



Wisconsin TAX BULLETIN

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Update: Important Sales and Use Tax Changes Effective October 1, 2009

Effective October 1, 2009, a number of changes were made to Wisconsin's sales and use tax laws which affect Wisconsin retailers. The October issue of the *Wisconsin Tax Bulletin* (WTB) listed a number of these changes, and since that time the department has published additional information concerning a number of other changes. This information is just a click away, using the links below. Please note that the changes listed below and in the October WTB are not all-inclusive. Additional sales and use tax changes were also included in 2009 Wisconsin Act 2 and 2009 Wisconsin Act 28.

- [Products Purchased Prior to October 1, 2009 That No Longer Qualify for Exemption Because of Changes in Definitions – Use Tax Not Due](#)
- [Change in Items Subject to Local Food and Beverage Tax](#)
- [Drop Shipment Sales - Change in Wisconsin Sales and Use Tax Treatment](#)
- [Sales to Restaurant Employees](#)
- [Sales of Food and Food Ingredients by Hospitals and Other Facilities](#)
- [Items Given Away for Free](#)
- [Equipment Provided With Operator](#)

Local Food and Beverage Tax Rate To Increase July 1

Effective July 1, 2010, the 0.25% local food and beverage tax will be increased to 0.5%. This increase is a result of the Wisconsin Center District exercising its authority to increase the rate, as provided in sec. 77.981, Wis. Stats. (2007-08), as amended effective October 1, 2009 by 2009 Wis. Act 2.

Note: A change in items subject to the local food and beverage tax occurred effective October 1, 2009. A link to additional information concerning this change, as well as other important sales and use tax changes effective October 1, 2009, may be found above. [↗](#)

Sales and Use Tax Report Available

The latest issue of the [Sales and Use Tax Report](#) became available on the Department of Revenue's web site in December. The December 2009 *Sales and Use Tax Report* (5-09) contains additional information concerning recent sales and use tax law changes and other pertinent sales and use tax information, including the following important reminders:

- Beginning April 1, 2010, the 0.5% county tax will be in effect in Fond du Lac County.
- Effective January 1, 2010, the motor vehicle dealers' measure of use tax was decreased from \$140 to \$138 per plate per month.
- Effective January 1, 2010, the premier resort area tax rates for the City of Wisconsin Dells and Village of Lake Delton increased from 0.5% to 1.0%.
- The department is no longer mailing Forms ST-12 and WT-7.
- The department's electronic funds transfer (EFT) registration and payment system is no longer available for sales and use tax, withholding tax, business tax registration renewal fee, premier resort area tax, and rental vehicle fee.
- A new withholding teleFile option is available for filing and paying WT-6 deposit reports and WT-7 annual withholding reconciliations.
- There are six new self-help Internet videos to help with registering, filing returns, and making payments in *My Tax Account*. [↗](#)



Hmm...This Stuff Looks Familiar

Has our front page given you a sense of déjà vu? If so, don't worry. More than likely you're among those who previously received much of this information through our [tax practitioner page](#) and [electronic mailing lists](#). They're the most efficient and timely means of getting the information you need (but you probably already knew that). [↗](#)

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Since the last issue of the *Wisconsin Tax Bulletin*, the following publications of the Income, Sales, and Excise Tax (IS&E) Division of the Department of Revenue have been revised:

Income and Franchise Taxes

103 Reporting Capital Gains and Losses for Wisconsin by Individuals, Estates, and Trusts (11/09)

104 Wisconsin Taxation of Military Personnel (11/09)

106 Wisconsin Tax Information for Retirees (12/09)

109 Tax Information for Married Persons Filing Separate Returns and Persons Divorced in 2008 (11/09)

113 Federal and Wisconsin Income Tax Reporting Under the Marital Property Act (1/10)

120 Net Operating Losses for Individuals, Estates, and Trusts (11/09)

121 Reciprocity (1/10)

122 Tax Information for Part-Year Residents and Nonresidents of Wisconsin for 2009 (11/09)

125 Credit for Tax Paid to Another State (11/09)

126 How Your Retirement Benefits are Taxed (11/09)

127 Wisconsin Homestead Credit Situations and Solutions (12/09)

503 Wisconsin Farmland Preservation Credit (12/09)

Sales and Use Taxes

201 Wisconsin Sales and Use Tax Information (9/09)

403 Premier Resort Area Tax (12/09)

Excise Taxes

MF-109 Fuel – How Does It Apply to Biodiesel and Vegetable Oil Used in Vehicles? (10/09)

Other Topics

117 Guide to Wisconsin Information Returns (12/09)

501 Field Audit of Wisconsin Tax Returns (11/09)

509 Filing Wage Statements and Information Returns Electronically (12/09)

All of the IS&E Division's publications may be downloaded or ordered [online](#). There are over 70 publications available, covering a wide range of topics. [☞](#)

**Wisconsin/Minnesota
Sales Tax Seminars**

The Wisconsin and Minnesota Departments of Revenue will again present a series of joint sales and use tax seminars in March. The seminars will include information on similarities and differences in the two states' sales and use tax laws. All of the seminars are for general businesses.

The specific dates, times, and locations of the seminars, as well as registration information, is available on the "[Training](#)" page of the Department of Revenue's web site. [☞](#)

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Combined Reporting Update: Administrative Rules and Forms

For taxable years beginning on or after January 1, 2009, groups of commonly controlled corporations (except S corporations) are generally required to compute their Wisconsin franchise or income tax liability using combined reporting. Combined reporting was enacted in 2009 Act 2 and subsequently amended in 2009 Act 28. These Acts also contained other law changes that apply to corporations that will use combined reporting.

In December 2009 and January 2010, the Department of Revenue took two major steps in implementing these law changes. These steps were:

- Issued two groups of administrative rules (as emergency rules) to interpret the combined reporting statute and the related provisions of Acts 2 and 28
- Finalized all forms and instructions that relate to combined reporting

Further details of these developments follow:

Administrative Rules

The two groups of emergency rules are described below, along with information about submitting comments and an upcoming public hearing:

Group 1: Combined Reporting Rules (ss. Tax 2.60 to 2.67). These rules interpret the combined reporting statute itself (s. 71.255, Stats.). This group was originally published on August 8, 2009. However, based on public comment, the department significantly revised these rules and on January 15, 2010, published a revised version. The revised version is still considered an emergency rule. The department's [Combined Reporting Web Page](#) contains the text of this group of rules, the official rule order, and a summary of the significant revisions made in the January 15, 2010 version.

Group 2: Amendments to Previously Existing Apportionment and Nexus Rules. This group consists of amendments to previously existing apportionment and nexus rules. The amendments explain how combined reporting and other provisions of 2009 Acts 2 and 28 affect various apportionment and nexus issues. This group was published on December 31, 2009. The [Combined Reporting Web Page](#) contains the text of this group of rules and the official rule order.

Submittal of Comments and Public Hearing. You may submit written comments about any of these

emergency rules. Submit written comments to either Wendy Miller or Dale Kleven at the Wisconsin Department of Revenue, Mail Stop 6-40, 2135 Rimrock Road, P.O. Box 8933, Madison, WI 53708-8933.

There will also be a public hearing on these rules. The date, time, and place are as follows:

Thursday, February 25, 2010

1:00 p.m.

Events Room
State Revenue Building
2135 Rimrock Road
P.O. Box 8933
Madison, Wisconsin

If you make an oral presentation at the hearing, you must also provide written comments at the hearing which reflect the oral presentation. However, you do not have to attend the hearing to provide written comments. All written comments submitted on or before March 4, 2010 will be given the same consideration as testimony presented at the hearing.

Combined Reporting Forms and Instructions

All forms that may apply to combined returns have been finalized and are available on the department's [2009 Corporation Tax Forms Web Page](#).

The department has also developed a table which organizes the specific forms that all or most combined groups will use, along with their instructions. The table includes all forms that are specific to combined returns as well as other forms that combined return filers will commonly use. You can find the table on the [Combined Reporting Web Page](#). [↗](#)

Quick Links to Combined Reporting Information and Resources:

- [Administrative Rules](#)
- [Articles](#)
- [Explanations and FAQs](#)
- [Forms](#)
- [Training](#)

Reminder: Electronic Resources Available

The Wisconsin Department of Revenue (DOR) has a variety of online [services](#) that provide a secure, fast, and convenient way to complete transactions. The following

are just two examples of how these services can help you better serve your clients:

- Every year, DOR adjusts the estimated tax payments claimed on thousands of tax returns. In an effort to minimize this type of adjustment, DOR developed

an [application](#) that allows individuals, corporations, partnerships, trusts, estates, and practitioners to verify available estimated tax payments when completing a tax return.

- Make filing income tax returns and homestead credit claims completely paperless by submitting Form W-RA and required attachments [electronically](#). [✉](#)



Enforcement Report

Two from Milwaukee Area Convicted for Tax Fraud

In separate cases in October 2009, two people from the Milwaukee area were convicted of tax fraud. Shana Marie Cooper, 30, was sentenced to five years in prison and five years of extended supervision following her prison term for using the identities of at least 40 individuals on false tax returns and Kenneth C. Kranich, 37, was sentenced to 90 days in jail for filing fraudulent Wisconsin income tax returns for the years 2004 through 2007.

In the case of Ms. Cooper, she filed sixty-six fraudulent income tax returns between 2006 and 2007, defrauding the Internal Revenue Service and the Wisconsin Department of Revenue of over \$170,000.

In the case of Mr. Kranich, he altered information in the wage and tax statements (W-2 forms) that he and his wife received from their employers. By altering the W-2 information, Kranich omitted \$74,236 that should have been reported on the tax returns he filed for these years, according to the criminal complaint.

Kranich further falsified the returns by overstating the amounts of income taxes withheld from their wages, claiming \$12,289 more than what was actually withheld in state and federal taxes.

Kranich was ordered to pay back \$6,540 to the Wisconsin Department of Revenue in taxes evaded.

Both cases were prosecuted by the Public Integrity Unit of the Milwaukee County District Attorney's Office after an investigation by the Fraud Unit of the Wisconsin Department of Revenue.

Mukwonago Man Sentenced for Tax Fraud

Michael L. Gengler, 34, of Mukwonago, was sentenced in November 2009 to nine months in jail for failure to

file Wisconsin income tax returns. Waukesha County Circuit Court Judge Linda Van De Water also placed Gengler on two years of probation and ordered him to file all back tax returns and pay all taxes due.

Gengler refused to file income tax returns for the years 2005 through 2007 and instead sent the Department of Revenue documents arguing that he did not have to file income tax returns because he had no income.

In November 2008, Gengler was criminally charged with failure to file income tax returns after an investigation by the Wisconsin Department of Revenue's Fraud Unit. The investigation revealed that Gengler earned \$280,637 in the years 2005 through 2007.

Portage Man Sentenced for State Tax Evasion

Russell J. Schmid, 39, was ordered in November 2009 to spend six months in the county jail for state income tax fraud. He pled no contest on Monday, October 26th, in Columbia County Circuit Court to two felony counts of filing fraudulent state income tax returns.

According to the criminal complaint filed July 17, 2009, Schmid filed six fraudulent Wisconsin income tax returns for the years 2003 through 2008 on which he reported that he had no income. Schmid also filed a letter with each tax return indicating that the tax code does not include wages as "income." The complaint alleged that Schmid received total income, comprised primarily of wages and unemployment compensation, of \$181,765 during the years 2003 through 2008.



The complaint further alleged that as a result of Schmid's fraudulent representation that he had no income, he owed Wisconsin income taxes of \$6,257 for the years 2003 through 2008.

As part of a plea agreement, Judge Daniel George placed Schmid on four years probation. As a condition of probation, Schmid was ordered to spend six months in jail. Schmid was also ordered to pay restitution of \$6,257 and fines, court costs, and other charges totaling \$226 as a condition of probation.

Schmid was prosecuted by the Columbia County District Attorney's office after an investigation by the Wisconsin Department of Revenue's Criminal Investigation Section.

Stoughton Man Charged With Tax Crimes

Dontrell A. Bluford, 26, Stoughton, is facing criminal charges for filing fraudulent state income tax returns.

According to the criminal complaint filed in December 2009 by the Dane County District Attorney's Office, Bluford was charged with three felony counts of filing fraudulent Wisconsin income tax returns for the years 2006 through 2008. The criminal charges are the result of an investigation by the Wisconsin Department of Revenue's Criminal Investigation Section.

The complaint alleges that during 2006 through 2008, Bluford earned well over \$50,000 in each of the years identified. However, Bluford filed income tax returns for 2006, 2007, and 2008 and reported zero income on each return. Bluford requested a refund of Wisconsin income tax withheld on each return.

The complaint goes on to state that as a result of Bluford's fraudulent representation that he had no income during 2006 through 2008, he owes Wisconsin income taxes of \$4,690 for those years.

If convicted on all counts, Bluford could face up to 18 years in prison and \$30,000 in fines, or both. [Ⓜ](#)



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 in a tax release, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment, and all references to section numbers are to the Wisconsin Statutes. (Caution: Tax releases reflect the position of the Wisconsin Department of Revenue, of laws enacted by the Wisconsin Legislature as of the date published in this Bulletin. Laws enacted after that date, new administrative rules, and court decisions may change the answers in a tax release.)

The following tax release is included:

Sales and Use Tax

1. Temporary Services	6
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SALES AND USE TAX

1 Temporary Services

Note: This tax release supersedes the tax release titled “Temporary Services Furnished by a Seller’s Employees,” which was published in *Wisconsin Tax Bulletin* 141 (January 2005), pages 31-37.

Statutes: Section 77.51(1f), Wis. Stats., as created by 2009 Wis. Act 2, sec. 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28, and secs. 102.315(1)(f), 108.02(21e), and 108.02(24m), Wis. Stats. (2007-08).

Wis. Adm. Code: Sections Tax 11.67(2), Wis. Adm. Code (April 2000 Register), as amended by EmR0924, Tax 11.71(2), Wis. Adm. Code (April 1993 Register), as amended by EmR0924, and Tax 11.86(6), Wis. Adm. Code (May 1999 Register), as amended by EmR0924.

Wisconsin Tax Appeals Commission Decision: *Manpower Inc vs. Wisconsin Department of Revenue*, (August 12, 2009)

Background: Section 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28, provides that, for the privilege of selling, licensing, performing, or furnishing certain services at retail in Wisconsin to consumers or users, regardless of whether the consumer or user has the right of permanent use or less than the right of permanent use and regardless of whether the service is conditioned on continued payment from the purchaser, a tax is imposed upon all persons selling, performing, or furnishing the services at the rate of 5% of the sales price from the sale, license, performance or furnishing of the services.

Services subject to Wisconsin sales and use tax include the following (this list is not all-inclusive):

- 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 sec. 77.51(5), Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2, element of another service that is sold to that purchaser and is not taxable under the sales and use tax law. Sec. 77.52(2)(a)5m., Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2.
- The repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property, and items, property, and goods under sec. 77.52(1)(b), (c), and (d), Wis. Stats., (i.e., certain coins and stamps, certain leased property and certain digital goods), unless:
 - When installed or applied, the installation or application of the tangible personal property or items, property, or goods will constitute an addition or capital improvement of real property.
 - At the time of such repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, or maintenance, a sale in Wisconsin of the type of property, item, or good repaired, serviced, altered, fitted, cleaned, painted, coated, towed, inspected, or maintained would have been exempt to the customer from sales taxation, for reasons other than the exemption provided in sec. 77.54(5)(a), Wis. Stats.

(2007-08) (exemption for certain sales of motor vehicles to nonresidents), and other than sales that are nontaxable because they take place outside Wisconsin.

Sec. 77.52(2)(a)10., Wis. Stats. (2007-08), as amended by 2009 Wis. Act 28.

- Landscaping and lawn maintenance services including landscape planning and counseling, lawn and garden services such as planting, mowing, spraying, and fertilizing, and shrub and tree services. Sec. 77.52(2)(a)20., Wis. Stats. (2007-08), and sec. Tax 11.86(6), Wis. Adm. Code (May 1999 Register), as amended by EmR0924.

Section Tax 11.67(2)(c)1., Wis. Adm. Code (April 2000 Register), as renumbered and amended by EmR0924, provides that if there is a single charge for providing both taxable and nontaxable services that is not a bundled transaction, the entire charge is subject to the tax, unless it is determined by the department that another method, such as allocation or primary purpose of the transaction, more accurately reflects the tax. If the charges for taxable and nontaxable services are separately stated on an invoice, the tax applies only to the charge properly attributable to the taxable services, unless it is determined by the department that the primary purpose of the transaction method for computing the tax more accurately reflects the tax.

Section 77.51(1f), Wis. Stats., as created by 2009 Wis. Act 2, provides, in part, that “bundled transaction” means the retail sale of two or more products, not including real property and services to real property, if the products are distinct and identifiable and sold for one nonitemized price. (“Products,” for purposes of the definition of “bundled transaction,” includes services. Section 77.51(11d), Wis. Stats., as created by 2009 Wis. Act 2.)

Section 102.315(1)(f), Wis. Stats. (2007-08), provides that:

“ ‘Employee leasing company’ means a person that contracts to provide the nontemporary, ongoing employee workforce of a client under a written agreement, regardless of whether the person uses the term “professional employer organization,” “PEO,” “staff leasing company,” “registered staff leasing company,” or “employee leasing company,” or uses any other, similar name, as part of the person’s business name or to describe the person’s business. “Employee leasing company” does not include a

cooperative educational service agency. This definition applies only for the purposes of this chapter and does not apply to the use of the term in any other chapter.”

Section 108.02(21e), Wis. Stats. (2007-08), provides that:

“ ‘Professional employer organization’ means any person who contracts to provide the nontemporary, ongoing employee workforce of more than one client under a written leasing contract, the majority of whose clients are not under the same ownership, management, or control as the person other than through the terms of the contract, and who under contract and in fact:

- (a) Has the right to hire and terminate the employees who perform services for the client and to reassign the employees to other clients;
- (b) Sets the rate of pay of the employees, whether or not through negotiations and whether or not the responsibility to set the rate of pay is shared with the client;
- (c) Has the obligation to and pays the employees from its own accounts;
- (d) Has a general right of direction and control over the employees, including corporate officers, which right may be shared with the client to the degree necessary to allow the client to conduct its business, meet any fiduciary responsibility, or comply with any applicable regulatory or statutory requirements;
- (e) Assumes responsibility for the unemployment insurance coverage of the employees, files all required reports, pays all required contributions or reimbursements due on the wages of the employees, and otherwise complies with all of the provisions of this chapter that are applicable to employers on behalf of the client;
- (f) Has the obligation to establish, fund, and administer employee benefit plans for the employees; and
- (g) Provides notice of the employee leasing arrangement to the employees.”

Section 108.02(24m), Wis. Stats. (2007-08), provides:

“ ‘Temporary help company’ means an entity which contracts with a client to supply individuals to perform services for the client on a temporary basis to support or supplement the workforce of the client in situations such as personnel absences, temporary personnel shortages, and workload changes resulting from seasonal demands or special assignments or projects, and which, both under contract and in fact:

- (a) Negotiates with clients for such matters as time, place, type of work, working conditions, quality, and price of the services;
- (b) Determines assignments or reassignments of individuals to its clients, even if the individuals retain the right to refuse specific assignments;
- (c) Sets the rate of pay of the individuals, whether or not through negotiation;
- (d) Pays the individuals from its account or accounts; and
- (e) Hires and terminates individuals who perform services for the clients. “

Wisconsin Tax Appeals Commission Decision in *Manpower Inc. vs. Wisconsin Department of Revenue*:

In *Manpower Inc. vs. Wisconsin Department of Revenue*, (Wisconsin Tax Appeals Commission, August 12, 2009), the Commission found that the temporary help services Manpower Inc. provides to its clients are not taxable services under sec. 77.52(2), Wis. Stats. The Department of Revenue had sought to impose sales tax on Manpower for the temporary help services performed by its employees that matched any service listed in sec. 77.52(2), Wis. Stats. The Department did not appeal the Commission’s decision.

How Does the *Manpower* Decision Apply to Other Sellers?

Following are factors that may be used to determine whether a seller’s services are nontaxable temporary help services based on the *Manpower* decision.

Generally, if a person sells, licenses, performs, or furnishes any of the services listed in sec. 77.52(2), Wis. Stats. (2007-08), as amended by 2009 Wis. Acts 2 and 28, the person is liable for sales tax on its sales price from such services. **However, if a seller meets all three of the following criteria (1, 2, and 3), it is considered to be providing nontaxable temporary help services:**

1. The seller meets **any one of the following:**

- The seller is a “temporary help company” under sec. 108.02(24m) of the Wisconsin Statutes. (see definition in the previous column);
- The seller is an “employee leasing company” under sec. 102.315(1)(f) of the Wisconsin Statutes. (see definition on page 7); **or**
- The seller is a “professional employer organization” under sec. 108.02(21e) of the Wisconsin Statutes (see definition on page 7).

2. The seller meets **any one of the following:**

- The seller, based on advertising, including website statements and Yellow Pages advertisements, describes its business as a temporary help, employee leasing, professional employer organization, or staff augmentation business;
- The seller is a member of a group or association for temporary help, employee leasing, professional employer organization, or staff augmentation businesses; **or**
- The seller is classified under the North American Industry Classification System (NAICS), 2002 edition, under industry code 561320, as a temporary help service establishment, or under industry code 561330, as a professional employer organization.

3. The seller meets **all of the following:**

- The seller does not provide the services its workers perform directly to customers;
- The seller’s training of its employees is limited to generic training, not specific to the needs of any one of its clients;
- The seller’s clients furnish the tools or equipment for workers to perform tasks;
- The seller does not control the employees performing the tasks and does not supervise or direct the activities that its workers perform for its clients;

- The seller does not define the scope of work of its workers, and is unaware of the specific tasks performed by its workers;
- The seller does not guarantee a specific or particular result of the work performed and does not contract to provide certain outcomes or results; **and**
- The seller's workers do not perform their activities for the seller's clients at the seller's location, and the seller does not control the location where the work is performed.

Example 1: Company A contracts with Company B to provide workers who will perform various nontaxable services (e.g. work on a production line) and taxable services (e.g. answering phones and taking messages, performing landscaping and installing prewritten software). Company A is a member of an association for staff augmentation businesses. For purposes of contributions to unemployment insurance, Company A is a temporary help company under sec. 108.24(24m) of the Wisconsin Statutes. Company A does not provide the services its workers perform directly to any of its customers. Company A provides only generic training for its employees, does not provide tools or equipment, does not control or supervise the employees performing the tasks, does not determine the location where the work is performed, and does not guarantee a specific or particular result. Company A does not define the scope of the work performed and is unaware of the specific tasks performed. All of the services provided by Company A's employees under the contract are nontaxable temporary help services.

Example 2: Company C contracts with Company D to prepare payroll, administer benefit plans and perform some services to prewritten software. Company C advertises that it is a professional employer organization (PEO). For worker's compensation insurance purposes, Company C falls under the definition of "professional employer organization" provided in sec. 108.02(21e) of the Wisconsin Statutes. Company C does not provide the services its workers perform directly to any of its customers. Company C provides only generic training for its employees, does not provide tools or equipment, does not control or supervise the employees performing the tasks, does not determine the location where the work is performed, and does not guarantee a specific or particular result. Company C does not define the scope of the work performed and is unaware of the specific tasks performed. All of the services of Company C's employ-

ees under the contract are nontaxable professional employer organization services.

Example 3: Company E contracts with Company F to perform on-site installation of hardware and off-the-shelf software programs. Company E will provide two individuals who have earned technical certification in several hardware and software specialties. Company E is not a temporary help company under sec. 108.02(24m) of the Wisconsin Statutes or an employee leasing company under sec. 102.315(1)(f) of the Wisconsin Statutes or a professional employer organization under sec. 108.02(21e) of the Wisconsin Statutes. Company E advertises as an IT Solutions Provider, belongs to several IT trade organizations and is classified under NAICS industry code 54512, computer hardware, consulting services or consultants. Company E does not provide specific training to meet the needs of Company F, furnish tools or equipment to the workers, control the employees performing the tasks, or guarantee a specific result. As Company E does not meet all of the criteria associated with providing nontaxable temporary help services (criteria 1, 2, and 3, on page 8), the services performed are not temporary help services. The amount charged by Company E for providing taxable services (installation of hardware and prewritten software) is subject to Wisconsin sales tax.

Example 4: Company G is a building management company. Company G hires Individual H to mow lawns at the properties that Company G owns. Company G provides Individual H with training and tools to perform his services, has the right to fire Individual H, and provides general direction and control over the mowing services furnished by Individual H. Company G is required to withhold income taxes and pay employment taxes on amounts paid to Individual H, and to furnish unemployment insurance and workers compensation benefits for Individual H. Although Individual H is performing lawn maintenance services, because Individual H is an employee of Company G, amounts paid by Company G to Individual H (wages) are not subject to Wisconsin sales tax. There is no sale of taxable services when an employee furnishes or performs services for an employer and the employee is paid wages by the employer as compensation for those services.

Example 5: Company I enters into a contract to provide the following on-site facility operations services at an office complex owned by Company J. Services provided by Company I include:

- Ensuring proper operation of building mechanical systems (i.e., furnaces, boilers, central air condition-

ing, water heaters, and water softeners). The services include monitoring temperature, programming changes to the mechanical system, and inspection, maintenance, and repair of the mechanical system.

- Changing light bulbs and tubes.
- Moving furniture.
- Clearing clogged plumbing pipes.
- Routine and repetitive janitorial services.
- Lawn and garden services, such as mowing, fertilizing, and trimming.
- Snowplowing, sanding, and salting parking lots and sidewalks.

Company I will set the schedule the employees will work. Company J will pay Company I on a monthly basis. Company I will prioritize and assign the tasks that must be performed as outlined in its contract with Company J. Company I will also supply tools, parts, and supplies necessary to perform the services.

The portion of the monthly charge by Company I to Company J for the following services is subject to Wisconsin sales tax under sec. 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28:

- Inspection, maintenance, and repair of furnaces, boilers, central air conditioning, water heaters, and water softeners.
- Lawn and garden services, such as mowing, fertilizing, and trimming.
- Changing light bulbs and tubes.

The portion of the monthly charge for the following services is not subject to tax under sec. 77.52(2), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28:

- Monitoring building temperature for purposes of making programming changes to the mechanical system that adjust temperature and air flow.
- Moving furniture.
- Clearing clogged plumbing pipes.
- Routine and repetitive janitorial services.

- Snowplowing, sanding, and salting parking lots and sidewalks.

Note: The transaction between Company I and Company J is not a “bundled transaction,” under sec. 77.51(1f), Wis. Stats. (2007-08), as created by 2009 Wis. Act 2, because it includes services to real property. For information about bundled transactions, see sec. Tax 11.985, Wis. Adm. Code, as created by EmR0924.

Company I may determine the portion of its lump sum charge to Company J that is subject to tax based on time spent by its employees doing the various activities as evidenced by time reports. Other reasonable methods of determining the tax treatment are also acceptable. For example:

- Alternative 1 – Primary Nature of Services Performed for Job Description

When Company I assigns employees to perform services for its customer, the employees do not keep detailed records of the activities furnished to the customer or the time spent doing specific activities. However, Company I does know that:

- Its maintenance engineer is responsible for monitoring building temperature and programming changes to the mechanical system, which are nontaxable services. The maintenance engineer may perform some of the taxable activities that would normally be performed by the heating, cooling and plumbing professionals, but the amount of that type of work is small and would not be known by Company I.
- Its outdoor general laborer will furnish lawn and garden services in the spring, summer, and fall, which are taxable services, and snowplowing, sanding, and salting services in the winter, which are nontaxable services. This general laborer may perform other incidental activities for Company I, which may be taxable or not taxable, and which are not known to Company I.
- Its indoor general laborer will perform routine and repetitive janitorial services, move furniture, and change light bulbs and tubes.
- Its heating, cooling, and plumbing professional will inspect, maintain, and repair furnaces, boilers, central air conditioning systems, water heaters, and water softeners and occasionally unclog plumbing pipes. The professional may

also be asked in very limited instances to assist contractors who have been hired by Company J to install or replace heating and cooling equipment.

Since Company I does not maintain any detail that would allow it to allocate its charges for services furnished to Company J based on the time spent doing each of the services furnished, it is acceptable for Company I to collect and remit sales tax on the charge for services performed by employees based on the primary nature of the services performed by the employees as properly indicated in their job descriptions. Therefore, charges for services furnished by the outdoor laborer during the winter months, maintenance engineer, and indoor laborer are not subject to Wisconsin sales or use tax because the services the employees furnish are primarily nontaxable services. Charges for the outdoor laborer during the spring, summer, and fall months and the heating, cooling, and plumbing professional are taxable because the services these employees furnish are primarily taxable services.

- Alternative 2 – Time Spent on Specific Activities

When Company I assigns employees, it requires that its employees keep a log or time sheet that indicates specific activities they completed for Company J and the time spent doing the specific activities. This documentation may be used by Company I for purposes of monthly billings to Company J, performance measurements, etc. Company I may allocate its charge to Company J between taxable and nontaxable services based on the logs or time sheets completed by the employees that indicates the time spent by each employee performing the specific activities. If the heating, cooling, and plumbing professional spent 150 hours of a 184-hour month repairing furnaces, boilers, air conditioning systems, and water heaters and softeners and the remaining 34 hours helping contractors install heating and cooling equipment in making real property improvements, the portion of the charge subject to tax for the heating, cooling, and plumbing professional for the month would be determined as follows:

Hours worked during the month	184
Price per hour	\$ X 75
Monthly charge	\$ 13,800
Percentage of time performing taxable services	
(150 hours ÷ 184 hours)	X 82%
Amount subject to tax	<u>\$ 11,316</u>

- Alternative 3 – No Documentation for Allocation

If Company I maintains no documentation (time sheets or logs, position descriptions, etc.), that it could use to make a reasonable allocation of lump sum charges for both taxable and nontaxable services furnished to its customer, the entire charge is subject to Wisconsin sales or use tax.

Example 6: Company K is a retail supermarket chain. Company K is contemplating selling its business. It must make an itemization of all inventory on hand as of the end of its fiscal year. Company K does not have the staff available to itemize the inventory. It contacts Company L, an employment agency, who will provide two people (Individuals X and Y) at a charge of \$25 per hour per person to itemize the inventory.

Company K requires that Individuals X and Y itemize the inventory during the hours the store is closed to the general public, within a two-week time frame. Company K's owner determines the order in which categories of inventory will be itemized, and the reporting format. The owner will supervise the work done by Individuals X and Y. However, Company L controls the payment of their wages, provides them with unemployment insurance and other benefits, and is the employer for employment tax purposes.

It takes 80 hours each for Individuals X and Y to complete the inventory itemization. The employment agency charges Company K \$4,000 for the services performed by Individuals X and Y.

The \$4,000 charge by the employment agency to Company K is not subject to Wisconsin sales tax. Taking inventory is not a service that is subject to Wisconsin sales tax under sec. 77.52(2), Wis. Stats. (2007-08), as renumbered and amended by 2009 Wis. Acts 2 and 28.

Example 7: Company T owns trucks that are used to haul tangible personal property for Company O. Company T does not have any employees. Company T contracts with Company O to obtain drivers to drive Company T's trucks.

The charge by Company O to Company T is not subject to Wisconsin sales or use tax. The service of driving trucks is not a service that is subject to Wisconsin sales or use tax under sec. 77.52(2), Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2.



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 111, “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

Apportionment of revenue from debit card sales and related fees

W0931003 (p. 12)

Apportionment of cancellation of debt income

W0950004 (p. 14)

✱ W0931003 ✱

May 15, 2009

Type Tax: Corporation Franchise and Income Taxes

Issue: Apportionment of revenue from debit card sales and related fees

Statute: Section 71.25(9)(dh), Wis. Stats. (2007-08)

This letter responds to your request for a private letter ruling dated December 11, 2008.

Facts, as provided:

Corporation A is a marketer and processor of prepaid debit cards and prepaid debit card services throughout the United States.

Corporation A’s network includes more than 15,000 retailers, check cashing locations and supermarkets. Independent agency agreements are executed between Corporation A and its retailers / distributors. Corporation A uses a combination of proprietary digital processing, New Account Representatives and Customer Service Representatives to deliver services to customers. All debit cards are issued by third party banks, with Corporation A acting as an authorized independent sales organization of these banks.

Corporation A’s core products include General Purpose Reloadable Cards (GPR), Gift Cards, and Travel-Money® Cards. GPRs operate like bank debit products. Money can be deposited onto the card by direct deposit, at a terminal or retail location, through a person-to-person payment, or online. Gift cards hold a pre-configured amount of money and cannot be reloaded. TravelMoney® cards are a hybrid between GPR and gift cards; they can only be reloaded up to three times. All cards carry the Visa or MasterCard acceptance marks.

Corporation A derives income from a variety of fees charged in connection with the issuance and subsequent use of the prepaid cards. The card is issued for a set amount, otherwise known as a fulfillment fee. Once money is loaded onto the card, various transactional fees are collected. These transactional fees include interchange fees (signature fees and PIN purchase fees), monthly service fees, account maintenance fees, lost or stolen card fees, convenience fees, and balance inquiry fees. The company’s transactional fees account for a majority of total revenues whereas the fulfillment fees account for a relatively small portion of total revenue. Corporation A tracks card sales (e.g. fulfillment fees) on a state-by-state basis according to the location of the transaction. The company’s transactional fees are not currently tracked on a state-by-state basis, as systems have not been created to allow for such tracking.

Corporation A’s corporate offices and headquarters are based in Texas. The majority of the company’s employees are stationed at the company’s headquarters. In addition, Corporation A maintains an inventory of its debit cards throughout the U.S. These debit cards are manufactured by various vendors and shipped to the company’s main distribution warehouses. The cards are

stored in the warehouses until they are needed and shipped to retailers throughout the country. Corporation A holds legal title to the inventory during the entire distribution process.

Corporation A employs regional account managers, located in sixteen states, who solicit business from new distributors and maintain relationships with existing distributors. The account managers educate and train the distributors' employees, set sales goals for the distributors, ensure that the distributors have the correct point of sales, and assist the distributors with the marketing of Corporation A's cards.

Transactions

As stated above, Corporation A generates revenue from the following transactions in the ordinary course of business:

1) Sale of Debit Cards (General Purpose Reloadable Cards, Gift Cards, TravelMoney Card, etc.) The card is issued for a set amount, otherwise known as a fulfillment fee.

2) Transactional Revenue

Interchange Fees ("Signature Fees" and "PIN Purchase Fees"). Interchange fees represent a fee charged by the issuing bank to the merchant's bank for processing the cardholder's purchase transaction. The purchase transactions are processed by third party processors. These third party processors are located in various states, and perform the processing services in various locations. Corporation A receives a portion of this interchange fee from the issuing bank via a revenue share agreement.

Service Revenue. The maintenance of the cardholder's account is controlled by Corporation A's proprietary digital processing intellectual property and the company's employees that are located in Texas. The company charges cardholders various service fees associated with the maintenance and use of outstanding cards. The typical service fees charged include the following:

- a. Service fees (per transaction or monthly) - Corporation A charges the cardholder a fee each time the card is used. Alternatively, the customer can pay a monthly service fee that allows for multiple transactions rather than paying a fee on a per transaction basis.

- b. Account maintenance fees - The company charges a cardholder an account maintenance fee for each reloadable card with an inactive balance exceeding 90 days. Gift card accounts are charged an account maintenance fee for inactive account balances exceeding six months.
- c. Lost or stolen card fees - Represents the fee charged a cardholder for replacing a lost or stolen card.
- d. Balance inquiry fees - Represents the service fee charged a cardholder for inquiring into the balance of their account.
- e. Account-to-account transfer fee - Represents the service fee charged a cardholder for transferring funds from one Corporation A cardholder account to another.
- f. Check fee - Represents the service fee charged a cardholder for issuing a check to close an account.

Questions Presented:

How should Corporation A apportion revenue generated from the following transactions:

- 1) Sale of debit cards (general purpose reloadable cards, TravelMoney card, etc.)
- 2) Transactional revenue
 - a. Interchange fees ("Signature Fees" and "PIN Purchase Fees")
 - b. Service fees (per transaction or monthly)
 - c. Account maintenance fees
 - d. Lost or stolen card fees
 - e. Balance inquiry fees
 - f. Account-to-account transfer fee
 - g. Check fee

Answers and Analyses:

In Wisconsin, a single sales factor apportionment formula has been phased-in over a three-year period beginning in 2006. Beginning after December 31, 2007, the apportionment formula is 100% sales. The numerator of the sales factor would include the revenues described above as follows:

1) *Sale of Debit Cards*

Corporation A's sale of debit cards is part of a sale of a bundle of services. The debit card itself is incidental to these services. The sourcing of these services is explained in 2) below.

2) *Fulfillment Fees and Transactional Revenue*

Section 71.25(9)(dh), Wis. Stats. (2007-08), provides that gross receipts from services are in Wisconsin if the purchaser of the service receives the benefit of the service in Wisconsin. If the purchaser of a service receives the benefit of the service in more than one state, the gross receipts from the performance of the service are included in the numerator of the sales factor according to the portion of the service received in Wisconsin.

The benefit of a service is received in Wisconsin if any of the following applies:

- a. The service relates to real property that is located in this state.
- b. The service relates to tangible personal property that is located in this state at the time that the service is received or tangible personal property that is delivered directly or indirectly to customers in this state.
- c. The service is provided to an individual who is physically present in this state at the time that the service is received.
- d. The service is provided to a person engaged in a trade or business in this state and relates to that person's business in this state.

Corporation A's gross receipts from fulfillment fees and transactional revenues are in Wisconsin if its customers receive the benefit of these services in Wisconsin. Based on the provisions of s. 71.25(dh), Wis. Stats. (2007-08), described in a. through d. above, Corporation A would source its fulfillment fees and transactional fees to Wisconsin if the services are sold and used in Wisconsin.

✱ **W0950004** ✱

October 8, 2009

Type Tax: Corporation Franchise and Income Taxes

Issue: Apportionment of cancellation of debt income

Statutes: Sections 71.25 and 71.255, Wis. Stats.
(2007-08, as amended by 2009 Acts 2 and 28)

Administrative Code: Section Tax 2.39(2)(a) and (e),
Wis. Adm. Code (March 2008 Register)

This letter responds to your request for a private letter ruling dated May 8, 2009.

Facts, as provided:

Company A, a State of Delaware incorporated business, is a parent holding company of a federal consolidated group of companies that together create a leading diversified, multistate industrial organization. Ownership is described as follows: several Company B funds and several individuals (hereinafter, "Company B funds") own Company A, which in turn owns 100% of Company C. Company C owns 100% of Company D, and the latter in turn owns 100% of Company E, a disregarded entity. The group's fiscal year is Month 1 to Month 12.

The transactions leading to the cancellation of debt income or discharge of indebtedness income ("COD income") are described as follows:

- 1) Company B funds acquired Company A in Year 1. The acquisition was partially financed with the issuance (by Company D and Company E) of X% Senior Notes due in Year 11 (hereinafter "10-year X% Senior Notes").
- 2) In Year 2, Company A entered into a credit agreement with unidentified parties which provided for Senior Notes due in Year 8 (hereinafter, "6-year Senior Notes"). The stated primary purpose of this transaction was to fund a dividend payment to Company A shareholders and holders of fully vested rollover options.
- 3) In Year 4, approximately two (2) years after the credit agreement and related "6-year Senior Notes", Company D and Company E announced a private exchange offer (hereinafter, "PEO") to exchange (a) newly issued Y% Senior Notes due in Year 9 (hereinafter, "New Senior Notes") for "10-year X% Senior Notes" and (b) "New Senior Notes" for "6-year Senior Notes."

In other words, the "New Senior Notes" would replace any tendered "10-year X% Senior Notes" and "6-year Senior Notes." The stated purposes of this transaction were to (a) reduce and (b) manage the indebtedness of Company A, Company D, and Company E.

- 4) The “PEO” results in COD income to be recognized by Company A and Company D.
- 5) Company A’s activities were described as completely taking place within Delaware. The activities of Company D and Company E were not described.

Question:

Whether the COD income is apportionable income to be included in the combined report or whether the COD income is nonapportionable income to be allocated to Company A’s state of domicile.

Answer:

The COD income is apportionable income to be included in the combined report.

Analysis

Section 71.255(2), Wis. Stats. (2007-08, as amended by 2009 Acts 2 and 28), imposes the requirement of combined reporting on a corporation engaged in a unitary business with one or more other corporations in the same commonly controlled group. Section 71.255(1)(n) defines “unitary business” and it is so defined to include a commonly controlled group. In turn, “commonly controlled group” is defined in sec. 71.255(1)(c). The group identified in the private letter ruling request constitutes a unitary business under sec. 71.255(1)(n) and subject to combined reporting under sec. 71.255(2).

As the private letter request relates to the treatment of COD income, this analysis does not delve into which members of the unitary group are included in the combined group. For purposes of simplicity, it is assumed none of the members of the unitary group are excluded. As such, every member of the unitary business is also a member of the combined group. Suffice it to state that Wisconsin’s combined reporting law does not require that every member of the unitary group be included in the combined report, as provided by secs. 71.255(2) and 71.255(1)(a) and (b). Only members of the combined group are required to report their income and apportionment factors on a combined report. Nonetheless, sec. 71.255(2)(f), grants the Department of Revenue authority to require other members of the unitary business other than “C” corporations to use combined reporting to prevent tax avoidance or evasion.

The combined report shall include the income and apportionment factors as provided under secs. 71.255(3), (4), and (5). Section 71.255(3)(a), provides, in part, that a member of the combined group is responsible for its tax liability a portion of which is derived from the

member’s share of business income of the combined group to which it belongs. Section 71.255(4) provides, in part, that the business income of the combined group is the sum of the income of each combined group member as determined under the Internal Revenue Code and as modified under secs. 71.26 or 71.45. Section 71.22(4)(um), as created by 2009 Wisconsin Act 28, provides that amendments “to the federal Internal Revenue Code enacted after December 31, 2008, do not apply . . . with respect to taxable years beginning after December 31, 2008.” On February 17, 2009, Public Law 111-5, sec. 1231(a), amended sec. 108 of the federal Internal Revenue Code by adding subsection (i), relating to a taxpayer’s election to defer and ratably include COD income arising out of reacquisition of a qualified debt instrument. Therefore, subsection 108(i) of the federal Internal Revenue Code does not apply for Wisconsin purposes.

Section 71.25(5), as amended by 2009 Wisconsin Act 2, sec. 123, provides that, for combined reporting purposes, sec. 71.25 applies in determining the situs of income. Section 71.25(5)(a), provides, in part, that apportionable income includes all income or loss of corporations other than income that is nonapportionable. Section Tax 2.39(2)(a), Wis. Admin. Code (Reg. No. 627, March 2008), also defines “apportionable income” to have the same meaning given in sec. 71.25(5)(a). The definition of nonapportionable income found in sec. 71.25(5)(b), Wis. Stats., and in sec. Tax 2.39(2)(e), Wis. Admin. Code, only encompasses sales, rental, and royalties of nonbusiness real or tangible personal property. It does not include COD income and such income would be apportionable unitary business income. Nonapportionable income, therefore, is deemed to be from sources other than from the unitary business.

Moreover, the subject COD income stems from the readjustment of the unitary business capital structure in the form of, in brief, the issuance of “10-year X% Senior Notes,” a “6-year Senior Notes” credit agreement, and a “PEO” to achieve the stated business objectives of reducing and managing the indebtedness of Company A, Company D, and Company E, each one a member of the unitary group and of the combined group. Further support for the conclusion that COD income is apportionable is found in sec. 71.25(5)(a)22. As the private letter ruling request points out, redemption of corporate bonds is illustrative of apportionable income.

The 2009 Wisconsin Act 28, sec. 1621eb, created sec. 71.255(2m), Wis. Stats. This subsection provides that the designated agent may elect, without first obtaining written approval from the Department of Revenue, to include in its combined group every corporation in its commonly controlled group. Were Company A to make such election, all of the group's income would be apportionable income for purposes of the Wisconsin combined report. Section 71.255(2m) provides, in part, that "all income of all members of the commonly controlled group, whether or not such income would otherwise be subject to apportionment or allocable to a particular state in the absence of an election under this subsection, shall be treated as apportionable income for purposes of the combined report."

Finally, the COD income would ultimately be shared by every member of the combined group, not just Company A and Company D. It may be the case that for federal consolidated return purposes only Company A and Company D report the COD income. For Wisconsin purposes, nonetheless, the COD income would be included in with the rest of the combined unitary income that gets shared by the members of the group. Section 71.255(5)(a), provides that "each member of the combined group is doing business in this state if any member of the combined group is doing business in this state and that business relates to the combined group's unitary business." Since at least one member of the combined group is doing business in this state, Company A and Company D are doing business in this state. Therefore, the COD income is apportionable to Wisconsin and includable in the combined report.