

Wisconsin Tax Bulletin

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Applicable Laws and Rules

This document provides statements or interpretations of the following provisions of Wisconsin Statutes and Administrative Rules in effect as of June 30, 2019: Chapters 66, 71, 73, 77, 78, 139, and 177, Wis. Stats., and ch. Tax 2, Wis. Adm. Code.

Laws enacted and in effect after July 15, 2019, new administrative rules, and court decisions may change the interpretations in this document. Guidance issued prior to July 15, 2019, that is contrary to the information in this document is superseded by this document, pursuant to sec. 73.16(2)(a), Wis. Stats.

Certification Statement

As the Secretary of the Wisconsin Department of Revenue (DOR), I have reviewed this guidance document or proposed guidance document and I certify that it complies with secs. 227.10 and 227.11, Wis. Stats.. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

DEPARTMENT OF REVENUE



Peter Barca
Secretary of Revenue

New Income and Franchise Tax Laws

Business Moving Expenses Disallowed

([2019 Wis. Act 7](#), create secs. 71.01(8j), 71.05(6)(a)29., 71.21(7), 71.26(3)(e)4., 71.34(1k)(o), and 71.45(2)(a)20., effective for taxable years beginning on or after January 1, 2019)

The amount deducted under the Internal Revenue Code as moving expenses, as defined in sec. 71.01(8j), Wis. Stats., paid or incurred during the taxable year to move the taxpayer's Wisconsin business operation, in whole or in part, to a location outside Wisconsin or to move the taxpayer's business operations outside the United States, must be added back to Wisconsin income.

Pursuant to sec. 71.01(8j), Wis. Stats., "Moving expenses" means all of the following:

- Vehicle rentals
- Storage rentals

- Moving company expenses for packing, unpacking, and transportation
- Consulting fees and surveys
- Brokerage commissions or fees
- Architecture, design, and remodeling expenses
- Expenses paid or incurred to sell property in this state
- Loss on the sale of property in this state
- Lease cancellation fees
- Expenses paid or incurred for professional services, including legal services
- Utility fees
- Employee wages
- Reimbursement of an employee's expenses
- The cost of meals, lodging, and fuel
- Mileage deductions for vehicle use

Individual and Fiduciary Income Tax Rate Decrease

([2019 Wis. Act 9](#), amend sec. 71.06(1q)(b), (2)(i)2., and (2)(j)2., effective for taxable years beginning on or after January 1, 2019)

The individual income tax rate for the second tax bracket is decreased from 5.84 percent to 5.21 percent. The decreased rate applies as follows:

- Fiduciaries, single individuals, and heads of households – On all taxable income exceeding \$7,500 but not exceeding \$15,000
- Married persons filing joint returns – On all taxable income exceeding \$10,000 but not exceeding \$20,000
- Married persons filing separately – On all taxable income exceeding \$5,000 but not exceeding \$10,000

Additional Individual and Fiduciary Income Tax Rate Decrease

([2019 Wis. Act 10](#), renumber and amend sec. 73.03(71)(a) to (d), and create sec. 73.03(71)(a)2., (b)2., (c)2., and (d)2., effective July 5, 2019)

The individual income tax rates for the first and second tax brackets under sec. 71.06, Wis. Stats., are reduced for taxable year 2019 and again for taxable year 2020 based on estimated amounts of additional sales and use tax revenue reported to the department from out-of-state retailers and marketplace providers, as defined in sec. 77.51(7i), Wis. Stats., as a result of the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, that expands Wisconsin's authority to require out-of-state retailers to collect and remit Wisconsin sales and use taxes. The individual income tax rates in effect for taxable year 2020 will remain for each taxable year going forward.

Taxable Year 2019

The reduction to the individual income tax rates under sec. 71.06, Wis. Stats., for taxable year 2019 is based on the additional estimated sales and use taxes reported for sales occurring October 1, 2018, through September 30, 2019.

The department will determine the reduction to the income tax rates no later than October 20, 2019. After review by the Legislative Audit Bureau (LAB), the income tax rates will be determined no later than November 10, 2019.

Taxable Year 2020

The reduction to the individual income tax rates under sec. 71.06, Wis. Stats., for taxable year 2020 is based on the additional estimated sales and use taxes reported for sales occurring October 1, 2019, through September 30, 2020.

The department will determine the reduction to the income tax rates no later than October 20, 2020. After review by the Legislative Audit Bureau (LAB), the income tax rates will be determined no later than November 10, 2020.

Tax-Exempt Bonds

([2019 Wis. Act 9](#), create secs. 71.05(1)(c)14., 71.26(1m)(o), and 71.45(1t)(n), effective for taxable years beginning on January 1, 2019)

Interest received on bonds or notes issued by the Wisconsin Health and Education Facilities Authority under sec. 231.03(6), Wis. Stats., are exempt for Wisconsin income tax purposes if the bonds or notes are issued in an amount totaling \$35,000,000 or less, and to the extent that the interest income received is not otherwise exempt.

New Sales and Use Tax Laws

Marketplace Providers

([2019 Wis. Act 10](#), repeal sec. 77.51(13b), renumber and amend sec. 73.03(71)(a) to (d), amend secs. 66.0615(1m)(f)2., 77.51(11d), and (13)(intro.), (a), and (c), 77.982(2), 77.991(2), and 77.9951(2), and create secs. 66.0615(1m)(g), 73.03(71)(a)2., (b)2., (c)2., and (d)2., 77.51(7i), (7j), (13)(p)7. and (q), (14)(n)7., and (17)(g), 77.52(3m) and (14)(c), 77.523, and 77.585(1g) and (11), effective January 1, 2020)

The Act clarifies that a marketplace provider is required to collect and remit sales or use tax on the entire amount charged to a purchaser for all sales of taxable products and services in Wisconsin that the marketplace provider facilitates on behalf of a marketplace seller. The Act reverses the effect of the decision in *Orbitz, LLC vs. Wisconsin Department of Revenue*, (Wisconsin Court of Appeals, District IV, February 11, 2016) by requiring marketplace providers that facilitate sales of lodging services to collect and remit sales or use tax on the entire amount charged to a purchaser. The Act also repeals the exception in the law that certain retailers are not required to collect tax on sales made on behalf of third-party sellers if the retailer or one of its affiliates operates a distribution facility and has no locations in which customers take possession of products.

"Marketplace provider" means any person who facilitates a retail sale by a seller by listing or advertising for sale by the seller, in any manner, tangible personal property, or items, property, or goods under sec. 77.52(1)(b), (c), or (d), Wis. Stats., or a service specified under sec. 77.52(2)(a), Wis. Stats., and, who directly or indirectly, through agreements or arrangements with third parties, processes the payment from the purchaser for the retail sale, regardless of whether the person receives compensation or other consideration in exchange for the services provided by the person. The following provisions apply to marketplace providers:

- The marketplace provider is required to notify the marketplace seller that the marketplace provider is collecting and remitting the tax.
- The marketplace provider shall maintain exemption certificates from purchasers claiming an exemption for sales facilitated on behalf of marketplace sellers.
- The marketplace provider may claim a bad debt deduction for a sales transaction facilitated on behalf of a marketplace seller, if either the marketplace provider or seller may claim a deduction under section 166 of the Internal Revenue Code for the sales transaction.
- The marketplace provider may, under certain conditions, apply for a waiver from collecting and remitting the tax if the department is satisfied that the marketplace sellers will collect and remit the tax.
- Only the marketplace provider may be audited and held liable for the tax, unless it can demonstrate that the error is due to insufficient or incorrect information provided by the marketplace seller.

"Marketplace seller" means a seller who sells products through a physical or electronic marketplace operated by a marketplace provider, regardless of whether the seller is required to be registered with the department. The following provisions apply to marketplace sellers:

- The marketplace seller can be audited and held liable for the tax on sales facilitated on its behalf by a marketplace provider if it provides insufficient or incorrect information to the marketplace provider.
- The marketplace seller is allowed a deduction on its sales and use tax return for the amount of the sales price for which it was notified that the marketplace provider is collecting and remitting the tax.
- If the marketplace provider is granted a waiver by the department from collecting and remitting the tax, the marketplace seller shall collect and remit the tax on the entire sales price charged to the purchaser.

The estimated amount of additional sales and use tax revenue reported by marketplace providers will be used to reduce individual income tax rates under sec. 71.06, Wis. Stats. For information about the income tax rate reductions, see the article above titled, *Additional Individual and Fiduciary Income Tax Rate Decrease*.

Note: For sales made prior to January 1, 2020, a marketplace may be liable for sales or use tax on taxable sales that it facilitates on behalf of third-party sellers. The third-party seller may also be liable for the tax. When more than one party is liable for the tax, the liability for the tax is extinguished for both parties when either party remits the tax to the department. See the article titled, [Online Marketplace Sellers Are Liable for Wisconsin Tax on Third-Party Sales](#) on the department's website.

The department is developing resources, including a web page and answers to common questions, to assist marketplace providers and sellers.

Department Authority to Grant One-Time Relief of Additional Sales Tax Discovered in a Field Audit

([2019 Wis. Act 10](#), create sec. 73.03(74), first applies to written notices of audit determinations made on or after October 1, 2019)

The department is authorized to provide a one-time reduction from the total tax due in a written notice by the department of an audit determination under sec. 77.59(2), Wis. Stats., equal to 10 percent of the additional sales tax imposed under sec. 77.52, Wis. Stats., for each year of the audit period, if the annual gross sales of the person being audited are less than \$5,000,000 for each year of the audit period and, at the time that the department sends notification of examination under sec. 77.59(2), Wis. Stats., the department has received all returns required under ch. 77, Wis. Stats., from the person being audited for the entire audit period. Each person eligible for a reduction is entitled to only one such reduction.

Disclosure of a Retailer's Sales Tax Liability

([2019 Wis. Act 15](#), create sec. 77.61(5)(b)14., effective July 12, 2019)

A person, or authorized agent of a person, may request a retailer's outstanding tax liability under subch. III of ch. 77, Wis. Stats., in order to comply with the withholding and tax liability requirements under sec. 77.52(18), Wis. Stats., if the following apply:

- The person intends to purchase or has purchased a retailer's business or stock of goods, or the person will be the successor or assignee of the retailer, **and**
- The person provides the department written documentation signed by the retailer that acknowledges the person as a purchaser or potential purchaser, successor, or assignee.

New Excise Tax Laws

Imposition of Excise Tax on Vapor Products

([2019 Wis. Act 9](#), amend secs. 139.75(1), (2), (4)(a) to (c), (5), (6), (7), (8), (9), (10), (11), and (13), 139.76(1) and (2), 139.77(1), 139.78(1) and (2), 139.79(1) and (3), 139.80, 139.801(1), (3)(a) to (c), and (4), 139.802, 139.803(intro), (4), and (5), 139.805, 139.81(1) and (3), 139.82(1), (2), and (8), and create secs. 139.75(14), 139.76(1m), and 139.78(1m), effective October 1, 2019)

The Act creates an excise tax on vapor products, defined as "a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element, regardless of whether the liquid or substance contains nicotine."

The tax is imposed on the sale of vapor products at the rate of 5 cents per milliliter of the liquid or other substance based on the volume listed by the manufacturer and at a proportionate rate for any other quantity or fractional part thereof. The tax applies to vapor products as of October 1, 2019, and the filing deadline for the October return is November 15, 2019.

Distributors of vapor products are required to obtain a distributor's permit and must file returns showing the quantity and taxable price of milliliters of vapor products brought, shipped or transported into Wisconsin for sale in the state, or vapor products made, manufactured, or fabricated in Wisconsin for sale in the state.

Vapor product retailers purchasing untaxed vapor products are required to obtain a distributor's permit and must file returns showing the quantity and taxable price of milliliters of vapor products brought, shipped or transported into Wisconsin for sale in the state, or vapor products made, manufactured, or fabricated in Wisconsin for sale in the state.

Distributors and retailers of vapor products that currently hold a tobacco products distributor permit do not need to apply for a new permit for vapor products.

The department is developing the application, tax forms, and additional guidance to assist manufacturers, distributors, and retailers. This web page will be updated when new information is available: <https://www.revenue.wi.gov/Pages/Businesses/Tobacco.aspx>.

Motor Vehicle Fuel Suppliers Administrative Allowance

([2019 Wis. Act 9](#), amend sec. 78.12(4)(a)2., and (4)(a)3., effective January 1, 2020)

The Act reduces the administrative allowance that licensed fuel suppliers may deduct when remitting the motor vehicle fuel tax on gasoline from 1.35 percent to 0.675 percent of the number of gallons of gasoline received for the taxable period.

Motor Vehicle Fuel Retailer Refunds

([2019 Wis. Act 9](#), repeal sec. 78.20, amend sec. 78.68(10), and create sec. 78.20(6), effective January 1, 2020)

The Act repeals the refund equal to 0.5 percent of tax allowed to be claimed by motor vehicle fuel retailers to cover shrinkage and evaporation losses on tax-paid gasoline received into the retailer's storage. Retailers may not file claims for refund after December 31, 2019.

General Updates and Reminders

Unclaimed Property Holder Reporting Reminder

Pursuant to sec. 177.17(5), Wis. Stats., unclaimed property holders are required to make a good faith effort to locate owners of abandoned property. A notification letter must be sent to owners of properties valued at \$50 or more and be sent between July and September to provide sufficient time for a response from the owner for purposes of determining whether the property must be reported to the department by November 1.

See Part 4 in [Publication 82](#), *Unclaimed Property Holder Report Guide*, for additional information on the holder reporting process and Appendix 3 for a sample letter.

Income and Franchise Tax Updates and Reminders

Filing 2018 Entity-Level Tax Returns for Tax-Option (S) Corporations

On December 14, 2018, Governor Scott Walker signed [2017 Wis. Act 368](#). The law provides an entity-level tax election available to tax-option (S) corporations for taxable years beginning on or after January 1, 2018, and partnerships for taxable years beginning on or after January 1, 2019.

Tax-option (S) corporations making an entity-level tax election for the 2018 taxable year, must compute tax on 2018 Schedule 5S-ET, *Entity-Level Tax Computation*. As of July 16, 2019, the 2018 Schedule 5S-ET is finalized and programmed and the department is accepting and processing 2018 Form 5S returns making the entity-level tax election.

Authorization to Discuss Wisconsin Corporate or Partnership Tax Return Information

As required by sec. 71.78(1), Wis. Stats., the department may not divulge information derived from an income, franchise, or partnership tax return, unless an exception applies. The following exceptions apply to Wisconsin corporate and partnership tax returns.

Discussing Wisconsin Corporate Tax Returns

The department may discuss information about a Wisconsin corporate tax return with the following:

- The officer that signed the corporate return
- Other officers of the corporation that submit proof of being an officer of the corporation
- The designated agent listed on Form 6, *Wisconsin Combined Corporation Franchise or Income Tax Return*
- The contact person identified on line 48 of Form 4, *Wisconsin Non-Combined Corporation Franchise or Income Tax Return*, or line 1, *Additional Information Required*, on page 2 of Form 5S, *Wisconsin Tax-Option (S) Corporation Franchise or Income Tax Return*
- The corporation's power of attorney(s) on file with the department
- Third-party designee identified on the corporate return*
- Employees of the corporation calling to discuss a letter or notice issued by the department

Discussing Wisconsin Partnership Tax Returns

The department may discuss information about a Wisconsin partnership tax return with the following:

- The partner that signed the partnership return
- Other managing partners of the partnership that submit proof of being a managing partner of the partnership
- The contact person identified on page 4 of Form 3, *Wisconsin Partnership Return*

- The partnership's power of attorney(s) on file with the department
- Third-party designee identified on the partnership return*
- Employees of the partnership calling to discuss a letter or notice issued by the department

* If a third-party designee is assigned on a Wisconsin corporate or partnership tax return, see article *Third-Party Designee Authorization*, on page 4 of [Wisconsin Tax Bulletin 205](#) (April 2019), for information on a third-party designee's authorization to discuss tax return information with the department.

File a Short-Period Corporate Tax Return on the Correct Year Form

Short-period corporate tax returns are often necessary when a corporation changes its structure or accounting period. When filing a short-period corporate tax return, mark the appropriate check box on page 1 of the return. Use Box D on Form 4 or Form 6 and Box A on Form 5S.

Note: The department cannot accept corporate tax returns submitted on a form with a different tax year other than the tax period being reported (e.g., a short-period corporate tax return beginning January 1, 2019, and ending March 15, 2019, must be submitted on a 2019 form). Pursuant to sec. Tax 2.03(1), Wis. Adm. Code, tax returns shall only be filed using the forms prescribed by the department. The department's instructions for Forms 4, 5S, and 6 require taxpayers to wait to file until the correct tax year form is available and the Modernized eFile (MeF) Fed/State program has been updated to include the correct tax year. If the correct form is not yet available, sec. 71.24(7), Wis. Stats., provides for an automatic seven-month extension.

Caution: Pursuant to sec. Tax 2.67(2)(b), Wis. Adm. Code, combined corporate tax returns are required to be filed electronically. Failure to file a short-period combined corporate tax return electronically on the correct year form will result in a rejection of the return. The department will not grant a waiver from electronic filing a short-period return.

Copies of Tax Returns or Forms W-2 Must Be Requested Electronically

The department has a new My Tax Account application for requesting copies of previously filed tax returns and Forms W-2. This application is secure, mobile friendly and replaces the paper Form P-521, *Request for Copy of Tax Returns*. The search fee remains \$5.00 for each year or period requested (\$6.00 if requesting certified copies). All requested documents are sent by mail.

If a taxpayer does not have access to a computer, he or she can call Customer Service at (608) 266-2486, and a representative will enter the request on his or her behalf.

For more information, common questions for requesting copies of previously filed tax returns are available on the department's [website](#).

My Tax Account - Qualified Wisconsin Business Registration

An individual taxpayer may defer capital gains that are invested in a qualified Wisconsin business, or exclude capital gains from the sale of an investment in a qualified Wisconsin business as provided in sec. 71.05(25) and (26), Wis. Stats. Pursuant to sec. Tax 2.986(4)(a), Wis. Adm. Code, a business must register with the department for each tax year it seeks to be a qualified Wisconsin business. Recent improvements were made to the online application in My Tax Account that will reduce the need for follow-up correspondence between the business and the department.

- Applicants are able to indicate if the business's employees are employed through a professional employer organization (PEO) or a professional employer group (PEG).
- Applicants are able to indicate if the business started operations in Wisconsin in the prior year.

Sales and Use Tax Updates and Reminders

Outagamie County Tax Begins January 1, 2020

Beginning January 1, 2020, the 0.5% county tax will be in effect in Outagamie County. This brings the number of counties that have adopted the county tax to 67.

Information about which sales and purchases are subject to the county tax and transitional provisions that apply to Outagamie County sales can be found in Wisconsin [Publication 201](#), *Sales and Use Tax Information*.

Motor Vehicle Dealer's Measure of Use Tax Increases to \$165 for 2020

Wisconsin licensed motor vehicle dealers are permitted to report use tax on a fixed dollar amount per plate per month for the use of motor vehicles assigned to certain employees and dealership owners.

Effective January 1, 2020, the amount subject to use tax is increased from \$162 to \$165 per plate per month. To calculate use tax, \$165 is multiplied by the appropriate use tax rate (5%, 5.1%, 5.5%, or 5.6%) to arrive at the use tax due per plate per month.

Pursuant to sec. 77.53(1m)(a), Wis. Stats., the department must annually adjust the amount subject to use tax to reflect the annual percentage change in the U.S. Consumer Price Index for All Urban Consumers, U.S. City Average, as determined by the U.S. Department of Labor for the 12-month period ending June 30. Because the index changed over this period by 1.6%, the measure of use tax is adjusted to \$165 as of January 1, 2020, ($\$162 \times (256.143/251.989)$, rounded to the nearest dollar).

Vendors Doing Business with State Agencies and Authorities

Pursuant to sec. 16.75(10m), Wis. Stats., Wisconsin State agencies and authorities cannot purchase any materials, supplies, equipment, or contractual services from vendors if the vendor and its affiliates are not registered, collecting, and remitting Wisconsin sales or use tax on sales of tangible personal property and taxable services in Wisconsin.

The department has been contacting vendors who have previously made sales to Wisconsin agencies and authorities. The vendors are being requested to complete a Form A-001, *Registration Verification*, and if necessary, a Form A-002, *Affiliate Registration Verification*, Form A-006, *Affidavit of Exempt Sales*, and/or Form BTR-101, *Application for Wisconsin Business Tax Registration*.

Form A-001 is needed from all vendors, even those who are currently registered with the department or who sign Form A-006, because the registration verification includes information about any affiliates the vendor may have. The information may also be used to determine filing requirements for all Wisconsin tax types.

Under sec. 77.66, Wis. Stats., the Secretary of Revenue is required to periodically certify to the Secretary of Administration the names of vendors and their affiliates who are not properly registered and remitting Wisconsin sales or use tax or who have not provided the department with Form A-006.

Whether an out-of-state vendor has nexus with Wisconsin or is required to collect and remit Wisconsin sales or use tax has no effect on this vendor law. Wisconsin state agencies and authorities cannot make purchases from vendors that are not registered, collecting, and remitting Wisconsin sales or use taxes.

If you are a vendor that sells to Wisconsin agencies and authorities, and you have not been contacted by the department, you can visit the department's [website](#) to obtain the necessary form(s) described above. For more information, common questions on vendors doing business with Wisconsin are available on the department's [website](#).

Rental of Multipurpose Facilities

The rental of multipurpose facilities are taxable when the rental fee provides access to or use of the facility for amusement, athletic, entertainment or recreational purposes, as provided in sec. 77.52(2)(a)2., Wis. Stats. Such rentals include a large hall, banquet room, or barn that is rented for special events like a wedding reception, birthday party, family reunion, holiday party, or similar gathering.

Separate and option fees for certain services and/or property from the rental of a multipurpose facility are taxable. Examples include:

- Rental of tangible personal property, such as chairs, chair covers, tables, table linens, and other furniture or equipment
- Sale of decorations, disposable napkins, and dinnerware
- Sale of alcoholic beverages, such as beer, liquor, and wine
- Bartender services
- Prepared food and catering

For more information see [Fact Sheet 2107](#), *Rentals of Multipurpose Facilities*, [Publication 236](#), *Restaurants and Bars*, and [Publication 201](#), *Wisconsin Sales and Use Tax Information*.

Garage Sales, Flea Markets, Rummage Sales, and Swap Meets

If you sell personal household items such as housewares, dishes, and clothing, your sales are not subject to sales or use tax if:

1. Your sales are less than \$2,000 for the calendar year or are isolated and sporadic, **and**
2. You do not hold, and are not required to hold, a seller's permit at the time of the sales.

It is presumed you are not pursuing a business or part-time business as a vendor of taxable products when your sales of taxable products or services do not exceed \$2,000 for the calendar year as, provided in sec. 77.51(9)(a)2., Wis. Stats.

Example 1: An individual holds an annual garage sale the third weekend of May and makes sales of used household goods totaling \$2,300. The individual does not hold a Wisconsin seller's permit and makes no other sales. The individual's sales are isolated and sporadic (one weekend per year) and the individual

does not hold a seller's permit and is not required to hold a seller's permit. The individual's sales are not taxable.

Example 2: An individual sells handmade jewelry at several craft fairs throughout the year. The individual does not hold a seller's permit. Taxable sales for the calendar year total \$1,850. The individual's sales qualify for the occasional sale exemption and is not required to remit sales tax on its sales. The individual may not purchase the materials used to make the jewelry without tax, for resale. The individual must pay sales tax or remit use tax on the purchase of beads, clasps, wire, stones, and other materials used to create the jewelry.

When Are Your Sales Taxable?

You are required to remit sales tax on your sale of taxable products and services if:

1. You hold, or are required to hold, a seller's permit, **or**
2. You are engaged in business (or a part-time business) and your taxable sales total \$2,000 or more in the calendar year. This includes the sales of works of art, handmade articles, antiques, or used property if you are pursuing a vocation or part-time business as a seller of such property.

Example 3: A craft vendor believes its taxable sales will exceed \$2,000 during the calendar year. Therefore, the vendor obtains a seller's permit on January 1. The vendor does not make \$2,000 in taxable sales by December 31. Since the vendor held a seller's permit, the occasional sales exemption does not apply. The vendor must remit sales tax on all of its taxable sales for the year. The vendor may purchase craft materials it resells to its customers without tax, for resale, by providing its suppliers with a fully completed exemption certificate.

Example 4: An individual sells new and used items at flea markets throughout the year. Taxable sales for the calendar year exceed \$2,000. The individual is engaged in the business of selling new and used items. The individual must register for a Wisconsin seller's permit and remit tax on such sales. The individual may purchase items it resells without tax, for resale, by providing its vendors with a fully completed exemption certificate.

Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions.

Sales and Use Tax

Specialty Instrument for Inserting a Prosthetic Device

Zimmer US, Inc. v. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 10, 2019).

The issue in this case is whether tools used to insert a prosthetic device are exempt under sec. 77.54(22b), Wis. Stats.

The taxpayer sells prosthetic devices, such as artificial hips, knees, and elbows, to hospitals in Wisconsin. When a hospital purchases a prosthetic device, the taxpayer supplies a set of specialized tools which are

needed for the safe and proper installation of these devices. The taxpayer provides the tools to the hospital, which uses the tools for no additional charge.

The taxpayer does not supply a set of tools with every device. Once a hospital has a set of tools, the tools can be reused to install additional devices purchased from the taxpayer for up to ten years. The taxpayer retains ownership of the tools.

During the period at issue, the taxpayer paid Wisconsin use tax on the purchase price of the tools. However, the taxpayer subsequently filed a claim for refund of this tax, claiming the tools to be exempt from sales and use tax under sec. 77.54(22b), Wis. Stats., as "accessories" to prosthetic devices. The Department denied the refund claim in its entirety.

The Commission stated that the tools are physically and functionally separate from the prosthetic device. Therefore, the tools do not fall within even a broad scope view of the term prosthetic device.

In addition, the commission stated that the tools are not accessories to the prosthetic device because the patient, the user of the prosthetic device, does not need, want, or have the ability to possess or purchase the tools. The tools do not enhance the patient's everyday use of the prosthetic device. An accessory is something intended for use with the item to enhance or supplement the item by making it more attractive, efficient, or effective.

Lastly, the Commission found that the tools in question fall clearly within the definition of durable medical equipment, sec. 77.51(3pm), Wis. Stats. However, because the tools are not used in a person's home, the specialized installation tool kits are not exempt under sec. 77.54(22b), Wis. Stats.

The Commission concluded that with no applicable exemption, the tool kits are subject to Wisconsin use tax under sec. 77.53, Wis. Stats.

It is unknown at the time of publication whether the taxpayer will appeal this decision to the Circuit Court.