until the individual exercised that birthright and actually became an enrolled member on October 20, 2000. All income earned prior to October 20, 2000, by this individual is subject to Wisconsin income tax. [\(Footnote\)](#)

SALES AND USE TAXES

Note: The following tax releases interpret the Wisconsin sales and use tax law as it applies to the 5% state sales and use tax. The 0.5% county sales and use tax and the 0.5% football stadium and 0.1% baseball stadium sales and use taxes may also apply. For information on sales or purchases that are subject to the county or stadium sales and use tax, refer to Wisconsin Publication 201, *Wisconsin Sales and Use Tax Information*.

2 Exemption for United States Flags and Wisconsin State Flags

Statutes: Section 77.54(46), Wis. Stats., as created by 2001 Wisconsin Act 16

Introduction:

This tax release reverses the tax treatment of “flag kits,” as provided in the article titled “Create Exemption for United States and Wisconsin Flags,” that appeared in Wisconsin Tax Bulletin 126 (September 2001) on page 8, and that also appeared in the September 2001 Sales and Use Tax Report on pages 1 and 2. Other than two new examples that appear at the end of this tax release, the only change is the reversal of the tax treatment for “flag kits.”

Background:

Section 77.54(46), Wis. Stats., as created by 2001 Wisconsin Act 16, provides a sales and use tax exemption for:

“The gross receipts from the sale of and the storage, use, or other consumption of the U.S. flag or the state

flag. This subsection does not apply to a representation of the U.S. flag or the state flag.”

The effective date of this exemption is October 1, 2001.

What Is Covered By This Exemption?

The sale of, and the storage, use or other consumption of the following are exempt under sec. 77.54(46), Wis. Stats.:

- The United States flag or the Wisconsin state flag. A flag, for purposes of this exemption, is considered to include the staff to which the flag is permanently mounted when sold by the retailer.

Example: Retailer A sells hand-held U.S. flags permanently mounted with staples to a wood or plastic staff. The sale of the flag (i.e., the fabric and staff to which the fabric is mounted) is exempt from Wisconsin sales or use tax.

(The following two paragraphs contain the revised tax treatment for “flag kits”)

- A “flag kit,” sold as a single unit, which includes a United States flag or Wisconsin state flag and related accessories, such as a mounting bracket, a flagpole, a cord, and instructions on the display of the flag. A “flag kit” does not include flag-related accessories that are available for sale individually, even if such items are sold in a single transaction along with a U.S. flag or Wisconsin state flag.

Example: Retailer B sells an 8-foot sectional “flag kit” consisting of a two-piece pole with an eagle affixed to the top, a cord, an attaching bracket and screws, and a U.S. flag, all enclosed in a package with a single Universal Product Code (UPC). The sale of the “flag kit” is exempt from Wisconsin sales and use tax.

What Is Not Covered By This Exemption?

The sale of, and the storage, use, or other consumption of the following are not exempt under sec. 77.54(46), Wis. Stats.:

- Any accessories, when not sold as a part of a “flag kit” containing a United States flag or Wisconsin State flag.

Example: Retailer C sells an 8-foot sectional flagpole. The sale of the flagpole is not exempt from Wisconsin sales or use tax under sec. 77.54(46), Wis. Stats.

Example: Retailer D sells 40-foot sectional flagpoles, hardware for flags, U.S. flags, and Wisconsin state

flags. All are for sale individually. The sale of the flagpoles and hardware are taxable, even if Retailer D sells these items in a single transaction along with the sale of a U.S. flag or a Wisconsin state flag.

- A representation of the United States flag or Wisconsin state flag.

Example: Retailer E sells a photograph of the Wisconsin state flag. The sale of the photograph is not exempt from Wisconsin sales or use tax under sec. 77.54(46), Wis. Stats.

Example: Retailer F sells a cape fashioned after the U. S. flag. The sale of the cape is not exempt from Wisconsin sales or use tax under sec. 77.54(46), Wis. Stats.

(The following are new examples that did not appear in Wisconsin Tax Bulletin 126 or the September 2001 Sales and Use Tax Report)

Example: Retailer G sells a lapel pin that has an image of the U.S. flag on it. The sale of the lapel pin is not exempt from Wisconsin sales or use tax under sec. 77.54(46), Wis. Stats.

Example: Retailer H sells a sticker that has an image of the U.S. flag on it. The sale of the sticker is not exempt from Wisconsin sales or use tax under sec. 77.54(46), Wis. Stats. 

3 Telecommunications Message Services: Taxability and Situs of Services; Credit Allowed for Tax Paid to Another State

Statutes: Sections 77.52(2)(a)5 and 5m, 77.53(1) and (16), and 77.72(3), Wis. Stats. (1999-00)

Introduction:

This tax release explains the sales and use tax treatment of various telecommunications message services. Effective December 1, 1997, certain telecommunications message services became subject to Wisconsin sales and use tax, under sec. 77.52(2)(a)5m, Wis. Stats., as created by 1997 Act 27. Other telecommunications services are taxable for sales both before and after December 1, 1997, under sec. 77.52(2)(a)5, Wis. Stats.

Background:

Section 77.52(2)(a)5, Wis. Stats. (1999-00), imposes sales tax on:

“The sale of telecommunications services that either originate or terminate in this state; except services that are obtained by means of a toll-free number, that originate outside this state and that terminate in this state; and are charged to a service address in this state, regardless of the location where that charge is billed or paid, and the sale of the rights to purchase telecommunications services, including purchasing reauthorization numbers, by paying in advance and by using an access number and authorization code.”

Section 77.52(2)(a)5m, Wis. Stats. (1999-00), imposes sales tax on:

“The sale of services that consist of recording telecommunications messages and transmitting them to the purchaser of the service or at that purchaser’s direction, but not including those services if they are merely an incidental, as defined in s. 77.51(5), element of another service that is sold to that purchaser and is not taxable under this subchapter.” (**Note:** Section 77.52(2)(a)5m, Wis. Stats., became effective December 1, 1997.)

What Are Telecommunications Message Services?

The following non-exhaustive set of examples describes various services and their tax treatment.

- **Voice Mail Service**

Example 1: Company A provides voice mail service to its customers. The customers are provided access to Company A’s EVX Office Message System computer through which a customer can deposit or retrieve telephone messages using a touch-tone telephone. The service may be used as a message center, a call forwarding service, or an answering service. Messages are stored in the computer, and the customer may send or retrieve messages, reply to a message directly, reroute messages to others, broadcast messages to a wider group, save selected messages, or cancel messages no longer needed. The service is available 24 hours a day. The customer accesses the computer either through a toll-free telephone number or a local telephone number.

This service is taxable as a telecommunications message service under sec. 77.52(2)(a)5m, Wis. Stats. (1999-00), effective December 1, 1997. However, this service has also been taxable since May 1, 1990 as a telecommunications service under sec. 77.52(2)(a)5, Wis. Stats. (1999-00), provided the service originates (or terminates effective December 1, 1997) in Wisconsin and is charged to a service address in Wisconsin. (May 1, 1990 is the date of a change in the Department of Revenue’s position regarding the sales and use tax treatment of mechanical or electronic voice mail services.)

- **E-Mail Service**

Example 2: Company B provides electronic mail (“e-mail”) services. Company B’s customers send e-mail messages from their computers to a central computer at Company B’s location where the messages are appropriately routed.

This service is taxable as a telecommunications message service under sec. 77.52(2)(a)5m, Wis. Stats. (1999-00), effective December 1, 1997. However, this service was also taxable as a telecommunications service under prior law.

- **Telephone Answering Services**

Example 3: Company C is a real estate business, whose employees spend considerable periods of time away from its office. Company C contracts with Company D to have Company D’s employees answer incoming telephone calls during periods when Company C’s employees are not available to answer the telephone. Company D takes messages from incoming callers and transmits them to Company C or particular employees of Company C.

This service provided by Company D is a taxable telecommunications message service, effective December 1, 1997. This service was not taxable prior to December 1, 1997.

Example 4: A bank provides a toll-free telephone number that its customers may call to register comments, suggestions, compliments, or complaints about the bank’s services or its tellers, loan officers, or other service representatives. The bank contracts with Company E to answer calls to this toll-free number. Company E records the comments, suggestions, compliments, and complaints, and forwards them by electronic or other means to the appropriate officials at the bank.

This service provided by Company E is a taxable telecommunications message service, effective December 1, 1997. This service was not taxable prior to December 1, 1997.

Example 5: A sales representative, who spends considerable periods of time traveling away from her home, hires Company F to answer incoming telephone calls to her residence while she is away. Individual employees of Company F keep a log of calls received, recording the name of the person calling, date and time of the call, and a short message, and transmit the log to the sales representative.

This service provided by Company F is a taxable telecommunications message service, effective December 1, 1997. This service was not taxable prior to December 1, 1997.

Example 6: Company G contracts with Company H, an office management service, to provide receptionist, typing, filing, scheduling, bookkeeping, and similar services. Employees of Company H also answer and route incoming telephone calls. When calls cannot be routed, Company H takes messages and transmits them to the appropriate person. This answering service is only a small part of the total office management services provided by Company H to Company G.

The telephone answering services provided by Company H are not taxable because such services are an incidental element of the nontaxable office management services provided by Company H to Company G.

Example 7: Company I, a mail order company, hires Company J to process telephone orders for merchandise from Company I's customers. Upon receiving a telephone call, Company J employees fill out an order form, verify the order and other information provided by the customer, check on-line inventory records to make sure the desired merchandise is available, and conduct a credit check of the customer. Company J then remits the order form to Company I. The telecommunications message service element of Company J's service (receiving telephone calls and filling out order forms) is only a small part of the total sales processing services provided by Company J to Company I.

The telephone answering services provided by Company J are not taxable because such services are an incidental element of the nontaxable sales processing services provided by Company J to Company I.

Example 8: A manufacturer has a toll-free telephone number that potential customers may call for information about its products. The manufacturer contracts with Company K whose employees answer incoming calls to the toll-free number and respond to the inquiries. Generally, Company K does not take and transmit messages to the manufacturer.

Company K is providing a service that is not taxable. If Company K occasionally takes and transmits messages to the manufacturer, this telecommunications message service is an incidental element of its customer service or product information service, which is not subject to tax.

• Security Monitoring Service

Example 9: Company L provides security monitoring services. When a customer's security system detects unauthorized entry, the system transmits a message over telephone lines to Company L's communications center.

The message contains information concerning the date and time of the unauthorized entry, the specific location of entry, etc. Company L keeps a record of this information, notifies the customer (by transmitting a message electronically to the customer's security system, placing telephone calls to the customer, or mailing written information to the customer) and may, if appropriate, notify local law enforcement authorities.

The service provided by Company L is a taxable telecommunications message service under sec. 77.52(2)(a)5m, Wis. Stats. (1999-00). This service was not taxable until the December 1, 1997 law change reversed the position taken by the Department of Revenue in *Wisconsin Tax Bulletin* 34, October 1983, page 12.

• Emergency Response Service

Example 10: Company M, located outside Wisconsin, provides emergency response services to subscribers in Wisconsin. When assistance is required, the subscriber presses a button that is worn by the subscriber. Pressing the button sends a radio signal which activates a base unit that is connected to an existing telephone jack in the subscriber's home. The base unit automatically dials the telephone number of Company M. Company M emergency response staff members have access to subscriber's files which include the subscriber's address, health information, and persons to contact. If possible, the staff member communicates directly with the subscriber using a speaker phone built into the base unit in the subscriber's home. Based on the circumstances, the staff member takes appropriate action, which may include calling neighbors or local emergency services.

This service is taxable as a telecommunications message service under sec. 77.52(2)(a)5m, Wis. Stats. (1999-00), effective December 1, 1997. However, this service was also taxable as a telecommunications service under prior law.

Note: The revenues collected under sec. 146.70(3), Wis. Stats., of a similar telecommunications emergency response service – the statewide emergency services number system ("911" service) – are exempt from sales and use taxes pursuant to sec. 77.54(37), Wis. Stats., effective August 1, 1987.

Where Does the Sale of Telecommunications Message Services Occur?

A telecommunications message service is furnished or consumed at the location where the customer, or someone at the direction of the customer, receives the message. If the customer, or someone at the direction of the customer, receives the message in Wisconsin, the telecommunications

message service is subject to Wisconsin sales or use tax. If the customer, or someone at the direction of the customer, receives the message outside Wisconsin, the telecommunications message service is not subject to Wisconsin sales or use tax.

Example 1: Company M, located in Wisconsin, contracts with Company N, a security monitoring service provider located in Texas. Company M's security system transmits messages to Company N's communications center located in Texas. Company N creates a computerized record of the message and transmits certain information by telephone, which is received by Company M at its Wisconsin location.

This telecommunications message service is furnished or consumed in Wisconsin because the messages are received by the customer, Company M, at its Wisconsin location. Therefore, the sale is subject to Wisconsin sales or use tax.

Example 2: Company O, located in Minnesota, contracts with Company P, an office message service provider located in Wisconsin. Employees of Company P answer Company O's incoming telephone calls at Company P's Wisconsin location, take messages from callers, and transmit the messages to Company O. Company O receives the messages at its Minnesota location.

This telecommunications message service is furnished or consumed in Minnesota, because the messages are received by the customer, Company O, at its Minnesota location. Therefore, the sale is not subject to Wisconsin sales or use tax.

Example 3: Company Q, located in Nontaxable County A, a Wisconsin county which has not adopted the 0.5% county sales and use tax, contracts with Company R, an office message service provider located in Taxable County B, a county which has adopted the 0.5% county sales and use tax. Employees of Company R answer Company Q's incoming telephone calls at its location in Taxable County B, take messages from callers, and transmit the messages to Company Q. Company Q receives the messages at its location in Nontaxable County A.

This telecommunications message service is furnished or consumed in Nontaxable County A, because the messages are received by the customer, Company Q, at its location in Nontaxable County A. Therefore, the sale is not subject to county sales or use tax.

Is Use Tax Due If Provider Does Not Charge Tax?

If a telecommunications message service is furnished or consumed in Wisconsin, but the service provider does not

charge the customer Wisconsin sales or use tax, the customer owes Wisconsin use tax, as provided in sec. 77.53(1), Wis. Stats. (1999-00).

Example: Company S, located in Wisconsin, contracts with Company T, an office message service provider located in California. Employees of Company T answer Company S's incoming telephone calls at Company T's California location, take messages from callers, and transmit the messages to Company S. Company S receives the messages at its Wisconsin location. Company T does not charge any sales or use tax to Company S.

Company S owes Wisconsin use tax on its purchase of the telecommunications message services.

Is Credit Allowed for Taxes Paid to Other States or Local Governments?

A purchaser is allowed a credit against Wisconsin sales or use tax owed on telecommunications message services for state sales or use tax properly paid to another state on such services, limited to the amount of Wisconsin tax due on the transaction.

Example: Company U, located in Wisconsin, contracts with Company V, an office message service provider located outside Wisconsin. For \$1,000, employees of Company V answer Company U's incoming telephone calls at Company V's location in the other state, take messages from callers, and transmit the messages to Company U. Company U receives the messages at its Wisconsin location. As required by the other state, Company V charges the other state's 6% state sales tax (\$60) to Company U on the telecommunications message service and properly pays such tax to the other state. Company V does not have nexus in Wisconsin and, therefore, does not charge Wisconsin sales tax to Company U.

Company U is allowed a credit against the 5% Wisconsin state use tax due on its purchase of the telecommunications message services. Although \$60 of sales tax was paid to the other state, the credit is limited to the \$50 of Wisconsin state use tax due. Company U may not claim a credit against Wisconsin state sales or use tax for the additional \$10 of tax paid to the other state.

For additional information concerning credits for taxes paid to other states or local units of government (e.g., whether a credit is allowed against county and stadium taxes, etc.), see *Wisconsin Tax Bulletin* 100, January 1997, page 29. 