# Wisconsin TAX BULLETIN

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## IPT/DOR Tax Seminar to Be Presented in Madison

The Institute for Professionals in Taxation (IPT), in cooperation with the Wisconsin Department of Revenue (DOR), is presenting a one-day tax seminar in Madison on September 23, 2010, at the Monona Terrace Community and Convention Center. The all-day seminar will include presentations on a variety of topics, including updates on Streamlined Sales Tax, combined reporting, and other multi-state tax issues.

An announcement including the specific agenda and registration information for the seminar will be posted on IPT's and DOR's web site by early August.

## IRS/DOR Workshops in October 2010

The Internal Revenue Service and Wisconsin Department of Revenue will be sponsoring several workshops around the state this fall. The workshops will cover tax law updates, e-filing updates, and other topics of interest to tax practitioners. All tax practitioners are invited to attend. All workshops will run from 9:00 a.m. to 3:30 p.m., dates and locations are as follows:

October 13 – Wausau
North Central Technical College

October 14 – Eau Claire
Ramada Inn Convention Center

October 19 – Madison Area
Epic Systems Corporation (Verona)

October 21 – Appleton
Fox Valley Technical College

October 27 – Milwaukee
Wilson Park Senior Center

Although a live online session will not be offered this year, there are tentative plans to provide a recorded session online. More information and the registration process will be sent through the department's tax practitioner electronic mailing list. If you are not receiving e-mail communications through this mechanism, please sign up today.

## *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 June. The *Sales and Use Tax Report* provides information concerning recent sales and use tax law changes and other pertinent sales and use tax information, including the following:

- A reminder that effective July 1, 2010, the 0.25% local food and beverage tax was increased to 0.5%.
- An overview of the sales and use tax treatment of procurement card programs (this topic was also the subject of an online article in News for Tax Professionals).
- A reminder that retailers may not absorb the sales tax for their customers.
- Clarification how use tax is computed on items previously purchased using an exemption certificate.
- A reminder that the sale of lawn care services is subject to Wisconsin sales tax.

## Updated Publications

The following publications of the Income, Sales, and Excise Tax (IS&E) Division of the Department of Revenue have recently been revised:

**Sales and Use Taxes**

216 Filing Claims for Refund of Sales or Use Tax (5/10)

410 Local Exposition Taxes (5/10)

**Other Topics**

401 Extensions of Time to File (3/10)

511 Office Audit of Wisconsin Income Tax Returns (4/10)

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.

## In This Issue



## DOR Takes On Statewide Debt Collection

Section 71.93 (8), Wis. Stats., as created by 2009 Wisconsin Act 28, required the Department of Revenue (DOR) to, by June 30, 2010, enter into written debt collection agreements with state agencies. 2009 Act 28 also allows counties and municipalities, the Legislature, the courts, and certain authorities to enter into agreements with DOR to collect amounts owed. Debt collection consolidation with DOR allows other governmental entities to utilize and take advantage of efficiencies and automated collection practices that DOR currently has in place.

At least 30 days prior to the referral of debt to DOR for collection, the agency must send the debtor a warning of the potential referral of the debt. The debt must have been reduced to a judgment or the referring agency must have provided the debtor with reasonable notice and an opportunity to be heard with regard to the amount owed. This warning will include potential collection actions DOR may initiate, including but not limited to:

- wage attachment;
- seizing of bank account(s);
- interception of tax refunds; and
- filing of a lien by DOR.

Debt referred to DOR for collection must be more than 90 days past due. Agencies will not refer debt when a repayment plan exists, there are active negotiations with the agency, or if there are on-going administrative proceedings or legal action concerning the debt. A collection fee of 15% of the referred balance will be added to the debtor's balance to cover DOR's collection costs. In addition, if the referring agency assesses interest per statute, DOR will charge the same interest rate.

## 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 October and December. 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.

## Sales and Use Tax Guidelines for Summer Camps

The Department of Revenue has found that many summer camps were not aware of how 2009 Wisconsin Act 2, effective October 1, 2009, affected the Wisconsin sales and use tax due on their sales and purchases. This may have resulted in summer camps collecting and remitting more sales tax on their charges to campers to attend the camps than was due and/or paying less Wisconsin sales or use tax on their purchases than what was due. As a result of this, the department is providing guidelines that summer camps may follow with respect to their sales and purchases.

*(continued on page 3)*

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## Sales and Use Tax Guidelines for Summer Camps

*(continued from page 2)*

An explanation of the proper Wisconsin sales and use tax treatment of sales and purchases by summer camps both prior to and on or after October 1, 2009, is available on the department's web site in an article titled "Summer Camps." For sales occurring prior to October 1, 2009, and on or after December 1, 2010, the proper amount of Wisconsin sales and use tax must be paid to the department based on the information provided in this article. If sales and purchases from October 1, 2009 through November 30, 2010 are treated in a manner consistent with how summer camps were supposed to treat their sales and purchases prior to October 1, 2009, as described in the article, there are two options:

1. Do nothing. The department will not adjust the sales and use tax liability for these items as long as both sales and purchases were treated consistently with these provisions.

2. File a claim for refund for the amount of tax that may have been charged a customer in error. However, Wisconsin use tax would be owed based on the purchase price of the taxable property, items, goods, and services used in operating the summer camp (i.e., purchases of candy, soft drinks, etc.).

   **Caution:** If the sales tax for which a refund is requested was collected from buyers, the tax and related interest refunded by the department must be returned to the buyers from whom the tax was collected, except that the taxes and interest required to be returned to the buyer may be reduced for the amount of tax subsequently due and owing on the purchases of the property, items, goods, and services transferred to the buyers. If the tax and interest is unable to be returned to the buyer, it must be returned to the department.

If no part of the charges to attend a summer camp from October 1, 2009 through November 30, 2010, were taxed and Wisconsin sales or use tax was paid on the purchases of the property, items, and goods used to operate the camp, nothing has to be done since the items were treated consistent with the law changes effective October 1, 2009.

**Example 1:** In June of 2010, Summer Camp A charged Camp Attendee B $4,000 for a 4-week (28 nights) camp program. The $4,000 charge included the camp program and all meals and lodging. The cost of the food, food products, and beverages and labor to make the meals was $200. Summer Camp A charged Camp Attendee B Wisconsin sales tax on $140 relating to the lodging they provided (28 nights times $5 per night) and $220 related to the meals they provided ($200 cost plus 10 percent ($20)). Summer Camp A did not pay any Wisconsin sales or use tax on its purchases of the food, food products, and beverages used to make the meals.

Since Summer Camp A treated their charge to Camp Attendee B and related purchases consistent with how summer camps were supposed to treat their sales and purchases occurring prior to October 1, 2009, Summer Camp A may either:

1. Do nothing. The Department of Revenue will not assess use tax on Summer Camp A's purchases of taxable food and food ingredients since they charged Camp Attendee B sales tax on these products; or

2. File a refund claim for the $18 of sales tax ($360 times 5 percent tax equals $18) charged in error to Camp Attendee B. However, if Summer Camp A files a claim for refund on its sale of the lodging and meals to Camp Attendee B, Summer Camp A is deemed the consumer of the food and food ingredients used to provide the meals and would owe Wisconsin use tax on its cost of the taxable food and food ingredients. In addition, Summer Camp A would be required to refund the net sales tax along with the related interest refunded to them to Camp Attendee B. If they could not return the tax and interest to Camp Attendee B, they would be required to return it to the Department of Revenue.

**Example 2:** Same as Example 1, except that Summer Camp A did not charge Wisconsin sales tax on any part of the $4,000 charge to Camp Attendee B and Summer Camp A properly paid Wisconsin sales or use tax on its purchases of taxable food and food products.

Since Summer Camp A treated the transaction in a manner consistent with the law changes effective October 1, 2009, Summer Camp A does not have to do anything.

## Controlled Group Election Under Combined Reporting

Wisconsin law allows a commonly controlled group of corporations to elect to include every member of the commonly controlled group for combined reporting purposes.

### History

The original act that created Wisconsin's combined reporting law, 2009 Wisconsin Act 2, did not contain the controlled group election. Wisconsin's combined reporting statute, s. 71.255, was shortly thereafter amended by 2009 Wisconsin Act 28 (the 2009-2011 Budget Bill) to include the controlled group election.

### Election

The provisions for the election are found in sec. 71.255(2m), Wis. Stats., as created by 2009 Wisconsin Act 28, and sec. Tax 2.63, Wis. Adm. Code (June 2010 Register). The scope of the election allows every member of the commonly controlled group to be included in the combined group regardless of whether they are all engaged in the same unitary business.

A "commonly controlled group" may be any one of the following, based on ownership of stock representing more than 50% of voting power:

- Parent-subsidiary chain, based on direct or indirect ownership.
- Brother-sister corporations with a single common owner, based on direct or indirect ownership.
- Corporations where stock cannot be separately transferred ("stapled entities").
- Brother-sister corporations owned by, or for the benefit of, family members.

The designated agent of the combined group makes the election. Preapproval of the election by the department is not needed. The designated agent makes the election on Wisconsin Form 4R, *Federal Taxable Income Reconciliation for Wisconsin Combined Groups*, Part I, line 1. For the first year of the election, a statement must be included with Form 4R that (a) lists every corporation that is a member of the commonly controlled group, (b) indicates that each corporation of the commonly controlled group has agreed to be bound by the election, and (c) indicates the election shall apply to any member that subsequently enters the commonly controlled group.

Form 4R must be submitted either with an original return filed by the due date, including extensions, or an amended return filed on or before the end of the automatic 7-month extension period for filing the original return.

**Example:** A combined return without a controlled group election is timely filed without an extension. The designated agent may make the election by filing an amended combined return on or before the end of the automatic 7-month extension period applicable to the original return.

Once the election is made, it is binding and applicable to all commonly controlled group members for ten years. The designated agent may renew the election without prior approval from the department by following the procedures for making the initial election.

The department may disregard, and subsequently revoke, an election if it has the primary effect of tax avoidance rather than simplifying the determination of which items are includable in a combined return. A revocation of an election is applicable to every member of the commonly controlled group, not just the members responsible for the tax avoidance transaction. The commonly controlled group may not make a new election during the three taxable years following a revocation.

### Apportionment and Nexus

Any enterprise engaged in business both in and outside Wisconsin must apportion its apportionable income when the business in Wisconsin is an integral part of a unitary business. For a combined group, nexus is determined for the unitary business as a whole, as provided in sec. 71.255(5)(a), Wis. Stats., as created by Wisconsin Act 2. Hence, if a member of a combined group has nexus in Wisconsin and that nexus is attributable to the combined group's unitary business, all members of the combined group have nexus in Wisconsin.

For a combined group that has made the controlled group election, the entire commonly controlled group's business is deemed to be a single unitary business, and the commonly controlled group becomes the combined group. Therefore, if a combined group has made the controlled group election and at least one member of the combined group has nexus in Wisconsin, all members of the combined group have nexus in Wisconsin.

## Enforcement Report

### Prisoners Facing Tax Fraud Charges Make Court Appearances

Attorney General J.B. Van Hollen made announcements in May and June 2010 concerning the court appearances of four Taycheedah inmates charged with multiple counts of homestead credit tax fraud. The charges were a result of claims that the inmates were living in private residential properties when in reality they were incarcerated.

- Nicole Ousley entered a guilty plea before Judge Robert J. Wirtz. She was convicted and sentenced to twenty four months of incarceration followed by thirty six months of extended supervision.

- Kristine Flynn entered a not guilty plea and a plea of not guilty by reason of mental disease or defect before Fond du Lac County Circuit Court, Branch 4. The court appointed the Wisconsin Forensic Unit to evaluate Flynn's mental status.

- Wendy Nelsen entered a guilty plea before Judge Peter L. Grimm. She was convicted of six counts of homestead credit tax fraud as a repeater on each count. At sentencing she faces a maximum of sixty years imprisonment and $60,000 in fines.

- Amy Prelwitz entered a not guilty plea on charges of tax fraud before Fond du Lac County Circuit Court Judge Peter L. Grimm. A jury trial has been set for August 2010.

These matters were investigated by the Wisconsin Department of Revenue and the Wisconsin State Capitol Police Department. Assistant Attorney General Eric D. Defort represents the State of Wisconsin in these cases.

### Mauston Man Charged With Possession of Unstamped Cigarettes

***Note:*** *Information for the following section of this article was obtained from an entry posted on WRJC.com.*

A Mauston man was charged in June 2010 with possession of unstamped cigarettes, a misdemeanor. According to the criminal complaint, in the fall of 2009 a Special Agent with the Alcohol and Tobacco Enforcement Unit of the Wisconsin Department of Revenue confronted John Randall, the owner of Randall's Uptown Bar, with invoices for the online purchase of 754 cartons of cigarettes. Investigation revealed Randall's Uptown Bar is not a licensed cigarette distributor, and the cigarettes in Randall's possession did not have a tax stamp.

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### Milwaukee Man Pleads Guilty to Tax Fraud

Dwayne Green, 49, pled guilty in June 2010 to filing fraudulent tax claims and identity theft. Green was charged in Milwaukee County with nine felonies alleging that he defrauded the State of Wisconsin out of $79,591.

According to the criminal complaint, between 2005 and 2009 Green filed 44 fraudulent homestead credit claims using stolen identities. The complaint further alleges that between 2004 and 2009 Green was responsible for filing 102 tax returns for other persons in which he claimed fraudulent earned income credits or fraudulent deductions for dependents. The returns showed a pattern of claiming the same persons as dependents on multiple claims.

Green was prosecuted by the Public Integrity Unit of the Milwaukee County District Attorney's Office after an investigation by the Wisconsin Department of Revenue and Wisconsin Department of Justice.

Green is scheduled to be sentenced on August 24, 2010, and faces up to 18 years in prison and $30,000 in fines.

# Report on Litigation

*Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.*

The following decisions are included:



## CORPORATION FRANCHISE AND INCOME TAXES

**Apportionment – income-producing activities.** *Ameritech Publishing, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, June 24, 2010). This is an appeal of a January 6, 2009, order of the Circuit Court for Dane County affirming a February 28, 2008, decision of the Wisconsin Tax Appeals Commission. The Commission's decision and Circuit Court's affirmation were not previously summarized in the *Wisconsin Tax Bulletin*, but the Commission's decision is briefly summarized below.

The issue on appeal is whether directory advertising services from 1994 to 1997 by Ameritech for advertisements in Wisconsin telephone directories constituted the performance of income-producing activities in Wisconsin for corporate franchise tax purposes.

The Commission granted summary judgment to the department on the issue, relying on its prior decision in *The Hearst Corporation vs. Wisconsin Department of Revenue* (see *Wisconsin Tax Bulletin* 69 [October 1990], page 10 for a summary of the decision in *Hearst*). It concluded the income-producing activity occurred in Wisconsin, at the time the Wisconsin users received their advertising directories. Ameritech had complete control over the content of the directories, including the distribution schedule of the directories in Wisconsin by a third party.

The Court of Appeals reviewed the Commission's decision, giving it due weight deference. It concluded the Commission's reliance on *Hearst* and determination the service of providing access to Wisconsin consumers was income-producing activity performed within Wisconsin were reasonable. Although Ameritech's interpretation that part of its income-producing activity was performed outside Wisconsin was also reasonable, it was not more reasonable than the Commission's because it failed to account for the fact the primary income-producing activity was furnishing access to a Wisconsin audience. The Court therefore affirmed the Circuit Court's decision affirming the Commission's decision.

The taxpayer has appealed this decision to the Wisconsin Supreme Court.

## SALES AND USE TAXES

**Admissions.** *Milwaukee Symphony Orchestra, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, May 5, 2010). See *Wisconsin Tax Bulletin* 150 (January 2007), page 31, *Wisconsin Tax Bulletin* 157 (July 2008), page 23, and *Wisconsin Tax Bulletin* 161 (April 2009), page 10, for summaries of the Wisconsin Tax Appeals Commission, Dane County Circuit Court, and Court of Appeals decisions, respectively.

The main issue in this case was whether revenues received by Milwaukee Symphony Orchestra, Inc. ("MSO") from admissions to its concerts are subject to Wisconsin sales tax under sec. 77.52(2)(a)2., Wis. Stats., which imposes Wisconsin sales and use tax on the sale of admissions to amusement, athletic, entertainment, or recreational events or places. The Department of Revenue contended that MSO's performances are *primarily entertainment* in nature. It was the assertion of MSO that its purpose of performing was *primarily educational* in nature.

The Wisconsin Tax Appeals Commission ("the Commission") previously held that admissions to MSO's concerts were subject to sales tax under sec. 77.52(2)(a)2., Wis. Stats., because the concerts were *not primarily educational* events. The Commission separately concluded that the ticket sales to the Milwaukee Symphony Orchestra concerts were taxable as "admissions to musical performances" under sec. Tax 11.65(1)(a), Wis. Adm. Code.

The Circuit Court concluded that the Commission had erred in basing its decision on a distinction between “education” and “entertainment,” when sec. 77.52(2)(a)2., Wis. Stats., does not use the word "education." The Circuit Court remanded the action back to the Commission to develop a standard for determining whether an event is “entertainment” within the meaning of sec. 77.52(2)(a)2., Wis. Stats., and then apply its standard to MSO's concert receipts. The Circuit Court stated that the Commission would be free to conclude that MSO's concerts are taxable entertainment events, but not by applying an educational test that has no basis in the statute.

The Court of Appeals reversed the judgment of the Circuit Court. The Court of Appeals gave the Commission's interpretation and application of the statute due weight deference and held that the Commission's interpretation of the statute is reasonable and that no more reasonable interpretation was available.

The Wisconsin Supreme Court affirmed the decision of the Court of Appeals by giving the Commission's interpretation and application of the statute due weight deference and determined that the Commission reasonably interpreted and applied sec. 77.52(2)(a)2., Wis. Stats. The Wisconsin Supreme Court concluded that the sales of admission to the MSO concerts were sales of admission to "entertainment events" under sec. 77.52(2)(a)2., Wis. Stats., and are, therefore, subject to sales tax.

# 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 – Sellers Who Provide Both Nontaxable Temporary Help Services and Taxable Services

**Note:** This tax release sets forth additional guidance regarding Condition 3, first bullet point, of the tax release titled "Temporary Services," which was published in *Wisconsin Tax Bulletin* 165 (February 2010). See page 8 of *Wisconsin Tax Bulletin* 165.

**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), 11.71(2), and 11.86(6), Wis. Adm. Code (May 2010 Register).

**Wisconsin Tax Appeals Commission Decision:** *Manpower Inc. vs. Wisconsin Department of Revenue* (August 12, 2009) (CCH 401-223).

**Background:** The tax release titled "Temporary Services," published in *Wisconsin Tax Bulletin* 165 (February 2010), pages 6-11, provides information about the sales and use tax treatment of services and provides examples of services that are subject to Wisconsin sales and use taxes. The following excerpt from pages 8 and 9 of the tax release explains the effect of the *Manpower* decision on the services provided by sellers:

> **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 above);
> - The seller is an "employee leasing company" under sec. 102.315(1)(f) of the Wisconsin Statutes. (see definition above); **or**
> - The seller is a "professional employer organization" under sec. 108.02(21e) of the Wisconsin Statutes (see definition above).
>
> **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**; [Emphasis added. See additional guidance in the next column for exception.]

- 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 worker 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.

**Tax Treatment For a Seller Who Provides Both Nontaxable Temporary Help Services and Taxable Services**

A seller is considered to provide nontaxable temporary help services, even though the seller also provides taxable services, under the following conditions:

- For the temporary help services, the seller meets Criteria 1 and 2, above, and also meets the last six requirements listed under Criteria 3 (e.g., the seller's training of its employees is limited to generic training, the seller's clients furnish the tools or equipment for workers to perform the tasks, etc.)

- The taxable services provided by the seller are contracted for separately from the nontaxable temporary help services.

- The taxable services provided by the seller are 10% or less of the seller's business.

**Example 1:** Company A is a "temporary help company" under sec. 108.02(24m) of the Wisconsin Statutes. Company A advertises itself as a temporary help business on its website and in advertisements. For contracts under which Company A provides temporary help services, Company A meets the last six requirements under Criteria 3 above (i.e., Company A's training of its employees is limited to generic training, Company A's clients furnish the tools or equipment for workers to perform the tasks, etc.). However, Company A also provides taxable computer repair services for clients for a fee. With respect to these taxable computer repair services, Company A furnishes the tools for its employees to perform the service, it directs the activities of its employees, it defines the scope of its employees work, and guarantees a satisfactory repair. Company A contracts for these computer repair services separately from the temporary help services. Company A's gross revenues from providing temporary help services are 90% of its total gross revenues. Company A's gross revenues from providing taxable computer repair services are 10% of its total gross revenues. Company A is not liable for sales tax on its receipts from the temporary help services it provides, because the taxable repair services are 10% or less of its business, as shown by its gross revenues from providing such services. Company A is liable for sales tax on its sales price of the computer repair services.

**Example 2:** Same as Example 1, except that Company A's gross revenue from providing taxable computer repair services is 25% of its total gross revenues. Company A is liable for sales tax on its receipts from both the temporary help services and the computer repair services it provides. In this case, the taxable computer repair services performed by Company A are more than 10% of its business.

# 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:

**Sales and Use Taxes**



## ❋ W1020001 ❋

**February 19, 2010**

**Type Tax:** Sales and Use Taxes

**Issue:** Wholesale versus retail transfers of admissions

**Statutes:** Sections 77.51(14)(intro.) and 77.52(2)(a)2.a., Wis. Stats. (2007-08). Section 77.51(14) (intro.), Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2. Sections 77.51(1f)(intro.), (3pf), (9p), and (11d) and 77.52(21), Wis. Stats., as created by 2009 Wis. Act 2.

**Administrative Code:** Section Tax 11.48(2)(e), Wis. Adm. Code (July 2002 Register).

This letter responds to your request for a private letter ruling dated July 27, 2009.

**Facts, as provided by you:**

Company A is taxed as a Subchapter S corporation and has four shareholders. The Company A shareholders and their respective ownership shares are as follows: a) Individual B - 43.85%; b) Individual C - 28.45%; c) Individual D - 7.15%; and d) Individual E - 20.55%.

Company A owns a water and amusement park, featuring go-karts, roller coasters, and various water slides and pools in Wisconsin. Company A sells admissions to its amusement park on a retail basis to individuals and groups. The price for an individual ticket for one day is $X.

In some cases Company A will also sell individual tickets to hotels at a discount and collect and remit sales tax on the discounted price. The hotels will then sell the tickets to their customers at Company A's discounted prices without a mark up as if the hotel was the agent of Company A. Company A will stipulate that these retail transactions are subject to Wisconsin Sales Tax.

In addition to these retail sales Company A has sold admission tickets to various hotels on a wholesale basis where the hotel purchases the tickets at a discounted rate and resells them to their guests. The hotel collects the tax and remits it to the Department of Revenue.

Company A has just begun selling amusement park passes on a wholesale basis under a partnering contract to hotels in the area. By partnering with hotels in the area the management of Company A believes that Company A will be able to increase its sales and net income. The hotels, which partner with Company A, purchase the passes from and transfer them in turn to the hotels' guests. Under these programs hotels will charge a flat all-inclusive rate entitling all guests to an admission to Company A's amusement park and no reduction in the room rate would be allowed for not requesting a pass to Company A's amusement park. Furthermore the hotel would not be allowed to explain to its customers the bargain made between the hotel and Company A.

The hotels and Company A measure the sales, under the partnering contract, from Company A to the hotels in one of three ways. The hotel in some instances will pay Company A a flat fee per week. This flat fee will allow the hotel to transfer a pass to Company A's amusement

park to each of its guests each day. The flat fee will be based on the number of rooms multiplied by a rate per room and the weekly payment will be divided by 13 to lessen the cash outflow of the hotel operator. For example in a 49 unit hotel the annual rate might be $750 per room per summer. The weekly payment under such an arrangement would be $2,827 ((49 x $750)/13).

Under a second method of determining the hotel's obligation to Company A, the hotel will pay a fixed percentage (e.g. 15%) of its room sales for a given period. Under this fixed percentage of room sales as a measure of the wholesale transaction, the hotel could transfer a pass to Company A's amusement park to each of its guests each day.

Under a third method the hotel will pay a fixed price (e.g. $6.50 per guest per day) for every guest who is given a pass to Company A's amusement park.

Additional facts from the copy of the "Partnering Hotel contract" provided are:

1. The hotel must display a Company A Amusement Park Partner logo and Link on its home page of its web site.

2. The hotel must display two 8.5 X 11 displays placed at its check-in counter at all times explaining the All Inclusive Hotel Program to its guests. Company A's amusement park will provide the displays.

3. The hotel must activate and put a wristband on every one of its guests' wrists. Giving the wristband to the guest is not allowed. No exceptions.

4. The hotel must keep the cost of the wristbands confidential and not tell any guest what it charged for the wristband. If asked by its guests how much the hotel pays for this wristband or how much is the room without the wristband(s) included, the proper response is, "It is included in your stay." The hotel may tell its guests if they go to the gate at Company A's amusement park, the value of the wristband is $X per person. This opportunity is purely meant to be an amenity of staying at the hotel property, not an opportunity to charge extra for these wristbands. Any property breaking this simple rule will no longer be allowed to be involved in this program.

5. The hotel must be current on all billing to remain in the program.

**Ruling requested by you:**

You request the Wisconsin Department of Revenue to rule that all of the wholesale transfers, under partnering contracts, to hotels by Company A of admissions to Company A's amusement park do not constitute "retail sales" and are, therefore, exempt from the Wisconsin Sales Tax.

**Ruling:**

A hotel or other lodging provider participating in the "Partnering Hotel Contract" is deemed the consumer of the right of admission to Company A's amusement park represented by the wristbands it purchases from Company A. As such, Company A is making retail sales of such wristbands and is liable for Wisconsin sales tax on its sales of the wristbands it sells under the "Partnering Hotel Contract."

This treatment is applicable to receipts derived from sales occurring prior to, and on and after October 1, 2009.

**Analysis:**

Section 77.52(2)(a)2.a., Wis. Stats. (2007-08), provides that a retailer's gross receipts from its sales of admissions to amusement, athletic, entertainment or recreational events or places, and the furnishing for dues, fees or other considerations, the privilege of access to or the use of amusement, athletic, entertainment or recreational devices or facilities, are subject to the sales tax.

Section 77.51(14) (intro), Wis. Stats. (2007-08), (prior to amendment by 2009 Wis. Act 2) provides, in part, that the terms "sale," "sale, lease or rental," "retail sale," "sale at retail," or equivalent terms include any one or all of the following: 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 77.51(14)(intro.), Wis. Stats. (2007-08), as amended by 2009 Wis. Act 2, provides, in part, that the term " 'sale' includes any of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property, or items, property, or goods under sec. 77.52(1)(b), (c), or (d), or services for use or consumption but not for resale as tangible personal property, or items, property, or goods under sec. 77.52(1)(b), (c), or (d), or services. …"

Section 77.51(1f) (intro.), Wis. Stats., as created by 2009 Wis. Act 2, provides, in part, that: " 'Bundled transaction' means the retail sale of 2 or more products, not including real property and services to real property, if the products are distinct and identifiable products and sold for one nonitemized price. …"

Section 77.51(3pf), Wis. Stats., as created by 2009 Wis. Act 2, provides, in part, that: " 'Distinct and identifiable product' does not include any of the following:…
(b) A product that is provided free of charge to the consumer in conjunction with the required purchase of another product, if the sales price of the other product does not vary depending on whether the product provided free of charge is included in the transaction."

Section 77.51(9p), Wis. Stats., as created by 2009 Wis. Act 2, provides that: " 'One nonitemized price' does not include a price that is separately identified by product on a binding sales document, or other sales-related document, that is made available to the customer in paper or electronic form, including an invoice, a bill of sale, a receipt, a contract, a service agreement, a lease agreement, a periodic notice of rates and services, a rate card, or a price list."

Section 77.51(11d), Wis. Stats., as created by 2009 Wis. Act 2, provides that: "For purposes of subs. (1f), (3pf), and (9p) and ss. 77.52(20) and (21), 77.522, and 77.54(51) and (52), 'product' includes tangible personal property, and items, property, and goods under s. 77.52(1)(b), (c), and (d), and services."

Section 77.52(21), Wis. Stats., as created by 2009 Wis. Act 2, provides that: "A person who provides a product that is not a distinct and identifiable product because it is provided free of charge, as provided in s. 77.51(3pf)(b), is the consumer of that product and shall pay the tax imposed under this subchapter on the purchase price of that product."

(**Note:** Those sections of the statutes amended by or created by 2009 Wis. Act 2 are effective on October 1, 2009 and thereafter.)

Section Tax 11.48(2)(e), Wis. Adm. Code (July 2002 Register), provides that: "Hotels, motels and inns are the consumers of all the items used to conduct their business, such as beds, bedding, equipment, advertising materials, supplies and items consumed by the occupants of a room. The tax applies to their purchases of all these items."

**Prior to October 1, 2009:**

Pursuant to sec. Tax 11.48(2)(e), Wis. Adm. Code, a hotel or other lodging provider participating in the "Partnering Hotel Contract" is deemed the consumer of the right of admission to Company A's amusement park represented by the wristbands purchased.

**October 1, 2009 and thereafter:**

Section 77.51(3pf), Wis. Stats. (2007-08), as created by 2009 Wis. Act 2, provides that the term "distinct and identifiable product" does not include a product that is provided free of charge to the consumer in conjunction with the required purchase of another product, if the sales price of the other product does not vary depending on whether the product provided free of charge is included in the transaction. As such, the wristbands furnished free of charge by the partnering hotel are not a "distinct and identifiable product," since they are furnished without charge in connection with the required purchase of lodging, and the price of the lodging does not vary depending on whether the wristbands are included in the transaction.

As the wristbands are not a distinct and identifiable product, sec. 77.52(21), Wis. Stats., as created by 2009 Wis. Act 2, stipulates that the partnering hotel is the consumer of the wristbands, and shall pay the tax imposed under this subchapter on the purchase price of that product.

## ❋ W1025002 ❋

**March 24, 2010**

**Type Tax:** Sales and Use Taxes

**Issue:** Computer software and services

**Statutes:** Section 77.51(20), Wis. Stats. (2007-2008), as amended effective October 1, 2009, by 2009 Wis. Act 28. Section 77.52(2)(a), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28.

**Administrative Code:** Section 11.71(2)(c) and (3)(d), Wis. Adm. Code (April 1993 Register), as amended by EmR0924.

This letter responds to your request for a private letter ruling dated January 7, 2010. In your letter, you request clarification of the sales and use tax treatment of transactions relating to Company A.

**Facts, as provided in your letter:**

Company A, formally known as Company B, is a corporation that markets and maintains Account Management System ("AMS"). AMS includes a software-supported service for customers that helps automate the customer‘s sales, parts, accounting, and other functions. It also includes related support, forms, programming, training, data conversion, and other services. AMS is also used to communicate with customers’ manufacturers with respect to items such as sales, data, parts, and inventory. Company A’s existing customers use the AMS and related services through an Application Service Provider ("ASP") type model which is described in greater detail below.

AMS consists of several different components. On an ongoing basis, the two primary components are a software-supported customer management service (the "Base Service") and 24/7 Internet and phone-based customer support to address issues related to use of the Base Service and related products or services ("Support"). The Base Service and Support are itemized separately on the governing service agreements and invoices, and the Base Service can be ordered and will function absent Support.

For ASP customers, the software supporting the Base Service, or base software, resides on servers owned and maintained by Company A in the State of Nevada. The Base Service includes (a) a nontransferable right to use the base software to access, add to, subtract from and otherwise use the database containing that customer's data and (b) a commitment by Company A to maintain its servers and to backup and provide continuous access to the base software and customers' databases during the term of the agreement. Customers access the base software and data files through the use of the Internet. Customers do not have the right to take possession of the base software.

The database servers are not dedicated to a specific customer. Nor are customers allowed a specified amount of server space, a specified server or a dedicated portion of a specified server. Company A can move customer data to different servers at different locations, add servers, delete servers or otherwise modify all aspects related to its hosting and storage of the customer data. Company A at all times controls where data is processed and stored, and the customers do not have the ability to add, delete, or otherwise modify the files stored on the servers other than through their use of the Base Service.

At the time of ordering the Base Service, customers may require set up of, and training on, the Base Service. Customers may be charged any combination of the following one-time fees depending upon the specific facts and circumstances of the customer:

1. Set Up: Fees charged to prepare, configure, and set up the customer's data files on a server and configure the initial business rules. This service is an optional service and is purchased only at the request of the customer of the Base Service.

2. Training: Fees charged for training on the Base Service. Included in the training fee, but not specifically broken out as separate component, are all out of pocket costs for travel, lodging, and meals incurred by the Company A staff while providing on site training. This service is an optional service and is purchased only at the request of the customer of the Base Service.

3. Data Migration: Fees charged to migrate data from the format of the prior service provider. Fee may not be applicable to all customers and is separately stated on invoices.

4. Forms Programming: Fees charged for the initial programming of the customer's forms to function with the AMS (if requested). The calculation for the Forms Programming Fee (# of Forms) is separately set forth in the purchase schedule.

5. Other: Any other fees charged, as specifically requested by the customer related to the installation of the software, not specifically identifiable to a group above.

In addition to the one-time fees described above, Company A negotiates and charges its customers an Application Service Fee and, if requested, a Support Fee, as follows:

1. Application Service Fee: To access via the Internet and use the base software for the Base Service solely for the customer's internal use and only at or from customer's site. This also includes a commitment by Company A to maintain, and provide ongoing access to, servers hosting the base software and the customer databases, and for any updates for the base software.

2. Support Fee: To receive 24/7 Internet and phone support for the Base Service and other services a customer may be receiving from Company A.

**Question:** Based on the descriptions of services provided in the *Facts*, are the following fees charged by Company A subject to Wisconsin sales and use taxes?

**A.** Application Service Fee

**B.** Support Fee

**C.** Set-Up Fee

**D.** Training Fee

**E.** Data Migration Fee

**F.** Forms Programming Fee

**G.** Other Fees

**Answer:** No. Company A's sales of the services identified in A. through G., above, are not subject to Wisconsin sales or use taxes.

**Analysis:**

***Application Service Fee***

A company may provide services which permit persons at different locations to access the same software through remote access by telephone lines, microwave, or other means. Such services are not subject to Wisconsin sales or use tax when (1) the persons or the persons' employees who have access to the software are not located on the premises where the equipment/software is located and do not operate the equipment or control its operation, and (2) software that is downloaded or physically transferred to the customer or the customer's computers is incidental to the data processing services (that is, used solely to allow access to the service provider's hardware and software).

Section Tax 11.71(3)(d), Wis. Adm. Code (April 1993 Register), as amended by EmR0924, provides that time-sharing services, which permit persons at different locations to access the same computer through remote access by telephone lines, microwave, or other means, are not subject to sales or use tax when a person or that person's employees, who have access to the equipment:

- Are not located on the premises where the equipment is located, and
- Do not operate the equipment or control its operation.

This same analogy can be applied to the sharing of computer software.

The lease of tangible personal property (e.g., computer hardware, prewritten computer software*) is subject to Wisconsin sales or use tax, unless an exemption applies. For example, a customer may have control over computer hardware and software it accesses from a remote location, if that person has unlimited access to the server, loads its own software, is responsible for security measures regarding its use of the computer equipment and software, and decides how, when, and where its output will be provided through its own manipulation of the software. In such cases, the seller is leasing tangible personal property to its customer. Based on the fact that you provided that Company A merely sells access to the AMS, Company A is not leasing tangible personal property.

*Prewritten computer software is deemed to be tangible personal property, as provided in sec. 77.51(20), Wis. Stats. (2007-08), as amended effective October 1, 2009, by 2009 Wis. Act 28.

***Support Fee***

Company A is not providing a taxable service when it is providing technical support via the Internet and telephone that consists of informing the customer how to solve a problem and, based on the instructions provided, the customer performs the functions necessary to correct the problem. **Note:** Telephone support that consists of Company A's support personnel providing a service to its customer's equipment or prewritten software is subject to tax. For example, if the customer calls for support and Company A's employee connects by modem from a remote location to the customer's computer or equipment, inspects the hardware or prewritten software, and corrects the customer's problem, Company A is providing a taxable service to tangible personal property.

***Set-Up Fee***

The set-up services that consist of data configuration and data processing are not subject to Wisconsin sales or use taxes. Only services specifically listed in sec. 77.52(2)(a), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28, are subject to Wisconsin sales or use tax. Data configuration and data processing are not listed as taxable services under sec. 77.52(2)a), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28.

***Training Fee***

Section Tax 11.71(2)(c), Wis. Adm. Code (April 1993 Register), as amended by EmR0924, provides, in part, that "…training services are not taxable."

***Data Migration Fee***

Data migration is not listed as a taxable service under sec. 77.52(2)(a), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28.

***Forms Programming Fee***

The forms programming fees that consist of computer programming, data processing, and data entry are not listed as taxable services under sec. 77.52(2)(a), Wis. Stats. (2007-08), as affected by 2009 Wis. Acts 2 and 28.

***Other Fees***

Other fees that Company A charges its customers relating to the installation of the software owned by Company A and maintained by Company A's employees on Company A's servers in Nevada that Company A uses in providing its service to its customers is not subject to Wisconsin sales or use taxes.