

# Wisconsin Tax Bulletin



July 2022 - Number 218

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## General Updates and Reminders

### Unclaimed Property Holder Reporting Reminder

Under sec. [177.0501\(1\)](#), Wis. Stats., unclaimed property holders are required to make a good faith effort to locate owners of abandoned property. Holders must send notification letters to owners of properties valued at \$50 or more. Letters must include the information required in sec. [177.0502](#), Wis. Stats., and must be sent between July and September. If the owners cannot be located, the abandoned property must be reported and delivered to the department on or before November 1, of each year.

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

## Unclaimed Property Voluntary Disclosure Program is Open

The unclaimed property voluntary disclosure program is open, and applications are accepted through February 28, 2023. The program was created by [2021 Wis. Act 87](#) and allows the department to enter into agreements to waive penalties for holders that voluntarily disclose and report unclaimed property.

### How to Apply

1. Go to the department's [unclaimed property homepage](#).
2. Under the Holders section, select the Voluntary Disclosure Agreement Application link.
3. Complete and submit the Voluntary Disclosure Agreement application.

You should receive a confirmation number upon submission. The department mails an executed agreement upon approval unless the applicant has previously opted to receive electronic mail in My Tax Account (MTA).

For additional information about eligibility and requirements, see the article on page 3 of [Wisconsin Tax Bulletin 216](#) (January 2022).

## Income and Franchise Tax Updates and Reminders

### Tax Incentives for Conducting Qualified Research in Wisconsin

Wisconsin offers two tax incentives related to research activities:

- Research Expense Credit
- Sales and Use Tax Exemption for Property Used in Qualified Research

To determine if your business is eligible to take advantage of one or both incentives, see [Publication 131](#), *Tax incentives for Conducting Qualified Research in Wisconsin*.

For more information about the research credit, please refer to the following:

- [Schedule R instructions](#)
- *Wisconsin Tax Bulletins*: [67-4](#), [104-17](#), [137-31](#), [138-26](#), [169-2](#), [189-10](#), [204-10](#), [205-9](#), [211-4](#), and [214-4](#)
- [Refundable Portion of Research Credit](#) common questions

For more information about the sales and use tax exemption, please refer to the following:

- Section Tax [11.20](#), Wis. Adm. Code
- [Fact Sheet 2101-2](#), *Sales and Use Tax Exemption for Qualified Research on and After July 3, 2013*
- [Exemption for Fuel and Electricity Consumed in Qualified Research](#) common questions
- Tax Releases titled "Sales Tax Exemption for Qualified Research When the Research Is Funded" and "Property Used in Qualified Research and Later Used in Other Activities" found in [Wisconsin Tax Bulletin 203](#) (October 2018), pages 8 and 10

## Qualified Opportunity Zones

The department has updated the common questions for [Qualified Opportunity Zones](#) to include information about the federal and Wisconsin tax benefits of investing in a Wisconsin qualified opportunity fund, including an example with computations.

## Reminders: Composite Returns, Form 1CNP or 1CNS

### A Nonresident Individual Partner or Shareholder Filing an Original Form 1NPR May Not Be Included on a Composite Return, Form 1CNP or 1CNS

A partnership or tax-option (S) corporation with income or loss from business transacted, services performed, or property located in Wisconsin may file a Wisconsin individual income tax return on behalf of their eligible nonresident individual partners or shareholders using [Form 1CNP](#), *Composite Wisconsin Individual Income Tax Return for Nonresident Partners*, or [Form 1CNS](#), *Composite Wisconsin Individual Income Tax Return for Nonresident Tax-Option (S) Corporation Shareholders*.

If a nonresident individual partner or shareholder files an original [Form 1NPR](#), *Nonresident and Part-Year Resident Wisconsin Income Tax*, they are not eligible to be included on Form 1CNP or 1CNS for that tax year.

For additional information on a nonresident partner's or shareholder's eligibility to be included on Form 1CNP or 1CNS, see the [Form 1CNP instructions](#) or [Form 1CNS instructions](#).

### Reporting Income or Loss for a Limited Liability Company or Grantor Trust Treated as a Disregarded Entity on a Composite Return, Form 1CNP or 1CNS

If a nonresident partner or shareholder is a limited liability company (LLC) or grantor trust treated as a disregarded entity, the owner of the LLC or grantor of the grantor trust is deemed to be the partner or shareholder for purposes of filing Form 1CNP or 1CNS.

When reporting a nonresident partner's or shareholder's allocated portion of income or loss on Schedule 2 of Form 1CNP or 1CNS, the same social security number (SSN) cannot be reported more than once in Column (B). If an individual is an owner of an LLC or grantor of a grantor trust treated as a disregarded entity and both are nonresident partners or shareholders of the same partnership or tax-option (S) corporation, all income or loss allocated to the individual and the disregarded entity must be combined when reporting on Schedule 2 of Form 1CNP or 1CNS.

#### **Example:**

#### **Facts:**

- Tax-Option (S) Corporation ABC has three equal shareholders:
  1. Nonresident Individual D
  2. Nonresident Individual E
  3. Nonresident Grantor Trust F (treated as a disregarded entity)
- Individual D is the grantor of Grantor Trust F
- Tax-Option (S) Corporation ABC's Wisconsin net income for 2021 is \$30,000

## Form 1CNS Reporting Requirement:

If all of the shareholders file on Form 1CNS, ABC should report the following on Form 1CNS, Schedule 2, Columns (A), (B), (C), and (D1):

Column (A) Name and Address	Column (B) SSN	Column (C) Pro Rata Share (%)	Column (D1) Shareholder's Share of WI Net Income (Loss)
D's name and address	D's SSN	66.67% <small>(Total ownership of D and F)</small>	\$20,000 <small>(Total WI net income of D and F)</small>
E's name and address	E's SSN	33.33%	\$10,000

For additional information on filing Form 1CNP or 1CNS, see the [Form 1CNP instructions](#), [Form 1CNS instructions](#), or [Composite Returns](#) common questions.

## Reminder: Due Date for Partnerships and Tax-Option (S) Corporations Making the Entity-Level Tax Election

An election for partnerships and tax-option (S) corporations to pay tax at the entity level must be made each tax year by the extended due date of the entity's income or franchise tax return.

The extended due date of a 2021 [Form 3](#), *Wisconsin Partnership Return*, for a calendar-year partnership is September 15, 2022, and the extended due date of a 2021 [Form 5S](#), *Wisconsin Tax-Option (S) Corporation Franchise or Income Tax Return*, for a calendar-year tax-option (S) corporation is October 17, 2022.

For additional information on making the entity-level tax election, see the following:

- Article titled *Election to Pay Tax at Entity Level for Tax-Option (S) Corporations and Partnerships*, on pages 2 and 3 of [Wisconsin Tax Bulletin 204](#) (January 2019)
- [DOR Pass-Through Entity-Level Tax: Partnerships](#) common questions
- [DOR Pass-Through Entity-Level Tax: Tax-Option \(S\) Corporation](#) common questions

The following tables show 2019 and 2020 filing statistics for the entity-level tax election:

2019 Tax Year		2020 Tax Year	
Tax-Option (S) Corporations (Form 5S) Filing Stats		Tax-Option (S) Corporations (Form 5S) Filing Stats	
Tax-Option (S) Corporation returns filed	81,517	Tax-Option (S) Corporation returns filed	80,602
Tax-Option (S) Corporation entity-level tax elections filed	2,992	Tax-Option (S) Corporation entity-level tax elections filed	4,076
Percent of entity-level tax elections filed	3.67%	Percent of entity-level tax elections filed	5.06%

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Partnership (Form 3) Filing Stats	
Partnership returns filed	79,885
Partnership entity-level tax elections filed	1,495
Percent of entity-level tax elections filed	1.87%

Partnership (Form 3) Filing Stats	
Partnership returns filed	80,432
Partnership entity-level tax elections filed	2,010
Percent of entity-level tax elections filed	2.50%

Pass-Through Entity Filing Stats - TOTAL	
Pass-Through entity returns filed	161,402
Entity-level tax elections filed	4,487
Percent of entity-level tax elections filed	2.78%

Pass-Through Entity Filing Stats - TOTAL	
Pass-Through entity returns filed	161,034
Entity-level tax elections filed	6,086
Percent of entity-level tax elections filed	3.78%

### Most Commonly Used Wisconsin Franchise and Income Tax Credits

Wisconsin tax law provides a variety of franchise and income tax credits. For an extensive list and additional information, see article titled *Reporting Certain Franchise/Income Tax Credits As Income*, on pages 3 and 4 of [Wisconsin Tax Bulletin 205](#) (April 2019), and the [Interactive Incentive Finder](#).

Below are statistics of the most commonly used credits by corporations for tax year 2019 and individuals for tax year 2020. The data for more current tax years was not completely available at the time of this publication.

Commonly Used Corporate Franchise/Income Tax Credits, Tax Year 2019				
Corporate Tax Credit	Number of Claimants Using Credit	Amount of Credit Used	Credit Available	Credit Carried Forward
Manufacturing credit	452	\$86,231,481	\$175,058,596	\$88,827,115
Enterprise zone jobs credit	18	\$52,900,818	Refundable	
State historic rehabilitation credit	36	\$46,878,490	\$61,345,108	\$14,466,618
Nonrefundable research expense credit	464	\$44,877,091	\$570,089,443	\$525,212,352
Refundable research expense credit	506	\$10,499,651	Refundable	
Research expense credit, internal combustion	10	\$6,438,064	\$70,856,432	\$64,418,368
Business development credit	28	\$5,101,236	Refundable	
Economic development credit	16	\$2,889,925	\$24,935,835	\$22,045,910
Agricultural credit	90	\$2,256,465	\$4,287,513	\$2,031,048

Commonly Used Individual Franchise/Income Tax Credits, Tax Year 2020				
Individual Income Tax Credits	Number of Claimants Using Credit	Amount of Credit Used	Credit Available	Credit Carried Forward
School property tax credit	1,758,963	\$430,249,715	\$504,688,959	No carryforward
Taxes paid to other states credit	78,000	\$387,037,455	\$394,106,581	No carryforward
Itemized deduction credit	573,650	\$268,920,645	\$485,277,722	No carryforward
Manufacturing credit	5,746	\$259,128,659	\$456,349,827	\$197,221,168
Married couple credit	627,998	\$257,299,915	\$261,368,046	No carryforward
Earned income credit	216,796	\$85,994,046	Refundable	
Homestead credit	112,492	\$54,562,798	Refundable	
Veterans and surviving spouses property tax credit	12,118	\$40,079,356	Refundable	
Nonrefundable research expense credit	3,394	\$21,595,964	\$52,055,330	\$28,946,495
Enterprise zone jobs credit	316	\$17,399,145	Refundable	

## Withholding Tax Updates and Reminders

### Worker Classification: Employee or Independent Contractor

Every person who pays an individual for work must classify the individual as either an employee or independent contractor. The correct classification is important because it impacts the payer's requirements for:

- Federal unemployment insurance, income tax withholding, and information return reporting under chs. [23](#), [24](#), and [61](#), Internal Revenue Code, administered by the Internal Revenue Service (IRS)
- Wisconsin unemployment insurance under ch. [108](#), Wis. Stats., administered by the Wisconsin Department of Workforce Development (DWD)
- Wisconsin income tax withholding and information return reporting under ch. [71](#), Wis. Stats., administered by the Wisconsin Department of Revenue (DOR)

Both the [IRS website](#) and the [DWD website](#) provide guidance to help payers determine if a worker is an employee or an independent contractor, and DOR generally follows the IRS guidance.

The IRS, DWD, and DOR have authority to audit a payer's records to ensure compliance with these laws. If an audit by the IRS or DWD determines that an employee was misclassified, the payer must ensure that it is complying with the laws administered by DOR. Failure to comply with Wisconsin's income tax withholding and information return reporting requirements under ch. [71](#), Wis. Stats., may result in an audit by DOR and liability for the following:

- *A penalty equal to the amount of the tax, plus interest and penalties on that tax* - A person required to withhold any tax under ch. [71](#), Wis. Stats., who intentionally fails to withhold such tax shall be liable to a penalty equal to the amount of the tax, plus interest and penalties on that tax (sec. [71.83\(1\)\(b\)2.](#), Wis. Stats.).

- **\$25,000 fine** - Any employer engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or similar construction projects who willfully provides false information to DOR, or who willfully and with intent to evade any withholding requirement, misclassifies or attempts to misclassify an individual who is an employee of the employer as a nonemployee shall be fined \$25,000 for each violation (sec. [71.65\(6\)](#), Wis. Stats.).
- **\$10 penalty** - If a person fails to file a wage statement (e.g. Form W-2) required under sec. [71.71](#) or [71.715](#), Wis. Stats., by the prescribed due date, including any extension, or files an incorrect or incomplete return, that person may be subject to a penalty of \$10 for each violation (sec. [71.83\(1\)\(a\)1m.](#), Wis. Stats.).
- **\$50 or \$150 late filing fee** - Any person who is required to file a withholding report (e.g. Form WT-7) and deposit withholding taxes that fails to do so timely and DOR shows that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause, shall be subject to a \$50 late fee, except for corporations taxed under subch. [IV](#) or insurance companies taxed under subch. [VII](#) of ch. 71, Wis. Stats., the late fee is \$150 (sec. [71.83\(3\)\(a\)](#), Wis. Stats.).
- **25 percent penalty** - Any person who is required to file a deposit report (Form WT-6) or a withholding report (Form WT-7) and files an incomplete or incorrect report, or fails to properly withhold or fails to properly deposit or pay over withheld funds, upon a showing by the department that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause may be subject to a penalty of 25 percent of the amount not reported or not withheld (sec. [71.83\(1\)\(a\)3.](#), Wis. Stats.).
- **1.5 percent interest per month** - Delinquent withholding deposits or payments shall bear interest at the rate of 1.5 percent per month. **Note:** During a period in which an extension is granted, interest accrues at the rate of 1 percent per month (sec. [71.82\(2\)\(d\)](#), Wis. Stats.).
- **Disallowed wage expense deduction** - If an employer fails to file wage statements (e.g. Form W-2), DOR may assess as an addition to taxable income the amount of deductions taken in arriving at federal adjusted gross income or federal taxable income by natural persons and fiduciaries for wages (sec. [71.74\(4\)](#), Wis. Stats.).
- **\$10,000 fine and/or 9 month prison sentence** - Any person who willfully fails or refuses to make required withholding deposits or payments or willfully renders a false or fraudulent wage statement (e.g. Form W-2) or report (e.g. Form WT-6 or Form WT-7) shall be guilty of a misdemeanor and may be fined not more than \$10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution (sec. [71.83\(2\)\(a\)1.](#), Wis. Stats.).

For more information about Wisconsin income tax withholding and information return reporting requirements, see [Publication W-166](#), *Withholding Tax Guide*, and [Publication 117](#), *Guide to Wisconsin Wage Statements and Information Returns*.

## Sales and Use Tax Updates and Reminders

### Temporary Event Reporting

A temporary event is an occasion, activity, or function at which merchandise is sold or traded or taxable services are provided. This includes events such as farmer's markets, flea markets, craft shows, gun shows, coin & stamp shows, festivals, fairs, and fund-raising concerts.

The department is actively working to educate event operators about reporting requirements. The operator of a temporary event is required to report certain information about each event vendor to the department. The event operator must submit an event report within ten days of the close of the event.

The department recently redesigned [Form S-240](#), *Wisconsin Temporary Event Report*, to improve and standardize reporting. Event operators report information about themselves and their events in Parts A & B on page 1. Part C on page 2, provides space to list up to four vendors. Page 2 can be reproduced as needed to report all vendors. Event operators may also use [Form S-240-Alt](#) which provides space for up to 100 vendors.

The department no longer accepts previous versions of Form S-240, including the previously downloadable Excel spreadsheet.

Penalties may be issued for failure to report or failure to file a complete report. Please see the [Temporary Events](#) common questions for more information.

For the latest Wisconsin temporary event operator information, sign up for our E-News service at [DOR E-News](#), and select Temporary Event Operator from the list. Also, review our [Event Operators](#) common questions.

## Updated Publications for Field Audits and Sampling

[Publication 501](#), *Field Audit of Wisconsin Tax Returns*, has been updated and posted on the department's website. Changes include information about:

- Communication the taxpayer and/or taxpayer's representative can expect during an audit
- Auditor's and taxpayer's responsibilities to ensure an audit includes credit for any taxes overpaid
- The one-time, 10% reduction of assessment for additional sales tax found upon audit, for qualifying small businesses
- Factors considered in determining if negligence penalty applies
- Requesting audit workpapers for completed audits

[Publication 515](#), *Sampling in Sales and Use Tax Audits*, has been updated and posted on the department's website. Previously, there were two publications (515 and 516) that covered statistical and non-statistical sampling methods. These publications have been combined into one new Publication 515 that covers both sampling methods. Other changes include:

- Expanded definitions of terms that relate to sampling
- Information on electronic records and auditor's responsibility to check for completeness of records provided
- Explanation of stratified block sampling method
- Detailed explanation and examples of the taxpayer's options for compiling a refund claim in an audit that involves sampling

## Reminder: Retailers May Not Accept 6-Digit CES Numbers After June 30, 2022

Beginning July 1, 2022, retailers may no longer accept 6-digit Certificate of Exempt Status (CES) numbers. Retailers may only accept 15-digit CES numbers. A CES number is used to identify churches, religious organizations, and certain nonprofit organizations that qualify to make purchases exempt from tax.

A CES number does not apply to exemptions claimed by other types of purchasers (e.g., farmers, manufacturers). For more information, refer to [Wisconsin Tax Bulletin 216](#) (January 2022), page 14.

Resources:

- [Certificate of Exempt Status](#) common questions
- [Application for Certificate of Exempt Status](#)

## Car Charging Stations

The tax treatment of a car charging station (charger) depends on whether the charger is installed and used for a residential or commercial purpose.

### Residential

The installation of a permanent, wall-mounted charger in a residential building is a nontaxable real property construction activity. The installation of the wiring to the outlet socket and the new outlet socket (if applicable) are also nontaxable real property construction activities. The contractor is required to pay Wisconsin sales or use tax on the purchase of materials and equipment transferred to the customer in the real property construction activity.

### Commercial

The installation of a charger is a taxable sale of tangible personal property, except the concrete foundation and underground or in-wall wiring. The contractor may purchase the charger without tax for resale. The installation of the concrete foundation is a nontaxable real property construction activity, as well as the installation of the wiring to the outlet socket and the new outlet socket (if applicable). Charges for real property construction activities are not taxable. The contractor is required to pay Wisconsin sales or use tax on the purchase of materials and equipment transferred to the customer in the real property construction activity.

In general, if a contract includes both the sale of or service to tangible personal property and real property construction activities, the tax treatment is as follows:

- The contractor's sale of or service to tangible personal property is taxable, unless an exemption applies (e.g., the purchaser is an exempt entity). The contractor may purchase without tax, for resale, the tangible personal property that is physically transferred to the customer.
- The contractor's sale of or service to real property is not taxable. The contractor is the consumer of materials used in making a real property improvement and must pay sales or use tax on its purchase of these materials.
- A reasonable allocation must be made between the taxable and nontaxable portions of the contract for items such as general overhead, labor, and other fees.

See Part 2.D.(1) in [Publication 207](#), *Sales and Use Tax Information for Contractors*, for additional information and also Part 2.D.(3) for information about the construction contract exemption that may apply when the sale of taxable products are less than 10% of the total contract price.

## Summer Camps

A summer camp's charge for meals, lodging, and program access for one nonitemized price is not subject to tax as provided in sec. [Tax 11.46\(5\)](#), Wis. Adm. Code. Although taxable products may be included (e.g., lodging for a continuous period of less than one month, prepared food, candy, and soft drinks), it is presumed that the taxable products included in the price are less than 10% of the total price and the exemption from Wisconsin sales and use tax provided in sec. [77.54\(51\)](#), Wis. Stats., applies.

If the summer camp's charge is nontaxable as explained above, the summer camp is the consumer of all property, items, goods, and services purchased and used in providing their services. The summer camp must pay Wisconsin sales or use tax on its purchase price of taxable property, items, goods, and services, unless an exemption applies (e.g., the summer camp is exempt from Wisconsin sales and use tax).

A summer camp is responsible for collecting and remitting Wisconsin sales tax on its separately stated sales of taxable products and services (e.g., lodging, meals), unless an exemption applies. A summer camp that resells taxable products and services may purchase such products and services without tax for resale.

## **Taxable Sales by Camps Include:**

- Lodging for a continuous period of less than one month
- Prepared foods, dietary supplements, candy, and soft drinks
- Other tangible personal property such as hats, tee shirts, souvenirs, toiletries, craft supplies
- Charges for admission to any amusement, athletic, entertainment, or recreational event, place or device
- Leases or rentals of canoes, boats, games, or any other tangible personal property
- Sales of used equipment

## **Nontaxable or Exempt Sales by Camps**

- Lessons, instruction, and training
- Lodging for a continuous period of one month or more

## **Exemption Certificates: Building Materials Exemption**

There is an exemption from sales and use tax for property sold to a construction contractor who, in fulfillment of a real property construction activity, transfers the property to a qualifying exempt entity, if the property becomes part of a facility in Wisconsin that is owned by the qualifying exempt entity (sec. [77.54\(9m\)](#), Wis. Stats.). The following criteria must be met for the exemption to apply:

1. The construction must be for a qualifying exempt entity,
2. The property must become part of a facility in Wisconsin that is owned by the exempt entity, and
3. The property must be transferred to the qualifying exempt entity.

More information on these criteria may be found in the document [Exemption for Building Materials That Become Part of Facility Owned by Local Government or Qualifying Exempt Entity](#) located on the department's website.

A contractor who makes purchases that qualify for this exemption must provide a fully completed exemption certificate (Form [S-211](#) or [S-211E](#)) to the seller. The contractor should check "other purchases exempted by law" on the certificate and enter "exempt under sec. 77.54(9m), Wis. Stats."

A retailer who receives a fully completed exemption certificate claiming this exemption within 90 days of the sale is not liable for sales tax on their sale of taxable products. Retailers are not required to collect information that shows the three criteria for the exemption have been met. A contractor who issues an exemption certificate for this exemption is liable for use tax on their purchases if the purchases do not

qualify for the exemption. A contractor should maintain records that show the contract meets the three criteria for the exemption.

A subcontractor's purchase of property used in providing real property construction activities for a general contractor may also qualify for the exemption if the property becomes part of a facility located in Wisconsin owned by a qualifying exempt entity. Although the subcontractor is providing nontaxable real property construction activities to the general contractor, the property may ultimately be transferred to a qualifying exempt entity upon completion of the contract between the general contractor and the qualifying exempt entity. In these situations, the general contractor should not issue an exemption certificate to their subcontractor because they are purchasing a nontaxable real property construction activity from their subcontractor. Rather, the contractor may provide information to the subcontractor to help the subcontractor show that the subcontractor's purchases qualify for the exemption. [Form S-227, Contractor Statement of Building Materials Purchased](#), is available to assist in documenting the necessary information for the criteria but is not required to be used.

A qualifying exempt entity is not required to issue an exemption certificate to the contractor for this exemption. The exempt entity is purchasing real property construction activities, which are not taxable. An entity that is a qualifying exempt entity under sec. [77.54\(9a\)\(f\)](#), Wis. Stats., can assist their contractor in claiming the exemption by providing the contractor their Certificate of Exempt Status (CES) number issued by the department.

### Importance of Sellers Obtaining Exemption Certificates

Wisconsin law provides a presumption that all receipts are subject to sales or use tax until the contrary is established and the burden of proving that a sale is not a taxable sale at retail is upon the person who makes the sale (sec. 77.52(13), Wis. Stats.). A seller or lessor may be relieved of their liability if they receive a fully completed exemption certificate (Form [S-211](#), [S-211E](#), or [S-211-SST](#)) from the purchaser which indicates that the property, item, good, or service being purchased is exempt.

A seller or lessor who accepts a fully completed exemption certificate from the purchaser within 90 days of the sale is relieved of any liability for payment of tax on transactions covered by the certificate.

**Exception:** A seller is not relieved of its liability to collect and remit the applicable Wisconsin sales or use tax on a sale to a purchaser if any of the following apply:

1. The seller fraudulently fails to collect the sales or use tax
2. The seller solicits the purchaser to claim an unlawful exemption
3. The seller accepts an exemption certificate from a purchaser claiming to be an entity not subject to sales and use taxes, if both of the following apply:
  - a. The subject of the transaction covered by the exemption certificate is received by the purchaser at the seller's Wisconsin location
  - b. The exemption certificate clearly and affirmatively indicates that the claimed exemption is not available in Wisconsin

A seller who does not obtain a fully completed exemption certificate within 90 days of the sale may, in the course of an audit, be asked to obtain exemption certificates from their customers. In these cases, a seller must obtain a fully completed exemption certificate in "good faith" within 120 days after the department's request in order to be relieved of any liability.

An exemption certificate is obtained in "good faith" from their customer if all of the following apply:

1. The exemption claimed was authorized by law on the date of the transaction in the jurisdiction to which the transaction is sourced
2. The exemption could be applicable to the property, item, good, or service being purchased
3. The exemption being claimed is reasonable for the purchaser's type of business

It is important for sellers to obtain a fully completed exemption certificate within 90 days of the sale because a seller is not required to accept the exemption certificate in "good faith" to be relieved of liability.

Purchasers that provide an exemption certificate to a seller to make a purchase exempt from tax may be liable for tax if the property does not qualify for exemption or if the purchaser uses the property in a manner that makes it ineligible for exemption from tax. A purchaser who uses an exemption certificate in a manner that is prohibited by or inconsistent with Wisconsin law or who provides incorrect information to a seller relating to an exemption being claimed may also be subject to a penalty of \$250 for each invoice or bill of sale related to the prohibited or inconsistent use to which the incorrect information applies.

## Out-of-State Contractors Performing Services in Wisconsin

Out-of-state contractors that bring taxable products into Wisconsin to perform services may owe Wisconsin use tax on the storage, use, or consumption of such products in Wisconsin. Wisconsin use tax is due on the purchase price of property that is stored, used, or consumed in Wisconsin. A credit is allowed for sales or use taxes properly due and paid to another state and/or local unit of government against (but not in excess of) the total Wisconsin state and county use taxes imposed on the same items, property or goods (sec. [77.53\(16\)](#), Wis. Stats.). Out-of-state contractors who perform services in Wisconsin are also required to register for a seller's permit to collect and remit Wisconsin sales and use tax on the sale of taxable products and services in Wisconsin. The following are some examples of contractors who may owe sales or use tax:

**Example 1:** An Illinois furnace company travels to Green County, Wisconsin to install a furnace in a residence. The installation is a nontaxable real property construction activity. The company's purchase of the furnace and related parts that are used in the real property construction activity are subject to Wisconsin use tax. The contractor has the furnace and parts delivered to their shop in Illinois and properly pays Illinois sales tax of 6.25%. Wisconsin use tax of 5.5% (5% state use tax and 0.5% Green County use tax) is due on the purchase price of the furnace and parts; however, a credit is allowed against the Wisconsin use tax for the Illinois sales tax that was properly paid. No additional Wisconsin use tax is due.

**Example 2:** Same as Example 1, except the contractor has the furnace and parts delivered by their vendor directly to the residence in Green County. The furnace and parts are subject to Wisconsin sales or use tax. No credit for tax paid to Illinois would be allowed because the sale takes place in Wisconsin. The Illinois contractor should pay their vendor Wisconsin sales tax, or remit Wisconsin use tax if the vendor does not charge them the proper Wisconsin sales tax.

**Example 3:** The Illinois furnace company returns to Green County, Wisconsin to repair the furnace that was installed in Example 1. The repair of a furnace is subject to Wisconsin sales tax. The Illinois contractor is required to hold a Wisconsin seller's permit and collect and remit Wisconsin sales tax because they are performing taxable services in Wisconsin. The entire sales price of the repair work, including services, parts, markups, trip charges, etc., is subject to Wisconsin sales tax. The contractor may purchase any parts transferred to the customer without Wisconsin sales tax by providing their vendor an exemption certificate claiming resale.

Contractors performing taxable services in Wisconsin are required to register for a seller's permit no matter the amount of work done in Wisconsin. The small seller exception provided in sec. [77.51\(13gm\)](#), Wis.

Stats., does not apply to contractors with a physical presence in Wisconsin. Contractors may also have an income/franchise tax filing requirement in Wisconsin if they perform services in Wisconsin.

## Excise Tax Updates and Reminders

### Master Settlement Agreement Updates

The Tobacco Master Settlement Agreement (MSA) is an agreement between most U.S. states and major tobacco companies. The agreement provides payment to states to compensate for the damaging impact tobacco use has on the population.

One of the requirements of the MSA is the Attorney General provides a list of approved brands of cigarettes that can be sold to Wisconsin consumers. The list of approved cigarette brands can be found here: [Wisconsin Department of Justice Directory of Certified Tobacco Manufacturers and Brands.](#)

Recently delisted brands that can no longer be sold to Wisconsin consumers include:

Brand	Company
Couture and Opal	Grand River Enterprises Six Nations
Wave	Japan Tobacco International U.S.A.
Carnival, This, and Timeless Time	KT&G Corporation
Lark, Players, and Saratoga	Phillip Morris USA Inc. (Altria)
Samson RYO	Scandinavian Tobacco Group Lane

## Report on Litigation

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

### Corporation Franchise and Income Tax

#### Nexus – Foreign Corporation Selling Travel Services

*ASAP Cruises, Inc. v. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 23, 2022).*

The issue is whether a Florida corporation selling travel services through independent travel consultants to individuals and businesses in Wisconsin is subject to Wisconsin income or franchise tax.

ASAP Cruises, Inc. (ASAP) is headquartered and primarily operates out of Jacksonville, Florida. ASAP sells travel services to customers across the United States by utilizing independent travel consultants, who ultimately provide the services to individuals and businesses. ASAP pays the independent travel consultants a commission based on sales volume as enumerated in the independent travel consultant agreements.

For taxable years 2012 through 2017:

- ASAP received income from the sale of travel services by independent travel consultants to customers across the United States, including Wisconsin
- ASAP was a party to at least 100 independent travel consultant agreements with individuals and businesses located in Wisconsin
- ASAP did not withhold taxes on the commissions paid to the independent travel consultants, but did issue federal Form 1099s to the consultants
- ASAP did not file Wisconsin income or franchise tax returns
- The department issued estimated income/franchise tax assessments, which ASAP appealed to the Wisconsin Tax Appeals Commission

ASAP made three arguments why they weren't subject to Wisconsin income or franchise tax:

1. Public Law 86-272 protects ASAP from having to file Wisconsin income or franchise tax returns.
  - Public Law 86-272 protects a foreign corporation from being subject to income or franchise tax if the only activity in the state is the solicitation of orders for tangible personal property, which are sent outside the state for approval, and filled by shipment or delivery from a different state.
  - ASAP is selling travel services, which are not tangible personal property, so the immunity under Public Law 86-272 does not apply.
2. They were actually selling software as a service (SaaS).
  - Six agreements between ASAP and the independent travel consultants were included in the trial exhibits. None of the agreements referred to SaaS, software licensing, software requirements, or the sale of tangible or intangible property. Instead, they referred to the sales as travel services.
  - The ASAP co-owner could not provide documentation or corroborating evidence to support the claim that ASAP was selling SaaS.
3. Nexus was not established in Wisconsin because all solicitation activity was conducted electronically from its headquarters in Jacksonville, Florida.
  - ASAP contracted with more than 100 independent travel consultants located in Wisconsin.
  - The independent travel consultants sold travel services within and without Wisconsin and were paid commissions by ASAP.
  - There was no evidence that the independent travel consultants with addresses in Wisconsin performed their work from outside of Wisconsin.
  - Section [71.22\(1r\)](#), Wis. Stats., provides that doing business in Wisconsin includes regularly selling products or services of any kind or nature to customers in Wisconsin that receive the product or service in Wisconsin, and regularly soliciting business from potential customers in Wisconsin.
  - Section Tax [2.82\(4\)\(a\)10.](#), Wis. Adm. Code, provides that a foreign corporation is subject to Wisconsin income or franchise taxes if the sale of non-tangible personal property such as real estate, services, and intangibles is in Wisconsin.
  - Section [71.23\(2\)](#), Wis. Stats., provides that for the privilege of exercising its franchise or doing business in Wisconsin, every corporation is required to pay a franchise tax measured by Wisconsin net income.

The Commission concluded that ASAP was engaged in the sales of travel services to Wisconsin resident individuals and businesses through the independent travel consultants. ASAP is not protected by Public Law 86-272, was doing business in Wisconsin according to sec. 71.22(1r), Wis. Stats., and must file Wisconsin franchise tax returns under sec. 71.23(2), Wis. Stats.

ASAP requested reconsideration of the decision, but the Commission denied the request.

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

### Sales and Use Tax

#### Trailers Sold to Nonresidents

*William Becker vs. Wisconsin Department of Revenue* (Wisconsin La Crosse County Circuit Court, Branch 3, June 27, 2022). This is a judicial review of the Wisconsin Tax Appeals Commission decision dated January 4, 2021. For a summary of that decision, see [Wisconsin Tax Bulletin 212](#) (January 2021), pages 28 and 29.

The issue in this case is whether the trailers sold by the taxpayer are "truck bodies" for purposes of the sales tax exemption under sec. [77.54\(5\)\(a\)\(4\)](#), Wis. Stats. This exemption excludes sales tax on "truck bodies" and motor vehicles sold to nonresidents whose use of the truck or vehicle for which the truck bodies were made is limited to removal for out-of-state use. "Truck bodies" is not defined in the Wisconsin Statutes.

The taxpayer sold single axel trailers (one set of wheels), tandem axel trailers (two sets of wheels placed near each other), and gooseneck trailers (neck extends over the back of a truck and into the truck bed, placing more weight of the trailer over the axle of the towing vehicles). All of these trailers are designed to be used together with a motor vehicle such as a car or pickup truck.

The Wisconsin Tax Appeals Commission found the trailers the taxpayer sold to out-of-state residents would not qualify for the exemption. The Commission concluded: (1) the Wisconsin Supreme Court decision in *Trudell* limits the "trucks and truck bodies" exemption to those combinations of power unit vehicles and trailers that, if not combined together, serve little to no purpose and (2) the trailer type vehicles sold by Becker have no "trucks for which the truck bodies were made" and, therefore, fail to fall within the plain language of the sec. [77.54\(5\)\(a\)\(4\)](#), Wis. Stats., exemption.

The Circuit Court reviewed whether the semitrailer definition extends to other trailers that require the support of a motor vehicle to hold cargo.

The Circuit Court found the trailers Becker sold are "truck bodies" for purposes of the sales tax exemption under sec. [77.54\(5\)\(a\)\(4\)](#), Wis. Stats., and therefore reversed the Tax Appeals Commission's ruling.

The department intends to appeal this decision.

### Applicable Laws and Rules

This document provides statements or interpretations of the following laws and regulations enacted as of July 28, 2022: chs. 71, 77, 139, and 177 [Wis. Stats.](#), and chs. Tax 1, 2, 3, 9, and 11, [Wis. Adm. Code](#). Laws enacted and in effect after this date, new administrative rules, and court decisions may change the interpretations in this document. Guidance issued prior to this date that is contrary to the information in this document is superseded by this document, according to sec. 73.16(2)(a), Wis. Stats.

### Public Comments

The public may [submit comments on guidance documents](#) at any time.