



## 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

Wholesale versus retail transfers of admissions  
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Computer software and services  
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### ✧ 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.